



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



In the matter of: )  
)  
) ISCR Case No. 18-00830  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel  
For Applicant: Mark S. Zaid, Esq.

07/17/2019

**Decision**

LYNCH, Noreen A., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline J, Criminal Conduct, but he did not mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse. National security eligibility for access to classified information is denied.

**Statement of the Case**

On August 15, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, Criminal Conduct, and H, Drug Involvement and Substance Misuse. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on October 12, 2018, admitting all allegations. He requested a hearing before an administrative judge. The case was assigned to me on February 20, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on April 1, 2019, for a hearing on June 20, 2019. The hearing was convened as scheduled. The Government offered Government Exhibits (GX) 1 through 7, which were admitted without objection. Applicant testified on his own behalf, presented two witnesses, and offered Applicant Exhibits (AX) A through H, which were admitted into the record. The record was held open until July 8, 2019. DOHA received the transcript of the hearing (Tr.) on July 1, 2018.

### **Findings of Fact**

Applicant is 35 years old. He works as a project manager for a defense contractor. He is single and has no children. He graduated from high school and received his undergraduate degree in 2005. Applicant reported no military service. He has held a security clearance since about 2009. (GX 1) He has been employed with his current employer for about three years. However, he has worked for many government agencies. He completed his most recent security clearance application in 2017. (GX 1, AX A)

### **Criminal Conduct**

In September 2016, Applicant was arrested and charged with possession of marijuana and concealing. (SOR 1.a) He was stopped by a police officer for swerving on the road. The officer, according to the report, noticed that Applicant had thrown out of the vehicle a small white tissue. (GX 5) The officer smelled marijuana as he was talking to Applicant. The police report stated that Applicant admitted that he had been smoking some marijuana earlier with a friend. (GX 5) The officer noted in the report that he saw a "green leafy like substance on Applicant's shirt and some on the passenger seat." The small white tissue was tested and found positive for marijuana as well as the tissue that had been thrown out of car. (GX 5) Applicant held a security clearance at the time.

At the hearing, Applicant stated that he was with a friend who asked him to hold some marijuana for him. (Tr. 59) Applicant initially told the friend that he does not use marijuana any more. When Applicant was driving home he saw that his friend had left a small bag of marijuana on the car seat. (Tr. 60) Applicant called his friend and was told that his friend would pick it up in the morning. The officer smelled marijuana coming from the vehicle. Before the actual stop, Applicant saw the police sirens and threw the bag of marijuana out of the car. (Tr. 61) Applicant claims that he explained to the officer that he does not use drugs. Applicant claims that the officer attempted to make a deal with Applicant. If Applicant would disclose the owner of the marijuana, he would dismiss charges. The report, however, noted that Applicant told the officer that he had been using some marijuana. Applicant now denies that he made that statement. (GX 5) (Tr. 64) As a result of the incident, the officer released him. Applicant reported the incident to his FSO. (AX F)

As to SOR 1.b, in February 2008, Applicant was arrested and charged with driving while intoxicated, first offense. (GX 4, 6) He reports that he left a sports bar and was stopped by the police when he made a turn that crossed a yellow line. Applicant attempted a breathalyzer test and performed routine tests. He reports that he was taken to a holding cell. When he used the breathalyzer, he registered a .08. (Tr. 58) When Applicant appeared in court, the charge was dropped to reckless driving. (GX 6) He pled not guilty and received a suspended 12 month sentence. (GX 4) He completed the required drug and alcohol classes. (GX 3)

In September 2005, Applicant was arrested and charged with possession of marijuana. (SOR 1.c) He admitted that he was racing his motorcycle on the highway and the motorcycle crashed into a wall. The police had been chasing him and found marijuana in his motorcycle. Applicant told the police that he had loaned his bike to a friend earlier in the day and did not know the marijuana was there that belonged to a friend. (Tr. 55) Applicant was detained in jail overnight and posted bail. When he went to court, the charge was reduced to nolle prossed due to insufficient evidence. (GX 3) He was required to attend six weeks of ASAP classes. In 2006, when he arrived for the ASAP classes, he tested positive for marijuana. (GX 3) Due to the untimely loss of his mother on September 2001, the judge ordered grief counseling as well. He has not taken any other drug or alcohol classes. (Tr. 66)

As to SOR 1.d, in December 2003, Applicant was arrested and charged with illegal possession of marijuana (misdemeanor). (GX4, 7) At the time, he was 20 years old. He and a friend drove to a party. Before entering, Applicant and the friend were parked in front of the house and were smoking marijuana. An officer pulled up and smelled a strong odor of marijuana from the car. Applicant had concealed the bag of marijuana under the seat. Applicant's friend stated the marijuana belonged to Applicant. Applicant retained an attorney and the case was dismissed and adjudication deferred. (GX 4) Applicant was ordered to attend drug and alcohol classes. (GX 3)

Applicant admitted that he used marijuana in college as an experiment. (Tr. 52) He believes he used between 2000 and 2005 at parties and on weekends. He also stated that he bought marijuana on one occasion. After he graduated from college, he did not use marijuana or any other drug. (Tr. 53) At the hearing, Applicant stated that he knows it is a privilege to hold a security clearance and that he takes it seriously. He stated that he no longer associates with anyone who uses marijuana. However, he stated that in 2016, he held marijuana for a friend.

During Applicant's 2018 investigative interview, he explained that he drinks perhaps two or three beers a month. He does not even consider himself a social drinker. (Tr. 53) He admits that he has made mistakes and immature decisions.

Applicant is involved in many sports activities and has progressed in his career path. He states that he knows he has to be responsible for his own behavior and the use of marijuana or any drug would be a dishonor to his mother. (Tr. 57)

## **Drug Involvement and Substance Misuse**

The Statement of Reasons cross alleged the criminal conduct under Guideline H, Drug Involvement and Substance Misuse. Applicant admitted the allegations as alleged under 1.a, 1.c, and 1.d.

Two witnesses testified for Applicant. The first witness, who is retired, held a security clearance for many years. She has known him for 20 years, and has acted as a surrogate mother to him as his mother was killed on September 11, 2001. His father is also deceased. The witness knew Applicant and his family through church. She described Applicant as a reliable, honest, dependable person who is a hard worker. (Tr. 22) The witness has never seen Applicant use marijuana. She was not aware of the 2016 arrest listed in the SOR until right before the hearing.

The second witness has been dating Applicant since 2008. She revealed that Applicant told her of the three arrests from 2003, 2005, and 2008. They have been living together for about five or six years. (Tr. 30) She stated that she has never seen any marijuana in the house nor has she seen him smoke. As to alcohol, he drinks if they are out. (Tr. 32) She testified that Applicant does not use marijuana. She does not know the friend who gave him marijuana. (Tr. 38) She testified that there is no alcohol in the house.

Applicant submitted a letter from a licensed clinical psychologist who worked with him for about 8 sessions from 2005 to 2006. He was referred for problems related to grief and his adjustment to losing his mother in the terrorist attack at the Pentagon in 2001. He participated actively in the sessions. (GX 3)

He submitted seven letters of recommendation. Each letter attests to his honesty and trustworthiness. All the declarations describe Applicant as a person who is career oriented and has never displayed any misconduct in the workplace. (AX B-H)

## **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J: Criminal Conduct**

AG ¶ 30 sets forth the security concerns pertaining to criminal conduct:

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 ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

(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

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant had four arrests between 2003 and 2016. Three arrests involved marijuana and one involved alcohol. The last arrest in 2016 involved marijuana. Applicant held a security clearance at the time of the 2016 arrest. The evidence establishes two disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has mitigated the security concern under this guideline. He has taken alcohol and drug education classes. He has had no recurrence of incidents since 2016. He attended therapy sessions in 2006. He has excelled in his career. He completed all required court orders.

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

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions are established:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana in college. The incidents in 2003 and 2005 are mitigated by the passage of time. He also reported that he purchased marijuana one time. However, he had a security clearance when he was arrested for marijuana possession in 2016. He claimed he was holding the marijuana for someone else or did not know the marijuana was in his car or motorcycle. Therefore, AG ¶ 25 (a), (c), and (f) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used; and
  - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's last incident with possession of marijuana was 2016. After having two other incidents with marijuana and an alcohol charge, he did not use good judgment by holding marijuana for others. This is particularly true, as he held a security clearance at that time. The 2016 incident casts doubt on his reliability and good judgment. He may have claimed that he did not know the marijuana was with him, but I do not find that credible. I do not find mitigation under this Guideline.

## Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has held a security clearance since 2009. He has excellent letters of recommendation. He has not had any criminal incidents since 2016. He successfully completed drug and alcohol programs. However, despite the fact that he had past marijuana arrests, he allowed himself to help a friend and hold marijuana for him. He should have known that this could put him in jeopardy with his security clearance. At the hearing, he denied what the police report in 2016 stated, but when he had an opportunity to correct the interrogatories, he made no changes. Any doubts must be resolved in favor of the Government. I have doubts about Applicant's judgment.

Applicant has made great strides, but the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the concerns under Guideline J, but failed to mitigate the security concerns arising under Guideline H.

### Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraphs 1.b-d:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT



Subparagraphs 2.a:

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 access to classified information. National security eligibility is denied.

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Noreen A. Lynch  
Administrative Judge