



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



In the matter of: )  
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 REDACTED ) ISCR Case No. 14-04163  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government:  
John B. Glendon, Esq., Deputy Chief Department Counsel  
Bryan J. Olmos, Esq, Department Counsel

For Applicant: Alan V. Edmunds, Esq.

07/31/2015

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the drug involvement and personal conduct security concerns raised by his marijuana use and drug-related arrest after being granted a security clearance. Notwithstanding the presence of some favorable evidence, his conduct continues to raise questions about his eligibility for access to classified information. Clearance is denied.

**Procedural History**

On October 3, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant’s conduct and circumstances raised security concerns under the criminal conduct, drug involvement, and personal conduct

guidelines.<sup>1</sup> On November 17, 2014, Applicant answered the SOR and requested a hearing to establish his eligibility for access to classified information.

On April 30, 2015, Department Counsel notified the Hearing Office that the Government was ready to proceed. Applicant's hearing was scheduled, with the agreement of the parties, for July 14, 2015. I convened the hearing as scheduled. At hearing, Department Counsel offered Government Exhibits (Gx.) 1 – 4. Applicant testified and offered Applicant's Exhibits (Ax.) A – E. He requested additional time post-hearing to submit further documentary evidence. I granted his request, and he timely submitted Ax. F. All exhibits were admitted into evidence without objection. The hearing transcript (Tr.) was received on July 22, 2015, and the record closed on July 24, 2015.

### **Findings of Fact**

After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant, 25, began using marijuana in 2012, during his senior year in college. He continued to use marijuana following his graduation, submission of a security clearance application (SCA), starting his employment as a federal contractor, and after being granted a security clearance. He inadvertently failed to list his past marijuana use on his SCA.

In late 2012, Applicant was stopped by police for speeding. A subsequent search of his car uncovered marijuana and drug paraphernalia. He was arrested and charged with drug-related offenses. After completing court-mandated drug counseling, his case was dismissed by civilian authorities. The discharge summary from the court-mandated drug program, which is signed by a licensed clinical alcohol and drug counselor, states that Applicant's prognosis is good, provided he remain abstinent from the use of mood altering substances for a minimum of at least one year.<sup>2</sup> Applicant states that he has not been involved with illegal drugs since his arrest, and submitted a negative drug screen from November 2014.<sup>3</sup>

Applicant, after seeing a poster in his office regarding the requirement to self-report adverse information, informed his company's facility security officer about his arrest. He did so about a month after the arrest. He was subsequently interviewed by an investigator conducting his initial background investigation. Applicant voluntarily provided information regarding the arrest, as well as his past drug use. During the interview, Applicant stated his intent not to be involved with illegal drugs in the future.

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<sup>1</sup> This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

<sup>2</sup> Ax. A.

<sup>3</sup> Ax. B.

He subsequently submitted a signed letter of intent not to use illegal drugs in the future on condition of automatic revocation of his clearance.<sup>4</sup>

Applicant has received favorable performance evaluations from his employer. The performance evaluations rate Applicant as “exceeds” expectations, with “exceptional work ethic.”<sup>5</sup> They further reflect that Applicant’s leadership has complete confidence in his integrity and trustworthiness. Applicant’s supervisors submitted letters extolling Applicant’s work, honesty, and reliability.<sup>6</sup>

### **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.<sup>7</sup>

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<sup>4</sup> Gx. 2; Ax. F.

<sup>5</sup> Ax. D.

<sup>6</sup> Ax. E.

<sup>7</sup> See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“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.”).

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. 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 an 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.<sup>8</sup>

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

## **Analysis**

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

The security concern regarding criminal conduct is explained at 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.

Applicant's past illegal drug involvement, which culminated in his arrest for marijuana possession and drug paraphernalia, raises this security concern. It also triggers application of the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The guideline also sets forth a number of conditions that may mitigate the criminal conduct concern. The following mitigating conditions warrant additional discussion:

AG ¶ 31(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is

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<sup>8</sup> Security clearance determinations are “not an exact science, but rather predicative judgments about a person's security suitability.” ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004). An administrative judge is required to examine an individual's past history and current circumstances to make a predictive judgment about an individual's ability and willingness to protect and safeguard classified information. ISCR Case No. 11-12202; ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013).

unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 31(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.

Applicant's illegal drug involvement ended almost three years ago, and has not been repeated. Before getting involved with marijuana during his senior year in college, Applicant did not engage in criminal activity. After his arrest, Applicant has not engaged in any type of criminal behavior that would call into question his fitness to hold a security clearance. His employment record is good. AG ¶¶ 31(a) and (d) apply.<sup>9</sup> Applicant's past criminal conduct no longer raises a security concern.

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

The security concern regarding illegal drug involvement is set forth at AG ¶ 24:

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's marijuana use in 2012, especially after being granted a security clearance, raises the drug involvement concern. The record evidence establishes the following disqualifying conditions:

AG ¶ 25(a): any drug abuse;<sup>10</sup>

AG ¶ 25(c): illegal drug possession, . . . or possession of drug paraphernalia; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The guideline also sets forth a number of conditions that could mitigate the drug involvement concern. I have considered all the mitigating conditions and only the following are relevant in this case:

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<sup>9</sup> The drug involvement mitigating conditions are the same or similar to some of the mitigating conditions listed under Guidelines H and E. *Compare*, AG ¶¶ 26(a), 26(b), *with*, AG ¶¶ 17(c), 17(d), 26(a), 26(b). Additionally, all three guidelines state that disqualifying conduct may raise a concern about an individual's judgement, reliability, and trustworthiness. Yet, each guideline represents a separate and distinct security concern. Thus, a favorable determination as to one guideline does not necessarily mean that an individual has mitigated concerns raised under a separate guideline(s).

<sup>10</sup> The Directive 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." See AG ¶ 24(b).

AG ¶ 26(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;

AG ¶ 26(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.

Applicant's illegal drug involvement occurred primarily while he was in college and ended nearly three years ago. Furthermore, he has promised not to use illegal drugs in the future on condition of automatic revocation of his clearance. However, he used marijuana and was arrested for possession of marijuana and drug paraphernalia after being granted a security clearance, which raises heightened concerns about his judgment, reliability, and willingness to comply with rules and regulations. Although Applicant convincingly testified that he was not specifically aware of his employer's drug policy and the standards required for those granted access to classified information, he was generally aware that involvement with illegal drugs, to include marijuana, was incompatible with his employment as a federal contractor granted access to classified information. Instead of reforming his behavior to that required of all individuals granted a security clearance when he was hired as a federal contractor, Applicant decided to continue his involvement with illegal drugs. Under such circumstances, the favorable evidence is outweighed by the serious security concerns raised by his illegal drug involvement while possessing a security clearance.<sup>11</sup> AG ¶¶ 26(a) and 26(b) do not apply. Applicant's illegal drug involvement after being granted a security clearance remains a security concern.

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

The personal conduct security concern is set forth at 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 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 SOR cross-alleges Applicant's use of marijuana after being granted a security clearance as a concern under Guideline E. As explained previously, such

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<sup>11</sup> ISCR Case No. 14-02203 (App. Bd. Mar. 30, 2015) (passage of five years since last used marijuana does not mitigate drug involvement concern because individual held clearance at time of use); ISCR Case No. 14-01551 (App. Bd. Dec. 15, 2014) (sustaining adverse determination, where individual's puff from a marijuana cigarette occurred while holding a security clearance).

conduct calls into question Applicant's judgment and willingness to comply with rules and regulations. His conduct also establishes disqualifying condition AG ¶ 16(c).<sup>12</sup> I have considered all the mitigating conditions under Guideline E and, for similar reasons explained under the drug involvement guideline, find that none apply. See, e.g., ISCR Case No. 13-01281 (App. Bd. Aug. 4, 2014) (sustaining denial under Guideline E where applicant used marijuana after being granted a security clearance).

The SOR also alleges that Applicant's failure to list his past drug use on his SCA was deliberate and, therefore, disqualifying under Guideline E.<sup>13</sup> Individuals seeking a security clearance must be fully upfront and candid on their application and during the ensuing background investigation. However, the omission of material, adverse information standing alone is not enough to establish that an individual intentionally falsified their SCA. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an individual's true intent.<sup>14</sup>

Applicant credibly testified that the omission of his past drug use from his SCA was not intentional. His subsequent actions demonstrate that his failure to list his past drug use was a mistake. First, he self-reported his drug-related arrest to his FSO, contemporaneously with the arrest. Second, he fully cooperated with the ensuing security clearance background investigation by discussing the arrest. Third, he voluntarily disclosed and candidly detailed his past drug involvement to the background investigator. Cf. AG ¶ 17(a).<sup>15</sup> His actions following the submission of the SCA are inconsistent with an individual who is attempting to hide or mislead the Government regarding his past drug involvement. Accordingly, I find that Applicant refuted the falsification allegation. However, as noted above, personal conduct concerns remain due to Applicant's illegal drug involvement following the grant of a security clearance.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>16</sup> I gave due consideration to all the favorable and

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<sup>12</sup> Credible adverse information in several adjudicative issue areas that . . . when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not safeguard protected information.

<sup>13</sup> See AG ¶ 16(a).

<sup>14</sup> See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

<sup>15</sup> The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

<sup>16</sup> The non-exhaustive list of factors are: (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

extenuating factors in this case, including Applicant's relative young age when the conduct occurred, his honesty in self-reporting his drug-related arrest and correcting the omission of his past drug use on the SCA, his good employment record, and favorable character references. Applicant's favorable evidence is admittedly substantial and may provide the basis for granting him eligibility for a clearance at some future point. However, at this time, the favorable evidence does not outweigh the serious security concerns raised by his involvement with illegal drugs after being granted a security clearance. Close cases, as the present one, must be decided in favor of national security.<sup>17</sup> Consequently, the record evidence leaves me with doubts and questions about Applicant's current eligibility for access to classified information.

### Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct)	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline H (Drug Involvement)	AGAINST APPLICANT
Subparagraphs 2.a – 2c:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant <sup>18</sup>
Subparagraph 3.b:	For Applicant

### Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information at this time. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge

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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.

<sup>17</sup> *Egan*; AG ¶ 2(b).

<sup>18</sup> SOR 3.a cross-alleges the allegations under ¶¶ 1 and 2. This adverse determination and that under Guideline H only extends to Applicant's illegal drug involvement after being granted a security clearance.