



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-01385

**Appearances**

For Government: Benjamin Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

11/21/2017

**Decision**

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline H (drug involvement and substance misuse). Clearance is granted.

**Statement of the Case**

On June 9, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. On June 16, 2017, Applicant responded to the SOR, and elected to have the case decided on the written record in lieu of a hearing.

On July 6, 2017, the Government submitted its written case. On July 13, 2017, Applicant received a complete copy of the file of relevant material (FORM). She was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit additional information.

On October 16, 2017, the case was assigned to me. The Government exhibits, Items 1 through 4, included in the FORM, are admitted in evidence. On November 12,

2017, I reopened the record until November 17, 2017, to provide Applicant with an opportunity to submit additional evidence. Applicant timely submitted an e-mail response, marked as Item 5, which is admitted in evidence.

### **Findings of Fact**

Applicant admitted the sole allegation in the SOR, with explanations. Her admission and explanation are accepted as a finding of fact. Additional findings of fact follow.

### **Background Information**

Applicant is a 23-year-old biomedical engineer employed by a defense contractor since June 2016. She seeks a security clearance in conjunction with her current employment. Applicant graduated from high school in July 2012. She attended college from August 2012 to May 2016, and was awarded a bachelor's degree in May 2016. Applicant has never married and has no dependents.

### **Drug Involvement and Substance Misuse**

The underlying basis of Applicant's past drug involvement is derived from her self-disclosure and is not disputed. Her past drug use consists of: (1) In March 2015, Applicant used marijuana one time at a college party; (2) In November 2016, Applicant used marijuana one time at a cast party; and (3) In December 2016, Applicant used marijuana one time again at a cast party. (SOR ¶ 1.a) Applicant reported in detail the circumstances of her three-time past marijuana use during her December 21, 2016 Office of Personnel Management Personal Subject Interview (OPM PSI) and in her SOR answer. (Items 2, 4) On November 16, 2017, Applicant reaffirmed her SOR answer stating that it is "still current and accurate." (Item 5)

Applicant has never been arrested because of past involvement with drugs. (Item 1) She submitted a signed statement of intent to refrain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (Item 2) Applicant recognizes the adverse effects drug use would have on her future employability and is committed to avoiding drug-using associates and contacts. (Items 2, 5) She added in her OPM PSI that she does not intend to use marijuana in the future because she is trying to get into the National Guard. (Item 4)

### **Policies**

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 this case 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), which became effective on June 8, 2017.<sup>1</sup>

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

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<sup>1</sup> [http://ogc.osd.mil/doha/SEAD4\\_20170608.pdf](http://ogc.osd.mil/doha/SEAD4_20170608.pdf)

## Analysis

### Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern concerning drug involvement:

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 Government established its case under Guideline H through Applicant's admissions and the evidence presented.

A review of the evidence supports application of two drug involvement and substance misuse disqualifying conditions. AG ¶ 25(a): "any drug abuse (see above definition);"<sup>2</sup> and AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia."

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions 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;" 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."

Concerning AG ¶ 26(a), there are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the Directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct,"

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<sup>2</sup> AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

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.”<sup>3</sup>

AG ¶ 26(a) applies. Applicant’s last drug use was December 2016, about 11 months before this decision was issued. Her illegal drug use ended when she realized the adverse effects it could have on her future. The absence of evidence of more recent or extensive drug use, and her promise not to use illegal drugs in the future eliminates doubts about her current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.<sup>4</sup>

AG ¶ 26(b) lists three ways Applicant can demonstrate her intent not to abuse illegal drugs in the future. With reflection on the adverse effects continued drug use could have on her future, she has broken or reduced the prevalence of her patterns of drug abuse, and she has made life changes with respect to illegal drug use. She has abstained from drug abuse for about 11 months and has had no problem in doing so. AG ¶ 26(b) applies.

Applicant is a recent college graduate and recently began her professional career as a defense contractor. Her limited involvement with marijuana was infrequent and occurred at a time in her life when she may not have been fully cognizant of the adverse consequences of her actions. From all indications, Applicant is committed to succeeding

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<sup>3</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

<sup>4</sup>In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

in her career and desire to join the National Guard. In short, she recognizes that drug misuse is incompatible with her future career. She expressed a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other drugs. I find for Applicant under this concern.

### **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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guideline H is incorporated in this whole-person section. However, additional comments are warranted.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. She self-reported her limited drug misuse, which demonstrated a willingness to accept responsibility for her past actions. Her self-introspection should ensure her continued success. Applicant demonstrated the correct attitude and commitment to remaining drug free. Considering the evidence presented, I believe Applicant has learned from her mistakes, and this behavior is unlikely to recur. I find Applicant has presented sufficient evidence of rehabilitation.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"<sup>5</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines.

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<sup>5</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

### **Formal Findings**

The formal findings on the SOR are as follows:

Paragraph 1, Guideline H:	FOR APPLICANT
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Subparagraph 1.a:	For Applicant
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### **Conclusion**

In light of all of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is granted.

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ROBERT TUIDER  
Administrative Judge