



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



In the matter of:

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ISCR Case No. 18-00979

Applicant for Security Clearance

**Appearances**

For Government: Jeff A. Nagel, Esq.

For Applicant: *Pro se*

10/22/2018

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant possessed and used marijuana on several occasions from about June 2011 to about August 2015 and once in January 2018. Guideline H (drug involvement and substance misuse) security concerns are not mitigated. Eligibility for access to classified information is denied.

**History of the Case**

On May 13, 2016, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 2) On May 16, 2018, 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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), effective on June 8, 2017.

The statement of reasons (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 him, 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 Guideline H. (Item 1)

On June 8, 2018, Applicant provided a response to the SOR. (Item 1) On July 2, 2018, Department Counsel completed a File of Relevant Material (FORM) including three exhibits. (Items 1-3) On July 12, 2018, Applicant acknowledged receipt of the FORM. On August 10 and September 20, 2018, Applicant responded to the FORM. On October 16, 2018, the case was assigned to me. There were no objections to my consideration of Items 1-3 and the FORM response, and all proffered documents are admitted into evidence.

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

In Applicant's SOR response, he admitted SOR ¶ 1.a. (Item 1) He admitted that he used marijuana with varying frequency from about June 2011 to about January 2018. (Item 1) His admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 26-year-old engineer, and a defense contractor has employed him since February 2016.<sup>2</sup> In 2011, he graduated from high school, and in 2016, he graduated from a top-tier engineering school with a bachelor's degree. He has not served in the military. He has never married, and he does not have any children.

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

In Applicant's May 13, 2016 SCA, he admitted occasional use of marijuana from about June 2011 to about August 2015.<sup>3</sup> Initially he used marijuana in social situations. Later, he used marijuana for medication and relief of anxiety. He used marijuana two or three times a month for one year. For the remainder of June 2011 to August 2015, he used marijuana less frequently. He said, "I no longer intend to use [marijuana] as it has relieved me of my past illnesses." He denied that he had any drug-related arrests or convictions, and he denied use of any illegal substances while holding a sensitive position or security clearance.

On January 31, 2018, an Office of Personnel Management (OPM) investigator conducted an enhanced subject interview of Applicant.<sup>4</sup> Applicant reiterated the information in his SCA about his history of marijuana consumption, and he added that he ate a marijuana-laced brownie cookie in January 2018. He did not consume marijuana from August 2015 to January 2018, and he is not dependent on marijuana. He consumed the marijuana in January 2018 because he learned marijuana was now legal in his state. He associates with marijuana users. He has never had any treatment for drug misuse.

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

<sup>2</sup> The information in this paragraph is from Applicant's May 13, 2016, Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 2)

<sup>3</sup> The information in this paragraph is from Section 23 of Applicant's May 13, 2016 SCA. (Item 2)

<sup>4</sup> The information in this paragraph is from Applicant's January 31, 2018 Office of Personnel Management personal subject interview (OPM PSI). (Item 3)

In Applicant's FORM response, he provided drug test results for a urine sample he submitted on August 18, 2018, that was negative for cocaine, marijuana, methamphetamine, and opiates. He explained that during his adolescence, he rejected prescribed medication for being shy, introverted, and anxious, and instead he chose occasional marijuana use. He described his history of marijuana use as infrequent, immature, and unsophisticated. After his OPM PSI, he severed his contacts with frequent marijuana users. He was never dependent on marijuana. He has had a successful career working for the government contractor. He does not suffer from anxiety, and he has no reason to use marijuana in the future. He has matured, and he promised not to use marijuana in the future.

### **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.

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 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 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:

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.

Director of National Intelligence (DNI) Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, indicates:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines . . . . 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.

AG ¶ 25 provides two conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition)”; and “(c) illegal possession of a controlled substance . . . .” Applicant possessed and used marijuana<sup>5</sup> on numerous occasions. AG ¶¶ 25(a) and 25(c) are established.

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

(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

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<sup>5</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 *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

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).

Applicant provided some mitigating information. He ended his marijuana possession and use in January 2018, and he does not associate with frequent marijuana users. He understands that marijuana involvement is inconsistent with holding a security clearance. He promised not to use marijuana in the future.

The evidence against mitigating drug involvement and substance misuse security concerns is more substantial. Applicant possessed and used marijuana from about June 2011 to about August 2015 and in January 2018. Each time he possessed marijuana, he committed a federal crime. He used marijuana in 2018 after indicating in 2016 that he was not going to use marijuana and after completion of an SCA. His marijuana use in January 2018 is recent. Drug involvement and substance misuse security concerns are not mitigated.

### **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 Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 26-year-old engineer, and a defense contractor has employed him since February 2016. In 2016, he graduated from a top-tier engineering school with a bachelor’s degree. He describes his current employment with a defense contractor as highly successful. In his FORM response, he indicated he does not associate with frequent marijuana users, and he promised not to use marijuana in the future. There is no evidence that he used marijuana after January 2018.

The evidence against granting Applicant's security clearance is more persuasive. Applicant possessed and used marijuana on several occasions from about June 2011 to about August 2015 and once in January 2018. Each time he possessed marijuana, he committed a federal crime. He used marijuana in 2018 after indicating in 2016 on his SCA that he was not going to use marijuana in the future. His marijuana possession and use "raises questions about [his] ability or willingness to comply with laws, rules, and regulations." 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 granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement and substance misuse security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. More time without misuse of illegal drugs is necessary to mitigate security concerns.

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. Guideline H 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
Subparagraph 1.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances in this case, 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.

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Mark Harvey  
Administrative Judge