



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
	)	ISCR Case No. 23-01902
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel P. O’Reilley, Esq., Department Counsel  
For Applicant: *Pro se*

05/01/2024

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**Decision**

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Dorsey, Benjamin R., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse and criminal conduct security concerns. Eligibility for access to classified information is granted.

**Statement of the Case**

On September 20, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline J, criminal conduct. On October 18, 2023, Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on January 26, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was given 30 days to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on February 12, 2024, and timely provided a March 10, 2024 statement of intent to not use illegal drugs in the future, as well as a statement noting that he has no criminal arrests (FORM Response). The case

was assigned to me on April 17, 2024. The Government exhibits included in the FORM (Items 1-5) and the FORM Response are admitted in evidence without objection.

### **Findings of Fact**

Applicant is a 34-year-old employee of a defense contractor for whom he has worked since August 2022. He also works another part-time job. He earned a bachelor's degree in 2014 and a master's degree in 2016. He has never been married and has no children. He has resided with a cohabitant since June 2016, who uses marijuana and holds a medical marijuana card. He has never held a clearance. (Items 3, 4)

Over the years, Applicant has used several illegal drugs. In using them, by necessity, he also possessed them. From March 2010 until July 2022, he used marijuana almost daily. From July 2012 to July 2018, he used cocaine, lysergic acid diethylamide (LSD), psilocybin (mushrooms), and dimethyltryptamine (DMT) with varying frequency. From July 2012 until July 2019, he also used speed/ecstasy with varying frequency. At all times relevant to this investigation, possession of these drugs (and therefore their use) has been illegal. In 2012, he underwent a drug test after he was involved in an accident at work for which he had to be hospitalized. He tested positive for marijuana and his employer terminated him. (Items 2-5)

As required, Applicant disclosed this illegal drug use on his November 2022 Electronic Questionnaires for Investigations Processing (SF 86). He also discussed his illegal drug involvement with a DOD investigator during his January 2023 security interview and related it again when he provided his responses to the Government's interrogatories in September 2023. His narrative remained consistent throughout the clearance investigation. He stopped using the last of these illegal substances (marijuana) when he accepted his current job offer in July 2022, because he knew it is incompatible with holding a security clearance, is against his new employer's conditions of employment, and is illegal under federal law, regardless of its status under state law where he resides. He stopped using some of the "harder" illegal drugs with which he was involved earlier because of their negative health impact and potential for addiction. He used these "harder" drugs far less frequently than marijuana. He clarified that he stopped using marijuana later than the "harder" drugs partially because of its legality under state law where he resides. (Items 2-4)

Applicant signed a statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. He still associates with at least two people who use illegal substances; his cohabitant, and his former fraternity brother with whom he used illegal drugs during much of the time he was involved with them. He claimed that he feels no pressure to use marijuana when others use it around him and that he has not had any trouble discontinuing his use since July 2022. He also has a legal prescription for Adderall that he uses for a chronic medical condition. (Items 2-4)

In his Answer, Applicant admitted the allegations in the SOR, which were related to his illegal drug use, his failing a drug test in 2012, and his employer terminating him as a result. His admissions are incorporated in my findings of fact.

### **Policies**

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline H, Drug Involvement and Substance Misuse**

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Appellant possessed and ingested illegal drugs from about 2010 until July 2022. In 2012, he tested positive for marijuana after urinalysis testing. The above listed disqualifying conditions are established.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

It has been almost two years since Appellant last possessed or used marijuana, and even longer for the other illegal substances with which he was involved. He was open and consistent about his illegal drug involvement, which speaks well as to his trustworthiness and reliability. He discontinued the last of his illegal drug involvement because he understands that he cannot continue that involvement while holding a security clearance or working for a federal contractor. He signed a statement of intent to abstain from all drug involvement. For these reasons, I find that he has proven that his drug involvement and substance misuse are unlikely to recur. I also find that he has established a sufficient pattern of abstinence. AG ¶ 26(a) and AG ¶ 26(b) both fully apply. I find that he has mitigated the drug involvement and substance misuse security concerns.

### **Guideline J, Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Appellant possessed and ingested illegal drugs between 2010 and July 2022. The evidence is sufficient to establish the above disqualifying condition, thereby shifting the burden to him to provide evidence in mitigation.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

For similar reasons that I enumerated in my Guideline H analysis, I find that the almost two years that have elapsed since Appellant engaged in criminal behavior, his open and consistent relaying of his illegal activity, and his declaration to stop that activity mean his illegal behavior is unlikely to recur. These considerations also provide evidence of successful rehabilitation. AG ¶ 32(a) and AG ¶ 32(d) both apply. I find he mitigated the criminal conduct security concerns.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and J in my whole-person analysis.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude he mitigated the drug involvement and substance misuse and criminal conduct security concerns.

## **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline J:	For APPLICANT
Subparagraphs 2.a:	For Applicant

## **Conclusion**

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Benjamin R. Dorsey  
Administrative Judge