



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 16-03327
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Benjamin R. Dorsey, Esq., Department Counsel  
For Applicant: *Pro se*

12/15/2017

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement), J Criminal Conduct), G (Alcohol Consumption), and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on September 16, 2015. On December 21, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, J, G, and E. The DOD acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense 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.<sup>1</sup>

---

<sup>1</sup> Security Executive Agent Directive 4 (SEAD 4), was issued on December 10, 2016, revising the 2006 adjudicative guidelines. The SEAD 4 guidelines apply to all adjudicative decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case

Applicant answered the SOR on February 17, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 9, 2017, and the case was assigned to me on April 7, 2017. Scheduling the hearing was delayed because of Applicant's work and travel schedule. On August 16, 2017, DOHA notified Applicant that the hearing was scheduled for September 13, 2017. I conducted the hearing as scheduled. Department Counsel submitted Government Exhibits (GX) 1 through 6, which were admitted without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until September 28, 2017, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through R, which were admitted without objection. DOHA received the hearing transcript on September 21, 2017.

### **Findings of Fact<sup>2</sup>**

Applicant is a 29-year-old installation technician employed by a defense contractor since March 2009. He graduated from high school in June 2007 and was employed in the private sector until he was hired for his current job. He received a security clearance in September 2009.

Applicant purchased and used marijuana with varying frequency from about 2004 to February 2016. He continued to use marijuana once or twice a week after he was granted a security clearance in September 2009. (Tr. 26.) He was arrested in April 2011 and charged with possession of marijuana. He appeared in court in July 2011 and was given first-offender status. He was sentenced to 24 hours of community service, fined, and required to attend a one-day, eight-hour drug education class, which he completed. He was placed on supervised probation for six months and was required to submit to urinalysis once a month, and all tests were negative for marijuana. He completed all the court-imposed requirements, and the charges were dismissed in December 2011. (GX 4 at 1-2.)

Applicant was charged with reckless driving and speeding in February 2013. He was driving 79 miles per hour (mph) in a 55-mph zone. He pleaded *nolo contendere*, was convicted, and was fined \$150. (GX 5 at 1-2.)

In April 2015, Applicant was arrested and charged with driving under the influence (DUI), driving the wrong way on a one-way street, and operating a vehicle without headlights when required. A breathalyzer indicated a .177 blood-alcohol content (BAC). (Tr. 34.) He was convicted of DUI. He spent one day in jail and his driver's license was suspended for six months. He was required to complete two alcohol-education classes and to have an interlock on his vehicle for six months. (Tr. 35.) He was placed on unsupervised probation for two years. He completed all the court requirements, and his driver's license was reinstated in September 2015. (Tr. 36; AX J.) At the hearing, he

---

<sup>2</sup> Applicant's personal information is extracted from his security clearance applications (GX 1 and GX 2) unless otherwise indicated by a parenthetical citation to other documents in the record.

testified that he did not consume alcohol after his DUI arrest in April 2015. (Tr. 37.) He later admitted that he consumed alcohol on the following Thanksgiving. (Tr. 38.)

Applicant was arrested in November 2015 and charged with possession of marijuana. He pleaded *nolo contendere*. He was convicted and sentenced to 30 days in jail (suspended), fined \$100, and placed on unsupervised probation until January 2017. (GX 5 at 3-4; AX C.)

When Applicant submitted an SCA in June 2009, he answered “No” to a question in Section 23a, asking if, during the last seven years, he had illegally used any controlled substance. He did not disclose his use of marijuana that began in 2004. He also answered “No” to a question in Section 23b, asking if, during the last seven years, he had been involved in the illegal possession or purchase of marijuana. He did not disclose that he purchased marijuana beginning in 2004. (GX 2 at 28.)

When Applicant was interviewed by a security investigator in August 2012, he falsely told the investigator that he had not smoked marijuana since age fifteen, and he declared that he did not intend to use it in the future. (GX 4 at 2.) At the hearing, he testified that he did not disclose his use of marijuana in his 2009 SCA and the follow-up interview by a security investigator in August 2012, because he was not using it on a daily basis. (Tr. 30, 43.)

When Applicant submitted his most recent SCA in September 2015, he answered “Yes” to a question in Section 23 asking if, during the last seven years, he had illegally used any controlled substance. He stated that he first used marijuana in October 2000 and last used it in August 2015. Regarding the nature and frequency of his use of marijuana, he stated that it was “recreational, not very frequent, three.” He answered “No” to the question whether, during the last seven years, he had been involved in the illegal purchase of marijuana. He declared that he did not intend to use marijuana again because he did not want to risk losing his security clearance. (GX 1 at 24.) In his response to DOHA interrogatories in November 2016, his answer to the SOR in February 2017, and in his testimony at the hearing, he admitted that he continued to purchase and use marijuana until February 2016.

Applicant’s current employer submitted a letter describing him as reliable, trustworthy, hardworking, loyal, and dedicated. His employer regards him as one of his most experienced and knowledgeable craftsman. (AX A.)

### **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 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

The SOR alleges that Applicant purchased and used marijuana with varying frequency from about 2004 to February 2016 (SOR ¶¶ 1.a and 1.b), and that he continued to use marijuana after being granted a security clearance in September 2009 (SOR ¶ 1.c). The SOR also cross-alleges the drug-related criminal conduct alleged in SOR ¶¶ 2.a and 2.d, summarized and discussed below.

The concern under this guideline 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.

Applicant's admissions and the documentary evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

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

The following mitigating conditions are potentially applicable:

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.

AG ¶¶ 26(a) and 26(b) are not established. Applicant has acknowledged his drug involvement but has not undergone any counseling or treatment other than the court-ordered drug education classes. His drug involvement was not infrequent, and it did not occur under circumstances making recurrence unlikely. Even though he has asserted that his last use of marijuana was in February 2016, his last use was not “so long ago” that it is mitigated by the passage of time.

There are no “bright line” rules for determining when drug involvement is mitigated by the passage of time. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant has purchased and habitually used marijuana once or twice a week since he was in high school. He continued to use it after he was granted a security clearance in 2009. He was not deterred by his arrest for marijuana possession in April 2011. In August 2012, he declared to a security investigator that he did not intend to use marijuana again, but he used it again in November 2015 and used it while on probation after his conviction in January 2016. He declared in his September 2015 SCA that he did not intend to use marijuana again, but he admitted in his answer to the SOR and at the hearing that he purchased and used it until February 2016. After considering all the evidence, I am not convinced that he will refrain from further marijuana use once the pressure of keeping his clearance is lifted.

## **Guideline J, Criminal Conduct**

The SOR alleges that Applicant was charged with possession of marijuana in April 2011 (SOR ¶ 2.a); charged with reckless driving and speeding in February 2013 (SOR ¶ 2.b); charged with DUI, a one-way street violation, and operating a vehicle without headlights in April 2015 (SOR ¶ 2.c); and charged with possession of marijuana in November 2015 (SOR ¶ 2.d). The concern under this guideline is set out in AG 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.”

Applicant's record of arrests and convictions establishes the following disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

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.

The following mitigating conditions are potentially relevant:

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; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has complied with the terms of each probation that was imposed in April 2011, April 2015, and January 2016, except for his use of marijuana in February 2016, while he was still on probation. His employer considers him a reliable, trustworthy, hardworking, loyal, and dedicated employee. However, based on all the evidence discussed above under this Guideline and Guideline H, I conclude that AG ¶¶ 32(a) and 32(d) are not established.

### **Guideline G, Alcohol Consumption**

SOR ¶ 3.a cross-alleges the DUI alleged in SOR ¶ 2.c. The security concern under this guideline is set out in AG ¶ 21: "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." Applicant's arrest for and conviction of DUI establish the following disqualifying condition:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.

The relevant mitigating condition is AG ¶ 23(a): “so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment.” Applicant has abstained from alcohol since Thanksgiving of 2015, more than two years ago. There is no evidence of any other instances of excessive alcohol use. He was required to complete educational classes, but he has not been diagnosed with an alcohol use disorder, and he has not been required to undergo any counseling or treatment. I conclude that AG ¶ 23(a) is established. No other mitigating conditions are relevant.

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

The SOR alleges that Applicant falsified his SCA in June 2009 by answering “No” to a question asking if, during the last seven years, he had illegally used any controlled substance (SOR ¶ 4.a) and answering “No” to a question, asking if, during the last seven years, he had been involved in the illegal possession or purchase of marijuana (SOR ¶ 4.b). It also alleges that he falsified material facts during an interview with a security investigator in August 2012 by telling the investigator that he had not used marijuana since age 15 (SOR ¶ 4.c). The SOR does not allege that Applicant’s answers to drug-related questions in his September 2015 SCA were false.<sup>3</sup>

After SOR ¶ 4.c, the SOR contains a phrase, “That information as set forth in in paragraphs 1, 2, and subparagraphs 4.a and 4.b., above” that is separated by a line space from SOR ¶ 4.c, without lettering and not closed with a period. It is not clear whether this phrase was inadvertently left in the text of the SOR or was intended to be SOR ¶ 4.d. In an abundance of caution, I have amended the SOR and treated the isolated phrase as SOR ¶ 4.d, cross-alleging all the conduct alleged under Guidelines H, J, and E, but not cross-alleging the conduct alleged under Guideline G.

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

---

<sup>3</sup> Because the SOR does not allege that Applicant falsified his September 2015 SCA, his answers to drug-related questions in that SCA may not be an independent basis for revoking his security clearance. However, they may be considered to assess his credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether he has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered his answers in the September 2015 for these limited purposes.



Applicant's explanation for not disclosing his marijuana use, *i.e.*, that he was not using it on a daily basis, was implausible and unconvincing. His falsification of his June 2009 SCA and subsequent false statements to an investigator establish the following disqualifying conditions:

AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

SOR ¶ 4.d, cross-alleging Applicant's drug involvement and criminal conduct as personal conduct, is established by the evidence discussed above, and it is sufficient to raise the following additional disqualifying conditions:

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; and

AG ¶ 16(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 . . . .

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

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.

Neither mitigating condition is established. Applicant made no effort to correct his omissions. Instead, he made implausible excuses for his multiple omissions of material facts. His falsifications were recent, numerous, and did not occur under unusual circumstances. His falsifications were not “minor,” because they undermined the integrity of the security clearance process. He knew that his drug involvement adversely affected his professional standing, and he chose to conceal or minimize it. His lack of candor throughout the security clearance process raises grave doubts about his reliability, trustworthiness, and good judgment.

### **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 and applying the adjudicative factors in AG ¶ 2(d).<sup>4</sup> I have incorporated my comments under Guidelines H, J, G, and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d).

After weighing the disqualifying and mitigating conditions under Guidelines H, J, G, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern raised by his alcohol use, but he has not mitigated the security concerns raised by his drug involvement, criminal conduct, and personal conduct.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant

---

<sup>4</sup> The factors are: (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.

Paragraph 3, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraphs 4, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 4.a-4.d:	Against Applicant

### **Conclusion**

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

LeRoy F. Foreman  
Administrative Judge