



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



In the matter of:

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ISCR Case No. 16-02052

Applicant for Security Clearance

**Appearances**

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

For Applicant: *Pro se*

11/22/2017

**Decision**

Curry, Marc E., Administrative Judge:

Applicant's history of drug abuse and criminal conduct render him an unacceptable security risk. Clearance is denied.

**Statement of the Case**

On December 8, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines J, H, and E, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On December 28, 2016, Applicant answered the SOR allegations, admitting all of the allegations except subparagraphs 2.d and 2.e, and requested a decision based on the written record instead of a hearing. On March 2, 2017, Department Counsel prepared a

File of Relevant Material (FORM). Applicant received the FORM on March 3, 2017. He did not file a response. The case was assigned to me on October 1, 2017.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.<sup>1</sup>

### **Evidentiary Ruling**

Item 6 contains interrogatories sent to Applicant from the Government, together with six investigative summaries of interviews of the Applicant. In Applicant's interrogatory response, he certified that he read all of the investigative summaries and that he formally adopted them, as they were accurate, true, and correct, subject to no clarifications or additions. Under these circumstances, I admit Item 6 and have incorporated it into the written record.

### **Findings of Fact**

Applicant is a 29-year-old man who lives with his fiancé and their child, age four. He earned a bachelor's degree in 2012. Since 2014, he has worked for a defense contractor as a tire technician. (Item 5 at 13)

From 2006 to 2008, Applicant belonged to a gang that "regularly associated to commit criminal activity." (Item 8 at 1) His gang membership coincided with a history of criminal conduct, as alleged in the SOR. During Applicant's stint in the gang, he frequently purchased cocaine with the intention of reselling it for a profit. He describes the individual from whom he purchased cocaine as a middleman. Applicant does not know where the middleman received the cocaine, and Applicant never left the United States to purchase illegal drugs, as alleged in subparagraph 2.e.

Applicant began smoking marijuana in 2006. (Item 4 at 3) He smoked it daily from 2010 to 2014, purchasing it twice per week. (Item 5 at 33) He denies ever selling marijuana. (Item 4 at 3)

In January 2007, Applicant was arrested after he was caught shoplifting. (Item 4 at 2) The disposition of the trial is unknown from the record. In August 2007, Applicant was arrested and charged with the felony of manufacture/delivery of controlled substances, and misdemeanor first degree possession of marijuana. He pleaded guilty to the felony charge and the latter charge was dismissed. Applicant was sentenced to ten years of probation, and fined \$1,000 in court costs. (Item 8 at 2)

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<sup>1</sup> Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

While the August 2007 charges were pending, Applicant was arrested and charged with possession of marijuana after police, during a routine stop, noticed marijuana in his car. (Item 7 at 6) This charge was dismissed.

In September 2007, Applicant gave a friend a ride to someone's home. While Applicant was waiting in the car, his friend ran out of the home and back to the car, telling Applicant that he had just shot someone. Applicant then drove his friend home. (Item 6 at 24) In November 2007, Applicant was arrested and charged with aggravated robbery, and possession of marijuana. (Item 7 at 7) He spent approximately eight months in jail while the trial was pending. The charges were later dismissed.

In 2009, Applicant was identified as a gang member in a civil court gang injunction. Under the terms of the injunction, which he signed, he agreed to stay away from certain parts of the city at night, and he agreed, among other things, not to congregate with the other individuals included in the injunction in public at night. (Item 8 at 2)

In November 2011, Applicant was charged with driving under the influence of alcohol (DUI), failure to yield, and traffic offense noise control. (Item 4 at 2) He was convicted, sentenced to 60 days in prison, suspended, fined \$1,200 and placed on probation for 12 months.

By 2011, Applicant had completed the community service requirement related to the ten-year probation order from August 2007. In 2011, he successfully applied for early termination of his probation. (Item 4 at 2)

Applicant no longer belongs to a gang. He no longer lives in the area where his gang-crimes occurred, nor does he associate with any of his old friends and acquaintances. He characterizes himself as a good person who made youthful mistakes, and is now dedicated to being a role model to his child. (Item 4)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. The administrative judge must consider all available, reliable

information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).<sup>2</sup>

## **Analysis**

### **Guideline J, Criminal Conduct**

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability and trustworthiness.” In addition, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (AG ¶ 30) Applicant admitted that he belonged to a gang, used marijuana, and sold cocaine. In addition, he was charged and arrested multiple times for various crimes. AG ¶ 31(b), “evidence (including, but not limited to, a credible allegation, an admission and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted,” applies.

Applicant’s gang involvement and drug dealing occurred between 2006 and 2008 when he was a teenager. In 2008, Applicant left the area where he grew up and went to college, graduating in 2012. He has not been arrested since 2011 and he no longer smokes marijuana or associates with his former friends who were in the gang. AG ¶ 32(d), “there is evidence of successful rehabilitation; including, but not limited to . . . higher education,” applies.

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<sup>2</sup> The factors under AG ¶ 2(d) are as follows:

(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.

Although Applicant ceased his drug dealing and gang involvement in 2008, he was arrested again in 2011 when he was in college. Moreover, as recently as 2014, he was smoking marijuana daily. Under these circumstances, it is too soon to conclude that AG ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” does not apply. On balance, I conclude Applicant has failed to mitigate the criminal conduct security concerns.

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

Under this guideline, “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.” (AG ¶ 24) The record evidence does not support the allegation, set forth in subparagraph 2.e, that Applicant purchased illegal drugs in a foreign country for sale in the United States. I resolve this subparagraph in Applicant’s favor. Conversely, Applicant did use illegal drugs and sell them, as alleged in subparagraphs 2.a through 2.c. AG ¶¶ 25(a), any substance abuse, and 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” apply.

Applicant no longer associates with his drug-using peers. AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” applies. Applicant deserves credit for moving from home in 2008, matriculating and graduating from college. However, although he stopped dealing drugs, he continued to smoke marijuana through 2014, two years after he graduated from college. Under these circumstances, AG § 26(b)(2), “changing or avoiding the environment where drugs were used,” does not apply. On balance, Applicant has failed to mitigate the drug involvement security concerns.

### **Guideline E, Personal Conduct**

Under this guideline, “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.” (AG ¶ 15) The Guideline E security concerns were not mitigated for the same reasons as discussed in the earlier sections of the Decision.

### **Whole-Person Concept**

Applicant’s criminal conduct was serious. There is some mitigation present, when Applicant’s youth at the time of his gang involvement is balanced with his more recent successful endeavors such as earning a college degree, and gaining his current job. Conversely, Applicant’s criminal conduct did not cease in 2008 when he left the gang, as he was arrested and charged with DUI in 2011, and he continued to smoke marijuana daily through 2014. Under these circumstances, it is too soon to conclude that Applicant has mitigated the security concerns.

## **Formal Findings**

Formal findings for 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 J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.l:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a – 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Marc E. Curry  
Administrative Judge