



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



In the matter of:	)	
	)	
	)	ISCR Case No. 15-06044
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel  
For Applicant: Jacob Ranish, Esq.

12/08/2017

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**Decision**

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RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana between 2007 and 2010 while possessing a clearance. He disclosed his substance misuse in his 2015 security clearance application (SCA). There is no evidence of substance misuse after 2010. He is committed to not using any illegal drugs in the future. He signed a statement of intent to abstain from illegal drug involvement, and understands that any future illegal drug involvement would be grounds for revocation of his clearance eligibility. Guideline H security concerns are mitigated. Clearance is granted.

**Statement of the Case**

Applicant submitted an SCA on January 2, 2015. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) on March 4, 2016. Applicant answered the SOR on April 4, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on August 12, 2016. DOHA issued a notice of hearing on January 6, 2017, setting the hearing for January 25, 2017. At the hearing,

the Government offered two exhibits (GE 1 and 2). Applicant testified, presented the testimony of an expert witness, and submitted two exhibits (AE A and B). All exhibits were admitted without objections. DOHA received the hearing transcript (Tr.) on February 2, 2017.

### **Findings of Fact**

Applicant partially admitted SOR ¶ 1.a. He admitted to illegally using marijuana once. He denied that he intends to use marijuana in the future (SOR ¶ 1.b). His SOR and hearing admissions are incorporated as findings of fact. After a thorough review of the record evidence, and having considered Applicant's testimony and his demeanor while testifying, I make the following additional findings of fact:

Applicant is a 35-year-old employee of a federal contractor. He graduated from high school in 2000, and attended college for four years, but did not complete a degree. He married in 2014, but as of his hearing, they were living separately. He has no children.

Applicant's work history indicates that he has worked for federal contractors since 2002. His current employer and clearance sponsor, a federal contractor, hired him in August 2014, and he has worked there since. He has possessed a secret clearance since 2005.

Applicant disclosed in Section 23 (Illegal Use of Drugs or Drug Activity) of his 2015 SCA that he illegally used marijuana. He estimated that his first use of marijuana was in December 2007, and his most recent use was in August 2010. He stated he used Ecstasy once in September 2010. He described his marijuana use as "Casual/social use, less than once per year, probably only 4-5 times since 2007." He used marijuana and Ecstasy while possessing a security clearance. He claimed no interest in using Ecstasy ever again. He stated his intent to use marijuana in the future as follows:

I do not intend to restrict my use in social settings beyond my current level of use as stated above. I do not intend, nor have I ever intended to purchase for myself any delivery vehicle for THC while it remains federally illegal. If in a situation where my employer performed random or regular drug tests for THC, I would abstain completely.

Applicant testified during cross-examination that he illegally used marijuana while in high school and during college. (Tr. 43-49) In August 2010, Applicant visited his future spouse in another state. He used marijuana with his future spouse and his spouse's roommates during the visit. He has known his spouse for more than 10 years. After the visit, Applicant and his spouse started living together. They married about three years ago. Applicant testified his last use of marijuana was in August 2010. To his knowledge, his spouse no longer uses marijuana, but he is not sure because, at the time of the hearing, they were not living together. (Tr. 57) The last time Applicant was

around people using marijuana was at a party in early summer 2016. His cousin and friends were using marijuana. Applicant testified that he and his spouse were at the party, but did not use marijuana.

Applicant explained that when he completed his 2015 SCA, he did not necessarily intend to use marijuana in the future, but he could not say he would never use it because he had not fully committed to not using it again in the future. Applicant credibly testified that after his attorney made him realize the adverse security clearance consequences of using illegal drugs, he changed his mind and he is now committed to not using any illegal drugs in the future. To substantiate his commitment, Applicant signed a statement of intent to abstain from illegal drug involvement, and acknowledged that any future illegal drug involvement would be grounds for revocation of his clearance eligibility.

Applicant's supervisor has known him for 15 years. He recommended Applicant for his current job and has been his supervisor since 2014. Applicant's supervisor and his references consider Applicant to be a model employee with exemplary performance and character. He is reliable, dependable, honest, and has a strong moral compass. He has consistently received positive performance evaluations. He is well-liked by his employer and coworkers. All of his references endorsed his eligibility for a clearance.

### **Policies**

The SOR was issued under Executive Order (Exec. Or.) 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.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017, which replaced the 2006 AG. I decided this case under the current AGs implemented by SEAD 4.

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, § 2. 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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 articulates the security concern for the illegal use of drugs:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802.

Between 2007 and 2010, Applicant illegally used marijuana four to five times, while possessing a security clearance granted to him in 2005. In his 2015 SCA, he expressed his intent to continue to use marijuana in the future. AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The record established the disqualifying conditions under AG ¶¶ 25(a), (c), (f), and (g) requiring additional inquiry about the possible applicability of mitigating conditions under 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;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used; and
  - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

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).

The above two mitigating conditions apply. The illegal marijuana use happened between 2007 and 2010. There is no additional evidence of any substance misuse or issues of concern after 2010. It has been over seven years since Applicant’s last substance misuse.

In his 2015 SCA, Applicant stated his intent to continue to use marijuana in the future. At hearing, Applicant credibly testified that after his attorney made him realize the adverse security clearance consequences of substance misuse, he changed his mind and is now committed to no future use. To substantiate his commitment, Applicant signed a statement of intent to abstain from illegal drug involvement, and acknowledged that any future illegal drug involvement would be grounds for revocation of his clearance eligibility.

I note that Applicant continues to associate with some drug-using associates and relatives. However, I believe that going through the clearance process has educated Applicant and he has learned his lesson. He now understands the adverse impact such contacts will have on his eligibility to continue holding a clearance and his job. I anticipate he will disassociate from drug-using associates and relatives, and will avoid environments where illegal drugs are used.

### **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. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guideline H in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 35-year-old employee of a federal contractor. He has worked for his employer since 2014, and has held a clearance since 2005. He is highly regarded by his supervisor and peers for his honesty, integrity, and dependability. Applicant disclosed his substance misuse in his 2015 SCA. There is no evidence of any substance misuse after 2010. He credibly testified that he is committed to not using any illegal drugs in the future. To substantiate his commitment, he signed a statement of intent to abstain from illegal drug involvement, and acknowledged that any future illegal drug involvement would be grounds for revocation of his clearance eligibility. The substance misuse 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

Subparagraphs 1.a and 1.b: For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance granted.

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JUAN J. RIVERA  
Administrative Judge