



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



In the matter of: )  
 )  
 [REDACTED] ) ISCR Case No. 17-03659  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Rhett Petcher, Esq., Department Counsel  
For Applicant: *Pro se*

07/23/2018  
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**Decision**  
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BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns about her illegal drug use and criminal behavior. Eligibility for access to classified information is denied.

**Statement of the Case**

On January 3, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement), Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).<sup>1</sup> Applicant responded to the SOR on January 3, 2018, and she elected a determination with a hearing. On May 25, 2018, a notice of hearing was issued, scheduling the hearing for June 12, 2018. The hearing proceeded as scheduled. Applicant testified and submitted one document, which I admitted as Applicant Exhibit (AE) A, without objection. Department Counsel submitted three documents, which I admitted as Government Exhibits (GE) 1 through 3, without objection. DOHA received the transcript on June 25, 2018.

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<sup>1</sup> The action was taken 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 implemented by the DOD on June 8, 2017.

## Findings of Fact

The SOR alleges security concerns based upon Applicant's illegal drug use, including while possessing a security clearance; two alcohol-related arrests; and two falsifications on her September 2015 security clearance application (SCA). In her response to the SOR, Applicant admitted the allegations in subparagraphs ¶¶ 1.a., 1.d., 2.a., and 2.b., and she denied the remaining allegations. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 28 years old. She earned a bachelor's degree in December 2012. Since June 2015, she has been employed as a contracts administrator for a DOD contractor. She was granted a DOD secret clearance in November 2015. She is not married, and she does not have any children.<sup>2</sup>

In June 2012, Applicant was arrested for and charged with driving under the influence (DUI). She failed a field sobriety test, and her blood alcohol level was measured at 0.22. She attended court-ordered counseling, her driver's license was suspended for seven months, and she was fined approximately \$5,000.<sup>3</sup>

In October 2016, Applicant was involved in a car accident. Applicant had marijuana in her possession at the time of the accident. She tested positive for marijuana following the accident. She was arrested and charged with DUI and possession of marijuana; however, the DUI charge was reduced to reckless driving. She was placed on probation for one year, lost her driver's license for three months, and paid approximately \$2,800 in fines and costs. Applicant currently consumes alcohol once or twice a month.<sup>4</sup>

In about 2006, Applicant was diagnosed with seizures. With her parent's knowledge, she illegally used marijuana daily until about 2008 to prevent seizures. During this period, Applicant purchased marijuana every two days. Applicant's seizures ceased by late 2007, and she stopped using marijuana by early- to mid-2008.<sup>5</sup>

In October 2016, Applicant illegally purchased marijuana, drove home, and then twice illegally used marijuana. At the time of Applicant's October 2016 DUI arrest, she had been returning from purchasing marijuana, with the intent to use marijuana again, when she was in a car accident. Applicant remains friends with an active marijuana user – who is legally prescribed marijuana – with whom she had used marijuana as a teenager. Applicant attributed her 2016 marijuana use to her emotional distress following her father's death. Applicant has not attended any grief, drug, or mental-health counseling since her October 2016 arrest. Applicant had two negative drug tests in November 2016 and May 2017.<sup>6</sup>

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<sup>2</sup> GE 1-2.

<sup>3</sup> GE 3; Tr. 42.

<sup>4</sup> GE 3; Tr. 43.

<sup>5</sup> GE 3; Tr. 27-29, 46-48.

<sup>6</sup> GE 3; Tr. 30-41, 59.

On her September 2015 security clearance application (SCA), Applicant listed no illegal drug use within the previous seven years. On her December 2016 SCA, Applicant listed that she used marijuana on two occasions while possessing a security clearance in October 2016. Applicant testified that her marijuana use began in 2006 and ceased prior to attending college in August 2008. She explained that she did not disclose any illegal drug use on her September 2015 SCA because she had not used any illegal drugs in the previous seven years. I found Applicant's testimony and explanation to be credible.<sup>7</sup>

Applicant's work performance, work ethic, and character are highly regarded by her current supervisor. Her supervisor's letter of support references poor "life decisions" but does not indicate that she is fully aware of Applicant's illegal drug use history.<sup>8</sup>

### **Policies**

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(c), 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

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<sup>7</sup> GE 1; GE 2; Tr. 28-31.

<sup>8</sup> AE A.

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.

## **Analysis**

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

The security concern for drug involvement 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

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

Applicant frequently purchased and used marijuana from 2006 until 2008. In October 2016, while possessing a security clearance, Applicant twice illegally purchased and twice used marijuana. Following her October 2016 arrest for DUI and possession of marijuana, she tested positive for marijuana. The Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (b), (c) and (f).

Conditions that could mitigate the drug involvement security concerns are provided under AG ¶ 26. The following are potentially applicable:

- (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

(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) 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.

Applicant abstained from marijuana use for over eight years; however, when faced with the emotional distress of her father's death, she deliberately sought out marijuana to purchase and use. Had she not been arrested, Applicant would have used marijuana again. About 20 months passed between Applicant's 2016 arrest and her security clearance hearing. Applicant has not sought any other assistance in dealing with her emotional distress or developing support structures to reduce the likelihood that future drug use will recur. Applicant's deliberate conduct, in knowing violation of DOD policies, casts doubt on her current reliability and judgment. AG ¶ 26(a) does not apply.

Applicant maintains contact with a childhood friend who has a prescription for medical marijuana; however, the individual does not use marijuana in Applicant's presence. There is no evidence that Applicant has changed or avoided the environment(s) where she previously used marijuana, and she has not provided a signed statement of intent to abstain from all drug involvement. Applicant has acknowledged her drug involvement and her violation of DOD policies, but there is no evidence of any actions she has taken to reduce the likelihood of her using marijuana in the future. AG ¶ 26(b) does not apply. There is no record evidence to support the application of AG ¶¶ 26(c) or 26(d).

Notwithstanding Applicant's emotional distress at the loss of her father, she took several deliberate actions to purchase and use marijuana, while possessing a DOD security clearance and aware of DOD policies prohibiting such drug use. While Applicant has acknowledged her poor judgment, there is no evidence that she has taken actions to avoid future lapses or to address her underlying emotional distress. Therefore, she has not mitigated the drug involvement and substance misuse concerns.

### **Guideline G, Alcohol Consumption**

The security concern for alcohol consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following is potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.

Applicant's alcohol consumption resulted in her 2012 DUI conviction. Although Applicant was arrested for DUI in October 2016, there is no record evidence that she was impaired by alcohol at the time of her arrest. There is no record evidence that Applicant failed any field sobriety tests, that her blood alcohol level exceeded the legal limit, or that she was in fact impaired at the time of her arrest. The Government did not provide substantial evidence that Applicant was impaired by alcohol at the time of her October 2016 arrest. AG ¶ 22(a) applies as to the 2012 DUI.

The burden thereby shifts to Applicant to rebut, explain, extenuate, or mitigate the facts. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. The following mitigating conditions are potentially applicable:

AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it 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;

AG ¶ 23(b): the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

AG ¶ 23(d): the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence with treatment recommendations.

Under AG ¶ 23(a), the first prong of this mitigating condition ("so much time has passed") focuses on the recency of the conduct. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. 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."

Applicant's 2012 DUI is the only alcohol-related incident or misconduct in the record evidence. Although Applicant continues to consume alcohol, there is no evidence of binge consumption or other alcohol-related security concerns. Since her 2012 DUI, Applicant has earned her bachelor's degree and begun employment at a DOD contractor.

Notwithstanding her poor judgment associated with her marijuana use, there is no evidence of security significant conduct associated with Applicant's alcohol consumption since her 2012 DUI. AG ¶ 23(a) applies. Applicant mitigated the alcohol consumption security concerns.

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

The concern under this guideline is set out in AG ¶ 15:

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 guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying condition is potentially applicable 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.

Applicant credibly testified that she did not use any illegal drugs between summer 2008 and October 2016. Therefore, her negative responses on her September 2015 SCA were accurate and no omissions occurred. AG ¶ 16(a) does not apply.

### **Guideline J, Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes several conditions that could raise security concerns under AG ¶ 31. The following are potentially applicable in this case:

(a) a pattern of minor offenses, any of which on their own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

In 2012, Applicant was convicted of DUI. In 2016, she was convicted of reckless driving and was found to have illegally possessed marijuana. She admitted that she twice

illegally purchased and twice illegally used marijuana in October 2016. AG ¶¶ 31(a) and (b) apply.

Criminal conduct security concerns may be mitigated under AG ¶ 32. The following are potentially applicable in this case:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Approximately 20 months elapsed between Applicant's most recent criminal behavior and the close of the evidentiary record. As discussed above, Applicant knowingly and deliberately violated criminal laws and DOD policies when she repeatedly purchased, transported, and used marijuana in October 2016. While she was experiencing significant emotional distress at the time, there is no evidence that her conduct may have ceased but for her arrest. In fact, she had just purchased more marijuana to use. Notwithstanding the passage of time and Applicant's continued favorable work performance, there is no evidence that she has taken steps to reduce the likelihood of future drug use or criminal behavior. AG ¶¶ 32(a) and 32(d) do not apply.

### **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 relevant 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), 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H, G, J, and E and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant repeatedly purchased, transported, and used marijuana while possessing a security clearance, at a time when she was distressed at the loss of her father. There is no evidence that she has taken steps to reduce the likelihood of future drug use or to address the issues that led her to use of illegal drugs in October 2016. Notwithstanding her well-regarded work performance and character, I cannot conclude that she has mitigated the drug involvement and criminal conduct security concerns based on the evidentiary record at this time.

### **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.-1.d.:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraphs 2.a.-2.b.:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a.-3.b.:	For Applicant
Paragraph 4, Guideline J:	AGAINST APPLICANT
Subparagraph 4.a.:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance.<sup>9</sup> Eligibility for access to classified information is denied.

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Eric H. Borgstrom  
Administrative Judge

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<sup>9</sup> See SEAD 4, Appendix A, ¶¶ 1(d) and 2(c).