



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



In the matter of: )  
)  
) ISCR Case No. 18-01961  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Nicholas T. Temple, Esq., Department Counsel  
For Applicant: *Pro se*

04/23/2019

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant possessed and used marijuana once in August 2015 and once in August 2017 while holding a security clearance. Guideline H (drug involvement and substance misuse) security concerns are not mitigated. Eligibility for access to classified information is denied.

**History of the Case**

On October 2, 2017, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On August 22, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find 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. (HE 2) Specifically, the SOR set forth security concerns arising under Guideline H.

On September 6, 2018, Applicant responded to the SOR, and he requested a hearing. (HE 3) On February 9, 2019, the case was assigned to me. On March 11, 2019, the Defense Office of Hearings and Appeals issued a notice scheduling Applicant's hearing for March 28, 2019. (HE 1) The hearing was held as scheduled using video teleconference.

Department Counsel offered two exhibits; Applicant provided a comprehensive SOR response with five attachments; there were no objections to the documents; and they were admitted into evidence. (Transcript (Tr.) 11, 14-17; GE 1-2; SOR response) On April 10, 2019, DOHA received a copy of the transcript of the hearing (Tr.).

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

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

Applicant is a 31-year-old mechanical engineer specializing in software, and a major defense contractor has employed him for the previous seven years. (Tr. 6, 19) In 2006, he graduated from high school, and in 2010, he graduated Summa Cum Laude and received a bachelor's degree in mechanical engineering. (Tr. 6; SOR response ¶ 3.2) In 2014, he received a master's degree in mechanical engineering. (Tr. 6) He earned two post-graduate certifications, and has an impressive professional work history. (SOR response ¶¶ 3.2-3.4) He has not served in the military. (Tr. 7) In 2010, he married, and his children are ages 2 and 5. (Tr. 7)

Applicant provided character-reference statements from 16 colleagues who have worked with him for several years. (SOR response ¶¶ 3.5.1-3.5.16) His awards, performance evaluations, and character statements establish his integrity, professionalism, diligence, responsibility, trustworthiness, and contributions to mission accomplishment. (SOR response ¶¶ 3.5.1-3.9 and Attach. D, E)

### **Drug Involvement and Substance Misuse**

Applicant did not timely disclose his marijuana use because he did not think about his duty to disclose that information to his security officer. (Tr. 25) In Appellant's October 2, 2017 SCA, he admitted use of marijuana on two occasions on float trips<sup>2</sup> in August 2015 and August 2017. (GE 1) He said he took one "hit" from a marijuana cigarette on both occasions, and he did not enjoy his marijuana use. (GE 1) Applicant's statement during his Office of Personnel Management personal subject interview, in his SOR response, and at his hearing were all consistent with his disclosure of marijuana use in his October 2, 2017 SCA. (SOR response, GE 1, GE 2)

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

<sup>2</sup> A "float trip" involves canoeing and rafting on a river. (Tr. 20)

Applicant used marijuana because of peer pressure and curiosity, and he acknowledged his marijuana use showed poor judgment. (Tr. 22, 24; SOR response) He disclosed the only times he used marijuana on his SCA. (Tr. 24) He does not associate with users of illegal drugs. (Tr. 26; SOR response ¶ 2.2.1.) He met with a counselor on two occasions for an evaluation; however, the counselor indicated there was no evidence of drug addiction, and therefore, no counseling was needed. (Tr. 26-27; SOR response ¶¶ 2.2, 2.4) He has had opportunities to use marijuana after August 2017, and he declined the invitations to use marijuana. (Tr. 28-29)

On August 31, 2018, Applicant's hair was tested for the presence of the marijuana metabolite, and the result was negative, indicating no marijuana use in the previous 90 days. (SOR response ¶ 2.1; Attach. A)

Applicant "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. (SOR response, Attach. B); see AG ¶ 26(b)(3). Applicant does not intend to use marijuana in the future. (Tr. 30) He promised not to compromise national security. (Tr. 30)

### **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 DNI 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 and Substance Misuse

AG ¶ 24 articulates the security concern for drug involvement:

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.

Director of National Intelligence (DNI) Memorandum ES 2014-00674, "Adherence to Federal Laws Prohibiting Marijuana Use," October 25, 2014, states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines . . . . An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in

national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition)"; "(c) illegal possession of a controlled substance . . . ."; and "(f) any illegal drug use while granted access to classified information or holding a sensitive position." Applicant possessed and used marijuana<sup>3</sup> on a total of two occasions in August 2015, and August 2017, while holding a security clearance. AG ¶¶ 25(a), 25(c), and 25(f) are established.

AG ¶ 26 details 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.

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<sup>3</sup> 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 substances. See Drug Enforcement Administration listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

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 ¶ 2(b).

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

Applicant provided some mitigating information. He ended his marijuana possession and use in August 2017, and he does not associate with marijuana users. He submitted 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. He understands that marijuana involvement is inconsistent with holding a security clearance. He promised not to use marijuana in the future.

There is no bright-line test for how much time must elapse after ending marijuana use while holding a security clearance to establish that future marijuana use "is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 26(a). The Appeal Board affirmed the denial of a security clearance for an Applicant holding a security clearance who abstained from marijuana use for 21 months before his security clearance hearing. ISCR Case No. 14-03450 (App. Bd. Sept. 11, 2015). In another case involving an Applicant with a history of frequent marijuana use, including while holding a security clearance, the Appeal Board affirmed denial of a security clearance after the passage of almost five years since the most recent marijuana use. ISCR Case No. 15-06277 at 2-3 (App. Bd. July 19, 2017) ("The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. *See, e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015). Applicant's drug use after having completed a clearance application and after having been granted a clearance is a significant factor in evaluating his judgment and reliability. *See, e.g.*, ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015)."). *See also* ISCR Case No. 06-18905 at 3-5 (App. Bd. Nov. 16, 2007) (reversing grant of security clearance for Applicant who ended marijuana use while holding a security clearance 30 months before hearing).

The evidence against mitigating drug involvement and substance misuse security concerns is substantial. Applicant possessed and used marijuana once in August 2015 and once in August 2017 while holding a security clearance. Each time he possessed marijuana, he committed a federal crime. His marijuana use in August 2017 is recent. More time must elapse without possession and use of illegal drugs before security

concerns are alleviated. Drug involvement and substance misuse security concerns are not 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 31-year-old mechanical engineer specializing in software, and a major defense contractor has employed him for the previous seven years. In 2010, he graduated Summa Cum Laude and received a bachelor's degree in mechanical engineering. In 2014, he received a master's degree in mechanical engineering. He earned two post-graduate certifications, and has an impressive professional work history. Applicant provided character-reference statements from 16 colleagues who have worked with him for several years. His awards, performance evaluations, and character statements establish his integrity, professionalism, diligence, responsibility, trustworthiness, and contributions to mission accomplishment. He is credited with being an intelligent, honest, and dedicated professional mechanical engineer who has the potential of making significant future contributions to national security.

Applicant voluntarily disclosed his marijuana use on his SCA. His voluntary disclosure enhances his credibility and increases his trustworthiness and reliability. His marijuana use on only two occasions tends to indicate he will not use marijuana in the future. He is not addicted to marijuana and drug counseling is unnecessary. He promised not to use marijuana in the future.

The evidence against granting Applicant's security clearance is more persuasive at this time. Applicant possessed and used marijuana on two occasions—August 2015 and August 2017. His marijuana use is somewhat recent. Each time he possessed marijuana, he committed a federal crime. His marijuana possession and use "raise

questions about [his] ability or willingness to comply with laws, rules, and regulations.” AG ¶ 24.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against the granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement and substance misuse security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. More time without misuse of illegal drugs is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Guideline H security concerns are not 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

**Conclusion**

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge