



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



In the matter of:

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ISCR Case No. 24-01101

Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

04/17/2025

Decision

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guideline H (drug involvement and substance misuse) are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On December 12, 2023, Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On October 1, 2024, the Defense Counterintelligence and Security Agency (DCSA) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent (SecEA) 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to

determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (HE 2) On November 14, 2024, Applicant provided a response to the SOR and requested a hearing. (HE 3) On December 19, 2024, Department Counsel was ready to proceed.

On January 15, 2025, the case was assigned to me. On January 21, 2025, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for March 4, 2025. (HE 1) The hearing was held as scheduled.

Department Counsel offered two exhibits into evidence; Applicant did not offer any exhibits; there were no objections; and I admitted all exhibits into evidence. (Transcript (Tr.) 11, 16; GE 1-GE 2) On March 18, 2024, DOHA received a transcript of the hearing. Applicant did not provide any exhibits after his hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a and 1.b. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 62-year-old engineer employed by a defense contractor since December of 2022. (Tr. 6-8, 19-20) In 1981, he graduated from high school. (Tr. 6) In 1985, he received a bachelor's degree in computer science. (Tr. 6) From 1986 to 1989, he was enrolled in a master's degree program in computers. (Tr. 6-7) He has not served in the military. (Tr. 7) He worked for defense contractors from 1985 to 2013, and he held a security clearance during those years. (Tr. 7, 20-22) He also worked for a federal contractor from February of 2021 until September of 2022. (Tr. 19) He was married from 1987 to 2005 and from 2008 to 2017. (Tr. 8) He married his current spouse in 2022. (Tr. 8) His two adopted children are ages 39 and 43, and his three stepchildren are ages 8, 10, and 19. (Tr. 9, 19)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about March 2017 to about November 2023. SOR ¶ 1.b alleges Applicant used psilocybin mushrooms in about October 2022.

Applicant was aware that his possession and use of marijuana and psilocybin mushrooms was a violation of federal law and inconsistent with holding a security clearance. (Tr. 23, 35) He did not have sponsorship for a security clearance from December of 2013 to December of 2023. (Tr. 23-24, 35) He did not disclose his marijuana use from February of 2021 to November of 2023 to his employer because no one told him he needed to disclose his marijuana use. (Tr. 35) He stopped using marijuana in November 2023 because he was going to be applying for a security clearance. (Tr. 36)

On December 12, 2023, he completed an SCA because his employer decided he was needed to work on a classified contract. (Tr. 24-25; GE 1) He never received a drug test from his employer. (Tr. 36, 39-40)

Applicant used marijuana in 2017, 2018, August 2020, and from February 2021 through November 2023. (Tr. 25-28, 33-34) In 2023 on diverse occasions, he ate about 14 marijuana gummies. (Tr. 29) In his December 12, 2023 SCA, he indicated he used marijuana from March of 2017 to November of 2023 no more than 20 times. (Tr. 27) He does not associate with anyone who currently uses marijuana; however, his son was with him when he ate marijuana gummies, and his son uses marijuana. (Tr. 31-32, 37-39) He purchased the marijuana gummies he used, and on the other occasions when he smoked marijuana, it was provided by friends who did not charge him for it. (Tr. 33) The marijuana gummies helped him with his pain from working on his house. (Tr. 34)

Applicant provided a signed statement of intent to abstain from all drug involvement and substance misuse. (SOR response) He acknowledged “that any future involvement or misuse is grounds for revocation of national security eligibility.” See AG ¶ 16(b)(3).

Applicant does not have any illegal drugs in his residence. (Tr. 41) He does not intend to use illegal drugs in the future. (Tr. 40-41)

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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s 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.

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 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 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

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case: “(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 record establishes AG ¶¶ 25(a) and 25(c). Additional discussion of the disqualifying conditions is in the mitigation section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

- (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;
- (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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2, [App. A] ¶ 2(b).

Applicant admitted that he possessed and used marijuana and psilocybin mushrooms. The drugs he used are listed on Schedule I of the Controlled Substances

Act. See 21 U.S.C. § 812(c); Drug Enforcement Administration listing at <https://www.dea.gov/drug-information/drug-scheduling>.

The SecEA promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that require them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. 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.

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 (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant used marijuana in 2017, 2018, August 2020, and from February of 2021 through November of 2023. He used marijuana occasionally during these periods and psilocybin mushrooms once, and at those times, he was not sponsored for and did not hold a security clearance. There is no evidence he held a “sensitive position” as defined by the DOHA Appeal Board, which has stated:

For purposes of national security eligibility determinations, the Directive defines “sensitive position” as:

Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant has access to classified information, and regardless of whether the occupant is an employee, military service member, or contractor.

SEAD 4, ¶ D.8. We have previously held that this broad language is “designed to be inclusive and encompass a wide range of positions, including those that require eligibility for access to classified information (i.e., a security clearance).” ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). The term “sensitive position” is not so broad, however, to encompass any and all employment with a defense contractor.

ISCR Case No. 22-02623 at 4 (App. Bd. Jan. 24, 2024).

The Appeal Board discussed disqualifying condition AG ¶ 25(f) (any illegal drug use while granted access to classified information or holding a sensitive position), and noted that AG ¶ 25(f):

provides a basis for disqualification that is distinct from the simple drug use the Judge addressed under AG ¶¶ 25(a) and 25(c). Conduct falling under AG ¶ 25(f) reflects a heightened security concern inasmuch as individuals who have already been granted access to classified information or who hold sensitive positions are held to a higher standard than individuals not similarly situated because of the existing potential to adversely impact national security. See Security Executive Agent Directive 3, Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position (effective June 12, 2017); ISCR Case No. 22-01661 at 3 (App. Bd. Sep. 21, 2023). It is undisputed that Applicant's drug use occurred after he was granted access to classified information and/or was in a sensitive position. Although he maintained that he was not working on a classified program at the time of his drug use, that is of no consequence because he was employed in a sensitive position. See ISCR Case No. 22-02623 at 3 (App. Bd. Jan. 24, 2024).

ISCR Case No. 23-01884 at 3 (App. Bd. Nov. 6, 2024). AG ¶ 25(f) was not alleged in the SOR and was not established in this case.

Applicant presented some important mitigating information. He ended his misuse of illegal drugs in November 2023; he disclosed his drug involvement on his SCA; and he admitted his drug involvement on his SOR response and at his hearing. His misuse of drugs was not discovered through a polygraph test, investigative efforts, or a urinalysis test. He avoids persons and environments where illegal drugs are used or likely to be used, except he continues to associate with his son who is a marijuana user. He promised not to use illegal drugs in the future, and he provided a statement of intent not to use illegal drugs. He did not have a drug use disorder diagnosis, and there is no recommendation that he receive drug treatment.

Applicant's decisions to possess and use illegal drugs are an indication he lacks the qualities expected of those with access to national secrets. However, the time between Applicant's most recent involvement with illegal drugs and his hearing was about 15 months, and this period is sufficient under all the circumstances to fully establish AG ¶

26(a). AG ¶ 26(b) is not fully established because he continues to associate with his son who is a drug user.

Applicant's involvement with illegal drugs is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and judgment. Guideline H security concerns are mitigated.

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 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.

Under AG ¶ 2(c), “[t]he 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. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 62-year-old engineer employed by a defense contractor since December of 2022. In 1985, he received a bachelor's degree in computer science. From 1986 to 1989, he was enrolled in a master's degree program in computers. He worked for defense contractors from 1985 to 2013, and he held a security clearance from 1985 to 2013.

Applicant was a credible witness during his security clearance hearing. He used psilocybin mushrooms in October 2022, and he ended his marijuana use in November 2023. He ended his drug involvement and substance misuse before he completed his December 12, 2023 SCA, and was granted access to classified information. He has abstained from all illegal drug involvement for 15 months at the time of his March 4, 2025 hearing. He promised not to use illegal drugs in the future.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified

information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated drug involvement and substance misuse security concerns.

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: **FOR APPLICANT**

Subparagraphs 1.a and 1.b: **For Applicant**

Conclusion

Considering all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge