



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



In the matter of: )  
)  
) ISCR Case No. 17-01390  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

04/25/2018

**Decision**

HEINTZELMAN, Caroline E., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). While holding a clearance, Applicant used marijuana and was arrested for possession of marijuana. Eligibility for access to classified information is denied.

**History of the Case**

Applicant submitted a security clearance application (SCA) on May 15, 2015. On September 8, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD acted under Executive Order (EO) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all decisions on or after June 8, 2017.

Applicant answered the SOR on October 10, 2017, and requested a decision on the record without a hearing. On December 12, 2017, a complete copy of the File of

Relevant Material (FORM), containing five Items, was mailed to Applicant and received by him on December 24, 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 object to the Government's Items. Hence, Items 1 through 5 are admitted into evidence without objection. He submitted additional evidence, which was admitted without objection as Applicant's Exhibit (AX) A. The case was assigned to me on April 9, 2018.

### **Findings of Fact<sup>1</sup>**

Applicant is a 59-year-old engineering associate who requires a security clearance for his employment as a federal contractor. He has worked for his employer since 1987, and has held a clearance since 2009. He has been married since 1986 and has an adult son and an adult stepdaughter. Applicant received associate's degrees in 1985 and 1992. He served on active duty in the U.S. Navy from November 1977 until January 1978. The record does not reflect his discharge.

The SOR contains three allegations under Guideline H for drug involvement (SOR ¶¶ 1.a. through 1.c). His use of marijuana while holding a security clearance was cross-alleged under Guideline E (SOR ¶ 1.a.). Applicant admitted to the Guideline H allegations, but denied the Guideline E allegation. I make the following findings of fact:

In May 2015, Applicant completed an SCA and reapplied for a DOD security clearance. He disclosed no drug use nor any involvement with drugs in this questionnaire (Item 2 at 25). In June 2015, Applicant moved to a new state and started to use marijuana with old friends (Item 3 at 1). He smoked marijuana on the weekends with these friends at gatherings and while playing golf. Applicant claims he used marijuana as a result of curiosity and a midlife crisis (AX A). Initially, he was given marijuana by his friends, but ultimately purchased marijuana three times.

In November 2015, Applicant was pulled over by local law enforcement for speeding. During the stop, the officer detected an odor of marijuana emanating from Applicant's car. As a result, he was searched and the officer found marijuana on his person (Item 3 at 2 and Item 5). Applicant was arrested for possession of a controlled substance, issued a notice to appear, and released. He was arraigned, but the charges were ultimately dismissed (Item 4).

In his Answer to the SOR, Applicant admitted to the underlying conduct (Item 1). He claims he discontinued his use of marijuana after the November 2015 arrest (Items 1, 3, and AX A). In his January 2017 interview, Applicant told the Government investigator that his arrest embarrassed him and he acknowledged he exercised poor judgment. However, he did not believe his drug use impaired his judgment at work, nor would he

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<sup>1</sup> Applicant's personal information is extracted from his security application (Item 2) unless otherwise indicated by a parenthetical citation to the record.

disclose the names of the individuals with whom he used marijuana (Item 3 at 2 and AX A).

Applicant self-reported the arrest to his facility security officer (FSO) in a timely manner (Item 5). There is no evidence Applicant disclosed his drug use to the FSO until he was arrested.

### **Policies**

“[N]o one has a ‘right’ to a security clearance.”<sup>2</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>3</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>4</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>5</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.

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<sup>2</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>3</sup> *Egan* at 527.

<sup>4</sup> EO 10865 § 2.

<sup>5</sup> EO 10865 § 7.

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>6</sup> “Substantial evidence” is “more than a scintilla but less than a preponderance.”<sup>7</sup> The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.<sup>8</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>9</sup> An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.<sup>10</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>11</sup> “[S]ecurity clearance determinations should err, if they must, on the side of denials.”<sup>12</sup>

## **Analysis**

### **Guideline H, Drug Involvement and Substance Misuse**

AG ¶ 24 expresses the security concern pertaining to 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, 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.

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<sup>6</sup> See *Egan*, 484 U.S. at 531.

<sup>7</sup> See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

<sup>8</sup> ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

<sup>9</sup> Directive ¶ E3.1.15.

<sup>10</sup> ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>11</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>12</sup> *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

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

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal use while granted access to classified information or holding a sensitive position.

Applicant admitted he used marijuana between June 2015 and November 2015, and all of his use was after he was granted a DOD security clearance in 2009. Additionally, he was arrested for possession of marijuana in November 2015. The evidence raised the above disqualifying conditions.

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides two conditions that could mitigate security concerns 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 and purchased marijuana when he was approximately 56 years old and had been working for his employer for almost 30 years. He claims he no longer associates with individuals who use marijuana, but when asked, he refused to disclose their identities. His promises to abstain from illegal drug use are undercut by the record evidence. Applicant used marijuana after he was granted a DOD clearance in 2009, and after he submitted his SCA in May 2015. His drug use continued until he was arrested for

possession of marijuana. Additionally, he did not disclose his drug use to his FSO until he was arrested. AG ¶¶ 26(a), 26(b), and 26(f) do not apply.

Applicant chose to use illegal drugs, and his decision to do so continues to reflect negatively on his current security worthiness. Applicant's decision to use illegal drugs, especially after being granted 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>13</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>14</sup> Furthermore, Applicant's eventual self-reporting of his illegal drug use does not change the security significance of the underlying conduct. Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the government when he was granted access to classified information.

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

AG ¶ 15 explains the security concerns relating to personal conduct:

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.

The SOR cross-alleges Applicant's drug use while holding a clearance as a concern under Guideline E. As explained previously, such conduct calls into question Applicant's judgment and willingness to comply with rules and regulations. His conduct also establishes disqualifying condition AG ¶ 16(c).<sup>15</sup> I considered mitigating condition AG ¶ 17(c)<sup>16</sup> under Guideline E and, for similar reasons explained under Guideline H, find that it does not apply.

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<sup>13</sup> See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

<sup>14</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).

<sup>15</sup> Credible adverse information in several adjudicative issue areas that . . . 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 person may not properly safeguard classified or sensitive information.

<sup>16</sup> 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.

## **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 Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the drug involvement and personal conduct concerns. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security of the United States 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:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	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. Eligibility for access to classified information is denied.

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Caroline E. Heintzelman  
Administrative Judge