



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



In the matter of:

)  
)  
)  
)  
)

ISCR Case No. 17-02371

Applicant for Security Clearance

**Appearances**

For Government: Caroline E. Heintzelman, Esq., Department Counsel  
For Applicant: *Pro se*

02/15/2018

**Decision**

HARVEY, Mark, Administrative Judge:

Personal conduct security concerns are mitigated; however, drug involvement and substance misuse security concerns are not mitigated. Applicant repeatedly used marijuana while holding a security clearance. Eligibility for access to classified information is denied.

**Statement of the Case**

On August 26, 2016, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Government Exhibit (GE) 1. On August 28, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs). Hearing Exhibit (HE) 2.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines H (drug involvement and substance misuse) and E (personal conduct).

On September 13, 2017, Applicant provided a response to the SOR and requested a hearing. HE 3. On October 24, 2017, Department Counsel was ready to proceed. On October 26, 2017, the case was assigned to me. On November 7, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for November 28, 2017. HE 1. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant did not offer any exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Transcript (Tr.) 15-17; GE 1-4. Applicant's clarification of the summary in the Office of Personnel Management (OPM) personal subject interview (PSI) that he was not aware of how the marijuana was delivered to a band practice is accepted as fact. Tr. 17-18; GE 4. On December 5, 2017, DOHA received a copy of the hearing transcript.

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

Applicant's SOR response admitted all of the SOR allegations. HE 3. He also provided mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 49-year-old director for an entity providing services, and his current employer has employed him since 2002. Tr. 7-9; GE 1. In 1987, he graduated from high school. Tr. 7. In 1990, he received a bachelor's degree in history. Tr. 7. He has not served in the U.S. armed forces. Tr. 7. In 1991, he married, and his children are 17 and 18. Tr. 8. He has held a security clearance for more than ten years, and there is no evidence of security violations.

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

Applicant's SOR alleges, and he admitted, that he used marijuana from about June 2012 to about June 2015 (§§ 1.a and 2.a), and he has held a security clearance since December 2006 (§§ 1.b and 2.a). Tr. 20; SOR response.

In Section 23 of Applicant's August 26, 2016 SCA, **Illegal Use of Drugs or Drug Activity**, he disclosed "[o]ccasional use of marijuana (less than ten times per year over a 2-3 year period)" from June 2012 to June 2015. GE 1. He said, "I do not INTEND to use in the future but I also do not consider occasional use of marijuana to be ethically any different than occasional use of alcohol, so I do not have any strong thoughts about future use." GE 1 (emphasis in original). His employer does not test employees for illegal drug use. Tr. 20.

Applicant used marijuana at band practices when friends were using marijuana. Tr. 20. He estimated he used marijuana a total of about ten times. Tr. 24. Sometimes he drove after using marijuana. Tr. 27. His children are unaware of his marijuana use. Tr. 27.

---

<sup>1</sup> Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant ended his involvement with the band about 30 months ago. Tr. 27. He has never had marijuana in his home or vehicle. Tr. 28. He continues to associate with friends who used marijuana two or three years ago. Tr. 22. He was around people who used marijuana at a social gathering in early 2017. Tr. 23. He said possession of marijuana is a misdemeanor, “equivalent of a parking ticket” or moving violation. Tr. 24. It is illegal, but “there are degrees of legality.” Tr. 24. Possession of marijuana is a misdemeanor-level crime in his state. Tr. 28. He assured marijuana use was not an important part of his life, and he did not intend to use marijuana in the future. Tr. 25. He emphasized that he viewed marijuana use as inappropriate because of the impact on his security clearance; however, he viewed it as a “relatively minor infraction.” Tr. 26.<sup>2</sup> He did not possess or view classified information during the period when he was using marijuana, and his marijuana use was infrequent. Tr. 26. In his SOR response, Applicant acknowledged that “any future involvement or misuse is grounds for revocation of national security eligibility.”

## **Personal Conduct**

SOR ¶ 2.a cross-alleges that Applicant engaged in the same conduct under the personal conduct guideline as alleged under the drug involvement and substance misuse guideline in SOR ¶¶ 1.a and 1.b.

Applicant describes himself as an honest and trustworthy person. (Tr. 29) He has never been charged with a crime. Tr. 29. He did not provide any character references or statements or employer performance evaluations.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

---

<sup>2</sup> Under the state law where Applicant committed the marijuana possession and use offenses, possession or use of marijuana is a “minor misdemeanor.” See Ohio Revised Code § 2925.11(B)(3)(a).

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 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 “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, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and the Director of National Intelligence (DNI) 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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**

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

AG ¶ 24 articulates the security concern for drug involvement and substance misuse:

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.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance . . .”; and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.” Applicant possessed and used marijuana.<sup>3</sup> His illegal drug possession and use occurred when he possessed a security clearance. AG ¶¶ 25(a), 25(c), and 25(f) are established.

Applicant noted that his state has reduced the criminal offense of marijuana possession to a minor misdemeanor. On October 25, 2014, the DNI addressed changes in state law legalizing marijuana possession and use. The DNI indicated marijuana possession continues to violate federal law, and he explained the security ramifications of marijuana possession as follows:

An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual’s judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

DNI Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, October 25, 2014.

AG ¶ 26 details conditions that could mitigate security concerns:

(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;

(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

---

<sup>3</sup> Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). See also e.g., *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions fully apply. From June 2012 to June 2015, Applicant used marijuana about ten times at band practices when friends were using marijuana. Sometimes he drove after using marijuana. His illegal marijuana possession and use occurred while he held a security clearance, although he did not possess or view classified documents from June 2012 to June 2015.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such 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). 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."<sup>4</sup>

---

<sup>4</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,

In his SOR response, Applicant provided a clear resolution not to use marijuana in the future. He recognized the adverse impact of drug abuse in connection with access to classified information. He also understands that possession of marijuana violates state and federal laws and constitutes criminal conduct. I accept Applicant's statement that he intends to continue to abstain from illegal drug possession and use as truthful. AG ¶ 26(a) partially applies to his possession and use of illegal drugs.<sup>5</sup>

AG ¶¶ 26(b), 26(c), and 26(d) are not fully applicable. AG ¶ 26(b) does not fully apply. He provided "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." However, he was unclear whether his associations with marijuana users have ended. He did not complete a drug counseling or treatment program. Applicant somewhat minimized the seriousness of his illegal marijuana possession and use, equating it to a traffic infraction or consumption of alcohol. Applicant has made important rehabilitative steps; however, more time without illegal drug possession and use is necessary to fully mitigate drug involvement and substance misuse security concerns.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

---

and gave too little weight to lifestyle changes 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, affirmed the administrative judge's decision to revoke an applicant's security clearance after considering 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>5</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 ISCR Case No. 14-00775 (App. Bd. July 2, 2015), the Appeal Board sustained the revocation of a security clearance for an Applicant, who did not hold a security clearance that used marijuana 20 months before the administrative judge decided the case.

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.

AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying in this case:

(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;

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ; (3) a pattern of . . . rule violations; and

(e) personal 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.

All of Applicant's conduct causing a security concern in SOR ¶ 2.a is explicitly covered under Guideline H, and that conduct is sufficient to warrant revocation of his security clearance under Guideline H. AG ¶¶ 16(c) and 16(d) do not apply. Applicant's involvement with illegal drugs affects his professional and community standing. However, this conduct does not create a vulnerability to exploitation, manipulation, or duress because security officials are aware of it. AG ¶ 16(e) is not established. Guidelines H and E address identical issues involving judgment, trustworthiness, and reliability. Guideline E concerns constitute a duplication of the concerns under Guideline H, and accordingly, personal conduct security concerns in SOR ¶ 2.a are found for Applicant.

## 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(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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines H and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 49-year-old director for an entity providing services, and his current employer has employed him since 2002. In 1990, he received a bachelor's degree in history. He did not provide performance evaluations or character statements describing his trustworthiness and reliability. He has held a security clearance for more than ten years, and there is no evidence of security violations.

The evidence against granting Applicant access to classified information is more substantial. His illegal drug use was extensive. From June 2012 to June 2015, Applicant used marijuana about ten times at band practices when friends were using marijuana. Sometimes he drove after using marijuana. His illegal marijuana possession and use occurred while he held a security clearance, although he did not possess or view classified documents from June 2012 to June 2015. His illegal drug possession and use raise unresolved "questions about [his] reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about [his] ability or willingness to comply with laws, rules, and regulations." See AG ¶ 24.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement and substance misuse concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With continued abstention from illegal drug possession and use, and a track record of behavior consistent with his obligations, he

may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are mitigated; however, drug involvement and substance misuse security concerns are not mitigated.

### **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, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

---

Mark Harvey  
Administrative Judge