



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-02921
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: William H. Miller, Esq., Department Counsel  
For Applicant: *Pro se*

07/18/2024

**Decision**

HALE, Charles C., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on November 14, 2022. On January 30, 2024, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and J. The Department of Defense acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, National Security Adjudicative Guidelines (June 8, 2017).

Applicant answered the SOR on January 31, 2024, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on March 4, 2024. On March 4, 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 acknowledged receipt of the FORM on March 29, 2024, and did not provide a response. The case was assigned to me on July 3, 2024.

The SOR and the Answer are the pleadings in the case. FORM Items 3 through 5 are admitted into evidence without objection.

### **Findings of Fact**

Applicant is a 36-year-old college graduate who is being sponsored for his first security clearance by a defense contractor. He admitted all SOR allegations and stated he has no intention of ever again being involved with drugs and substance misuse.

**SOR ¶¶ 1.a and 1.b:** The SOR alleged that from May 2002 until at least October 2020, he used marijuana with varying frequency and intended to use it in the future. In his Answer, Applicant admits he used marijuana with varying frequency from about 2002 to October 2020. He states he will continue to avoid situations where it is being used. He stated in his SCA, in his security clearance interview, and his Answer that his intention of using marijuana in the future was contingent on it being legalized federally and after he had retired. The Government offered no evidence he intended to illegally use marijuana in the future. (Answer; Item 3 at 43, 46; Item 5 at 10.) **SOR 1.b is resolved for Applicant.**

**SOR ¶ 1.c:** Applicant admits in about November 2006, he was charged with possession of controlled paraphernalia and possession of controlled substance, which was dismissed upon completion of a diversionary program. In his Answer, he notes this matter was over 17 years ago and that he had not been arrested or charged with anything illegal since then. He states he does not associate with any known criminals, and he refuses "to engage in any activity that could jeopardize [him] from obtaining a security clearance." He was placed in a diversionary program and failed a drug test while in the program, and he had to restart his probationary period. The charge was ultimately dismissed after he completed the probationary period. (Answer; Item 4 at 5-6; Item 5 at 9.)

**SOR ¶¶ 1.d-1.f:** The SOR alleged that from May 2006 until about October 2022 he used cocaine with varying frequency and that from September 2006 until about October 2021 he used psychedelic mushrooms with varying frequency and that he had purchased psychedelic mushrooms in July 2009. In his Answer he admitted he used cocaine and psychedelic mushrooms. He states he has abstained from cocaine use since October 2020 and his use of psychedelic mushrooms was infrequent and he has no intention of ever using either of them again. For both drugs he affirms he will remove himself from any situation where these drugs are being used and that he does not associate with people who use these drugs. He admits purchasing psychedelic mushrooms in 2009 but states he does not associate with any known drug dealers. He declares that he has "no intention of ever purchasing any illegal drug ever again." (Answer; Item 3 at 43-44; Item 5 at 10.)

Applicant estimated he used cocaine ten times mostly to “sober up” during the period alleged. (Item 3 at 43-44; Item 5 at 10.) He estimated he used psychedelic mushrooms six times during the period alleged. (Item 3 at 44; Item 5 at 11.)

**SOR ¶¶ 1.g and 1.h:** The SOR alleged that from July 2018 until at least June 2022, he used ecstasy, with varying frequency and that he purchased ecstasy in June 2022. Applicant admits both allegations. He states he only used ecstasy a couple of times and will continue to abstain from its use. He affirms he will remove himself from any situation where drugs are being used and that he will not associate with people who use drugs. He admits he did purchase ecstasy once in June 2022 but states he does not associate with any known drug dealers and will continue to avoid association with any known drug dealers. He declares that he has “no intention to ever use it again.” (Answer; Item 3 at 45-46; Item 5 at 11.)

## **Guideline J**

SOR ¶ 2.a cross-alleges the information set forth in SOR ¶¶ 1.c through 1.h. Applicant admits the allegation. He states he has no desire to engage in any criminal act that could jeopardize his job or affect his ability to obtain a security clearance. He affirms the mitigations steps noted above, that he intended to abstain from all drug involvement and substance misuse. He acknowledges that any future involvement or misuse is grounds for revocation of national security eligibility. See the above findings of fact for the underlying conduct involving his criminal conduct.

## **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*, 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 (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*, 484 U.S. at 531.

## **Analysis**

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

The concern under this guideline 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 Answer to the SOR and elsewhere in the record are sufficient to raise the following disqualifying conditions under AG ¶ 25:

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

(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.

AG ¶¶ 26(a) and (b) are not established. Applicant has established an 18-year history of illegally using marijuana. His last marijuana use was in October 2020. He used cocaine at least ten times and as recently as October 2022. He used and purchased psychedelic mushrooms. He last used psychedelic mushrooms in October 2021. He admitted purchasing and using ecstasy as recently as June 2022. He has stated an intent to abstain from all drug involvement and substance misuse and affirms he will no longer associate with any known drug dealers and will continue to avoid association with any know drug dealers. He acknowledges that any future involvement or misuse is grounds for revocation of national security eligibility. However, he has only abstained from illegal drug use since June 2022, which is not long enough to overcome the security concerns raised by his 18 years of marijuana use and other admitted illegal drug use. While his statements appear candid and sincere, there is insufficient evidence at this time, to conclude this behavior is unlikely to recur and his conduct continues to cast doubt on his reliability, trustworthiness, and good judgment.

## **Guideline J: Criminal Conduct**

AG ¶ 30 expresses the security concern for criminal conduct:

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.

31: The following disqualifying condition is potentially applicable as detailed in AG ¶

(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; and

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's misconduct is documented in his SCA and by court records. The above disqualifying conditions apply.

32: The following mitigating conditions are potentially applicable as detailed in AG ¶

(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;

(c) no reliable evidence to support that the individual committed the offense; 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.

AG ¶ 32(a), (c), and (d) do not apply. Applicant's criminal conduct is longstanding, recent and continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns given his history of using marijuana, cocaine, psychedelic mushrooms, and ecstasy. While he ultimately successfully completed his probation, he continued to consume and purchase multiple controlled substances over the next 15 years. He needs to establish evidence of successful rehabilitation and a longer record of responsible behavior and compliance with rules, regulations, and the law before his criminal conduct can be considered mitigated.

## 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). 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). 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 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-1.h:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2: Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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.

Charles C. Hale  
Administrative Judge