



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-01339

**Appearances**

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

For Applicant: *Pro se*

11/06/2017

**Decision**

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on March 21, 2013. On September 26, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E.<sup>1</sup>

Applicant answered the SOR on October 17, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with

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<sup>1</sup> The DOD CAF acted 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

supporting documents, known as the File of Relevant Material (FORM), dated November 27, 2016, was submitted by Department Counsel. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on December 6, 2016. His response to the FORM is marked as Applicant Exhibit (AE) A. The Government's exhibits included in the FORM (Items 1 to 3) and AE A are admitted into evidence. The case was assigned to me on October 1, 2017.

### **Findings of Fact**

Applicant is a 51-year-old engineer for a defense contractor, employed since 1999. He received his bachelor's degree in 1991. He married in 1997, and has two children. He was previously granted a DOD security clearance in 2004, but was denied a sensitive compartmented information (SCI) designation in 2012 based on his past illegal drug use.

The SOR alleges under Guideline H that Applicant used marijuana from 1991 to February 2010, and that he used marijuana between approximately 2004 and 2010 while holding a DOD security clearance. Additionally, the SOR cross-alleges under Guideline E, Applicant's use of marijuana while holding a security clearance. He admitted the Guideline H allegations, but denied the Guideline E cross-allegation, stating that he has tried to be completely truthful and that the incidents happened a long time ago.

In his SCA, Applicant admitted the drug use alleged in the SOR. He described his use as "very rarely by accident," and noted that he will no longer use marijuana since it "affects [his] physical activity level." In his personal subject interview (PSI) before a DOD investigator, Applicant stated he began using marijuana when he was 26 years old. Between 1991 and 2010, he used marijuana once every two to three years at friends' houses or friends of people he would meet. He could not recall the names of people with whom he used marijuana. He stopped his drug use in 2010 because it slowed his bicycling down and his breathing was not well when he cycled after having one puff of marijuana. He acknowledged using marijuana while holding a security clearance, granted in 2004 or 2005, knowing that it was prohibited and illegal drug use could result in revocation of his clearance. He has not sought drug abuse treatment.

In response to the FORM, Applicant submitted a letter from an attorney,<sup>1</sup> who reiterated Applicant's admission of marijuana use from 1991 to 2010, but claimed anew that he used it only on one occasion from 2004 to 2010. He forwarded a letter from Applicant's primary care physician showing that Applicant was treated for multiple medical problems since 2006. His physician stated that Applicant has reported being under a great deal of intermittent stress during the past several years, mostly work-related, but also resulting from some family related issues. He has not sought pharmaceutical, psychotherapy or psychiatric care.<sup>2</sup>

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<sup>1</sup> The attorney stated he was "writing . . . on behalf of [Applicant] . . ." He did not indicate his representation as counsel for Applicant, nor did he enter a notice of appearance in the record.

<sup>2</sup> AE A.

Since Applicant elected to have this case decided on the written record in lieu of a hearing, I was unable to further inquire into these allegations or evaluate his demeanor or credibility in response to questions. He did not submit documentary evidence of drug abuse counseling, changes in his lifestyle, or a signed statement of intent to abstain from further drug involvement.

### **Law and Policies**

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, effective on June 8, 2017. These AGs are applicable to this decision.

“[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 § 2.

National security eligibility 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, 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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.” 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 ¶ 1(d).

## **Analysis**

### **Guideline H: Drug Involvement and Substance Misuse**

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

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. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying condition potentially applicable in this case includes:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant has a history of illegal drug use, particularly from 1991 to 2010. Additionally, he used illegal drugs after being granted a DOD security clearance in 2004. Disqualifying conditions under AG ¶¶ 25 (a) and (f) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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; 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.

Applicant is a mature adult. He began using drugs when he was 26 years old. He discussed his drug use from 1991 to 2010. He was granted a security clearance in approximately 2004. He continued to use illegal drugs while holding a security clearance, with knowledge that illegal drug use is not permitted. His claim to have refrained from drug use since 2010 is not supported by credible evidence. He has not shown a clear and convincing commitment to discontinue further drug use or to change the environment where illegal drugs are being used. He has not attended a drug treatment program or submitted a signed statement of intent to abstain from all drug involvement and substance misuse. Applicant's stated history of drug use raises questions about his truthfulness as he was reluctant to disclose details during his PSI. Applicant's history of illegal drug use after being granted a security clearance, continues to cast doubt on his reliability, trustworthiness, and good judgment. No mitigation is fully applicable.

#### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the personal conduct security concern:

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. Of special interest is any failure to cooperate or provide

truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

...

(3) a pattern of dishonesty or rule violations;

...

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

...

(g) association with persons involved in criminal activity.

Applicant's use of illegal drugs as discussed above, including while holding a DOD security clearance, is disqualifying conduct. AG ¶¶ 16(d), (e), and (g) apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I considered all of the facts and circumstances of Applicant's use of illegal drugs, his age and employment, his lack of drug abuse treatment, his stated intentions with regard to future drug use, and his clearance status while using drugs. I find that he intentionally continued to use illegal drugs after obtaining a favorable security determination, with knowledge of its prohibition and consequences for any violation. Applicant did not present sufficient credible evidence to apply any mitigating condition. His actions as described above create substantial doubts about his overall trustworthiness, reliability, and good judgment. AG ¶ 17 does not apply.

### **Whole-Person Concept**

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d). Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines H and E in my whole-person analysis. Applicant is a mature adult whose history of illegal drug use, especially after receiving a favorable security determination in 2004, leaves me with serious questions about his future intent and his willingness to follow rules and regulations. I am not convinced that he fully appreciates the legal and policy implications of his actions, and he has not clearly and convincingly established a commitment to discontinue further illegal drug use.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

### **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 – 1.b:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

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Gregg A. Cervi  
Administrative Judge