



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



In the matter of: )  
)  
) ISCR Case No. 10-10379  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Raashid S. Williams, Esq., Department Counsel  
For Applicant: *Pro se*

September 30, 2011

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant, 29, illegally used marijuana from January 2006 until June 2010. He is commended for disclosing his illegal drug use in his security clearance application (SCA). Notwithstanding, in light of his age, his recent use of marijuana, and the little corroborating evidence about a permanent lifestyle change and disassociation from his marijuana-using friends, I find that not enough time has passed to establish that Applicant’s use of marijuana is unlikely to recur. His recent behavior casts doubt on his reliability and judgment. Clearance is denied.

**Statement of the Case**

Applicant submitted a SCA on July 28, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant’s request for a security clearance.

<sup>1</sup> Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On February 28, 2011, DOHA issued Applicant a statement of reasons (SOR), alleging security concerns under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).<sup>2</sup> Applicant responded to the SOR allegations on March 17, 2011, and requested a decision based on the record. On June 8, 2011, Applicant requested a hearing before an administrative judge. (Hearing exhibit (HE) 1) The case was assigned to me on July 5, 2011, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on July 29, 2011, convening a hearing for August 19, 2011. At the hearing, the Government offered exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified and submitted exhibits (AE) 1 through 3, which were admitted without objection. AE 3 was received post-hearing. DOHA received the transcript of the hearing (Tr.) on August 26, 2011.

### **Findings of Fact**

Applicant admitted the single factual allegation in the SOR. His admission is incorporated herein as a finding of fact. After a thorough review of all the evidence, including Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 29-year-old Information Technology (IT) employee working for a Government contractor. He attended college from 2000 until 2006, and received his bachelor's degree in Computer Science. He is single and he has no children. After college, he started working for company A. In 2007, he was hired by his current employer, a Government contractor, but he also continues to work for company A. He submitted his first SCA in July 2010, and disclosed his illegal marijuana use. He wanted to be completely forthcoming with the Government at the start of his new career path. Applicant testified that he was granted access to classified information at the secret level by two other Government agencies in April and May 2011. There is no evidence that he has compromised or caused others to compromise classified information.

Applicant started using marijuana illegally during his senior year in college. He used marijuana socially, during college parties and fraternity activities. He estimated he used marijuana three to four times while in college. He continued his use of marijuana after he graduated from college. He estimated he smoked marijuana three or four more times after college. He smoked marijuana with some of his current coworkers at his company's Christmas party in 2008. He also smoked marijuana with friends at a party in New York City in May 2007 or May 2008, and he last smoked it with friends at a party in New Jersey in June 2010. (Tr. 40)

Applicant repeatedly testified that he no longer associates socially with his marijuana-using friends. However, he still works with the same coworkers with whom he smoked marijuana during the company's 2008 Christmas party. He averred that although they are employed with the same company, he works in a different section of

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<sup>2</sup> Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

the company, and he does his best to stay away from them. Applicant also attends some of his college fraternity's functions as a graduate advisor. He testified that the use of illegal drugs is no longer allowed at his fraternity functions, and that policy is strictly enforced.

Applicant applied for his current job in June 2010, but he had not yet been interviewed when he illegally smoked marijuana during that same month. Applicant testified that as soon as he was offered the job, he decided never to use any illegal drugs ever again. He submitted the pending SCA in July 2010, and disclosed his past use of marijuana. He was forthright and disclosed his past use of marijuana because he does not want to jeopardize his job or his ability to hold a security clearance. His current job is very important to him. He believes it will enhance his career path.

After his hearing, he submitted a written statement of intent promising to never use any illegal drugs, or to associate with drug users, with the understanding that any violation of his promise would result in the automatic revocation of his clearance. (AE 3). He is willing to participate in any type of drug testing to show that he has been abstinent. He believes that being candid and forthcoming in his SCA, during his background interview, and at his hearing demonstrates his honesty, reliability, and trustworthiness.

Applicant has not participated in drug counseling or rehabilitation, and has not been diagnosed with substance abuse. He presented no evidence of a recent diagnosis or prognosis concerning his use of illegal drugs. Since high school, Applicant has known that the use of marijuana was illegal. He initially experimented with marijuana, and then continued to use it socially, but not because of peer pressure. He considers himself a dedicated employee and his job is very important to him.

Applicant is considered to be an excellent employee with a great work ethic. He is dedicated, loyal, and trustworthy. His references have known Applicant both personally and professionally, and they strongly recommend him for a security clearance because of his demonstrated dedication, knowledge, and qualifications.

### **Policies**

The President of the United States 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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, to reach his decision.

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 protect or 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. 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. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication that 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 (4<sup>th</sup> 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 or her] 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

### Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

Use 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.

Applicant started using marijuana during his senior year in college. He used marijuana eight times from 2006 until June 2010. Applicant stopped using marijuana because he wants to pursue a career with a Government contractor. He knows that his use of marijuana was illegal, and his continued use of marijuana would affect his ability to obtain a security clearance and pursue a career. He promised to never use illegal drugs again.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise security concerns in this particular case: AG ¶ 25(a) "any drug abuse"<sup>3</sup> and AG ¶ 25(c) "illegal drug possession including cultivation, processing, manufacture, purchase."

AG ¶ 26 provides four 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

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<sup>3</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."

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.

(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.

I find that none of the Guideline H mitigating conditions fully apply. AG ¶ 26(b)(4) partially applies because Applicant submitted a signed statement of intent with automatic revocation of clearance for any violation. Notwithstanding, for the reasons outlined in the following paragraphs, this mitigating condition does not fully mitigate the security concerns raised by his recent, illegal marijuana use. Applicant's use of marijuana spans four years. His favorable evidence is not sufficient to establish that he has implemented permanent lifestyle changes to prevent his future use of marijuana. He continues to have some association with his college friends and coworkers with whom he used marijuana. Not enough time has passed for me to conclude that his questionable behavior is unlikely to recur. His behavior still casts doubts on Applicant's reliability and judgment. AG ¶ 26(a) does not apply.

Applicant has not participated in any counseling or aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. In light of Applicant's age and his recent history of illegal marijuana use, Applicant's promise not to use marijuana without corroboration (e.g., clear evidence of lifestyle changes, statements from those who know him about his disassociation from his drug-using friends, or a competent medical diagnosis and prognosis) is not sufficient to show his questionable behavior is unlikely to recur.

Considering the record evidence as a whole, I find there has not been a sufficient period of abstinence. Applicant's past questionable behavior still casts doubts on his reliability, judgment, and willingness and ability to comply with the law. His favorable evidence, at this time, is not sufficient to fully mitigate the Guideline H security concerns.

### **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 relevant 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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for being truthful and forthcoming during the security clearance process. He stopped using illegal drugs in June 2010, because he wants to develop a career. He has outstanding endorsements from his character references. He is considered to be a truthful, highly competent, and dependable worker. These factors show responsibility, good judgment, and some mitigation.

Notwithstanding, in light of Applicant's age, his four years of marijuana use, and the recency of his last marijuana use, his promise to not use illegal drugs in the future without corroboration is not sufficient to show his questionable behavior is unlikely to recur. At this time, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

### **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
Subparagraph 1.a:	Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

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JUAN J. RIVERA  
Administrative Judge