



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 14-03324
	)	
Applicant for Security Clearance	)	

**Appearances**

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

02/02/2016

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges and the record establishes that he used marijuana 3 times from January 1998 to January 2001, and on 10 to 25 occasions from 2008 to June 2013. He provided accurate information about his illegal drug use on his May 9, 2007 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Government Exhibit (GE) 1). Applicant held a security clearance from August 2007 to present. Personal conduct security concerns are mitigated; however, drug involvement security concerns are not mitigated. Access to classified information is denied.

**History of the Case**

On May 9, 2007, and August 14, 2013, Applicant completed and signed two SF 86s. (GE 1; GE 2) On July 2, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest 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. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth security concerns arising under AGs H (drug involvement) and E (personal conduct).

On August 18, 2015, Applicant responded to the SOR and requested a hearing. On October 14, 2015, Department Counsel was ready to proceed. On October 27, 2015, the case was assigned to me. On December 9, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 12, 2016. (HE 1) The hearing was held as scheduled. During the hearing, Department Counsel offered three exhibits and Applicant offered two exhibits, which were admitted into evidence without objection. (Transcript (Tr.) 16-18; GE 1-3; AE A-B) On January 19, 2016, I received a transcript of the hearing.

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

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a, 1.b, and 2.a, and he also provided some extenuating and mitigating information. He denied the allegation in SOR ¶ 2.b. Applicant's admissions are accepted as findings of fact.

Applicant is a 37-year-old systems engineer, who is seeking to retain his security clearance. The same defense contractor has employed him for 12 years. (Tr. 6-7, 26) In 1997, he graduated from high school, and in 2003, he received a bachelor of science degree in electronics engineering technology. (Tr. 6) In 2013, he was awarded a master of science degree in system engineering. (Tr. 6-7) He has never married, and he does not have any children. (Tr. 7; GE 1; GE 2) He has never served in the military. (GE 1; GE 2)

### **Personal Conduct and Drug Involvement**

When Applicant completed his May 9, 2007 SF 86, he was asked about illegal drug use in the previous seven years, and he disclosed three marijuana uses from January 1998 to January 2001, while he was in college. (GE 1) At his hearing, he said this was accurate information. (Tr. 19-20, 23)

Applicant's descriptions of when he used marijuana were estimates. (Tr. 23-25) In his October 15, 2013 Office of Personnel Management (OPM) personal subject interview (PSI), he estimated he used marijuana five times per year; however, his interview did not specify the years he used marijuana five times each year. (GE 3) Moreover, he said he made a high estimate of his marijuana use to ensure he was making full disclosure of his marijuana use. From 2008 or 2009 to 2013, he said he used marijuana about two to five times a year with a particular group of his friends. (Tr. 20-21, 35) He stopped using marijuana in June 2013. (Tr. 34) The decision to stop using marijuana was reinforced when he learned during his October 2013 OPM PSI that marijuana use was prohibited for security clearance holders. (Tr. 21, 23, 27, 29, 31, 34-

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

35) He told the OPM investigator that he was willing to stop using marijuana in order to maintain his security clearance. (Tr. 32)

Applicant's employer prohibits illegal drug use. (Tr. 25-26) Applicant's colleagues consider marijuana use to be "fairly acceptable," and some of them hold security clearances. (Tr. 27) After October 2013, he told his friends that he does not use marijuana because it would put his job in jeopardy. (Tr. 29) Some of his friends have prescriptions authorizing marijuana use. (Tr. 33) When he sees friends use marijuana, he leaves that location. (Tr. 30, 34) His friends do not consider Applicant to be a marijuana user. (Tr. 22)

### **Character Evidence**

Two customers receiving assistance from Applicant lauded his diligence, professionalism, ethics, integrity, loyalty, competence, and trustworthiness. His valuable assistance was very helpful. He is an asset to his company, community, and country. (AE A; AE B)

### **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 revised 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.

This decision is not based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. Thus, any 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.

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

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes three drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse";<sup>2</sup> "(c) illegal drug possession"; and "(g) any illegal drug use after being granted a security clearance." AG ¶¶ 25(a), 25(c), and 25(g) apply because Applicant used marijuana on 10 to 25 occasions from 2008 to June 2013.<sup>3</sup> He possessed marijuana

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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 medical direction."

<sup>3</sup>AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis,

before he used it. He used marijuana while holding a security clearance. Consideration of mitigating conditions is required. The 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).

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

(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) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

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

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depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

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 substance. See Sch. I(c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

(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.

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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant recognized the adverse impact on his authorization to have continued access to classified information additional marijuana use will have. There is no evidence of marijuana use after June 2013. He said he intends to continue to abstain from illegal drug possession and use. However, he has ongoing friendships with marijuana users. It is too soon to conclude that his marijuana use happened under such circumstances that it is unlikely to recur. His marijuana use while holding a security clearance continues to cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

In conclusion, I have credited Applicant with mitigating the three marijuana uses from January 1998 to January 2001 while he was in college. Those three marijuana uses are not recent, and he did not use marijuana again for seven years. However, Applicant’s possession and use of marijuana on 10 to 25 occasions from 2008 to June 2013 continue to raise security concerns. From 2008 to present, Applicant’s company prohibited illegal drug use, and he held a security clearance. The passage of more time without illegal drug use is necessary to demonstrate a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

## **Personal Conduct**

AG ¶ 15 expresses the security concern pertaining 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 information. Of special interest is any failure to provide truthful

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying with respect to the alleged falsification of Applicant's May 9, 2007 SF 86, which was used to process the adjudication of his security clearance 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

In his May 9, 2007 SF 86, Applicant was asked whether in the last seven years he used marijuana. Applicant answered, "Yes," and he disclosed that he used marijuana three times from January 1998 to January 2001. In his October 15, 2013 OPM PSI, he estimated he used marijuana five times per year; however, his interview did not specify the years he used marijuana five times each year. Moreover, he explained his estimate of five times per year was his attempt to be conservative and fully disclose the magnitude of his marijuana use. He credibly stated that his marijuana use five times a year related to the years 2008 to 2013, and not to the years 1998 to 2001. All of the evidence of his marijuana use is based on his self-reports. He insisted that he reported accurate information on his May 9, 2007 SF 86. Applicant has refuted AG ¶ 16(a).

The other personal conduct concern in SOR ¶ 2.a relates to his marijuana use while holding a security clearance. This allegation is explicitly covered under Guideline H, and is sufficient for an adverse determination under that guideline. Marijuana use while holding a security clearance reflects "questionable judgment . . . or unwillingness to comply with rules and regulations [and raises] raise questions about [his] reliability, trustworthiness and ability to protect classified information." See AG ¶ 15. However, as it is a duplication of the same conduct and concern described under Guideline H, personal conduct concerns are 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(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.

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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has achieved important employment goals, demonstrating some self-discipline, responsibility, and dedication; however, this evidence is insufficient to mitigate security concerns. Applicant is a 37-year-old systems engineer, who has been employed by the same defense contractor for 12 years. In 2003, he received a bachelor of science degree in electronics engineering technology, and in 2013, he was awarded a master of science degree in system engineering. Two customers receiving assistance from Applicant lauded his diligence, professionalism, ethics, integrity, loyalty, competence, helpfulness, and trustworthiness. He is an asset to his company, community, and country.

The adverse information is more significant. Applicant possessed and used marijuana on 10 to 25 occasions from 2008 to June 2013. During those years, his company prohibited illegal drug use, and he held a security clearance. These are relatively recent and serious rule violations.

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 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 abstinence from marijuana use, 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, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are mitigated; however, drug involvement 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:	For Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARK HARVEY  
Administrative Judge