



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 15-06428
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tara R. Karoian., Department Counsel  
For Applicant: *Pro se*

01/09/2017

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**Decision**

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HESS, Stephanie C., Administrative Judge:

Applicant's one-time marijuana use while holding a security clearance was unintentional, is not likely to recur, and does not cast doubt on his reliability, trustworthiness, or judgment. Applicant has mitigated the Guideline H security concern. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (e-QIP) on January 9, 2015. On February 10, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H. The DOD CAF acted under Executive Order (Ex. Or.) 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 September 1, 2006.

Applicant answered the SOR on March 22, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 28, 2016, and the case was assigned to me on June 30, 2016. On June 30, 2016, the Defense

Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for July 25, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and Applicant's Exhibit (AX) A was admitted without objection. I kept the record open until August 8, 2016, to enable him to submit additional documentary evidence. He timely submitted AX B through D, which I have admitted without objection. DOHA received the transcript (Tr.) on August 2, 2016.

### **Findings of Fact**

The SOR alleges that Applicant tested positive for marijuana in a random drug test given by his employer on December 2, 2014. Applicant admits the SOR allegation.

Applicant is a 27-year-old quality inspector employed by his current employer, a defense contractor, since 2011. He was first granted a security clearance in 2010. (GX 1.) His former supervisor, who supervised Applicant before his January 2015 promotion, highly recommends Applicant for a clearance, stating that he is reliable, professional, and ethical. A friend of more than 23 years recommends Applicant, describing him as "dependable, responsible, honest, and courteous." (AX A.) A friend from college states that Applicant has good moral character and judgment. (AX B.)

Applicant has used marijuana on only two occasions in his life. (GX 1; GX 2; Tr. 20.) One night in 2007, just after graduating from high school, Applicant and a childhood friend visited various fraternity houses at a local college and experimented with marijuana at one of them. Afterwards, Applicant became ill and he never intentionally used it again. (GX 2; Tr. 20.) In November 2014 Applicant's childhood friend and his brother, who were in town for the Thanksgiving holiday, visited Applicant at his home. Applicant was aware that these friends used marijuana, but had always been able to distance himself from it. The three friends celebrated by drinking a lot of alcohol. At some point, they decided to smoke cigars. One of the friends had brought several cigars, one of which also contained marijuana. Applicant told his friend he did not want the "altered" cigar. The three men smoked the cigars, and not long after, Applicant became ill. The following morning, he attributed this illness to drinking too much alcohol. He testified that he did not taste or otherwise notice the marijuana because of the amount of alcohol he had consumed. (GX 1; GX 2; Tr. 18-20.)

On December 2, 2014, the following Tuesday, Applicant and about five other employees were subjected to a random drug test. The screening was the first one Applicant had ever given. On December 9, 2014, Applicant was shocked when he was informed by his employer that he had tested positive for marijuana. (Tr. 22.) Per company policy, he was suspended for five days. He was also required to participate in an educational drug counseling program and submit to random drug testing. (GX 3; Tr. 30; Tr. 32.) Applicant attended six one-on-one counseling sessions and successfully completed the program on January 30, 2015. (AX D.) His drug tests, including those administered in February, June, and November 2016 were all negative. (AX C; Tr. 32.)

Applicant is remorseful about this incident and states that, while unintentional, it was nonetheless due to his poor judgment. (Tr. 18.) As a result of this incident, Applicant has learned to exercise better judgment about his surroundings and his friends. He confronted his childhood friend over the telephone several months after the incident, and the friend confirmed that Applicant had smoked part of the altered cigar. He no longer associates with his childhood friend or his brother or other people who use marijuana. He has no future intent to use marijuana and he has cut back on his use of alcohol. (GX 1; GX 2; Tr. 38.) Applicant's account of his inadvertent use of marijuana has remained consistent. (GX 1; GX 2; Answer, Tr. 19-20.)

Applicant is dedicated to and takes pride in his job and would not intentionally jeopardize it. (Tr. 38.) His testimony was sincere, contrite, and unwavering. When queried about the unlikeliness of undergoing the only random drug screening he had ever been subjected to, Applicant stated, "It's just horrible luck. There's no way to explain it other than it's just bad timing or else I wouldn't have known that I even had done it since 2007." (Tr. 35.)

### **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." *Id.* 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." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's 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." See Exec.

Or. 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. 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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. See 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; see AG ¶ 2(b).

## **Analysis**

### **Guideline H (Drug Involvement)**

The concern under this guideline is set out in AG ¶ 24: “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.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, 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).”

Applicant’s admissions, corroborated by the record evidence, establish the potential application of AG ¶ 25(a): “any drug abuse,” defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction,” AG ¶ 25(b) “testing positive for illegal drug use,” and AG ¶ 25(g): “any illegal drug use after being granted a security clearance.”

The following mitigating conditions are potentially relevant:

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;

AG ¶ 26(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, and

AG ¶ 26(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.

Applicant's one-time use of marijuana in November 2014 occurred over two years ago in unusual circumstances. He used poor judgment under the circumstances and accepts responsibility for his actions. He has matured and no longer associates with people who use marijuana and does not put himself in perilous situations. He successfully completed the educational drug treatment program required by his employer, and passed all of the multiple subsequent random drug tests. His inadvertent use of marijuana does not cast doubt on his current reliability, trustworthiness, or good judgment. All of the above mitigating conditions apply.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline H in my whole-person analysis and I have considered the factors in AG ¶ 2(a). Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Applicant's testimony was sincere and his account of his inadvertent use of marijuana was consistent throughout the adjudicative process. He fully accepted responsibility for placing himself in a precarious situation and has taken multiple measures to prevent the recurrence of such circumstances. He is respected at his job and was promoted in January 2015, not long after this incident. He has held a clearance for more than five years.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug use. Accordingly, I conclude he 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**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
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Subparagraph 1.a:	For Applicant
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### **Conclusion**

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess  
Administrative Judge