



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-03184

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel

For Applicant: *Pro se*

08/31/2016

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency from 2010 to at least May 2015. His evidence is insufficient to mitigate the drug involvement security concerns. Clearance is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on August 25, 2014. On December 5, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement).<sup>1</sup> Applicant answered the SOR on December 16, 2015, and elected to have his case decided on the written record.

A copy of the Government's file of relevant material (FORM), dated February 5, 2016, was mailed to Applicant on 10 February 2016. Applicant acknowledged receipt of

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<sup>1</sup> The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

the FORM on February 17, 2016. He was allowed 30 days to submit any objections to the FORM and to provide material in rebuttal, extenuation, and mitigation. Applicant did not respond to the FORM or submit any information after his receipt of the FORM. The case was assigned to me on August 23, 2016.

### **Findings of Fact**

Applicant illegally used marijuana with varying frequency between October 2010 and May 2015 (SOR ¶ 1.a). He denied that he intends to use marijuana in the future or to associate with his drug-using friends and associates. (SOR ¶¶ 1.b, 1.c). His admissions are incorporated in the findings of fact. After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 26-year-old engineer working for a federal contractor. He received his bachelor's degree in May 2013, and as of August 2014, he was continuing his post-graduate studies on a part-time basis. He started working with his current employer, a federal contractor, in April 2014. He has never been married and has no children. This is Applicant's first security clearance application.

Applicant disclosed in Section 23 (Illegal Use of Drugs or Drug Activity) of his 2014 SCA that he illegally used marijuana with varying frequency from about October 2010 to June 2014. (FORM, Item 2) He stated that he "smoked marijuana on occasion when offered by friends at parties or when a few friends gathered and were all smoking." He estimated the total number of times he smoked marijuana was less than two dozen – once every few months. He stated his intent to illegally use marijuana in the future and explained:

If it becomes fully legalized I might smoke more often, but if it doesn't I won't actively seek it out. Most probably participation is if it's offered by a friend. I don't see this substance as particularly harmful. (FORM, Item 2)

Applicant was interviewed by a government investigator in November 2014. He told the investigator that he smoked marijuana about once every three months. Each time he took two to three hits from a marijuana bong. The marijuana was provided by friends while hanging out at their homes. He did not disclose his friends' names. Applicant explained he used marijuana for enjoyment - because it made him feel good. He claimed he was not dependent on marijuana and had not received any counseling or treatment. Applicant expressed his intent to continue using marijuana when offered by friends. He would use it more frequently if legalized. Applicant stated that he continued to associate with friends that use marijuana and his family and friends know about his use of marijuana.

In his November 2015 answers to DOHA interrogatories, Applicant disclosed that his most recent use of marijuana was on May 31, 2015. He noted the frequency of use was "once or twice a year as of the last few years, was every few months before." He

stated his intent to discontinue smoking or eating marijuana for the foreseeable future. He noted that if it is legalized at the state and federal level he may consider using again.

Applicant disclosed in his answer to the interrogatories that he purchased marijuana legally in another state. He noted that his state prohibits the use of marijuana and he stated he will not seek out marijuana. Applicant denied he continues to associate with his drug-using friends or that he frequents places where marijuana or other illegal drugs are used.

In his answer to the SOR, Applicant stated that if his continued use of marijuana would hinder his ability to obtain and possess a security clearance he would not consume marijuana at any time in the future. He submitted a written statement of intent to not consume marijuana in the future. The statement does not include a provision for the automatic revocation of his clearance for any violation.

Applicant also stated that he does not regularly associate with people who illegally use marijuana or other drugs. He claimed that in the last few years he only associated with people that purchased marijuana legally (in a state that allows recreational marijuana or with a legal marijuana medicinal card). He also promised that if associating with these individuals, would hinder his ability to obtain and possess a security clearance he would disassociate from those individuals and avoid places where illegal drugs are used.

Applicant submitted no documentary evidence to show that his use of marijuana was legal or pursuant to a prescription issued by a duly qualified medical professional. The record is silent as to the circumstances surrounding his acquisition of marijuana, the extent of his contacts with his drug-using friends and associates, and whether Applicant has made permanent lifestyle changes to avoid illegal drugs in the future.

### **Policies**

Eligibility for access to classified information may be granted “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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available,

reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 articulates the security concern for 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 illegally used marijuana with varying frequency from around October 2010 to at least May 2015. He expressed his intent to continue using marijuana in his August 2014 SCA and during his November 2014 interview with a government investigator. He also indicated his continued association with drug-using friends and associates. More recently, in his December 2015 answer to the SOR, he denied any further intent to illegally use marijuana, and any further association with his drug-using friends and associates.

AG ¶ 25 describes three conditions related to drug involvement that could raise a security concern and are disqualifying in this case:

(a) any drug abuse;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

AG ¶ 26 provides 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;

(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.

None of the Guideline H mitigating conditions are fully applicable, and do not mitigate the security concerns. Applicant's use of marijuana was frequent, and it is recent. He expressed his intent to continue using marijuana and associating with illegal drug users as recently as November 2014.

Applicant disclosed in his August 2014 SCA that his most recent marijuana use occurred in June 2014. He was also made aware of the Government's concerns about his illegal drug use during a November 2014 interview with a government investigator. Notwithstanding, Applicant continued his use of marijuana until at least May 2015.

In his answer to the SOR, Applicant promised that he would not consume marijuana at any time in the future or associate with his drug-using friends and associates. He submitted a written statement of intent to not consume marijuana in the future, but the statement does not provide for the automatic revocation of his clearance

for any violation. Applicant submitted no documentary evidence to show that his use of marijuana was legal or pursuant to a prescription issued by a duly qualified medical professional. The record is silent as to the circumstances surrounding his acquisition of marijuana, the extent of his contacts with his drug-using friends and associates, and whether Applicant has made permanent lifestyle changes to avoid illegal drugs in the future.

Considering the period during which Applicant illegally used marijuana, his past expressed intent to continue his use of marijuana and his association with illegal drug users, his evidence is insufficient to mitigate the drug involvement security concerns. Additional time without the illegal use of marijuana is needed for Applicant to establish that he has made permanent lifestyle changes to abstain from using marijuana and that he has disassociated from his drug-using friends.

### **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)) I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant is a 26-year-old employee of a federal contractor. He has worked for a federal contractor since April 2014. He illegally used marijuana with varying frequency from 2010 to at least May 2015. His use of marijuana continues to raise questions about his reliability, trustworthiness, judgment, and ability to comply with the law, or to protect classified information. 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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.c:	For 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 eligibility for a security clearance to Applicant. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge