



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 16-00851
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: Ronald C. Sykstus, Esq.

03/23/2018

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**Decision**

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HESS, Stephanie C., Administrative Judge:

Applicant mitigated the potential security concerns raised by his marijuana use and two marijuana-related arrests between January and May 2012, while holding a security clearance. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (e-QIP) on October 19, 2015. On August 6, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The DOD 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 DOD on September 1, 2006.

Applicant submitted his Answer to the SOR on August 25, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 3, 2016, and the case was assigned to me on April 25, 2017. On May 5, 2017,

the Defense Office of Hearings and Appeals (DOHA) notified Applicant through counsel that the hearing was scheduled for May 25, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted into evidence without objection. Applicant testified, called six witnesses, and Applicant's Exhibits (AX) A through V were admitted without objection. DOHA received the transcript (Tr.) on June 6, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017. The outcome of this case would have been the same if decided based on the former AG.

### **Findings of Fact**

Applicant is a 39-year-old systems engineer currently employed by a defense contractor since January 2008. He received a bachelor's degree in electrical engineering in 2004. He was granted his first secret security clearance in 2004. (GX 1; Tr. 18-19.)

Under Guideline H, the SOR alleges that Applicant was arrested and charged with possession of marijuana twice in 2012, and that he used marijuana with varying frequency between January and May 2012 after having been granted a security clearance. The SOR cross alleges these allegations under Guideline E. Applicant admits the arrests, and that he used marijuana in 2012 after having been granted a clearance. Applicant's admissions are incorporated in my findings of fact.

Applicant visits his mother and family who live in another state about once a month. In January 2012, Applicant was visiting his girlfriend who lived in the same town where his family lived. At the time, Applicant suffered from a painful medical condition which he alleviated through the use of topical medication. However, he forgot to bring the medication with him. He called the doctor's office to get another prescription, but the office was closed. He purchased some over-the-counter medication, but it was not very effective. Applicant's girlfriend was a recreational marijuana user, and offered him some marijuana to alleviate the pain. Applicant had never used marijuana before, but he tried it, and it helped with the pain. (Tr. 22-23; Tr. 25-27.)

In February 2012, on another visit with his girlfriend, Applicant used marijuana a second time. Applicant's girlfriend gave him a small bag of marijuana to take with him and use as needed. Later during the same trip, Applicant was driving to visit some friends and was pulled over by a state trooper for speeding. Applicant consented to a search of his vehicle, and the trooper found the marijuana and arrested Applicant. Applicant was charged with possession of marijuana and careless driving. Applicant and his girlfriend stopped seeing each other in late February 2012. (Tr. 28-29; Tr. 30-35.)

In about March 2012, Applicant pled not guilty to possession of marijuana. Ultimately, Applicant was fined and placed on three months' unsupervised probation which included monthly drug screening. Applicant successfully completed the probation,

and the possession of marijuana charge was dismissed in July 2012. Applicant's record was expunged in September 2012. (Tr. 36-38; Answer; GX 1.)

In May 2012, on another visit to his home state, Applicant was pulled over for speeding. Applicant consented to a search of his vehicle, and the officer found marijuana. Applicant was not aware that there was marijuana in his vehicle, and is uncertain how it got there. He was arrested and charged with possession of marijuana. Applicant entered a plea agreement and in September 2012, pled guilty to the possession of marijuana charge, and the speeding charge was dismissed. He was fined and placed on unsupervised probation for the period of one year. Following successful completion of the probation, the marijuana charge was dismissed in September 2015, and expunged in December 2016. (AX B.)

Applicant used marijuana two times with his former girlfriend in 2012. He was candid when he stated that he considered trying it again, but after his arrests, he realized marijuana had no place in his life. Applicant regrets his decision to use marijuana on the two occasions that he did and does not make excuses for his behavior. (Tr. 40-41; Answer; GX 1.) Prior to his periodic background reinvestigation in 2015, Applicant fully disclosed his marijuana use and the two arrests to his facility security officer. (GX 3.)

Applicant's coworkers and friends, all of whom hold security clearances and know of the SOR allegations, indisputably recommend Applicant for a security clearance. They believe Applicant to be trustworthy, reliable, and honest, with a good work ethic and good judgment. (Tr. 57-89.) Applicant has consistently received positive performance evaluations, as well as several monetary awards for exceptional performance. (AX D-S.) He volunteers with community youth athletics since 2007. (AX T.)

Applicant unequivocally stated that he has no intent to use marijuana in the future. (Tr. 39; AX A; Answer.) He provided a signed a statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of his security clearance. Applicant testified that his two uses of marijuana were bad judgment and he knows that his actions were wrong. He no longer associates with people who use and is not exposed to social settings where marijuana is being used. (Tr. 35; Tr. 38-40.) Applicant is engaged to be married, is committed to his personal fitness and health, and dedicated to his career and family. (Tr. 39; Tr. 41.) He was sincere, candid, and contrite while testifying.

### **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 and Substance Misuse**

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances . . . 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.

Applicant's admissions, corroborated by the record evidence, establish the potentially disqualifying conditions under this guideline:

AG ¶ 25(a) any substance misuse; and

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions may also apply:

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) 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.

Applicant used marijuana on two occasions in 2012. He was arrested and charged with possession of marijuana twice in 2012. Afterwards, Applicant chose never to use marijuana again. Beginning at some point in April 2012, Applicant, while on probation, underwent drug screening over a period of three months. He successfully completed both periods of probation. Both records of his arrests have been expunged. He no longer

associates with the girlfriend with whom he used the marijuana, and does not have a social circle that includes people who use illegal substances.

Applicant recognizes that his decision to use marijuana was a mistake, accepts responsibility for his actions, and has provided a written statement in which he acknowledges the use, states his intent of no future use of any illegal drugs, and recognizes that any such use will result in the loss of his security clearance.

Applicant's use of marijuana while holding a security clearance places a heavy burden on applicant to establish mitigation. After considering the record as a whole, specifically, the circumstances surrounding Applicant's limited use of marijuana, the length of time that is passed since that limited use, and Applicant's remorse for his actions, I conclude that applicant has met his heavy burden of proof and persuasion. Applicant's marijuana use happened under circumstances that are unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant's last use of marijuana in 2012 is not recent. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). He will not use marijuana in the future. Applicant has mitigated the Guideline H concern.

## **Guideline E, Personal Conduct**

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The following disqualifying condition is applicable:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

The following mitigating conditions are potentially applicable:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances

that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant has no intention of using any illegal drugs in the future, and is aware of the consequences that such actions would bring. Given his commitment to his job, his family and his health, as well as the fact that he has not used marijuana since 2012, it is unlikely that he will use marijuana in the future. Further, Applicant has acknowledged the wrongfulness of his conduct and accepted responsibility for his actions. AG ¶¶ 17(c) and 17(d) 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(d):

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

Applicant is highly regarded and trusted by his coworkers and friends, and has received positive performance evaluations for many years. He accepts responsibility for his conduct and acknowledges that it was wrong. Applicant's testimony was credible and sincere. He volunteers in his community with youth athletics. He is dedicated to his career and his family.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his illegal 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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Subparagraphs 1.a – 1.d:	For Applicant
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Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
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Subparagraph 2.a:	For Applicant
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### **Conclusion**

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

Stephanie C. Hess  
Administrative Judge