



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-00913

Appearances

For Government: Troy Nussbaum, Esq., Department Counsel

For Applicant: Brittany Forester, Esq.

03/31/2025

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant mitigated drug involvement and substance abuse and criminal conduct concerns, but did not mitigate personal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On September 17, 2024, 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 and personal conduct guidelines 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 October 31, 2024, and requested a hearing. The case was assigned to me on December 16, 2024. A hearing was scheduled for January 22, 2025, and was heard on the date as scheduled. At the hearing, the Government's case consisted of three exhibits. (GEs 1-3) Applicant relied on one witness (himself) and 12 exhibits. (AEs A-L) The transcript (Tr.) was received on February 3, 2025.

Procedural Issues

Before the close of the hearing, Applicant and Department Counsel were afforded the opportunity to brief the availability of the prompt prong of MC ¶ 17(a) of the personal conduct guideline to the facts of the case at bar. For good cause demonstrated, Applicant and Department Counsel were granted 30 days to supplement the record. Within the granted 30-day time period for briefing the issue, Applicant provided a case citation that adopted a favorable application of the prompt prong of MC ¶ 17(a) of Guideline E. See ISCR Case open No. 22-01736 at 6 (Jan. 18, 2024) Neither Applicant nor Department Counsel supplied any Appeal Board authority.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana with varying frequency from about August 2017 to about July 2021, to include while granted access to classified information. (b) used psychedelic mushrooms in about April 2019, while granted access to classified information; and (c) used cocaine in about August 2022, while granted access to classified information. Allegedly Applicant's use of illegal drugs while holding a security clearance presents continuing security concerns.

Under Guideline E, Applicant allegedly falsified the electronic questionnaires for investigations process (e-QIP he completed I March 2018 by omitting his past use of illegal drugs. Allegedly, Applicant repeated his omissions of his past use of illegal drugs in the e-QIP he completed January 2023.

In his response to the SOR, Applicant admitted the allegations with explanations. He claimed he reported his past drug use during his past background investigation and has taken remedial actions to ensure it never happens again. He further claimed that he was honest and forthcoming about his past drug use and his failure to accurately report his drug use on his 2018 and 2023 e-QIPs.

Allegations covered by Guideline H are cross alleged under Guideline J. These allegations incorporate the allegations covered by SOR ¶¶ 1.a-1.c. and cover the same factual allegations.

Findings of Fact

Applicant is a 26-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 never married and has no children. (GEs 1-2) He earned a high school diploma in May 2016 and a bachelor's degree in May 2020. (GEs 1-2)

Applicant married in May 2022 and has one stepchild (age 10) from this marriage. (GE 1) He earned two bachelor degrees in May 2020: one in mechanical engineering and one in aerospace engineering. (GE 1; Tr. 16-17) He reported no military service.

Since January 2023, Applicant has been employed by his current employer as an engineer. (GE 1; Tr. 17) Previously, he worked for other employers in varying professional capacities. (GE 1; Tr. 19) He reported brief periods of unemployment in 2018-2019, 2017-2018, and 2015-2016. Applicant has held a security clearance since June 2018. (GE 1; Tr. 19)

Applicant's drug history

Between August 2017 and July 2021, Applicant used marijuana with varying frequency at parties and in social gatherings while in college. (GEs 1-3; Tr. 21) He characterized his use as experimental (no more than four times) with college friends. (GE 3; Tr. 20) He relied on his friends for providing the marijuana and never purchased any himself. The marijuana he used never affected him and had no known impact on his personality, judgment, reliability or ability to hold a confidence. (GE 3)

Applicant tried psychedelic mushrooms on one occasion in April 2019 while in college. (GE 3; Tr. 22) He tried the mushrooms for experimental purposes and only used them on one occasion. They were given to him by a college friend, and he never purchased any on his own. The mushrooms had no impact on his work finances, school, home, family, or friends. (GE 3; Tr. 22)

Applicant experimented with cocaine as well in August 2022 while a full-time employee of his current employer. (GE 3; Tr. 22) Like the other drugs he tried, they were gifted to him by a friend, and he never purchased any himself. (GE 3; Tr. 23) He only used the cocaine on one occasion to satisfy his curiosity. (Tr. 22, 37-38)

Beginning in 2018 at all relevant times of his experimenting with illegal drugs, Applicant had approved access to classified information. (Tr. 23, 37-38) He maintained his access to classified information until March 2023 and was aware of his employer's

anti-drug policy. (Tr. 24, 37-39, 44) While employed by his current employer he completed workplace training in June 2020 and annually on his employer's zero tolerance anti-drug policies. (Tr. 44)

From his experiences in experimenting with illegal drugs, Applicant learned important lessons about making smarter decisions about the use of drugs that are banned by federal law. (Tr. 24-25) He was never ordered or advised to seek drug counseling and claims no addictive problems with illegal drugs. All of his drug use occurred while he was under the influence of alcohol. (Tr. 46)

Recent non-randomized drug tests produced negative results for all illegal drugs. (AEs D and L; Tr. 25) Along with other awards and certificate of recognition from his employer, Applicant earned a behavioral modification course certificate after completing the course. (AE F)

Applicant's stated reason for trying illegal drugs was curiosity and a desire to experiment. (GE 3; Tr. 20-21) In March 2023 (six months before his personal subject interview), Applicant reported all of his illegal drug use to his lead and manager. (GE 3; Tr. 33-35) He has since abstained from all illegal drug use. Corroborating his expressed intention to avert any use of illegal drugs in the future, Applicant has executed both a sworn declaration and signed statement not to use illegal drugs in the future. (AEs B-C)

Allegations covered by Guideline H are cross alleged under Guideline J and incorporate the same facts covering Applicant's use of illegal drugs in violation of federal law. The facts covering Applicant's use of illegal drugs while holding a security clearance are incorporated by reference.

Applicant's E-QIP omissions

Asked to complete an e-QIP in March 2018, Applicant failed to disclose his experimental use of marijuana in 2017 and 2018. (GEs 1-2) In a second e-QIP he completed in January 2023, he again failed to disclose his past use of illegal drugs: in this case his experimental use of marijuana, psychedelic mushrooms, and cocaine. Acknowledging his deliberate omissions out of his concern of the potential impact of his full disclosure on his security clearance, Applicant made the deliberate decision to withhold any information about his past drug in his 2018 e-QIP.

When asked to complete a second e-QIP in January 2023, he repeated his omissions of his past use of illegal drugs for the same reasons he withheld his drug use information in the first e-QIP he completed. (GEs 1-2) Asked why he declined disclosure of his past drug use in his second e-QIP, he responded that it was because he could get away with it after avoiding any consequences from his 2018 omission. (Tr. 59-60) Considering all of the circumstances surrounding his e-QIP omissions of his past illegal

drug use, inferences of knowing and willful omission of material facts about his use of illegal drugs are warranted.

Following his completion of his 2023 e-QIP, Applicant disclosed his past drug use to his past design lead and supervisor. (Tr. 33-34) Whether his supervisor passed on the information to his company's facility security officer (FSO) or others in his chain of command is unclear. What is known is that Applicant was disciplined by his employer for falsifying his 2023 e-QIP. (Tr. 32)

In March 2023 (three months after completing his second e-QIP), Applicant was asked to meet an investigator from the Office of Personnel Management (OPM) to follow up on the information he provided in his 2023 e-QIP. (GE 3) When asked in his personal subject interview (PSI) by the OPM investigator about any past drug use, Applicant provided full and accurate accounts of his drug use history without any evidence of confrontation. (GE 3) He did so out of feelings of guilt over his previous omissions of his past drug use. (Tr. 28) Whether concerns over the possibilities of his being polygraphed played any role in his decision to come clean about his past drug use is unclear. (Tr. 54-56)

Endorsements and awards

Applicant is well-regarded by his managers and former design lead and supervisor who are familiar with his current security clearance investigation. (AE E; Tr. 33-34) Applicant's performance evaluations for the 2023 rating period earned him solid completion marks in all rated categories. (AE G) Over the course of the past three years, he has received numerous awards of recognition for his contributions to his design team's missions. (AE H) His awards include recognition awards for reshaping operations, strengthening our foundation, and evolving our culture.

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 guidelines 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 ¶

Criminal Conduct

The Concern: 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. AG ¶ 30.

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 (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. 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 experimentation with illegal drugs (marijuana, psychedelic mushrooms, and cocaine over a period of several years (2017 through 2022) while holding a security clearance. Additional concerns are raised over his omissions of his drug use in two e-QIPs he completed in 2018 and 2023, respectively.

Drug Involvement and Substance Misuse and Criminal Conduct concerns

Applicant's admissions to his involvement with multiple illegal drugs raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions (DCs) of the AGs for drug involvement and substance misuse apply to Applicant's situation: DC ¶¶ 25(a), "any substance misuse"; 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia"; and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

Allegations covered by Guideline H are cross alleged under Guideline J. Applicable DCs for criminal conduct are DC ¶¶ 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 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."

To his credit, Applicant has committed to abandoning all use and involvement with illegal drugs and has remained abstinent from illegal drugs for almost three 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. His use of illegal drugs in college was never reached more than experimental levels with friends in social situations, and he is regularly tested for any resumption possibilities. None of his non-randomized tests have yielded any positive results to date.

Applicable mitigating conditions (MCs) for raised Guideline H concerns are as follows: MC ¶¶ 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 26(b), “the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome the 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;

MCs available to Applicant under Guideline J are ¶ 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,” applies.

Applicant’s progress to date in avoiding all illegal drugs and persons who use these drugs is notable. While his past use of illegal drugs while holding a security clearance is troubling, he has learned important lessons from his mistakes and can be expected to abstain from illegal drugs in the foreseeable future

Personal Conduct concerns

Applicable to Applicant’s e-QIP omissions is DC ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.”

Without any evidence of confronting him with information pertaining to his e-QIP omissions by the interviewing OPM investigators in his ensuing 2023 PSI, Applicant’s documented voluntary corrections of his omissions when asked about his past use of marijuana, entitle him to the mitigation benefits of MC 17(a), “the individual made

prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,”

What continues to be troubling about Applicant's belated disclosures of his past drug use is the timing of his disclosures. With over five years of unbroken employment with his current employer, he had plenty of opportunities to correct his omissions of marijuana use in his 2018 e-QIP but declined to do so out of concern for his security clearance.

Afforded a second opportunity in 2023 to disclose his past drug use, he declined to do so out of concern for his security clearance. Not until he appeared for his PSI In March 2023 did he make his voluntary decision to fully disclose his past use of illegal drugs.

In Applicant's case, his voluntary PSI disclosures of his past use of illegal drugs satisfy the good-faith component of MC ¶ 17(a). Troubling, though, is the eight-year time elapse between his initial 2018 e-QIP and when he was able to summon the will to come clean about his past illegal drug use in his March 2023 PSI.

While Applicant's PSI disclosures were made less than three months from the time he completed his January 2023 e-QIP, over five years had elapsed since his earlier completion of an e-QIP in March 2018. Challenging is the reconciling of this eight-year gap with an even stretched meaning of the prompt prong in MC ¶ 17 (a).

With no bright line definitions of the term “prompt” to work with, the Appeal Board recently found an applicant's two-month delay in making corrections to be reasonable under all of the circumstances considered. See ISCR Case No. 22-02601 at 5 (App. Bd. Feb. 22, 2024). So, while Applicant is entitled to credit for making good-faith disclosures of his past drug use in his PSI, issues remain as to whether his disclosures satisfy the “prompt” prong of MC ¶ 17(a).

In previous Appeal Board decisions, the Board has drawn more restrictive definitions of the term “prompt” in situations where the applicant was an facility security officer (FSO) who was in a position to know and respect the importance and urgency of making timely disclosures. *Compare* DISCR Case No. 93-1390 at 5-7 (App. Bd. Jan. 27, 1995) And, clearly the circumstances in this 1995 Appeal Board decision are distinguishable from the facts in Applicant's case. Unlike in the 1995 decision, Applicant was not an FSO with a clearance.

Even with a more expansive construction of the “prompt” prong of MC ¶ 17(a) by the Appeal Board, Applicant's cumulative delays of over eight years (i.e., January 2018 through March 2023) to make right decision to voluntarily disclose his past use of illegal drugs came way too late to satisfy the Appeal Board's reasonable time interpretations of the prompt prong of MC ¶ 17(a). Even though a reasonable time interpretation of the

prompt prong can be useful in incentivizing applicants to come forward voluntarily without fear of being too late for credit, time allowances must have limits in the interest of ensuring the expeditious requirements of security clearance investigations.

Whole-person assessment

From a whole-person perspective, Applicant has not established 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 has not produced enough positive reinforcements of his overall honesty and trustworthiness to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole and granting due weight to Applicant's positive commitments to abstinence, there is sufficient 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.

However, taking into account all of the facts and circumstances surrounding Applicant's delayed efforts in making his voluntary, good-faith disclosures of his past illegal drug use (insufficient to satisfy the prompt prong of MC ¶ 17(a)), he does not mitigate the personal conduct concerns covered by SOR ¶¶ 2.a-2-b.

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 and criminal conduct security concerns are mitigated. Personal conduct security concerns are not mitigated. 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):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
GUIDELINE E: (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
GUIDELINE J (CRIMINAL CONDUCT):	FOR APPLICANT
Subparagraph 3.a:	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.

Roger C. Wesley
Administrative Judge