



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



In the matter of:

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ISCR Case No. 24-00256

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Applicant for Security Clearance

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**Appearances**

For Government: Tara R. Karoian, Esquire, Department Counsel

For Applicant: *Pro se*

10/16/2024

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse. Eligibility for a security clearance is denied.

**Statement of the Case**

On December 24, 2022, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On August 29, 2023, an investigator from the U.S. Office of Personnel Management (OPM) interviewed him. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to those interrogatories on December 21, 2023. On another unspecified date, DOHA issued him another set of interrogatories. He responded to those interrogatories on February 27, 2024. On April 11, 2024, the Defense Counterintelligence and Security Agency (DCSA) Adjudications and Vetting Services (AVS) issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4),

*National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 16, 2024, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), including proposed Government Exhibits (GE), was mailed to him by DOHA on June 26, 2024, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on July 23, 2024. His response was due on August 22, 2024. As of August 28, 2024, no response had been received. The case was assigned to me on October 11, 2024, and there was still no response to the FORM.

### **Findings of Fact**

In his Answer to the SOR, Applicant, admitted with comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.d.). Applicant's admissions and acknowledgments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

### **Background**

Applicant is a 25-year-old employee of a defense contractor. He has been serving as a software engineer since July 2022. He was previously self-employed as a part-time ice hockey referee (September 2018 – August 2022). A 2017 high school graduate, he received a bachelor's degree in 2021. He has never served with the U.S. military. He has never held a security clearance. He has never been married.

### **Drug Involvement and Substance Misuse, and Personal Conduct**

In his December 2022 SF 86, at Sec. 23 – Illegal Use of Drugs or Drug Activity, Applicant candidly acknowledged that, during the last seven years, he had previously used a variety of "legal" and "illegal" substances and had misused a prescription drug. During his August 2023 OPM interview, he essentially confirmed his earlier admissions. Based on Applicant's admissions and comments up until the date he submitted his SF 86, the following facts have clearly been established:

Applicant was an illegal substance user, and one of his substances of choice was tetrahydrocannabinol (THC) – also known as marijuana – a Schedule I Controlled

Substance. From March 2018 through February 2022, he and several friends would make bulk purchases of marijuana every six to eight weeks at a local dispensary in a state where it was legal. He smoked the marijuana in social settings with his friends at parties or merely hanging out in a dorm or apartment a few times per week during that time period, never expecting to work in a government job. At some point, he decided that the marijuana made him feel lazy and anxious, so he lost interest in it and stated that he had no interest or intent in using it again. (Item 3 at 31-32; Item 4 at 5, 9; Item 5 at 2-4)

During the period April 2019 through September 2021, Applicant also “experimented” on fewer than 12 occasions, or approximately 12 times, by snorting powdered cocaine – a Schedule II Controlled Substance – that was furnished to him by one particular long-time friend. He used the cocaine in social settings because it was a pop culture drug known to be fun. Although the substance made him feel docile, he failed to experience the “fun” and instead he felt groggy and dazed. He stated that he does not intend to use cocaine in the future. (Item 2 at 2; Item 3 at 32-33; Item 4 at 5, 9; Item 5 at 2, 4)

During the period July 2019 through August 2019, Applicant “experimented” by using on two occasions 3,4-methylenedioxymethamphetamine, also known as ecstasy – a Schedule I Controlled Substance – that was furnished to him by his long-time friend. His first use took place at a concert. Applicant anticipated that the substance would be enjoyable, but instead it made him feel more awake and not necessarily good. He stated that he does not intend to use ecstasy again because he did not like the way it made him feel, it hurt his stomach, made him feel groggy and dazed, and he did not like the way people on it acted. (Item 2 at 2; Item 3 at 33; Item 4 at 5, 9; Item 5 at 4, 8)

On two occasions during final exams in May 2018 and during a midterm exam in November 2018, Applicant used the prescription drug Adderall, for which he did not have a prescription, while trying to focus for his exams. The drug was given to him without cost by a friend who had a prescription. The drug made him feel “wired and attentive, but he did not like the anxiety or feeling groggy and dazed the next day associated with it. He does not intend to use the drug ever again. (Item 2 at 2; Item 3 at 34; Item 4 at 5, 9; Item 5 at 4, 8)

In May 2022, Applicant underwent a drug test the result of which was negative for drugs. (Item 4 at 11) As noted above, when Applicant submitted his SF 86 in December 2022, he clearly stated that he had no interest or intent in using marijuana in the future. In July 2022, he became an employee of a federal contractor whose General Corporate Policy is to have a substance-free workplace where prohibited substances such as those specifically defined as controlled substances under federal law are prohibited. (Item 5 at 10-14) During his August 2023 OPM interview, Applicant admitted that on July 22, 2023 – approximately a year and one-half after he stopped using marijuana – at a friend’s birthday party cookout, shortly after a “relationship breakup,” he “took a hit” or smoked marijuana out of a vape pen that a friend’s girlfriend gave him. He claims he immediately regretted doing so because of his commitment to his job and the country. He said he avoids any environment where marijuana was used, and that his one-time use in 2023

does not change his resolve to never use marijuana again. (Item 2 at 2; Item 4 at 4, 9; Item 5 at 2, 4)

As of the closing of the record, with the exception of his comments in his Answer to the SOR, and in his responses to the interrogatories, Applicant had not submitted 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; and had not submitted verifiable proof that he had disassociated himself from drug-providing associates. There is no evidence to indicate that Applicant ever reported his marijuana use to his employer's security manager or to anyone else where he worked. He has never received counseling or treatment associated with his drug use. (Item 4 at 10)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of several 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). "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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation, or mitigation, sufficient to overcome the doubts raised by the Government's case. 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))

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, at 531)

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) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

## **Analysis**

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

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, which states in part:

. . . disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position....

Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF 86), Questionnaire for National Security Positions.

The guideline notes several conditions under AG ¶ 25 that could raise security concerns in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including . . . purchase;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Commencing as far back as March 2018, and continuing periodically until as recently as July 2023, Applicant legally and illegally purchased, as well as used, marijuana, purportedly “experimented” with cocaine on about a dozen occasions, experimented with ecstasy twice, and also used a prescription drug that was not prescribed for him. His “experimentation” with cocaine took place between April 2019 and September 2021 but was never continued thereafter. His experimentation with ecstasy took place during a two-month period in 2019 but was not continued thereafter. His illegal use of the prescription drug Adderall, for which he did not have a prescription, took place on two occasions in 2018 but was never continued thereafter. His marijuana use, though paused for over a year and one-half, resumed in July 2023 after he had submitted his SF 86 in December 2022 and after he was hired by an employer with a drug free workplace in a sensitive position in July 2022. Applicant’s continued use of marijuana after July 2022, and especially after he submitted his SF 86, raises questions about his judgment, reliability, and willingness to comply with laws, rules, and regulations. See ISCR Case No. 22-02132 at 4 (App. Bd. Oct. 27, 2023); ISCR Case No. 23-00093 at 3 (App. Bd. Nov. 21, 2023). Applicant was aware that marijuana use was illegal federally, and against his corporate policy, even if it was legal in his state, but he used it at least one more time. See ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022); ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015).

Applicant’s comments regarding future use of marijuana creates some confusion regarding his true intentions. He initially intended never to use it again, but after a one and one-half year period of purported abstinence, he resumed it once again. His repeated “no intent” comments and resumption of such use, even one time, reflects an equivocation or failure to clearly and convincingly commit to discontinue such misuse. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

- (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.

As noted above, as of the closing of the record, Applicant still had in place his seemingly set-aside previous declarations that he would not use marijuana in the future. He had not submitted 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; and had not submitted verifiable proof that he had disassociated himself from drug-providing and drug-using friends and associates. AG ¶ 26(b) has not been established.

It is clear that from about March 2016 and continuing until at least September 2021, Applicant was imbedded in an environment where drug use thrived. Applicant essentially became a regular marijuana user and a frequent cocaine user. His use of ecstasy and Adderall was fairly limited, and by now, stale. With respect to his past involvement with cocaine, ecstasy, and Adderall, AG ¶ 26(a) has been established. However, with respect to his past purchase and use of marijuana, and his resumption of such use after he had accepted his corporate position, submitted his SF 86, and repeatedly declared he had no intention of using marijuana again, but then did so, AG ¶ 26(a) has not been established.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his full history of drug use, especially his marijuana use, the resumption of his marijuana use after a relatively brief period of purported abstinence is considered insufficient to conclude that the abstinence will continue, especially after so much confusion regarding his future intentions. Applicant's use of marijuana for such a lengthy period, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

### **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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case considering the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

My comments associated with Applicant's drug involvement and substance misuse are incorporated herein. Applicant is a relatively young employee of a defense contractor for which he has been serving as a software engineer since July 2022. While in college



he experimented with some illegal substances, periodically used other illegal substances or used a prescribed medication that was not prescribed for him, and regularly purchased and used marijuana, something that was legal in the state where he was located. The college-based drug culture was acceptable to him because he never expected to work in a government job. He was hired by a government contractor with a drug-free workplace, and he candidly acknowledged his past involvement in drug involvement and substance misuse and pledged to never use those substances in the future. If the facts had ended at that point, Applicant would probably not be currently having his eligibility for a security clearance questioned. However, the story continued when he resumed using marijuana, even on one occasion. That resumption raises a degree of equivocation surrounding his future intent regarding using marijuana.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

### **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:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraphs 1.a. through 1.d.:	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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ROBERT ROBINSON GALES  
Administrative Judge