



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



In the matter of:

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ISCR Case No. 14-06447

Applicant for Security Clearance

**Appearances**

For Government: Caroline E. Heintzelman, Esq., Department Counsel

For Applicant: Tod D. Stephens, Esq.

02/23/2017

**Decision**

Harvey, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges, and the record establishes that Applicant used marijuana three or four times in October 2011 while holding a security clearance. He self-reported his marijuana use. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. Drug involvement security concerns are mitigated. Access to classified information is granted.

**Statement of the Case**

On February 14, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SCA). (GE 1) On December 8, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding 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. Specifically, the SOR set forth security concerns arising under Guideline H (drug involvement).

On January 25, 2016, Applicant responded to the SOR and requested a hearing. On August 8, 2016, Department Counsel was ready to proceed. On September 8, 2016, the case was assigned to me. On November 18, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for December 8, 2016. (HE 1) His hearing was held as scheduled. During the hearing, Department Counsel offered 8 exhibits and Applicant offered 11 exhibits. (Transcript (Tr.) 22-25, 123-124; Government Exhibits (GE) 1-8; Applicant Exhibits (AE) A-K) I sustained Applicant's objections to the Office of Personnel Management (OPM) personal subject interviews (PSI), GE 4 and GE 5, because they were not authenticated. (Tr. 23) I initially sustained Applicant's objection to GE 7 and GE 8 because they were not provided through discovery; however, after cross-examination, I admitted GE 7 and GE 8 about whether Applicant disclosed his marijuana use to his security officer. (Tr. 16-19, 122-124) There were no other objections, and all other proffered exhibits were admitted into evidence. (Tr. 12-13; GE 1, 2, 3, and 6; AE A-K) On December 8, 2016, I received a transcript of the hearing.

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

In Applicant's SOR response, he admitted the allegation in SOR ¶ 1.a. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 35-year-old lead engineer who has worked for a major defense contractor since October 2015. (Tr. 31, 38; GE 1) He provides leadership and advice to 15 engineers. (Tr. 41-42) In 2007, he began working for a major defense contractor as an engineer. (Tr. 39) In high school, Applicant had a 4.1 grade point average (GPA), and he was captain of the cross-country team. (Tr. 34) In 2004, he received a bachelor's degree in mechanical engineering, and he had a 3.2 GPA. (Tr. 35; AE F) In 2007, he received a master's degree in aerospace engineering. (Tr. 35) In graduate school he had a 4.0 GPA. (Tr. 35-36; AE F) His resume details his education and professional experiences. (Tr. 43; AE F)

Applicant is not married, and he has no children. (GE 1) He has never served in the U.S. Armed Forces. (GE 1) In March 2009, Applicant received a security clearance. (Tr. 40) He did not receive access to classified information until 2012 or 2013. (Tr. 41) There is no evidence of any security violations.

### **Drug Involvement**

In October 2011, Applicant was on vacation several hundred miles from his residence; a friend passed a marijuana pipe to him; and he used marijuana once or twice

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

with a friend he knew since high school. (Tr. 44-45, 62, 65) He has not visited the high school friend since 2013. (Tr. 62-63) Applicant believed his friend has stopped using illegal drugs because of changes in his friend's life. (Tr. 64) After Applicant returned to his residence, in October 2011, he was at a pool at his apartment complex, when a friend passed him a pipe containing marijuana, and he inhaled marijuana smoke once. (Tr. 45, 65, 67)

Applicant moved to a different state and changed his employment after he used marijuana. (Tr. 47) He has not seen the friend who provided the marijuana since moving to a different state. (Tr. 66) He admitted the marijuana use as described in the SOR (three or four marijuana uses in October 2011 while holding a security clearance). (Tr. 31, 44; SOR ¶ 1.a response) In 2012, he disclosed his marijuana use to his security manager; however, his security manager did not provide a statement attesting to Applicant's disclosure of his marijuana use in 2012. (Tr. 32, 68-72, 75-78, 101-102)

Applicant disclosed his marijuana use on his February 14, 2014 SCA. (Tr. 31; GE 1) Other than his marijuana use in October 2011, he has never used illegal drugs. (Tr. 32, 61) He has not been offered marijuana since 2011. (Tr. 81) He has never had a positive urinalysis for use of illegal drugs. (Tr. 50) He promised to not use illegal drugs, to comply with security rules, and to be trustworthy and responsible in his handling of classified information. (Tr. 32) He has abstained from marijuana use for 62 months. (Tr. 48) He does not intend to use marijuana in the future. (Tr. 48, 57)

Applicant told his closest confidants, including his girlfriend, father, and engineering mentors or colleagues, that he used marijuana. (Tr. 46-47, 52-56, 72-77; AE H-AE K) His father works for a state government. (Tr. 37) Appellant told his father that he used marijuana even though he knew his father would be disappointed in him. (Tr. 37) His father was pleased that Appellant told the government about his marijuana use because it showed his good character. (Tr. 37-38)

Applicant had received training from his employer that marijuana use was prohibited. (Tr. 46, 59-60) He knew it was illegal to possess marijuana. (Tr. 46) He said he was sorry for his marijuana use; he acknowledged that he used poor judgment; and he admitted he was wrong. (Tr. 45-46, 56, 84)

Applicant does not associate with illegal drug users or frequent locations where illegal drugs are used. (Tr. 47) He does not attend parties where marijuana is used. (Tr. 80) If someone uses marijuana at a party, Applicant leaves the party. (Tr. 80) He did not receive drug rehabilitation counseling because he believed he could abstain from illegal drug use without it. (Tr. 50)

In January 2016, Applicant provided a signed statement of intent not to use marijuana or any other illegal drug with automatic revocation of clearance for any violation. (Tr. 48-51; AE G) See AG ¶ 26(b)(4), *infra*. On December 8, 2016, he reaffirmed his statement of intent. (Tr. 50)

## Character Evidence

Three of Applicant's colleagues and friends provided character statements. (Tr. 85-120; AE H-AE K) The general sense of the statements is that Applicant is enthusiastic, dedicated, reliable, diligent, professional, trustworthy, competent, and ethical. (Tr. 85-120; AE E-AE H) Applicant's employers gave him excellent performance evaluations. (Tr. 40; AE C; AE E) He successfully completed his employer's leadership program. (Tr. 40; AE D)

## 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. This decision is not based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. Thus, any 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. 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

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

AG ¶ 25 describes three drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: “(a) any drug abuse;”<sup>2</sup> “(c) illegal drug possession;” and “(g) any illegal drug use after being granted a security clearance.” AG ¶¶ 25(a), 25(c), and 25(g) apply because Applicant used marijuana three or four times in October 2011 while holding a security clearance.<sup>3</sup> Consideration of mitigating conditions is required.

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<sup>2</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.”

<sup>3</sup>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.

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 substance. See Sch. I(c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The 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).

AG ¶ 26 provides for 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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). See ISCR Case No. 14-05095 at 3 n. 1 (App. Bd. Feb. 18, 2016) (affirming lack of bright-line test for recency of illegal drug use) (citing ISCR Case No. 14-01847 at 3 (App.

Bd. Apr. 9, 2015)). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent; however, the marijuana use in that case was not while holding a security clearance. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."<sup>4</sup>

Applicant used marijuana about three or four times in October 2011. His most recent marijuana use was 62 months before his hearing. He recognizes the adverse impact on his life of drug abuse. These actions create some certitude that he will continue to abstain from drug use. AG ¶ 26(a) applies to his marijuana-related offenses.<sup>5</sup>

Applicant has completed a sustained period of abstinence, and he provided "a signed statement of intent [not to use illegal drugs] with automatic revocation of clearance for any violation." He does not associate with drug users, and he does not go to or stay in environments where drugs were or are used. AG ¶ 26(b) applies. AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not provide proof of satisfactory

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<sup>4</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

<sup>5</sup>In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse. See also ISCR Case No. 15-03403 at 2-3 (App. Bd. Dec. 20, 2016) (affirming denial of security clearance for applicant who used marijuana while holding a security clearance 37 months before administrative judge's decision); ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015) (affirming denial of security clearance and addressing the security significance of illegal drug use after having completed a security clearance application).

completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

In sum, the only evidence of Applicant's marijuana use is his self-report during the security clearance process. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. He credibly described his marijuana use, and he sincerely expressed remorse for his marijuana use, and he promised not to use marijuana in the future. He has abstained from marijuana use for 62 months, demonstrating a sufficient track record of no drug abuse to mitigate drug involvement security concerns. Even if security concerns were not mitigated under AG ¶ 26, they would be mitigated under the whole-person concept, *infra*.

### **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(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.

Under AG ¶ 2(c), 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. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline H, but some warrant additional comment.

Applicant is a 35-year-old lead engineer who has worked for a major defense contractor since October 2015. He provides leadership and advice to 15 engineers. In 2007, he began working as an engineer for a major defense contractor. In 2004, he received a bachelor's degree in mechanical engineering, and he had a 3.2 GPA. In 2007, he received a master's degree in aerospace engineering. In graduate school he had a 4.0 GPA. His resume details his education and professional experiences. In March 2009, Applicant received a security clearance. There is no evidence of any security violations.

Three of Applicant's colleagues and friends described Applicant as enthusiastic, dedicated, reliable, diligent, professional, trustworthy, competent, and ethical. His employers gave him excellent performance evaluations, and he successfully completed his employer's leadership program.



In October 2011, Applicant used marijuana three or four times while holding a security clearance. He self-reported his marijuana use to security in 2012, and on his February 14, 2014 SCA. There is no evidence that he lied about his marijuana use or that the Government suspected him of using marijuana before he made these disclosures. He provided a signed statement of intent with automatic revocation of clearance for any violation. He ended his marijuana use in October 2011, and his marijuana use is not recent. He disclosed his marijuana use to family and friends. He expressed remorse about his marijuana use. He sincerely and credibly assures he will not use marijuana in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Drug involvement security concerns are 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:           FOR APPLICANT

Subparagraph 1.a:                   For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Mark Harvey  
Administrative Judge