



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 23-02053  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Bryan L. Farrell, Esq., Department Counsel  
For Applicant: *Pro se*

04/26/2024

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse) and J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on January 30, 2023. On September 19, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and J. The DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on September 28, 2023, and requested a decision on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on January 11, 2024. On January 19, 2024, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on February 6, 2024, but did not respond. The case was assigned to me on April 15, 2024.

### **Evidentiary Issue**

The SOR (FORM Item 1) and Applicant's Answer (FORM Item 2) are the pleadings in this case. The Government's evidence in support of the allegations is contained in FORM Items 3 and 4.

The FORM included a summary of a personal subject interview (PSI) conducted on March 9, 2023. (FORM Item 4) The PSI summary was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the PSI summary; make any corrections, additions, deletions, or updates; or object to consideration of the PSI summary on the ground that it was not authenticated. I conclude that he waived any objections to the PSI summary by failing to respond to the FORM. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016). FORM Items 3 and 4 are admitted in evidence.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all the allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 26-year-old data scientist employed by a defense contractor since January 2023. He received a bachelor's degree in May 2020. He is currently enrolled in a graduate program while working full time. He worked as a data engineer for a non-federal employer from August 2020 until he was hired by his current employer. He has never married and has no children. He stated in his response to the SOR that he is involved in community service, but he did not provide any specifics about his involvement. He has never held a security clearance.

Applicant disclosed his drug involvement in his SCA and his answer to the SOR. He admitted that he used marijuana daily in 2016 and less than 20 times a year from May 2015 to December 2022. He admitted that he used LSD, mushrooms, and Ecstasy until about June 2022, and that he experimented with "whippets" (nitrous oxide inhalants) in college. He admitted that he used cocaine once a week for several weeks while in college and continued to use it occasionally until about October 2022. He admitted that he used Adderall and Vyvanse, drugs used for treatment of attention deficit hyperactivity disorder (ADHD), without a prescription, while studying for exams in college. He admitted that he

sold marijuana between August 2016 and August 2017. He attributed his drug use in college to his desire to fit in. After he graduated from college, he was diagnosed with ADHD and received a prescription for Adderall.

Applicant admitted in his SCA and his answer to the SOR that he was charged with possession of marijuana in July 2016. He was represented by an attorney, who succeeded in having the charges dismissed and the record expunged. (FORM Item 4 at 2-3) The FORM does not contain any court records or other documentation of this charge and its disposition.

Applicant admitted in his SCA and his answer to the SOR that he was arrested for driving under the influence (DUI) in June 2018. The charge was reduced to reckless driving. He did not remember the disposition of the charge, but he remembered that he was required to take a safe-driving course and pay a fine. (FORM Item 4 at 3) The FORM does not contain any court records or other documentation of this charge and its disposition.

In Applicant's answer to the SOR, he stated that he has moved to another state, disassociated from his former drug-using friends, made new friends with healthy recreational activities, and started weekly mental health sessions. He submitted a statement of intent to abstain from all illegal drug involvement and substance abuse, and he acknowledged that any future involvement or misuse is grounds for revocation of national security eligibility.

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard

classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan* at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan* at 531.

## **Analysis**

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

The SOR alleges that Applicant used marijuana with varying frequency from about May 2015 to about December 2022 (SOR ¶ 1.a); that he used LSD and hallucinogenic mushrooms with varying frequency from about January 2016 to June 2022 (SOR ¶ 1.b); that he used MDMA (Ecstasy) with varying frequency from about 2017 to about June 2022 (SOR ¶ 1.c); that he used “whippets” with varying frequency from about December 2018 to about May 2019 (SOR ¶ 1.d); that he used cocaine with varying frequency from about January 2019 to about October 2022 (SOR ¶ 1.e); and that he used the prescription medications Adderall and Vyvanse without a prescription from about February 2017 to about May 2019 (SOR ¶¶ 1.f and 1.g). It also alleges that he sold marijuana from about August 2016 to about August 2017 (SOR ¶ 1.h).

The security concern under Guideline H 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.

Applicant's admissions in his SCA and his answer to the SOR establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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

AG ¶ 26(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.

The first prong of AG ¶ 26(a) (happened so long ago) focuses on whether the drug involvement was recent. There are no bright line rules for determining when conduct is

recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

AG ¶ 26(a) is established for Applicant's sale of marijuana, his use of inhalants and his unprescribed use of prescription medications for his then undiagnosed ADHD, all of which ended almost five years ago. It is not established for his use of LSD, hallucinogenic mushrooms, and MDMA, which was frequent and continued until June 2022, and his use of cocaine, which was frequent and continued until October 2022. In the context of Applicant's extensive use of illegal drugs from May 2015 to October 2022, his abstinence from illegal drugs from October 2022 until he submitted his SCA in January 2023 is not a "significant period of time." Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). I am not convinced that he will continue his abstinence from illegal drug involvement when the pressure of qualifying for a security clearance is lifted.

AG ¶ 26(b) is not established. Applicant has disassociated from drug-using associates and contacts, changed his environment, and provided a signed statement of intent to abstain from drug involvement and substance abuse, but insufficient time has elapsed for him to establish a pattern of abstinence. Since January 30, 2023, when he submitted his SCA, he has been under pressure of qualifying for a security clearance.

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

The SOR alleges that Applicant was arrested and charged with possession of marijuana in July 2016, and that the charges were dismissed and expunged (SOR ¶ 2.a). It also alleges that he was arrested and charged with driving under the influence (DUI) in June 2017, that the charge was reduced to reckless driving, and that it was eventually expunged (SOR ¶ 2.b).

The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person'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."

Applicant's admissions in his SCA and in the PSI are sufficient to establish the following disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(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.

The following mitigating conditions are potentially applicable:

AG ¶ 32(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

AG ¶ 32(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.

Neither mitigating condition is established for Applicant's arrest for possession of marijuana. His possession of marijuana in July 2016 was part of his long pattern of drug involvement alleged under Guideline H, which continued until December 2022.

Both mitigating conditions are established for Applicant's arrest for DUI. There is no evidence in the record that his maladaptive use of alcohol continued after this arrest, and no evidence of recent alcohol-related criminal conduct.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines H and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying

and mitigating conditions under Guidelines H and J and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and criminal conduct.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f-1.h:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge