



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-04598
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Stephanie Hess, Esq., Department Counsel  
For Applicant: Sheldon I. Cohen, Esq.

04/29/2016

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant's long history of marijuana-related criminal conduct (including his use, possession, and sale of marijuana after he was granted a security clearance), and his deliberate falsification of his 2003 security clearance application (SCA) to cover his marijuana-related criminal conduct continue to raise questions about his current reliability, trustworthiness, judgment, and ability to comply with the law and protect classified information. He failed to mitigate the Guidelines H and E security concerns. Clearance is denied.

**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 Applicant eligibility for a clearance. On October 22, 2014, the 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 November 11, 2014, and

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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*

requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to another administrative judge on October 28, 2015. It was reassigned to me on January 11, 2016. The DOHA issued a notice of hearing on November 30, 2015, scheduling a hearing for January 12, 2016. At the hearing, the Government offered eight exhibits (GE 1 through 8). Applicant testified and submitted seven exhibits (AE A through G). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 21, 2016.

### **Findings of Fact**

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.d, 1.e, and 2.b through 2.g, with explanations. He denied the allegations in SOR ¶¶ 1.b, 1.c, and 2.a. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 35-year-old network engineer employed with a federal contractor. He graduated from high school in 1998, and attended a community college in 2009, but did not receive a degree. He also attended a vocational school to complete some information technology certifications in 2013. Applicant has never been married. He resided with a cohabitant between 2011 and 2015, and he has a three-year-old daughter.

Applicant worked for two federal contractors between April 2002 and September 2011. He was laid off and unemployed between September 2011 and January 2012. He was hired by his current employer, a federal contractor, in January 2012.

Applicant submitted his first SCA in February 2003. In response to Section 24 (Your Police Record – Alcohol/Drug Offenses) asking whether he had ever been charged with or convicted of any offense related to alcohol or drugs, Applicant answered “yes” and disclosed that in March 2003 he was charged with driving while intoxicated (DWI). Applicant failed to disclose that in December 1998 and February 1999 he was charged with possession of alcohol under 21. He was convicted of both charges and fined in January 1999 and July 1999, respectively. (GE 5) Applicant completed alcohol and other drug education counseling in October 2001. (GE 7)

In response to Section 27 (Your Use of Illegal Drugs and Drug Activity-Illegal Use of Drugs), asking whether in the last seven years he had illegally possessed, or used any controlled substances (including marijuana), or used them while possessing a security clearance, Applicant answered “no.” He deliberately failed to disclose his prior

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*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.

illegal marijuana use from 1997 to 2003. Applicant was granted a secret level security clearance in 2003. At his hearing, Applicant admitted that he deliberately falsified his 2003 SCA because he wanted to keep his job.

Applicant submitted his second SCA in January 2014. In response to Section 22 (Police Record) asking whether in the last seven years he had been issued a criminal ticket or summons, arrested, charged with or convicted of any criminal offense, or whether he had been or was currently on probation or parole, Applicant answered "yes." He disclosed that in January 2005 he was charged with possession with intent to distribute.

At his hearing, Applicant explained that a friend told him that some guys from a neighboring state were looking for marijuana. Applicant testified: "I knew I could make some money, and so I drove out there with them one night and it turned out to be the cops." He sold four pounds of marijuana to the police officers. (Tr. 116) He claimed that was the last time he sold marijuana. He stopped selling marijuana because he did not want to get in any more trouble – that it was not worth it. (Tr. 103)

Applicant was convicted of possession with intent to distribute (a felony) in November 2005, and placed on three years' probation until November 2008. He also was ordered by the court to attend substance abuse counseling from March to July 2005. In August 2008, Applicant was charged with violating condition of release. (GE 3)

Additionally, Applicant disclosed on his 2014 SCA the following offenses:

(1) In June 2006 he was charged with both attempting to operate a motor vehicle while intoxicated and under the influence of alcohol. Both charges were *nolle prosequi* in December 2006. Applicant participated in substance abuse counseling during September 2006.

(2) In December 2009-January 2010 Applicant was arrested and found to be in possession of marijuana. He was charged with possession of a controlled dangerous substance. (Tr. 104) The charge was *nolle prosequi* in April 2010. Applicant claimed he has not used marijuana since January 2010.

(3) In May 2010 he was charged with DWI and DUI. He was convicted of DWI and sentenced to serve 60 days in jail. However, he was given probation before judgment. The DUI charge was *nolle prosequi*. (GE 5)

(4) In January 2011 he was charged with driving on a suspended license. This charge was *nolle prosequi*. Applicant was found guilty of failure to display driving license on demand.

(5) In October 2011 he was charged with second degree assault (misdemeanor). At his hearing, Applicant explained that he and his girlfriend were consuming alcohol

and were involved in a mutual affray. The charge was later *nolle prosequi* when she refused to appear in court to testify against him. (GE 4)

In his response to Section 23 (Illegal Use of Drugs or Drug Activity), asking whether in the last seven years Applicant had illegally possessed, or used any controlled substances (including marijuana), or used them while holding a security clearance, Applicant answered “yes,” and disclosed that he illegally used marijuana from June 1999 to December 2009 - “a couple of times throughout that ten year period.” He admitted he illegally used marijuana after he was granted a secret level security clearance in 2003.

Applicant also disclosed that he sold marijuana between December 2004 and January 2005 – “once or twice a week for that month period” because he was going through some rough times financially.

Applicant stated in his 2014 SCA that he stopped using illegal drugs because he needed to ensure a future for his daughter and provide for his family. He believed that his use of drugs would hinder him from doing so. He averred that he no longer associates with his illegal drug-using friends.

Applicant testified that between 1997 (age 17) and 2009 (age 29), he illegally purchased and used marijuana socially with friends. In his answer to the SOR, Applicant denied SOR ¶ 1.b. At his hearing, Applicant admitted that he used marijuana with varying frequency between 2003 and 2009, after he was granted a secret clearance in 2003. In his answer to the SOR, Applicant also denied SOR ¶ 1.c. However, at his hearing, Applicant admitted that he sold marijuana between November 2004 and January 2005. He explained that if a friend needed illegal drugs, he had access to illegal drugs, and he would help them out by selling them drugs. He claimed he only sold drugs during that period about five times. (Tr. 102-103)

Applicant promised that he would never use illegal drugs again. He claimed he no longer associates with his marijuana-using friends. Concerning his 2003 SCA falsification, Applicant stated that it was not smart for him to falsify his 2003 SCA because the government could go back and look at his high school history. He believes it was not smart for him to lie in the 2003 SCA and “I felt like I needed to come clean.”

Applicant does not believe he is a threat to national security. He believes he just made many mistakes and bad decisions. Applicant also believes that he has matured and his main concern now is providing support for his daughter - to do the right things for her. He believes that his concern for his daughter and his need for his job to be able to support his daughter will be sufficient assurance that he will never use marijuana again or engage in alcohol-related criminal conduct.

Applicant submitted the testimony of four references lauding his reliability, trustworthiness, professional qualifications, expertise, and work ethic. His references supervised Applicant for extended periods. He is considered to be a phenomenal

employee who has excelled as the go-to person of his network engineering team. Applicant was relied upon to provide network services. His performance has been impressive; above and beyond what he was asked to do.

Applicant reliably worked weekends and late-night shifts. He demonstrated the correct attitude to get the job done. He is considered to be a self-starter. He has been pursuing his own training and courses at his own expense to get the required industry security and network certifications. His hard work has been recognized and he has been promoted. Additionally, he receives great feedback from his clients, coworkers, and supervisors. Applicant received an employee appreciation award for exceptional performance in 2015. (AE A)

Applicant's references believe Applicant deserves a second chance – that he has atoned for his past mistakes and is ready to move forward. They do not believe Applicant is a threat to national security. His references recommended his eligibility for a clearance.

### **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 1997 and 2009. He used marijuana after he was granted a secret level security clearance in 2003. He sold marijuana on multiple occasions at least between November 2004 and January 2005. He was convicted of possession with intent to distribute four pounds of marijuana (a felony) in 2005, and was placed on probation for three years. In January 2010, Applicant was in possession of marijuana and charged for the offense.

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;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution . . . ; 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.

Applicant's last marijuana-related criminal behavior occurred in December 2009-January 2010. It has been over six years since Applicant's most recent use of marijuana. There is no evidence of any further drug abuse. By all accounts, Applicant has been a productive member of society and has not been involved in any issues of concern since October 2011.

Applicant promised to never use any illegal drugs again. His assurance is grounded on his desire to care and provide for his daughter. I have given this statement less weight and reviewed Applicant's evidence cautiously, in light of his long history of illegal marijuana possession, use, and sale. Applicant sold marijuana for a profit. Applicant knew his marijuana-related criminal behavior would raise the Government's concerns because he falsified his 2003 SCA to cover his criminal behavior. Notwithstanding, Applicant continued his marijuana-related criminal conduct after he submitted his 2003 SCA, after he was granted a security clearance, and after he was convicted of possession with intent to distribute marijuana (a felony) in 2005.

Applicant's drug involvement was frequent and continues to cast doubt on his reliability, trustworthiness, and judgment. I note that Applicant did not sign a statement of intent with automatic revocation of clearance for any violation. Furthermore, there is no favorable prognosis by a duly qualified medical professional. Considering the evidence as a whole, I find that the passage of time so far is insufficient to mitigate the security concerns raised by his marijuana-related criminal behavior.

#### **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.

SOR ¶ 2.a cross-alleged the same facts alleged under SOR ¶ 1 (Guideline H), which are incorporated herein by reference. The security concerns raised by Applicant's drug-related behavior could be different when analyzed under the Guideline E concerns

(questionable judgment, lack of candor, and dishonesty). Considering the evidence as a whole, and for the reasons stated under the Guideline H analysis (*Supra*), I find that Applicant's evidence is insufficient to mitigate SOR ¶ 2.a.

SOR ¶ 2.b alleges, and Applicant admitted, that he deliberately falsified his 2003 SCA to cover his history of marijuana-related criminal conduct between 1997 and 2003. The remaining Guideline E allegations alleged Applicant's convictions for possession of alcohol as a minor in 1998 and 1999 (SOR ¶¶ 2.f and 2.g); June 2006 charges for both attempting to operate a motor vehicle while intoxicated and under the influence of alcohol (*nolle prosequi* in December 2006) (SOR ¶ 1.e); a May 2010 conviction for driving while impaired by alcohol (SOR ¶ 1.d); and an October 2011 charge for assault 2<sup>nd</sup> degree (dismissed) (SOR ¶ 1.c).

Applicant's history of repeated criminal misconduct from 1997 to at least 2011, and his deliberate falsification of the 2003 SCA trigger the applicability of the following disqualifying conditions under AG ¶ 16:

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, 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 properly safeguard protected information; and

(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's evidence is insufficient to mitigate the Guideline E security concerns. Applicant has a long history of repeated criminal misconduct extending from about 1997 to at least 2011. In 2003, Applicant deliberately falsified his 2003 SCA to cover his criminal conduct. Notwithstanding, he continued his marijuana-related criminal conduct after he submitted his 2003 SCA, after he was granted a security clearance in 2003, and after he was convicted of possession with intent to distribute marijuana (a felony) in 2005. In January 2010, Applicant was still involved in marijuana-related criminal conduct, and was charged with marijuana possession.

Applicant disclosed his marijuana-related criminal behavior, other criminal behavior, and his 2003 SCA falsification in his 2014 SCA. I considered that Applicant's disclosures may demonstrate an acknowledgment of his mistakes. It also could show his intent to comply with the law, rules, and regulations. By disclosing the information, Applicant reduced his vulnerability to exploitation, manipulation, and duress. It also could show Applicant has matured, acquired good judgment, and now has a desire to be truthful, reliable, and honest.

Notwithstanding, for the same reasons outlined under the Guideline H discussion, incorporated herein, I find Applicant failed to mitigate the Guideline E security concerns. Applicant never made any attempts to correct his falsification. Nor did he present documentary evidence to show that he disclosed any of the misconduct and criminal behavior he was involved in between 2003 and 2011. Applicant's disclosures on his 2014 SCA were likely prompted by the realization that the Government would investigate his background and acquire the knowledge of his past criminal behavior.

For the above reasons, and those discussed under Guideline H, incorporated herein, I find that none of the personal conduct mitigation conditions 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 35-year-old employee of a federal contractor. His past illegal drug use is not recent. There is no evidence of any further marijuana-related criminal conduct after 2010, or of any other illegal drug use. Applicant falsified his 2003 SCA to cover his history of marijuana-related criminal conduct. He disclosed his falsification, his history of marijuana-related criminal conduct, and other questionable behavior and criminal conduct in his 2014 SCA.

Applicant's references lauded his reliability, trustworthiness, professional qualifications, expertise, and his work ethic. He is considered to be a phenomenal employee who has excelled as the go-to person of his network engineering team. His performance has been impressive; above and beyond what he was asked to do.

Notwithstanding, Applicant continued his marijuana-related criminal conduct after he was granted a security clearance in 2003, and after he was convicted of a marijuana-related felony offense in 2005. He continued his marijuana-related criminal behavior until at least 2010. Applicant violated the trust placed in him by the Government. Moreover, he never corrected his falsification or disclosed his criminal behavior until he submitted his 2014 SCA. His actions underline his possible inability or unwillingness to comply with the law, rules, and regulations.

On balance, Applicant's evidence is insufficient to mitigate the security concerns raised by his criminal misconduct, his use, possession, and sale of marijuana while possessing a security clearance, and his deliberate falsification of his 2003 SCA.

## **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.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.g:	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.

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JUAN J. RIVERA  
Administrative Judge