



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
XXXXXXXXXXXX, XXXXX ) ISCR Case No. 14-03450  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Gina L. Marine, Esq., Department Counsel  
For Applicant: *Pro se*

06/29/2015

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines H (drug involvement) and E (personal conduct). Clearance is denied.

**Statement of the Case**

On July 30, 2013, Applicant submitted a Questionnaire for National Security Positions (SF 86). On September 2, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 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 alleged security concerns under Guidelines H and E. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it

recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant answered the SOR on October 1, 2014 and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated March 31, 2015, was provided to him by letter dated May 4, 2015. Applicant received the FORM on May 8, 2015. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information and by memorandum dated June 10, 2015, Department Counsel indicated she had no objections to Applicant's FORM response. The case was assigned to me on June 19, 2015.

### **Findings of Fact**

Applicant admitted all the SOR allegations. After a thorough review of the record, I make the following findings of fact.

#### **Background Information**

Applicant is a 32-year-old systems engineer employed by a defense contractor since October 2004. He seeks to retain his security clearance, which he has held since November 2006. (Item 2)

Applicant was awarded a bachelor's degree in May 2004. (Items 2, 4) He has never married and has no dependents. Applicant did not serve in the armed forces. (Item 2)

#### **Drug Involvement/Personal Conduct**

Applicant listed the following drug use on his July 2013 SF 86, "I was at a friend's house and I inhaled from a joint. This was more of a joke than anything, as I am not a regular or recreational user of any type of drugs" estimating the use occurred in January 1996. Applicant added that his most recent drug use occurred in January 2013 stating, "Only a handful of times since I first experimented in my teens. I have never been a regular user of any type of drug." (Item 2)

On a previously submitted SF 86 on November 30, 2005, Applicant indicated that he used marijuana three times during the approximate timeframe of August 1997 to September 1997. (Item 4)

During Applicant's Office of Personnel Management Personal Subject interview on September 3, 2013, he stated that he used marijuana "a handful of

times” since approximately 1996. Within the last seven years, Applicant used marijuana one time in approximately January 2013 while at a party claiming that he took one puff from a marijuana joint as the joint was being passed around. At the time of this marijuana use, he held a secret security clearance. (Item 3) There is no record evidence that Applicant disclosed his 2013 marijuana use to his employer or that his employer was aware of it. (Item 3)

In his SOR answer, Applicant expressed remorse for his past marijuana use and stated that he has no intention using any drugs in the future. He recognizes the adverse implications of drug use, especially as it pertains to his employment. Applicant focused on the infrequency of his drug use over the past ten years and noted that his most recent use occurred 21 months from the time of his SOR answer. (Item 1)

In Applicant’s FORM response, he provided extensive information regarding a June 2005 driving under the influence (DUI) charge for which he was selected for the pretrial diversion program. He successfully completed the program and the charge was dismissed. While this DUI charge was listed on his July 2013 SF 86 and discussed during his September 2013 OPM PSI, it was not alleged as a security concern on his SOR. Additionally, Applicant rebutted an assertion made by Department Counsel in her FORM that he failed to disclose his 2005 DUI to his employer. His security officer stated that Applicant disclosed his 2005 DUI arrest to him, but was not required to do so as he did not have a security clearance at the time of this arrest. I have not considered Applicant’s 2005 DUI arrest in reaching my final decision regarding Applicant’s suitability for a security clearance. (FORM response)

Furthermore in his FORM response, Applicant submitted a signed statement of intent not to use marijuana in the future with the understanding that any further drug violation would result in the automatic revocation of his clearance. (FORM response) There is no record evidence of a current drug and alcohol assessment.

### **Character Evidence**

Applicant submitted a reference letter from his supervisor. His supervisor has known him professionally and personally since 2005. Applicant has been rated highly in the company’s engineering organization and has received three promotions in less than ten years. Applicant’s supervisor also noted that he has received 23 awards for outstanding performance adding that he is highly regarded by senior engineering management. (Item 1)

## 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. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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 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 (4<sup>th</sup> 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).

## **Drug Involvement**

AG ¶ 24 articulates the security concern pertaining to 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 eight drug involvement-related conditions that could raise a security concern and may be disqualifying. Three of those drug involvement disqualifying conditions are applicable in this case: (a) any drug abuse, defined as the illegal use of a drug or use of a legal drug in a manner that deviates from the approved medical direction; (c) illegal drug possession, including cultivation, processing, manufacture, purchase, or sale or distribution; or possession of drug paraphernalia;<sup>1</sup> and (g) any illegal drug use after being granted a security clearance. The Government established its case through Applicant’s admissions and the evidence presented.

---

<sup>1</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, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

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

(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.

None of the drug involvement mitigating conditions are fully applicable. Applicant claims that, in the last seven years, which is the time span covered by his SF 86, he used marijuana only one time in January 2013 at a party as a joint was being passed around. He depicted this one-time use as an "isolated incident" that was "more of a joke than anything." Of note, Applicant acknowledged that he held a secret clearance at the time of this party. Applicant was no stranger to the Government's position on drug use while holding a security clearance having completed an SF 86 in November 2005.

AG ¶ 26(a) does not apply because Applicant's illegal use of marijuana, most notably while holding a security clearance, raises serious questions about his ability to exercise good judgment, which encompasses his willingness to comply with laws, rules, and regulations. Applicant is able to derive some

mitigation from AG 26 ¶ (b) as a result having submitted a signed statement of intent with automatic revocation of clearance for any violation. However, it is unclear from the record regarding his willingness to disassociate from drug-using associates and contacts. Further corroboration is required regarding Applicant's ability and commitment to refrain from further drug use and that he is drug-free. Finally, and assuming that Applicant's most recent drug use was more than two years ago, that passage of time is countered by Applicant's decision to use marijuana while holding a security clearance after a reported 10-year abstinence.

## **Personal Conduct**

AG ¶ 15 articulates 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 seven personal conduct concerns that could raise a security concern and may be disqualifying. One of those disqualifying conditions is applicable in this case: "(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing...." The Government established this condition through Applicant's admissions and the evidence presented.

AG ¶ 17 provides seven potential conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's security violation is cross-alleged under Guideline E. None of the mitigating conditions under this concern are applicable for the reasons discussed under Guideline H.

### **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 relevant 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.

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. AG ¶ 2(c). My comments in the Analysis section are incorporated in the whole-person discussion.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his excellent work record and 11 years of employment as a defense contractor, essentially his entire working life since graduating from college. Apart from his statements of remorse, he provided insufficient evidence corroborating rehabilitation. If other favorable evidence exists, Applicant did not provide it. Drug use, especially while holding a security clearance, is inconsistent with the standards required of those entrusted with holding a security clearance.

Lastly, in requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, sufficiently articulate his position, and mitigate the security concerns. By failing to provide such information, and in solely relying on the evidence presented in the FORM and precluding a credibility assessment, security concerns remain.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

---

ROBERT J. TUIDER  
Administrative Judge