



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 [REDACTED] ) ISCR Case No. 19-00452  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*  
08/29/2019

---

**Decision**

---

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on July 16, 2018. On March 21, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and H. The DOD CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on April 10, 2019, and requested a decision on the record without a hearing. On June 3, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 5. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on June 11, 2019, and did not respond.

Items 1 through 3 are the pleadings in the case. Items 4 through 5 are admitted into evidence. The case was assigned to me on August 7, 2019.

### Findings of Fact

Unless otherwise indicated by citation to another part of the record, I have extracted the below findings of fact from Applicant’s SOR answer (Item 3) and SCA (Item 4).

Applicant, age 18, is unmarried without children. He graduated high school in June 2018. He attended college part time between July 2017 and September 2018, and has been attending full time since September 2018. He has been employed by a federal contractor as a cyber-security trainee since July 2018. This is his first application for a security clearance.

The SOR alleged the following under Guideline J: “You consume alcohol other than that provided by a parent, and other than that at a parent’s residence, in violation of [state law].” In his SOR answer, Applicant admitted the allegation. Because the Government did not specify a citation or provide documents referencing the state law alleged, I *sua sponte* confirmed that, while there is a criminal code section under applicable state law prohibiting underage consumption of alcohol as alleged in the SOR, violation of that section is a civil offense, not a crime. (§ 10-114 and § 10-119).

The SOR alleged, under Guideline H, that Applicant “used and purchased marijuana with varying frequency, from about 2014 to about June 2018.” Applicant admitted the allegation, with the following comment:

These uses are past occurrences and will not happen again. Some even date back to freshman year of high school, when one can be very easily influenced. I believe that I have changed and matured since, and these past uses would not affect my current ability to be trusted.

In his 2018 SCA, Applicant disclosed the following facts in response to questions concerning “Illegal Use of Drugs or Controlled Substances:”

Type of Drug	First Use	Most Recent Use	Frequency of Use	Do you intend to use in the future?	Explanation of Intent Not Use in the Future
THC	Jan. 2015	Jun. 2018	Sporadic usage on less than a weekly occurrence.	No.	In order to ensure peak performance in work and in future college studies, I will not use this substance.
Psilocybin mushrooms	Feb. 2015	Feb. 2015	Used one time.	No.	Use was experimental and further use of substance will not occur.

LSD	Sept. 2016	Sept. 2017	Used twice experimentally.	No.	Substance impacts development of brain and inhibits mental dexterity.
Codeine	Feb. 2017	Feb. 2017	Used once experimentally, without a prescription.	No.	Substance can be very addictive and inhibits regularly bodily functions.
Cocaine	May 2018	May 2018	Used once during senior week.	No.	Gave into peer pressure while at senior week, recognizes the adverse health effects as well as both mentally as well as physically addictive nature of the substance. Definitely will never try again.

Applicant also disclosed the following facts in response to questions concerning "Illegal Drug Activity:"

Type of Drug	First Involvement	Most Involvement	Nature and Frequency of Activity	Reason why you engaged in activity	Do you intend to engage in activity in the future?
Marijuana	Jan. 2015	Jun. 2018	Sporadic purchase for personal use.	To obtain for personal use.	No.
Psilocybin mushrooms	Feb. 2015	Feb. 2015	Purchased one time.	For personal consumption.	No.
LSD	Sept. 2015	Sept. 2015	Purchased on two occasions.	For personal use.	No.
Codeine	Feb. 2017	Feb. 2017	Purchase 2 fluid ounces one time.	For personal consumption and experimentation.	No.
Cocaine	May 2018	May 2018	Received for free during senior week once.	Peer pressure during senior week to receive and consume.	

During his October 2018 interview with a DOD authorized investigator concerning his SCA, Applicant expounded on the facts and circumstances underlying his illegal drug use and activity. He reiterated his intent not to use any illegal drugs in the future. He has never had any drug treatment or counseling. (Item 5).

Applicant smoked marijuana once every ten days after his first usage in 2014. From 2014 through 2016, he smoked it once every week. He smoked it at either his home or a friend's home. He purchased approximately two to three grams of marijuana at a time. After his father smelled marijuana emanating from Applicant's room, he abstained from using marijuana during a five month period not specified in the record. He then resumed weekly usage until the week before he started his current position with a federal contractor. I will consider the illegal drug use and activity not alleged in the SOR only for the purpose of evaluating mitigation and the whole person. (Item 5).

### **Policies**

"[N]o 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." (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (EO 10865 § 7). Thus, a 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. (*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. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993)). 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

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)). "[S]ecurity clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531; AG ¶ 2(b)).

## **Analysis**

### **Guideline J (Criminal Conduct)**

The concern under this guideline is set out in AG ¶ 30: 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. The facts alleged in the SOR ¶ 1.a did not establish criminal activity. Accordingly, I must find the allegation in Applicant's favor.

### **Guideline H (Drug Involvement and Substance Misuse)**

The concern under this guideline is set out in 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 facts and circumstances surrounding Applicant's marijuana use establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Neither of the following potentially applicable mitigating conditions under this guideline are established:

AG ¶ 26(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

AG ¶ 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: (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 regularly used marijuana during his four years of high school and through the week before he began his current employment with a federal contractor. He misused a prescription drug and used other illegal drugs on occasion during high school. He illegally purchased the marijuana and other drugs that he used. He attributed his drug use to experimentation and peer pressure, and professed a sincere intent never to use illegal drugs again. However, he has not established a sufficient pattern of abstinence in light of the recency and circumstances of his use. Moreover, I am unable to conclude that his marijuana use is unlikely to recur, particularly given that he did not provide a signed statement of intent. I have doubts about his reliability, trustworthiness, and good judgment.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

The record did not establish the criminal conduct alleged under Guideline J. I have incorporated my comments under Guideline H in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his purchase and use of marijuana. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

Formal findings 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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine  
Administrative Judge