



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



In the matter of: )  
)  
) ISCR Case No. 16-02504  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

05/17/2018  
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**Decision**  
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HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate security concerns raised under Guideline H (Drug Involvement). Applicant used marijuana for almost 40 years. Eligibility for access to classified information is denied.

**History of the Case**

Applicant submitted a security clearance application (SCA) on February 26, 2015. On December 20, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement). The DOD CAF acted 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 (AG) implemented by the DOD on September 1, 2006 (2006 AG).

Applicant answered the SOR on March 1, 2017, and requested a decision on the record without a hearing (answer). On March 23, 2017, a complete copy of the File of Relevant Material (FORM), containing three Items, was mailed to Applicant. He received it on March 27, 2017. The FORM notified Applicant that he had an opportunity

to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not respond to the FORM. Items 1 through 3 are admitted into evidence without objection. The case was assigned to me on May 10, 2018.

On June 8, 2017, the DOD implemented new AG (2017 AG).<sup>1</sup> Accordingly, I have applied the 2017 AG.<sup>2</sup> However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. I conclude that my decision would have been the same under either version.

### **Findings of Fact**

Applicant is 59 years old and works as a vice president of software engineering and a program manager for a defense contractor. He has worked for his employer since January 2015, and requires a clearance for his employment. He has been married since 1982, and he and his wife have two adult children.

Applicant used marijuana from the late 1970s until at least March 2016. In his February 26, 2015 SCA, Applicant reported using marijuana “from time to time” but did not disclose specific dates of use. (Item 3 at 26) In his March 2017 answer, Applicant acknowledged that he started using marijuana when he was a teenager in the late 1970s. His use decreased during the 1980s after he married and became a father. From the early 1990s through 2014, he used marijuana at parties or concerts. According to Applicant, marijuana was “just something that naturally occurred once in a while.” (Item 2)

Applicant used marijuana an unspecified number of times after he started working for his current employer and after he applied for a clearance in early 2015. He claimed that only after he was interviewed multiple times by a government investigator, did he become aware of the significance of any infraction of the law. Since those interviews, he declined to use marijuana at parties and/or concerts. He claims he will never use marijuana again. Applicant asserts that his professional accomplishments and success reflect that he is stable, reliable, and trustworthy. (Item 2)

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<sup>1</sup> On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a “single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position.” (SEAD-4 ¶ B, *Purpose*) The SEAD-4 became effective on June 8, 2017. (SEAD-4 ¶ F, *Effective Date*) The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD-4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD-4 ¶ C, *Applicability*)

<sup>2</sup> ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

## Policies

“[N]o one has a ‘right’ to a security clearance.”<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup>

Eligibility for a security clearance is predicated upon the applicant 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.”<sup>6</sup> 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 national security eligibility.

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.<sup>7</sup> “Substantial evidence” is “more than a scintilla but less than a preponderance.”<sup>8</sup> The guidelines presume a nexus or

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<sup>3</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>4</sup> *Egan* at 527.

<sup>5</sup> EO 10865 § 2.

<sup>6</sup> EO 10865 § 7.

<sup>7</sup> See *Egan*, 484 U.S. at 531.

<sup>8</sup> See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.<sup>9</sup> Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>10</sup> An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.<sup>11</sup>

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."<sup>12</sup> "[S]ecurity clearance determinations should err, if they must, on the side of denials."<sup>13</sup>

## Analysis

### Guideline H: Drug Involvement and Substance Misuse

The concern under Guideline H 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, but 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.

AG ¶ 25 describes two conditions that could raise a security concern and be disqualifying in this case:

(a) any substance misuse (see above definition); and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana between the late 1970s and March 2016. The evidence established these two disqualifying conditions.

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<sup>9</sup> ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

<sup>10</sup> Directive ¶ E3.1.15.

<sup>11</sup> ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>12</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>13</sup> *Egan*, 484 U.S. at 531; *See also* AG ¶ 2(b).

AG ¶ 26 provides conditions that could mitigate security concerns. Two are potentially applicable in this case:

(a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(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 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 for close to 40 years, including after he applied for a DOD security clearance. His recent assertions that he will discontinue all future use of marijuana are unconvincing and outweighed by his history of use. Applicant's illegal drug use is not isolated, nor did it occur under unusual circumstances. There is no evidence he has changed or avoided the environments in which he used drugs. AG ¶¶ 26(a) and 26(b) do not apply.

Applicant chose to use illegal drugs for the majority of his life, and his decision to do so continues to reflect negatively on his current security worthiness. Applicant's decision to use illegal drugs, after he applied for a security clearance, cannot be considered a minor lapse in judgment, but a pattern of behavior that indicates an unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours;<sup>14</sup> off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an applicant's security worthiness.<sup>15</sup> Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the Government when he applied for access to classified information.

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<sup>14</sup> See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

<sup>15</sup> See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989).

## **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. 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 in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the drug involvement concerns. Accordingly, 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, Drug Involvement:	AGAINST APPLICANT
Subparagraphs 1.:	Against Applicant

## **Conclusion**

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

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CAROLINE E. HEINTZELMAN  
Administrative Judge