



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 [REDACTED] ) ISCR Case No. 19-02211  
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 Applicant for Security Clearance )

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel  
For Applicant: *Pro se*  
12/16/2019

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**Decision**

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MARINE, Gina L., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on April 25, 2018. On August 12, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. 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 September 12, 2019, and requested a decision on the written record without a hearing. On October 8, 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 3. 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 October 17, 2019,

and did not respond. Item 1 contains the pleadings in the case. Items 2 and 3 are admitted into evidence. The case was assigned to me on November 26, 2019.

### **Procedural Matter**

I extracted the below findings of facts from Applicant's SOR Answer (Item 1), his SCA (Item 2), and a summary of his security clearance interview (SI) (Item 3). Item 3 was not authenticated as required by Directive ¶ E3.1.20. However, I conclude that Applicant waived any objection to Item 3. The Government included in the FORM a prominent notice advising Applicant of his right to object to the admissibility of Item 3 on the ground that it was not authenticated. Applicant was also notified that if he did not raise any objection to Item 3 in his response to the FORM, or if he did not respond to the FORM, he could be considered to have waived any such objection, and that Item 3 could be considered as evidence in his case. Applicant received the FORM, including a copy of Item 3, but did not either respond to the FORM or otherwise object to Item 3.

### **Findings of Fact**

Applicant, age 31, has never married and does not have children. He earned a bachelor's degree in 2011. He has been employed by a defense contractor as an engineer since July 2016. He previously worked for this same employer from September 2011 through August 2015. He was granted a DOD security clearance in December 2012. (Items 1, 2)

Applicant left his job in 2015 to relocate to a new city, and to explore "the world" and employment opportunities outside of the defense sector. He remained unemployed through July 2016. During this period of unemployment, he used illegal drugs, which is the subject of the SOR allegations. (Items 1, 2)

Applicant's illegal drug use consisted of: 1) consuming a food product infused with marijuana one time in November 2015; 2) using cocaine that he purchased on three occasions between February and June 2016; and 3) using ecstasy twice between June and July 2016. He described his drug use as "recreational" and "experimental." He attributed his drug use to an exploration phase in his life and to living in a city where drug use was prevalent and normalized. (Items 1, 2)

Applicant acknowledged that he used drugs knowing that they were illegal. He admitted that his drug use was a "lapse in judgment." He has abstained from any drug use since resuming his defense-contractor employment, and has no intent to use any illegal drugs in the future. Applicant reported his drug use on his SCA, and candidly discussed it during his SI and in his SOR response. He relocated from the city in which he used drugs. Despite the fact that Applicant lives in a state that allows recreational use of marijuana, he understands that its use remains incompatible with the maintenance of his defense-contractor position and access to classified information. (Items 1, 2, 3)

The SOR alleged that Applicant not only used illegal drugs, but did so "while granted access to classified information." Although Applicant answered "I admit" to each

SOR allegation, in his accompanying explanations, he denied that he had any access to classified information during the period of unemployment when he used drugs. In the FORM, the Government argued that Applicant's clearance should be denied on the basis that he used drugs "while holding a security clearance." Applicant's assertion that his access to classified information was limited to the duration of his employment was unrebutted by the Government. The record did not otherwise establish the status of Applicant's security clearance during the period of his drug use. (Item 1)

### **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. 15-01253 at 3 (App. Bd. Apr. 20, 2016). 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 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.

Applicant's illegal use of marijuana, cocaine that he purchased, and ecstasy establishes two 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.

The SOR alleged facts that rendered the following additional disqualifying condition potentially applicable: AG ¶ 25 (f) any illegal drug use while granted access to classified information or holding a sensitive position. Applicant was granted a DOD security clearance in 2012 while employed in the defense sector. His drug use occurred during a period when he was unemployed and exploring employment opportunities outside of the defense sector. He has not used any illegal drugs since resuming his defense-contractor position. The record did not specify whether Applicant retained his security clearance during his period of unemployment. However, regardless of the status of his security clearance, during the period when he used illegal drugs, he neither had

access to classified information nor was in a position where he could potentially have been exposed to classified or sensitive information. Thus, I find that there is insufficient record evidence to apply AG ¶ 25(f).

The security concerns raised under this guideline have been mitigated by the following applicable factors:

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 experimented with using illegal drugs, including cocaine that he purchased, during a relatively short phase in his life that has ended. He was candid about his drug use during the security clearance process and acknowledged that it was a lapse in judgment. He has since resumed employment in the defense sector in a different city from where he used drugs. He demonstrated that he understands that illegal drug use is incompatible with maintaining his defense-contractor position and his access to classified information. He has not used any illegal drugs in over three years and has no intent to use any illegal drugs in the future. Based on the record evidence, I conclude that Applicant's illegal drug use is not likely to recur, and does not cast doubt on his current reliability, trustworthiness, and judgment.

#### **Guideline E: Personal Conduct**

Applicant's illegal drug use establishes the general concern involving questionable judgment and unwillingness to comply with rules and regulations, which is set forth under this guideline in AG ¶ 15 as follows:

"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 or sensitive information."

The security concerns raised under this guideline have been mitigated by the following applicable factor:

AG ¶ 17(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.

Incorporating my comments under Guideline H, I conclude that Applicant's illegal drug use is not likely to recur, and does not cast doubt on his current reliability, trustworthiness, and 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has mitigated the security concerns raised by his illegal drug use. Accordingly, Applicant has 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 H:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is granted.

Gina L. Marine  
Administrative Judge