



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



In the matter of: )  
 )  
----- ) ISCR Case No. 23-00597  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

05/21/2024  
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**Remand Decision**  
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WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate the security concerns covered by the drug involvement and substance abuse guideline. Personal conduct concerns are favorably resolved. Eligibility for access to classified information or to hold a sensitive position is denied.

**Statement of the Case**

On June 14, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DCSA CAS could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, Department of Defense (DoD) Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on July 11, 2023, and requested a hearing. The case was assigned to me on November 9, 2023. A hearing was scheduled for December 19, 2023, and heard on the date as scheduled. At the hearing, the Government's case consisted of two exhibits (GEs 1-2). Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on January 4, 2024.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly (a) used methamphetamines with varying frequency from approximately June 1995 through approximately December 1995; (b) was discharged from the U.S Navy under Other Than Honorable Conditions in April 1996, after testing positive for tetrahydrocannabinol (THC); (c) used marijuana with varying frequency from approximately 2009 through approximately 2010; (d) assisted with the cultivation of marijuana in his home from approximately July 2021 through approximately August 2022; and (e) used hallucinogenic mushrooms with varying frequency from approximately March 2022 through approximately May 2022.

By Government amendment made without objection, SOR subparagraphs 2.a and 2.b of the Personal Conduct guideline incorporated the allegations of SOR ¶¶ 1.a-1.b of Guideline H and added additional language to the incorporated allegations. Under Guideline E, the added language is as follows: "while on active duty in the U.S. Navy" (SOR ¶ 2.a) and italicization of tetrahydrocannabinol (SOR ¶ 2.b). Applicant admitted each of the allegations incorporated in the amendments without any explanations or clarifications.

In his response to the SOR, Applicant admitted all of the allegations with explanations. He claimed deep remorse for his using methamphetamine while in the Navy and testing positive for the drug. He claimed that he smoked marijuana with his wife in social situations and no longer uses the drug. He also claimed that his involvement with cultivation of marijuana in his state of residence (where it is legal) was limited to his financing the purchases of cultivating equipment.

Applicant further claimed that his use of hallucinogenic mushrooms was limited and ended after only a couple months of use. And, he claimed that his COVID-19 vaccination refusal caused him to lose his job of many years after having been a trusted employee with excellent employee evaluations and merit awards.

### **Appeal Board Remand**

On May 9, 2024, the Appeal Board remanded this case to correct the cited errors associated with findings regarding (a) assistance Applicant provided his spouse for the cultivation of marijuana (as opposed to hallucinogenic mushrooms) in his state of residence and (b) the mischaracterization of the Government's SOR amendments as amendments to the Guideline H allegations, instead of adding incorporated allegations to newly included Guideline E allegations.

Corrections of these cited pleading drug characterization errors are incorporated in this remand decision. Responding to the Government's amendments, Applicant admitted the added Guideline E allegations without objection, explanation, or clarification.

### **Findings of Fact**

Applicant is a 48-year-old employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant married in November 1984 and divorced in January 1996. (GE 1) He has no children from this marriage. He remarried in December 2002 and has three children from his 20-year marriage (ages 18, 20, and 23). (GE 1; Tr. 25) He earned a high school diploma in September 1993. (GE 1)

Applicant enlisted in the Navy in October 1993 and served two and one-half years of active duty. (GEs 1-2) He received a military discharge Under Other Than Honorable Conditions in April 1996, after testing positive for THC. (GEs 1-2; Tr. 28-32)

Since August 2022, Applicant has been employed by his current employer as a senior automation systems engineer. (GEs 1-2) He reported unemployment between February 2022 and August 2022, following his loss of employment with an employer of over 12 years over his declination to receive a COVID-19 vaccination. (GEs 1-2; Tr. 25-26) Applicant has never held a security clearance.

### **Applicant's drug history**

Applicant was introduced to methamphetamine in the Navy and used it with varying frequency between June 1995 and December 1995 without appreciating the consequences. (GEs 1-2; Tr. 19-20, 32) Following his Navy discharge, he encountered difficulties finding work and has paid the consequences. (Tr. 21) Between 2009 and 2010, Applicant used marijuana on a couple of occasions. (GEs 1-2; Tr. 33-34)

Between July 2021 and August 2022, Applicant assisted his wife in cultivating marijuana while using hallucinogenic mushrooms a couple of times between March and May of 2022 to reduce his anxiety and pull himself out of depression. (GE 2; Tr. 21-23) The help he provided his wife in cultivating marijuana in his yard consisted of purchasing supplies for growing the marijuana. (GE 2; Tr. 22-23, 37-38)

Neither Applicant nor his wife have cultivated the growth of marijuana since August 2022. (Tr. 22-23) Both Applicant and his wife have made the commitment to avoid all illegal drug use and drug cultivating processes. Applicant is committed to putting his past drug activity behind him and moving forward to being the person "the

Government needs me to be.” (Tr. 23) His expressed hope is to restore the Government’s trust in him. (Tr. 40)

While Applicant did not provide any evidence of drug counseling, endorsements, or performance evaluations relative to his military service and current employment, he is looking to redeem himself. (Tr. 41-42) Applicant’s expressed commitments to continued abstinence from illegal drugs are sincere and encouraging and accepted.

### **Policies**

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

### **Drug Involvement and Substance Abuse**

*The Concern:* The illegal use of controlled substances, to include the misuse of 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.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes . . . AG ¶ 15.

### **Burdens of Proof**

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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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*, 484 U.S. 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 (4<sup>th</sup> 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Security concerns are raised over Applicant’s multiple involvement with illegal drugs over a period of many years, dating to 1993. His use of methamphetamines and marijuana in the Navy was followed by his testing positive for THC in 1996. His positive drug test, in turn, resulted in his being discharged from the Navy under Other Than Honorable conditions in April 1996.

Applicant’s admissions to his testing positive for THC in the Navy, his involvement with multiple illegal drugs (inclusive of his aiding his wife in the cultivation of marijuana) raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, two disqualifying conditions (DCs) of the AGs for drug involvement and substance misuse apply to Applicant’s situation: DC ¶¶ 25(a), “any substance misuse” and 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia.”

Marijuana use, while legalized in Applicant’s state of residence, remains banned at the federal level as a Schedule I controlled substance under the Controlled Substances Act (CSA) (21 U.S.C. ¶ 802(32)(A)). Both methamphetamine and hallucinogenic mushrooms are banned under the CSA as Schedule II drugs. See 21 U.S.C. ¶ 802(32)(A).

Cross-alleged under Guideline E are the incorporated allegations covered by SOR ¶¶ 1.a and 1.b of Guideline H. These incorporated allegations under Guideline E are supplemented by the words “while on active duty in the U.S. Navy.” (SOR ¶ 2.a) and the italicization of THC under SOR ¶ 2.b. Both of the SOR 2.a and 2.b allegations with the added amendments are sufficiently covered by AG H as to require no separate application of disqualifying and mitigating conditions covered by Guideline E.

To his credit, Applicant has committed to abandoning all use and involvement with illegal drugs and has remained abstinent from illegal drugs (inclusive of methamphetamine, marijuana, and hallucinogenic mushrooms for almost two years. Currently, he exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use and involvement in the foreseeable future.

Still, with the combination of his multiple use of illegal drugs, along with his brief involvement with the cultivation of marijuana in 2022, it is still too soon to absolve Applicant of risks of recurrence. Without more time to establish a probative pattern of sustained abstinence from drug use and involvement, none of the mitigating conditions are fully available to Applicant at this time. With only one-plus years of demonstrated abstinence from illegal drug involvement, more time with more corroborating evidentiary sources to support his continued abstinence are needed to facilitate safe predictions that he is no longer a recurrence risk.

### **Whole-person assessment**

From a whole-person perspective, Applicant has failed to establish enough independent probative evidence of his overall, trustworthiness, reliability, and good judgment required of those who seek eligibility to hold a security clearance or sensitive position. At this time, he lacks enough positive reinforcements and time in abstinence from active use and involvement with of illegal drugs to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole, and granting due weight to his positive commitments to abstinence, there is insufficient probative evidence of sustainable mitigation in the record to make safe, predictable judgments about Applicant’s ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s drug activities over an extended number of years with less than two years of sustained abstinence, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶ 1.a-1.e.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude drug involvement and substance misuse security concerns are not mitigated. Personal conduct concerns are fully covered by Guideline H concerns and do not require independent consideration. Eligibility for access to classified information is denied.

### **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:

GUIDELINE H (DRUG INVOLVEMENT):            AGAINST APPLICANT

    Subparagraphs 1.a-1.e:                      Against Applicant

GUIDELINE E (PERSONAL CONDUCT):            FOR APPLICANT

    Subparagraphs 2.a-2.b:                      For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Roger C. Wesley  
Administrative Judge