



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



In the matter of: )  
)  
) ISCR Case No. 18-00864  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kelly M. Folks, Esq., Department Counsel  
For Applicant: Troy L. Nussbaum, Esq.

03/28/2019

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**Decision**

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LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On April 23, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. Applicant responded to the SOR on June 28, 2018, and requested a hearing before an administrative judge.

The case was assigned to me on January 9, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 18, 2019, scheduling the hearing for March 7, 2019. The hearing was convened as scheduled.

## Evidence

Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. The objections to GE 5 and 8 are sustained. See Directive, Additional Procedural Guidance, ¶ E.3.1.20; ISCR Case No. 02-12199 (App. Bd. Oct. 7, 2004); and ISCR Case No. 02-12199 (App. Bd. Aug. 8, 2005). The objections to GE 6 and 7 are overruled and the exhibits are admitted. See Directive, Additional Procedural Guidance, ¶ E.3.1.22; Federal Rule of Evidence 803(8); ISCR Case No. 02-12199 (App. Bd. Aug. 8, 2005); and ISCR Case No. 10-08390 (App. Bd. Mar. 30, 2012).

Applicant testified, called six witnesses, and submitted Applicant's Exhibits (AE) A through C and AA through CC. AE A through C and AA through BB were admitted without objection. AE CC was admitted over Department Counsel's objection.

## Findings of Fact

Applicant is a 38-year-old employee of a defense contractor. He has worked for his current employer since 2016. He served on active duty in the U.S. military from 2002 until he was honorably discharged in 2011. He seeks to retain a security clearance, which he has held since he was in the military. He has a bachelor's degree, awarded in 2016, and he attended graduate school in pursuit of a master's degree. He has never married, but he and his fiancé have cohabitated since about 2008. He does not have children.<sup>1</sup>

Applicant had a difficult childhood. His father was not in his life, but he was raised by his mother and stepfather, who he refers to as his father. His parents smoked marijuana. His stepfather sold marijuana and occasionally cocaine. Applicant started smoking marijuana when he was about 12 or 13 years old. He started smoking marijuana with his mother when he was about 16 years old. He completed one year of college after high school. He worked and occasionally sold marijuana. He came home one day and found that his home had been burglarized and ransacked. He decided he needed a change in his life and joined the U.S. military in 2002 at the age of 22.<sup>2</sup>

Applicant was stationed overseas from 2003 through 2006. He deployed to Iraq from October 2003 to July 2004 and from September 2007 to January 2008. In about December 2004, Applicant was home visiting his mother and stepfather. His stepfather had been diagnosed with Alzheimer's disease and dementia. His stepfather smoked marijuana to help manage his pain. He asked Applicant to smoke marijuana with him, which Applicant did on one occasion. Applicant again smoked marijuana with some friends about a day later. He held a top secret security clearance with access to sensitive compartmented information (SCI) at the time. His marijuana use was not detected by the military.<sup>3</sup>

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<sup>1</sup> Tr. at 31, 38, 43-45, 102-103; Applicant's response to SOR; GE 1; AE AA.

<sup>2</sup> Tr. at 32-38, 79-80; Applicant's response to SOR; GE 1.

<sup>3</sup> Tr. at 40-41, 46-47, 54, 80-81; Applicant's response to SOR; GE 1-3; AE AA.

Applicant was coming to terms with his sexuality when he had his first homosexual relationship with a foreign national in about 2004.<sup>4</sup> The foreign national was emotionally and physically abusive to Applicant. The foreign national pushed Applicant to use cocaine, which he did on about five to six occasions in 2005. He held a top secret security clearance with access to SCI at the time. These were the only occasions Applicant ever used any illegal drugs other than marijuana. His cocaine use went undetected by the military.<sup>5</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86) in August 2009, while he was still in the military. He did not report any illegal drug use in the previous seven years, and he did not report his marijuana and cocaine use while holding a security clearance.<sup>6</sup>

Applicant submitted another SF 86 in November 2014. He answered “no” to the question that asked if he had ever illegally used a drug while possessing a security clearance.<sup>7</sup>

Applicant submitted a third SF 86 in February 2015. He answered “yes” to the question that asked if he had ever illegally used a drug while possessing a security clearance. He reported marijuana use in May 2005. He wrote that he “[s]moke[d] marijuana once with [his] friends after coming back from deployment . . . .” He did not report that he used cocaine in 2005 while he held a security clearance.<sup>8</sup>

Applicant’s eligibility for access to SCI was denied by a government agency in May 2016. He submitted a fourth SF 86 in July 2017. He reported his marijuana and cocaine use in 2004 to 2005.<sup>9</sup> He wrote:

There will be a discrepancy in this answer on my last SF86 and it is because I did not notice the question was asking for “EVER” instead of a time period. I had also forgotten about the incidents because they are over 12 years old and it wasn’t until I was undergoing a full scope polygraph that I started to remember the incidents.<sup>10</sup>

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<sup>4</sup> The adjudicative guidelines specifically state that “[n]o adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.” AG ¶ 12. Applicant’s sexual orientation is not relevant to a determination of his security worthiness. It is discussed here solely because Applicant specifically addressed it as part of the reason he “buried” his illegal drug use and did not remember it when he completed Questionnaires for National Security Positions.

<sup>5</sup> Tr. at 36-37, 47-54, 81-82, 180.

<sup>6</sup> GE 3.

<sup>7</sup> GE 2.

<sup>8</sup> GE 4.

<sup>9</sup> Applicant’s response to SOR; GE 1, 6, 7.

<sup>10</sup> GE 1.

Applicant denied intentionally providing false information on any of the SF 86s. He stated that he did not remember the drug use when he filled out the questionnaires. He stated that he buried the incident with his stepfather “because of what it meant and how much it hurt to come back after being gone a year.” He stated that he also forgot about smoking marijuana with his friends because it all happened on the same weekend, and he “looked at it as one situation.” He also buried the cocaine use because it was associated with an abusive relationship.<sup>11</sup>

Applicant’s stepfather passed away in 2010. At some point after his stepfather passed away, Applicant told his fiancé that he smoked marijuana with his stepfather. Applicant’s fiancé helped him fill out the 2015 SF 86. Applicant stated that he had forgotten about his marijuana use in 2004. It was his fiancé who reminded him that he smoked marijuana with his stepfather. He stated that he did not report the cocaine use on that questionnaire because he did not remember it.<sup>12</sup>

Applicant’s fiancé’s testimony was consistent with Applicant’s testimony. He helped Applicant fill out the 2015 SF 86. He testified that Applicant looked confused like he did not remember when he reminded Applicant of his marijuana use with his stepfather. He believes Applicant is an honest and truthful person. He completely believes Applicant’s testimony that he did not report his drug use because he forgot about it.<sup>13</sup>

Applicant stated that he only remembered the cocaine use when he was being questioned about his foreign contacts in a pre-polygraph interview for the government agency. While discussing his foreign boyfriend, the interviewer asked him if they ever used drugs, which triggered his memory that they used cocaine, and he divulged that information to the interviewer.<sup>14</sup>

Applicant spent two years in Afghanistan working for a defense contractor in support of the U.S. forces. He regularly volunteers in his community. He submitted documents and letters, and he called six witnesses who attested to his excellent job performance in the military and in his current job. He is praised for his trustworthiness, technical expertise, honesty, reliability, moral character, patriotism, work ethic, dedication, judgment, maturity, professionalism, leadership, loyalty, and integrity. His witnesses are all aware of the allegations in the SOR. They completely believe Applicant’s statements and testimony that he did not report his marijuana and cocaine use because he forgot about it. They recommend that he retain his security clearance.<sup>15</sup>

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<sup>11</sup> Tr. at 62-67, 75-76, 84-90; Applicant’s response to SOR.

<sup>12</sup> Tr. at 60, 65, 68, 72-75, 92-94; Applicant’s response to SOR; AE C.

<sup>13</sup> Tr. at 104-121; AE C.

<sup>14</sup> Tr. at 67, 75-78, 90-92; Applicant’s response to SOR.

<sup>15</sup> Tr. at 123-176; Applicant’s response to SOR; AE C, BB.

## Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 and endures throughout off-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 the 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.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant used marijuana and cocaine in 2004 and 2005 while he was in the military and holding a security clearance. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

Applicant did not report his drug use on SF 86s submitted in 2009 and 2014, and he did not report the full extent of his drug use on a 2015 SF 86. He denied intentionally providing false information on the SF 86s. He asserted that he did not remember his drug use when he filled out the questionnaires.

I have considered all the evidence, including Applicant's and his fiancé's testimony, his strong character evidence, and his witnesses' belief that he told the truth. I also considered his motive to falsify, particularly in 2009, while he was still in the military; the two explanations given in the 2017 SF 86 ("I did not notice the question was asking for 'EVER' instead of a time period [and] I had also forgotten about the incidents"); and the inherent improbability that he would forget these significant events.

I did not find Applicant's explanation to be credible. I do not believe that Applicant's marijuana use while in the military blended in with his extensive marijuana use before he joined the military. Illegal drug use is a significant event in the military, and not one that is quickly forgotten. Additionally, Applicant never used cocaine except while he was in the military. Again, that is an event not likely to be forgotten. Applicant asserted that he used marijuana and cocaine in 2004 to 2005; forgot about it when he submitted his 2009 SF 86, while he was still in the military; remembered his marijuana use and told his fiancé at some point after his stepfather passed away in 2010; forgot about it again until he was reminded of his marijuana use by his fiancé in 2015; and only remembered the cocaine use when he was being questioned about his foreign contacts in a pre-polygraph interview for the government agency. I am convinced by substantial evidence<sup>16</sup> that Applicant intentionally provided false information about the extent of his illegal drug use on the three SF 86s. AG ¶ 16(a) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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;

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<sup>16</sup> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See, e.g., ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

(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 contributed to 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 illegal drug use is mitigated by time and the absence of any additional drug use. SOR ¶¶ 1.a and 1.b are concluded for Applicant.

Applicant has consistently denied that he lied on the SF 86s. Having determined that he intentionally omitted information in an attempt to mislead the government, I have also determined that his explanations that the omissions were unintentional were also false. It would be inconsistent to find his conduct mitigated.<sup>17</sup>

### **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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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

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<sup>17</sup> See ISCR Case 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge's decision to grant Applicant's security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.



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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

I also considered Applicant's honorable military service, particularly his deployments, and his excellent character evidence. I can see why he has such strong support from those around him, both professionally and personally. I believe Applicant is an otherwise honest person who felt he had to lie in 2009 while he was still in the military. He was then stuck with the lie, was unable to extricate himself from it, and felt he had to propagate it. Unfortunately, at this time, he cannot be trusted to tell the truth.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the 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 E:	Against Applicant
Subparagraphs 1.a-1.b:	For Applicant
Subparagraphs 1.c-1.f:	Against Applicant

### **Conclusion**

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge