



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-00914

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

04/30/2025

Decision on Remand

WESLEY, ROGER C. Administrative Judge

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

Statement of the Case

On August 12, 2024, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudications Service (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse guideline the DSCA 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 August 18, 2024, and requested his case be decided on the written record. The case was assigned to me on January 2, 2025. Applicant received the File of Relevant Material (FORM) on November 1, 2024, and was instructed to file any objections to the FORM or supply additional information for consideration within 30 days of receipt.

Applicant timely responded to the FORM with a letter clarification of his interrogatory response. The Government's exhibits (Items 1-4) were admitted without objection. Applicant's post-FORM letter submission was admitted as Item 5.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) used marijuana from about January 2016 until at least July 2023, with varying frequency; (b) used LSD from about December 2018 until at least January 2020, with varying frequency; (c) used psilocybin mushrooms from about December 2018 until at least January 2020, with varying frequency; (d) used cocaine from about November 2020 until at least January 2021, with varying frequency; (e) used prescription medication Adderall that was not prescribed for him from about May 2018 until at least December 2022; and (f) purchased marijuana from about January 2016 until at least December 2022.

In Applicant's response to the SOR, he admitted each of the allegations covered by SOR ¶¶ 1.a through 1.f with explanations and clarifications. He claimed he has not used marijuana since July 2023 and has taken other positive steps to overcome this problem (inclusive of disassociating with friends and acquaintances who encourage drug-using behaviors). He claimed, too, to have recently bought a house with his fiancée, which has helped to distance himself from his drug-using acquaintances. And, he claimed his previous choices to use drugs are not reflective of where he is today.

Issuance of Remand

On April 9, 2025, the Appeal Board issued a remand. In its remand, the Appeal Board issued instructions to consider relevant evidence, relevant factors, and important aspects of the case. The Board also instructed me to articulate a satisfactory explanation for my conclusions.

Findings of Fact

Applicant is a 27-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 has never married into a civil marriage but has cohabited with another person since May 2021. (Item 3) He earned a high school diploma in June 2016 and

attended college classes in 2017 without earning a degree or diploma. (Item 3) He reported no military service.

Since September 2023, Applicant has worked for his current sponsoring employer. (Item 4) Previously, he worked for other employers in various jobs. (Item 3) He has never held a security clearance. (Item 3)

Applicant's drug history

Between January 2016 and July 2023, Applicant purchased and used marijuana with varying frequency in social settings with friends. (Applicant's response and Items 3-4) He used marijuana generally for relaxation purposes and relief from lower back pain. (Item 4) Between 2016 and early 2022, "he was a heavy cannabis user" with acknowledged daily usage (sometimes multiple times a day) during these years. (Items 3-4) Whether the amount of marijuana he possessed in his home at any time after July 2021 exceeded one ounce is unknown from the evidence presented in the record. Whether he used or shared any of his possessed marijuana outside of his home following his state's legalization of the drug in July 2021 is unclear.

Applicant reduced his marijuana intake between 2021 and June 2023 out of concern for how it was affecting him mentally and physically. To satisfy his personal marijuana needs (while lacking a medical cannabis license), he purchased the substance monthly (typically 3.5 grams per week) from a local dealer between August 2018 and December 2022. (Items 3-4) Applicant ceased using marijuana altogether in July 2023, two months before he completed his electronics questionnaires for investigations processing (e-QIP) in September 2023. (Item 3)

Applicant's oldest brother (a daily marijuana user), who Applicant hosted in his home between December 2023 and August 2024 while his brother was on a job contract, typically used marijuana around him (if not "in my presence") outside of his home. (Items 3-5) Applicant assured in his interrogatory responses that his brother never used marijuana inside the home. (Items 4 and 5) Applicant assured, too, in his post-FORM letter submission that his brother no longer resides in his home. (Item 5) Applicant's assurances of discontinued marijuana involvement and association with his oldest brother are both plausible and credible and are accepted.

Between 2018 and 2021, Applicant used other drugs as well. (Item 4) Specifically, he used psilocybin mushrooms from December 2018 to January 2020 on approximately 20 occasions. (Item 4) He obtained the mushrooms from friends in social situations. He also used cocaine (on three occasions) between November 2020 and January 2021 and non-prescribed medications (Adderall) on three occasions between May 2018 and June 2018 that had been provided him by a former classmate or coworker. (Item 4)

Applicant has not engaged in any recurrent use of these cited other drugs and assured that he has no intention of using illegal drugs in the future. (Items 2 and 4-5) He has never tested positive for illegal drugs in his system and has never pursued drug

counseling. (Items 2 and 4) In his signed statement of intent (dated August 18, 2024), he acknowledged the past irresponsible choices he made in using illegal drugs and committed to distancing himself from drug-using associates and contacts and removing himself from the environment where drugs were used. (Item 2) Acknowledging a lapse in judgment in using illegal drugs and allowing his brother to stay with him, he has committed to making “significant efforts to improve his life.” (Item 5)

In addition to avoiding any illegal drugs since July 2023 (a period of over 16 months), he has reevaluated his associations and has distanced himself from his brother and many of his friends. (Item 5) Most importantly, he committed himself to maintaining the highest standards of integrity “going forward.” (Item 5) Applicant never denied his awareness at all relevant times that the drugs he was using were illegal under federal and state law. (Items 2, 4, and 5)

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

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.

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.518, 531, *supra*. “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 518, 531; *supra*; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant’s lengthy history of use and purchases of federally illegal marijuana and other illegal drugs and non-prescribed prescription drugs. Considered together, Applicant’s involvement with illegal drugs raises security concerns over whether his use of these illegal drugs reflect actions incompatible with the good judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Drug involvement concerns

Applicant resides in a state that in July 2020 decriminalized marijuana possession and legalized adult recreational use of the substance in July 2021 (up to one ounce of marijuana) for personal use in the user’s private residence. See Code Ann. § 18.250.1 (2020) and Code Ann. Title 4.1, Ch. 16, *et seq.* (July 2021) of Applicant’s state of residence for more details of the statute’s legislative coverage. Any marijuana possessed by Applicant after the state-approved date that exceeds the one ounce threshold remains illegal. Possessing more than four ounces of marijuana is subject to a civil penalty of up to \$25. See *Id.* Possessing more than an ounce of marijuana (but not more than a pound) is a Class 3 misdemeanor for a first offense and a class 2 misdemeanor for a second offense.

Between January 2016 and at least July 2023, Applicant purchased and used marijuana with varying frequency in social settings with friends for relaxation purposes and relief from lower back pain. He admitted to using other drugs (LSD, psilocybin

mushrooms, cocaine, and non-prescribed Adderall) that are banned under both federal and state law. Findings on Applicant's use of these drugs are not disputed in the Appeal Board's remand order.

Applicant's admissions to possessing and using illegal drugs raise security concerns over judgment and risks of recurrence. On the strength of the evidence presented, two disqualifying conditions (DCs) of the AGs for drug involvement 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."

Both marijuana and the other illegal drugs covered by the SOR are federally banned by the Controlled Substance Act of 1970, 21 U.S.C., §§ 801, *et seq.* (signed into law by President Richard Nixon in 1970) (hereinafter CSA). The Act established five schedules of controlled substances as follows: Schedules I, II, III, IV, and V. The CSA makes no accommodations for state-approved marijuana recreational possession and use where federal interests are asserted or involved.

Drugs covered by Schedule I of the CSA are those considered to have a high potential for abuse and include marijuana, LSD, and psilocybin mushrooms. None of these scheduled drugs are considered to have any currently accepted medical use. As a result, marijuana and other Schedule I drugs are subject to the most stringent controls among drugs covered by the CSA. See *Legal Effect of Marijuana Rescheduling on FDA's Regulation of Cannabis*, Cong. Research Serv. at 2 (2024).

While substances covered by Schedule II (inclusive of cocaine) are considered to have a high potential for abuse and dependence, unlike Schedule I drugs, they do have an accepted medical use and may be lawfully prescribed (assuming other federal legal requirements are satisfied). See *id.* Schedule III, by contrast, covers drugs and substances that have a potential for abuse less than the drugs or other substances in Schedules I and II and also have an accepted medical use. Schedule III drugs include unprescribed Adderall. See 21 U.S.C. § 812.

Violations of any of the provisions of the CSA carry potentially serious penalties. Nothing in the CSA can be read to provide any explicit or implicit exception for state laws approving the recreational possession and use of marijuana (a Schedule I drug) where a federal interest or priority is asserted.

Where state laws decriminalize and legitimate the recreational use of marijuana (as in Applicant's state of residence), they risk federal preemption by the CSA. See *Gonzales v. Reich*, 545 U.S. 1, 6-11 (2005). *Reich* endorsed Congress' ability to regulate activities within states that are not economic in nature. Extended powers included the policing of activities within states that have decriminalized marijuana involvement. *Id.*, 6-17.

What the *Reich* holding means is that the Federal Government (acting through the Commerce Clause of the Constitution) can criminalize the production and

possession of marijuana, even when the state impacted (as here) maintains laws that allow the possession and use of marijuana for both medicinal and recreational use purposes, along with the purchase of marijuana for the personal use of the user. And so, while *Reich* did not completely ban state-level medicinal cannabis laws, it confirmed the Federal Government's power to enforce the bans of marijuana possession, even in cases where such enforcement conflicts with overlapping state laws (as here, to a limited extent)).

Providing further clarification on the application of federal law to persons seeking access to classified information, the Director of National Intelligence (DNI) issued a memorandum in December 2021 confirming the relevance of federal law for persons seeking access to classified information or eligibility to hold a sensitive position without making federal law determinative to eligibility determinations. See 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*.

Neither *Reich* nor the DNI's 2021 Memorandum clarifying the application of federal law to security clearance adjudications afford much room for accommodations of state laws decriminalizing and legitimating marijuana activity. Without any cited persuasive reasons for deviating from the application of federal law to Applicant's marijuana possession and purchases in his state of residence, application of federal law and policy remains both relevant and determinative for assessing the extent of his marijuana possession during his admitted years of possession, use, and purchases. See *id.*

In its remand assessment of my analysis of Applicant's polysubstance abuse, the Board stressed the importance of a dual track analysis in distinguishing Applicant's legalized marijuana drug involvement (both use and purchases) under state law from his past use of other drugs banned by both state and federal law. (Appeal Board Decision, at 4) Of special importance in the Board's analysis were the comparative dates of Applicant's frequency and recency of his possession, usage, and purchases of marijuana *vis-à-vis* the other drugs covered by the SOR. Comparative figures differentiated his cycle of marijuana usage between 2016 and July 2023 (the accepted cessation date) and his cycle of usage of other illegal drugs covered in the SOR (*viz.*, unprescribed Adderall, hallucinogens, and cocaine) that ended by 2021.

To be sure, distinguishing Applicant's marijuana activity from his use of the other drugs covered by the SOR does produce potentially different overall mitigation results than if all of the drugs used by Applicant were considered cumulatively and collectively as a pattern of illegal drug involvement over a lengthy period of time. Undertaking this type of differentiated analysis suggested by the Appeal Board risks, however, a piecemeal assessment that violates the preemptive ban of marijuana possession and purchases under the CSA. And, wherever there is a conflict between state and federal law, federal law is controlling.

Consideration of Applicant's marijuana possession (covered by the CSA) and use over a lengthy period spanning 2016 through July 2023 cannot be reasonably considered and assessed separately from the other drugs he used without engaging in a piecemeal analysis of his overall drug use and involvement. Piecemeal assessment has long been disfavored by the Appeal Board. See ISCR Case No. 04-12916 at 5-6 (App. Bd. Mar. 21, 2007); ISCR Case No. 02-11489 at 3 (App. Bd. Sep. 11, 2003).

While whole-person assessment can potentially allow for consideration of an applicant's past poly-substance abuse of other illegal drugs apart from his recent marijuana use, the facts in Applicant's case do not warrant any departure from the preemptive ban of drugs covered by Schedules I through III of the CSA. A distinguishing approach to evaluating Applicant's use of the drugs covered in the SOR and under the CSA's schedules cannot be fairly made without violating *Reich's* preemptive pronouncements and the Board's own historical disfavoring of piecemeal assessments in DOHA decision making.

Without a lengthier time of sustained abstinence from the use and purchase of marijuana and the use of other illegal and non-prescribed drugs, application of any of the potentially available mitigating conditions is limited. Longstanding illegal drug use (inclusive of state-approved marijuana possession, use, and purchases) without a proven period of sustained abstinence is incompatible with the coverage of the CSA is not enough to warrant more than partial application of potentially available mitigating conditions of Guideline H.

MC ¶¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such unusual 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 this problem, and has established a pattern of abstinence, including, but not limited to . . .
(2) changing or avoiding the environment where drugs were used and 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 eligibility: . . .

partially apply to the facts of Applicant's case. See, e.g., ISCR Case No. 11-00193 (App. Bd. Jan. 24, 2013). Applicant's limited period of cessation of his illegal drug involvement (16 months) makes it too soon to absolve him of risks of recurrence.

To Applicant's credit, he has displayed a commitment to the avoidance of illegal drugs and friends and family members who use them in his presence. His commitments to a drug-free lifestyle are certainly welcomed and encouraged. They need more corroborated sustained abstinence (certainly more than 16 months), however, to satisfy minimum risk-free recurrence concerns. Further, while this is not a close case, even

close cases must be resolved in the favor of the national security where doubt exists. See *Dept. of Navy v. Egan*, *supra*.

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. He lacks enough positive reinforcements and time in abstinence (no more than 16 months) from active possession and purchases of federally controlled marijuana and previously other cited drugs to facilitate safe risk-free predictions of his ability avoid recurrent use of federally banned drugs.

Considering the record as a whole at this time, there is insufficient evidence of sustainable mitigation in the record to make safe predictable judgments about Applicant's trusted ability to avoid illegal drugs in the foreseeable future. Overall, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶ 1.a-1.f.

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 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): AGAINST APPLICANT

Subparagraphs 1.a-1.f: Against 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