



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



In the matter of: )  
)  
) ISCR Case No. 14-06034  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: Jeffrey L. Rhodes, Esq.

02/23/2016

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency between 1995 and 2010, and tested positive for marijuana use in 1998. He used marijuana six times after he was granted a security clearance in 2005. He disclosed his marijuana use in his 2004 and 2014 security clearance applications (SCA). There is no evidence of any further illegal drug use after 2010. Under the circumstances of this case, Applicant's use of marijuana does not raise questions about his current reliability, trustworthiness, judgment, ability to comply with the law, and to protect classified information. He mitigated the Guidelines H and E security concerns. Clearance is granted.

**Statement of the Case**

Applicant submitted his most recent SCA on January 8, 2014. After reviewing it, and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant or deny Applicant's eligibility for a clearance. On January 23, 2015, DOD issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and

Guideline E (Personal Conduct).<sup>1</sup> Applicant answered the SOR on February 23, 2015, and elected to have his case decided on the written record, in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), dated September 2, 2015, was mailed to him on September 17, 2015. Applicant received the FORM on October 5, 2015. He was allowed 30 days to submit any objections to the FORM and to provide material in rebuttal, extenuation, and mitigation. Applicant failed to submit an answer within the period provided. The case was assigned to me on December 1, 2015.

On January 11, 2016, Applicant's attorney filed a motion requesting leave to file a response to the FORM. Department Counsel did not object, and I granted the motion. Applicant submitted his response to the FORM on January 29, 2016, which included Applicant's statement of intent to never use illegal drugs again, with automatic revocation of clearance for any violation. Department Counsel did not object, and Applicant's FORM response was admitted and included in the record.

### **Findings of Fact**

Applicant admitted all the SOR factual allegations with explanations. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, including the evidence attached to the FORM (Items 1 through 7) and his response to the FORM, I make the following findings of fact:

Applicant is a 41-year-old employee of a federal contractor. He graduated from high school in 1993. He attended college from 1993 to 1999, and earned bachelor's degrees in May 1998 and in May 1999. Applicant has never been married, and he has no children. He started working for federal contractors in 2004, and was hired by his current employer, a federal contractor, in January 2012.

Applicant submitted his first security clearance application in June 2004. He disclosed in Section 27 (Your Use of Illegal Drugs and Drug Activity – Illegal Use of Drugs) that he illegally used marijuana on about 50 occasions between 1995 and 2003. He later explained to a government investigator during his September 2004 interview that, as a junior in college (1993), he worked as a bartender and his coworkers introduced him to marijuana. After work they would get together to smoke marijuana. In 1998, Applicant applied for a position in a computer manufacturing company. As part of the in processing, he was screened for drug use, which tested positive for marijuana and he was not hired for the position.

Applicant further stated in his September 2004 interview that he decided that the continued use of marijuana was not worth the risks to his personal life and potential new

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<sup>1</sup> The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

jobs. He claimed that he had made the decision not to use marijuana in the future and that he had not done so since 2003. Following his interview, Applicant was granted a secret level clearance in April 2005.

Applicant submitted his most recent SCA in 2014. In his response to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant disclosed that he had illegally used marijuana, while possessing a security clearance, approximately six times between February 2008 and December 2010. He claimed that his use was concurrent with heavy alcohol use in social settings. Applicant further claimed that he had not use any illegal drugs since December 2010.

During a subsequent government interview in 2014, Applicant disclosed the circumstances surrounding his last use of marijuana in 2010. He averred that he loves his job and realized it is not worth putting his job at risk by breaking the law. In his answer to the FORM, Applicant claimed that he has never been addicted to marijuana, and he used it occasionally when it was provided by others. Applicant averred that he no longer associates with his marijuana-using friends or frequents places where the illegal use of drugs is likely. To show his commitment to never use illegal drugs again, Applicant submitted a written statement of intent with automatic revocation of clearance for any violation.

Applicant acknowledged that his illegal drug use demonstrated bad judgment; however, he noted that his admissions also demonstrate his honesty, reliability, and trustworthiness.

## **Policies**

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government

must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 articulates the security concern for drug involvement:

Use 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.

Applicant illegally used marijuana with varying frequency between 1995 and December 2010. He tested positive for marijuana use in 1998. Furthermore, he used marijuana at least six times between 1998 and 2010, after he was granted a secret level security clearance in 2005.

AG ¶ 25 describes three conditions related to drug involvement that could raise a security concern and are disqualifying in this case:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

AG ¶ 26 provides two 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;  
and

(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;

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

Both Guideline H mitigating conditions are raised by the facts and circumstances in this case and mitigate the drug involvement security concerns. Applicant disclosed his illegal use of marijuana in both his 2004 and 2014 SCAs. There is no evidence that the Government had any independent knowledge about his use of marijuana prior to his disclosures. The SOR allegations were based on his candid disclosures in both his 2004 and 2014 SCAs.

It has been over five years since Applicant's most recent use of marijuana. There is no evidence of any further illegal drug abuse after December 2010. Applicant promised to never use any illegal drugs ever again. To reinforce his commitment, Applicant signed a statement of intent with automatic revocation of clearance for any violation. I have given this statement less weight, and reviewed Applicant's evidence cautiously, in light of his prior unkept promise not to use marijuana.

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

AG ¶ 15 articulates the security concern for 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.

The Guideline E allegation cross-alleged the same facts and circumstances alleged under Guideline H, which are incorporated herein by reference. Applicant's illegal drug use triggers the applicability of the following disqualifying condition under AG ¶ 16:

(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.

AG ¶ 17 lists five conditions that could potentially mitigate the personal conduct security concerns:

(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; and

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

Applicant disclosed his illegal use of marijuana in both his 2004 and 2014 SCAs. The Government had no independent knowledge of Applicant's use of illegal drugs until his disclosures. Applicant's disclosures demonstrate an acknowledgment of his mistakes. It also shows his intent to comply with the law, rules, and regulations. By disclosing the information, Applicant reduced his vulnerability to exploitation, manipulation, and duress. Moreover, it shows Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest.

For the above reasons, and those discussed under Guideline H, incorporated herein, I find that AG ¶ 17 ¶¶ (c), (d), and (e) partially apply.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). 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 that guideline, but some warrant additional comment.

Applicant is a 41-year-old employee of a defense contractor. His past illegal drug use is not recent. There is no evidence of any further marijuana use after 2010, or of any other illegal drug use. He has established a reasonable period of abstinence and a change of lifestyle. Applicant was honest and forthcoming in both his 2004 and 2014 SCAs and disclosed his past illegal drug use.

I carefully considered that Applicant promised in 2003-2004 to stop using illegal drugs and he failed to keep it. His illegal marijuana use after he was granted a security clearance in 2005 raises serious concerns. Applicant violated the trust placed on him by the Government. His criminal behavior underlines his possible inability or unwillingness to comply with the law, rules, and regulations.

On balance, Applicant's period of abstinence, his disclosures in both of his SCAs, and his statement of intent under penalty of clearance revocation for any violation, give substance to his promise to never use drugs again. He clearly understands the possible adverse consequences he will face if he is ever involved in the use of illegal drugs. He specifically understands that he could be fired from his job, and his eligibility for a security clearance may be revoked.

Applicant acknowledged his mistakes and demonstrated his intent to comply with the law, rules, and regulations in the future. His disclosures show Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest. After weighing all the facts and circumstances, in the context of the whole person, I conclude that Applicant has mitigated the drug involvement and personal conduct security concerns.

### **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:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is granted.

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JUAN J. RIVERA  
Administrative Judge