



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



In the matter of: )  
)  
) ISCR Case No. 11-03405  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Philip J. Katauskas, Esquire, Department Counsel  
For Applicant: *Pro se*

January 31, 2012

**Decision**

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RIVERA, Juan J., Administrative Judge:

Applicant is long-term illegal drug user who twice failed his rehabilitation efforts. He used marijuana while working for a defense contractor. He used marijuana after he was served with the SOR and weeks before his security clearance hearing. He is living with his illegal drug provider and he continues to associate with illegal drug-using friends, including his girlfriend. His recent behavior casts serious doubt on his reliability, judgment, and ability to comply with the law. Clearance is denied.

**Statement of the Case**

Applicant submitted the pending security clearance application (SCA) on August 19, 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.

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<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 October 7, 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 on October 25, 2011, and requested a hearing before an administrative judge. The case was assigned to me on November 29, 2011. DOHA issued a notice of hearing on January 3, 2012, convening a hearing for January 10, 2012. At the hearing, the Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified and presented no exhibits. DOHA received the hearing transcript (Tr.) on January 18, 2012.

### **Procedural Issue**

On December 6, 2010, Applicant and Department Counsel agreed to a hearing on January 11, 2012. (Hearing Exhibit (HE) 1) Because of administrative problems and the unavailability of a hearing room for the agreed date, the Notice of Hearing was not issued until January 3, 2012. At Applicant's request, the hearing was scheduled for 12:00 on January 10, 2012. (HE 2) Applicant had more than 15 days advance notice of his hearing. He stated he had sufficient time to prepare for his hearing and he was ready to proceed.

### **Findings of Fact**

Applicant admitted all SOR factual allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 26-year-old lead associate (consultant) working for a government contractor. He attended college from 2005 until May 2010, when he received his bachelor's degree with a double major in mass communications and journalism and public relations. He has never been married and he has no children. Applicant was hired by his current employer in July 2010. This is his first security clearance application.

In his August 2010 SCA, Applicant disclosed that between 2003 and June 2010, he illegally possessed and used numerous illegal drugs, including marijuana, cocaine, mushrooms (psilocybin), hashish, and ecstasy. He also misused prescription medications, and he purchased marijuana on a frequent basis. Additionally, Applicant disclosed two arrests for illegal possession of marijuana. His first arrest was in August 2005, for smoking marijuana in a public concert. He was convicted in March 2006, and was sentenced to supervised probation, community service, drug awareness counseling, random drug tests, one-year suspension of his driver's license, and a fine and court costs. Pursuant to a trial diversion program, the charge was dismissed in March 2007, after he complied with the above sentence.

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

Applicant was arrested again in March 2009, and charged, in part, with possession of marijuana and drug paraphernalia. He and a number of his friends were smoking marijuana in his apartment. His conviction was placed on a "stet docket" pending Applicant's compliance with court orders. He was placed on probation, ordered to perform 48 hours of community service, and to complete a one-year drug counseling/addiction program.

On September 2010, Applicant was interviewed by a government investigator about his illegal drug use. At his hearing, he reiterated his statement to the investigator. Specifically, Applicant testified he started using marijuana after high school. Between August 2003 and February 2004, he used marijuana around 20 times. In February 2004, he started dating a woman who was a heavy marijuana user, and he also became a heavy marijuana user. While in college, Applicant used marijuana almost daily. He purchased marijuana from his friends to meet his needs.

During his interview, Applicant acknowledged he was addicted to marijuana. He discovered he was addicted to marijuana as a result of his 2006 court-mandated drug counseling. Applicant told the investigator that he stopped using marijuana in June 2010, because he was applying for a job with a government contractor. He knew the contractor had a policy prohibiting the illegal use of drugs, and he did not want to risk losing his job. He stated that he did not intend to use illegal drugs in the future.

At his hearing, Applicant disclosed that his most recent marijuana use was in early December 2011, when he used marijuana with his current girlfriend and roommate. (Tr. 22) His most recent purchase of marijuana was in April 2009. And, his most recent use of cocaine and mushrooms was in 2009. Applicant testified he had smoked marijuana a "handful of times" with his girlfriend since his September 2010 interview. Applicant has been dating his girlfriend for about one year. During that period they smoked marijuana together approximately 12 times. (Tr. 33) Applicant met his current roommate in college and they have been friends for approximately two years. His roommate has been his supplier of marijuana, and they smoked marijuana on a frequent basis. (Tr. 33) Applicant still lives in the same town where he went to college. He continues to associate with his college drug-using friends, but he claimed he does not associate with them on a regular basis.

Applicant testified he uses marijuana because it makes him feel good. He likes to use marijuana when he is depressed, upset, or something bad happens to him. It is something he can fall back on when things are going wrong. He equated his use of marijuana to smoking a cigarette or drinking alcohol. However, during his most recent marijuana use in December 2011, he was not upset and nothing wrong had happened to him. He used marijuana with his roommate and girlfriend because it was a nice day.

Applicant was diagnosed as being addicted to marijuana during his 2006 court-mandated counseling. His 2009 court-mandated counseling ended in June 2010. He is not participating in any aftercare treatment.

At his hearing, Applicant acknowledged his serious lapse in judgment. He claimed he had not used marijuana, or any other illegal drugs, since December 2011. He averred he no longer has the urge to smoke marijuana. He promised to abstain from the use of any illegal drugs in the future. He does not want to place in jeopardy his future career, or his ability to hold a security clearance. Applicant also claimed that he has made lifestyle changes to remain abstinent. He claimed he has taken steps to avoid circumstances where the use of illegal drugs is likely. He averred he is now in a stable relationship with his girlfriend. He is involved in sports, coaching a youth hockey team, and practicing a new diet.

### **Policies**

The Secretary of Defense may 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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, a clearance decision is merely an indication that the Applicant has or 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 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.

Between 2003 and December 2011, Applicant illegally possessed and used numerous illegal drugs, including marijuana, cocaine, mushrooms (psilocybin), hashish, and ecstasy. He also misused prescription medications, and he purchased marijuana on a frequent basis. He was arrested twice (2005 and 2009) for illegal possession of marijuana. He participated in substance abuse counseling in 2006 and 2009. He was diagnosed as marijuana abuser in 2006. He continued to use marijuana after his counseling, after he was hired by a government contractor, and after he promised a government agent he would stop using marijuana. He was aware of his employer's policy against the use of illegal drugs. Applicant knew that his possession and use of marijuana was illegal, and that his drug-related behavior would adversely affect his ability to retain his job and to possess a security clearance.

Three drug involvement disqualifying conditions raise security concerns in this particular case: AG ¶ 25(a) "any drug abuse";<sup>3</sup> AG ¶ 25(c) "illegal drug possession

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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.

including cultivation, processing, manufacture, purchase”; and AG ¶ 25(d) “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, psychiatrist) of drug abuse or dependence.”

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

(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 apply. Applicant’s illegal marijuana use is recent and frequent. Because of his age, education, and experience working for a government contractor, he was aware of the illegality of his actions and the adverse consequences he would face because of his misconduct.

Applicant was arrested and charged twice with illegal possession of marijuana. The court required him, in part, to attend mandatory substance abuse counseling, to perform community service, his driver’s license was suspended, and he was placed on probation. In 2005, he was diagnosed as a marijuana abuser. At his hearing, Applicant acknowledged he is addicted to marijuana. Notwithstanding his brushes with the law and his substance abuse counseling, Applicant has not learned from his mistakes. He continued to use marijuana after he was served with the SOR and weeks before his hearing. He is not participating in any follow-up substance abuse counseling. Moreover, Applicant frequently uses marijuana with his girlfriend and with his male roommate, who is also his marijuana provider. Applicant also continues to associate with his college

drug-using friends. He has not implemented realistic lifestyle changes to help him remain abstinent. Under the circumstances, Applicant's promises to never use illegal drugs again are not credible.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant is long-term illegal drug user who twice failed his rehabilitation efforts. He used marijuana while working for a defense contractor. He used marijuana after he was served with the SOR, and weeks before his security clearance hearing. He is living with his illegal drug provider and continues to associate on a daily basis with his illegal drug-using friends, including his girlfriend.

Considering the record evidence as a whole, I find Applicant is a current illegal drug user who cannot control himself. Applicant's recent questionable behavior casts serious doubt on his reliability, judgment, and willingness and ability to comply with the law. He failed to mitigate the Guideline H security concerns.

### **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 – 1.j:	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