



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 17-00250
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Carroll Connelley, Esq., Department Counsel  
For Applicant: Brian Bodansky, Esq.

01/31/2018

**Decision**

MARINE, Gina L., 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 granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on December 14, 2015. On March 1, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. 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 DOD on September 1, 2006.

Applicant answered the SOR on March 21, 2017, and requested a decision based on the administrative record. On May 17, 2017, he requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 25, 2017, and the case was assigned to me on October 26, 2017. On November 15, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 6, 2017. The hearing was convened as scheduled.

Government Exhibits (GX) 1 through 3 were admitted into evidence without objection. The Government's exhibit list was appended to the record as Hearing Exhibit (HE) I. At the hearing, Applicant testified and submitted Applicant's Exhibits (AE) A and B, which were admitted into evidence without objection. One witness testified on behalf of Applicant. At Applicant's request, I left the record open until December 13, 2017. Applicant timely provided an additional document that was admitted into evidence as AE C, without objection. DOHA received the transcript (Tr.) on December 21, 2017.

On June 8, 2017, the DOD implemented new AG.<sup>1</sup> Accordingly, I have applied the June 2017 AG.<sup>2</sup> However, I have also considered the September 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<sup>3</sup>**

Applicant is 40 years old. He married his wife in 2007. He has one child, age 11. He received his bachelor's degree in 1999. He has been employed, as a senior wireless technician, by a defense contractor since November 2015. This is his first application for a security clearance.<sup>4</sup>

The SOR cross-alleged, under Guidelines H and E, that Applicant used marijuana with varying frequency from approximately 2002 through at least 2015 (SOR ¶ 1.a/2.a); that he was charged with marijuana-related criminal offenses in April 2011 (SOR ¶ 1.b/2.a); and that he then continued to associate with individuals who use marijuana (SOR ¶ 1.c/2.a). Applicant admitted to each of the SOR allegations.

In April 2011, Applicant was travelling in a van with members of his band, while touring for music events in which they were playing. On April 22, 2011, a police officer pulled over the van for speeding and eventually charged each of the occupants, including Applicant, with possession of marijuana and possession of drug paraphernalia. Applicant and the other occupants had been smoking marijuana approximately an hour before the police officer stopped the van. Applicant permitted the police officer to search his backpack in which he found a clear sandwich baggie that contained marijuana. Applicant pled guilty to the charges with a stipulation that his case

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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).

<sup>3</sup> Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR Answer and his SCA (GX 1).

<sup>4</sup> See also Tr. at 5-6, 15, 33.

would be handled through a diversion program. After he successfully completed the program (including passing a random drug test, attending an eight-hour drug education course, completing 60 hours of community service, and paying a \$600 fine), his case was dismissed. Applicant has not been arrested or cited for any drug-related offense since April 2011.<sup>5</sup>

Applicant began using marijuana at the age of 23 or 24. The frequency of his use during the first two years was four times per year, and then it increased to twice per month. In 2004, he began using it six to twelve times per year. He stopped using marijuana after his 2011 arrest, while he was in the diversion program. Once he completed the program, he resumed using marijuana until March 2015, when he stopped using it in anticipation of seeking employment that would not permit drug use. During that time, he also quit his band. Applicant attributed his marijuana use to his association with his band. Applicant has not used marijuana since March 2015.<sup>6</sup>

Applicant does not associate with anyone who uses drugs and has no intent to associate with anyone who uses drugs in the future. If he were to encounter anyone using drugs, Applicant would immediately leave that space and, if it was someone he knew, explain that he is not able to continue that association. He spends his free time working on home projects, working to further the technical knowledge required of his profession, tinkering with his motorcycle, and travelling with his family.<sup>7</sup>

In connection with his 2011 diversion program, Applicant submitted to a drug evaluation that concluded that he did not have any dependency towards marijuana.<sup>8</sup> Applicant tested negative for drug use, including marijuana, on a pre-employment drug screen in November 2015 and on a random drug screen in January 2017.<sup>9</sup> In December 2017, Applicant submitted a statement of intent to refrain from use of illegal drugs and swore that he would not use any illegal drugs in the future, subject to automatic revocation of his security clearance for any violation.<sup>10</sup> Applicant's former supervisor of almost two years praised Applicant's work performance and character.<sup>11</sup>

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<sup>5</sup> GX 2 at p. 9 and 10; Tr. at 19-20, 27-29.

<sup>6</sup> SOR Answer; GX 2 at p. 10-11; Tr. at 16-17, 24.

<sup>7</sup> Tr. at 20-23, 35.

<sup>8</sup> GX 2 at p. 10; Tr. at 35.

<sup>9</sup> AE A and B; Tr. at 17-18.

<sup>10</sup> AE C.

<sup>11</sup> Tr. at 11-14.

## Policies

“[N]o one has a ‘right’ to a security clearance.”<sup>12</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>13</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>14</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>15</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 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.<sup>16</sup> “Substantial evidence” is “more than a scintilla but less than a preponderance.”<sup>17</sup> The guidelines presume a nexus or

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<sup>12</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>13</sup> *Egan* at 527.

<sup>14</sup> EO 10865 § 2.

<sup>15</sup> EO 10865 § 7.

<sup>16</sup> See *Egan*, 484 U.S. at 531.

<sup>17</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>18</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>19</sup> An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.<sup>20</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>21</sup> "[S]ecurity clearance determinations should err, if they must, on the side of denials."<sup>22</sup>

## 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, 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 marijuana use, including his 2011 marijuana-related criminal charges, establish the following disqualifying conditions under this guideline:

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

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

The following mitigating conditions under this guideline are established:

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

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<sup>18</sup> See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

<sup>19</sup> Directive ¶ E3.1.15.

<sup>20</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>21</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>22</sup> Egan, 484 U.S. at 531; See also AG ¶ 2(b).

cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

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 acknowledged the incompatibility of marijuana use with his current lifestyle and goals. Applicant has substantially changed the behaviors and circumstances underlying his past marijuana use. As such, I conclude that it is not likely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment.

### **Guideline E (Personal Conduct)**

The concern under this guideline, as set out in AG ¶ 15, includes: "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."

Applicant's marijuana use, including his 2011 marijuana-related criminal charges, establish the following disqualifying condition under this guideline:

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.

Applicant has mitigated the security concerns raised by his past marijuana use. Accordingly, I conclude that it does not cast doubt on his current reliability, trustworthiness, or good judgment.

### **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 Guidelines H 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 Guideline 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 past marijuana use. Accordingly, I conclude that 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**

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

Paragraph 1, Guideline H (Drug Involvement and Substance Misuse): FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is granted.

Gina L. Marine  
Administrative Judge