



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 14-06422

**Appearances**

For Government: Caroline E. Heintzelman, Esq., Department Counsel  
For Applicant: *Pro se*

02/03/2016

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges and the record establishes that Applicant used marijuana about five times from September 2002 to August 2010. One marijuana use was after he completed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) and he received a security clearance. He self-reported his marijuana use. His company has enrolled him in a drug-testing program. He does not associate with drug-using associates and contacts; he avoids the environment where drugs were used; and he provided a signed statement of intent with automatic revocation of clearance for any violation. Drug involvement and personal conduct security concerns are mitigated. Access to classified information is granted.

**History of the Case**

On September 10, 2009, and January 23, 2011, Applicant completed and signed two SF 86s. (GE 1; GE 2) On May 20, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth security concerns arising under AGs H (drug involvement) and E (personal conduct).

On June 15, 2015, Applicant responded to the SOR and requested a hearing. On October 14, 2015, Department Counsel was ready to proceed. On October 27, 2015, the case was assigned to me. On December 9, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 11, 2016. (HE 1) The hearing was held as scheduled. During the hearing, Department Counsel offered three exhibits and Applicant offered seven exhibits. (Transcript (Tr.) 21-22, 24-28; GE 1-3; AE A-G) There were no objections, except Applicant objected to admission of his Office of Personnel Management personal subject interview (OPM PSI), and he provided clarifications and corrections to his OPM PSI. (Tr. 22, 28, 32-49) His clarifications were accepted as amending his OPM PSI, and all proffered exhibits were admitted into evidence. (Tr. 22, 28, 49) On January 19, 2016, I received a transcript of the hearing. On January 26, 2016, I received two exhibits, which were admitted without objection. (AE H-I)

### **Findings of Fact<sup>1</sup>**

In Applicant's SOR response, he admitted the SOR allegations, and he also provided some extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 56-year-old engineer, who is seeking to retain his security clearance. (Tr. 6) The same defense contractor has employed him since November 2009. (Tr. 10) In 1977, he graduated from high school, and in 1983, he received a bachelor of science degree in civil engineering. (Tr. 7) In 2004, he was awarded a master's degree in business administration. (Tr. 8-9) In 2010 and 2013, he received important work-related certifications. (AE D; AE E)

In 1983, Applicant married, and in 1992, he divorced. (Tr. 8-10; GE 1) In 1992, he married, and he does not have any children. (Tr. 10; GE 1; GE 2) He has never served in the military. (Tr. 10; GE 1; GE 2)

### **Personal Conduct and Drug Involvement**

Applicant used marijuana approximately twice while he was in high school and once while he was in college. (Tr. 50) He held a security clearance with another defense contractor from 1983 to 1995, and he did not use marijuana during those 12 years. (Tr. 51)

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

When Applicant completed his September 10, 2009 SF 86, he was asked about illegal drug use in the previous seven years, and he said he used marijuana from about September 2002 to about December 2007 on less than five occasions when he in Canada. (GE 1) When Applicant completed his January 23, 2011 SF 86, he was again asked about illegal drug use in the previous seven years, and he said he used marijuana from about September 2003 to about August 2010 on less than five occasions and only once in the previous three years. (GE 2)

In 2002 Applicant and his supervisor were in a European country for two days. (Tr. 35-37) Applicant received marijuana and mushrooms from his supervisor, and he used the substances with his supervisor. (Tr. 35-37, 44-45, 73-74) He has not associated with the supervisor who provided marijuana and mushrooms to him since 2008. (Tr. 74)

When Applicant went to Canada, he visited his sister-in-law. (Tr. 32) On two to four occasions, she offered marijuana to Applicant and he took a couple of puffs "to be polite." (Tr. 33, 41, 52-53) On all occasions except one, he did not consume enough marijuana to feel any effect from it. (Tr. 38) On one occasion he felt relaxed and tired. (Tr. 39) He has not visited his sister-in-law's residence in Canada since 2007. (Tr. 61)

In August 2010, Applicant had an interim security clearance. (Tr. 81) Applicant's stepdaughter's friend invited Applicant and his spouse to use marijuana with his stepdaughter and her friend at Applicant's residence. (Tr. 30-31, 56) He took two puffs on the marijuana cigarette to show that he was a "cool step dad" and to improve his relationship with her. (Tr. 31, 58) He did not consider the consequences of his conduct, and he acknowledged his marijuana use was wrong. (Tr. 32, 40, 66, 79) His employer prohibits marijuana use. (Tr. 58-59) He did not truly appreciate the security significance of using marijuana while holding a security clearance. (Tr. 62-64) He does not intend to use illegal drugs in the future so long as he holds a security clearance or marijuana continues to be illegal. (Tr. 41-42, 48, 68) No one has used marijuana at his residence since August 2010. (Tr. 56) He does not associate with any illegal drug users. (Tr. 74) Applicant's stepdaughter's friend has not returned to his residence and he does not associate with her. (Tr. 75)

On December 31, 2015, Applicant submitted to a urinalysis test, which was negative for illegal drugs. (Tr. 59-60; AE G) Applicant's employer has placed him on a random drug testing program at Applicant's request to show his abstinence from illegal drug use. (Tr. 88; AE H)

Applicant provided a signed statement of intent not to use marijuana or any other illegal drug with automatic revocation of clearance for any violation. (Tr. 88) He stated:

I, [Applicant's name], intend never to use marijuana or any other illegal drug in the future. I intend never to misuse prescription drugs or nonprescription medications. I understand that any future violation will result in the automatic revocation of my security clearance. (AE I)

## Character Evidence

On June 3, 2015, Applicant's spouse was naturalized as a U.S. citizen. (AE B) She describes him as generous, responsible, diligent, loyal, responsible, and dedicated. (AE A) She and Applicant do not use illegal drugs. (AE A) He received excellent evaluations from his current employer. (AE F)

## 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 revised 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. This decision is not based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. Thus, any decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines

presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 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 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

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes three drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse";<sup>2</sup> "(c) illegal drug possession"; and "(g) any illegal drug use after being granted a security clearance." AG ¶¶ 25(a), 25(c), and 25(g) apply because Applicant used marijuana about eight times over his lifetime, and about five times from September 2002 to August 2010. He possessed marijuana before he used it. His most recent marijuana use was after he completed an SF 86, and he received a security clearance.<sup>3</sup> Consideration of mitigating conditions is required.

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<sup>2</sup>AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

<sup>3</sup>AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Sch. I(c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The 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 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

(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) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

(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.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including

rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant recognized the adverse impact on his authorization to have continued access to classified information additional marijuana use will have. There is no evidence of marijuana use after August 2010. He said he intends to continue to abstain from illegal drug possession and use. He does not associate with marijuana users, and he does not frequent the environment where illegal drugs are used. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. Applicant disclosed his marijuana use to his employer; he requested to be placed on a drug-testing program; and his employer has agreed to randomly test Applicant for illegal drugs. His marijuana use while holding a security clearance was more than five years ago, and no longer casts doubt on his current reliability, trustworthiness, or good judgment.

AG ¶¶ 26(a) and 26(b) apply. The only evidence of Applicant’s marijuana use is his disclosures during the security clearance process. He credibly described his marijuana use, and he sincerely promised not to use marijuana in the future. He has abstained from marijuana use for more than five years, demonstrating a sufficient track record of no drug abuse to mitigate drug involvement security concerns.

## **Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single

guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; or (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Marijuana possession and use as well as marijuana use while holding a security clearance are thoroughly addressed under Guideline H, and accordingly, AG ¶ 16(c) does not apply. AG ¶ 16(e)(2) does not apply because the SOR does not allege Applicant's marijuana or mushroom use in locations outside of the United States.

AG ¶¶ 16(d)(1), 16(d)(3), and 16(e)(1) apply because Applicant used marijuana on about five occasions from September 2002 through August 2010. His marijuana use in August 2010 was while holding a security clearance. His marijuana use reflects adversely on his professionalism and creates a vulnerability to exploitation, manipulation, or duress. Marijuana use while holding a security clearance reflects "questionable judgment . . . or unwillingness to comply with rules and regulations [and raises] raise questions about [his] reliability, trustworthiness and ability to protect classified information." See AG ¶ 15.

AG ¶ 17 provides four potentially applicable personal conduct mitigating conditions in this case:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;



(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(c), 17(d), 17(e), and 17(g) apply. The disqualifying conduct alleged in the SOR under Guidelines H and E is identical. The mitigating facts discussed under Guideline H are applicable to mitigate personal conduct security concerns. His most recent marijuana use was in August 2010, and happened under such unique circumstances that it is unlikely to recur and does not cast doubt on Appellant's reliability, trustworthiness, or good judgment. He disclosed his marijuana use to his company and security officials, and he is not vulnerable to exploitation, manipulation, or duress. Personal conduct 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(a):

(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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 56-year-old engineer, who has been employed by the same defense contractor since November 2009. In 1983, he received a bachelor of science degree in civil engineering. In 2004, he was awarded a master's degree in business

administration, and in 2010 and 2013, he received important work-related certifications. He has received some excellent evaluations from his employer.

Applicant expressed sincere regret for his history of marijuana use, especially while holding a security clearance. He ended his marijuana use in August 2010, and his marijuana use is not recent. He sincerely assures he will not use marijuana in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Drug involvement and personal conduct security concerns are mitigated.

### **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

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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MARK HARVEY  
Administrative Judge