



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



In the matter of: )  
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) ISCR Case No. 18-01057  
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Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. DeAngelis, Esq., Department Counsel  
For Applicant: *Pro se*

**06/07/2019**

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**Decision**

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DAM, Shari, Administrative Judge:

Applicant failed to mitigate the drug involvement and substance misuse, and personal conduct security concerns, related to his use of marijuana while holding a security clearance, and his failure to fully disclose it on his security clearance application and during an investigative interview. Based on the pleadings and exhibits, national security eligibility for access to classified information is denied.

**History of Case**

On August 10, 2017, Applicant submitted a security clearance application (SCA). On July 2, 2018, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). 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* (January 2, 1992), as amended (Directive); and *the National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DoD on June 8, 2017.

Applicant filed an Answer to the SOR on September 11, 2018, and elected to have his case decided on the written record in lieu of a hearing. On March 20, 2019, Department Counsel submitted the Government's File of Relevant Material (FORM), containing seven Items. Applicant received the FORM on March 27, 2019. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not provide a response to the FORM, object to the Government's evidence, or submit documents. Hence, all Items are admitted into evidence. The case was assigned to me on May 29, 2019.

### **Findings of Fact**

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.e, 2.a, and 2.b. He denied the allegation in SOR ¶ 1.d.<sup>1</sup> (Item 3)

Applicant is 57 years old. He is divorced twice and has two adult children. He served in the Army from 1980 to 2004, and received an honorable discharge. He held a security clearance while in the Army. He has worked for federal contractors since 2004. In 2014, he was granted an interim security clearance. (Item 4)

In his August 2017 SCA, Applicant stated that in June 2017 he used marijuana for the first time to alleviate arthritic pain. He said his physician was going to issue him a medical certificate to use it, so he decided to try it before that. On June 30, 2017, his employer notified him that he tested positive for marijuana on his recent drug urinalysis and was required to enroll in a mandatory Employee Assistance Program (EAP) starting July 6, 2017. He was placed on a leave of absence from July 3, to August 2, 2017, and required to complete some form of treatment.<sup>2</sup> He stated that he is now required to participate in a five-year drug treatment program, beginning on July 27, 2017, and continuing to July 27, 2022. He explained that his employer requires him to be drug free during those years. (Items 4, 5, 6)

During a December 2017 interview, Applicant told an investigator that on June 23, 2017, he used marijuana to relieve arthritic pain in his back. He said his doctor had offered to prescribe him a medical marijuana card, but Applicant refused because it was prohibited under federal law and his employer's policies. He stated that on June 26, 2017, he was randomly selected for a drug urinalysis. On June 30, 2017, his employer notified him that he tested positive for marijuana and was ordered not to return to work, beginning on July 3, 2017. He was off work for 30 days and had to take another drug urinalysis on July 24, 2017. Those results were negative and he returned to work on August 2, 2017. (Item 6)

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<sup>1</sup> Applicant denied that he tested positive for marijuana on June 28, 2017, as alleged in SOR ¶ 1.d. He admitted that it was July 5, 2017, as alleged in SOR ¶ 1.e. He asserted he only tested positive once during the June to July 2017 timeframe. There is confusion in this record as to the correct date of his positive urinalysis in 2017. I find that the date of the positive drug screen was in June 2017, which is consistent with the preponderance of the evidence, including his SCA, interview, and interrogatories. (Item 6)

<sup>2</sup> There is no information describing the components of this mandatory treatment program.

On May 10, 2018, a government investigator obtained Applicant's medical records. The records documented that Applicant had been using marijuana from approximately October 2015 until July 2017, during which time he held a security clearance. According to the medical records, Applicant's physician prescribed him Tramadol, and required him to refrain from alcohol or marijuana use while using this drug. On October 14, 2015, he tested positive for marijuana. Subsequently, Applicant acknowledged to his physician in writing that he would not use alcohol or marijuana and agreed to random drug testing ordered by his physician to confirm abstinence. Despite his promise, he tested positive for both marijuana and alcohol on January 22, 2016, and March 22, 2016. He later reported to his physician that he discontinued marijuana use, but his subsequent drug test in June 2017 again tested positive for marijuana. (Items 3, 7)

On June 12, 2018, Applicant completed a set of government interrogatories. He reported that he had used marijuana only once, on June 26, 2017. He admitted that he failed a drug test, but stated he had no intention of using marijuana again. He submitted a Certificate of Completion of an eight-hour drug and alcohol awareness class in July 2017, while on his leave of absence. He wrote that he had recently taken cortisone shots for his arthritic pain and participated in physical therapy, both of which were alleviating his pain. (Item 6)

### **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Guideline H: Drug Involvement and Substance Misuse**

AG ¶ 24 describes the concerns related to drug involvement and substance misuse:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 sets out three conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana from October 2015 until June 2017, and tested positive for using the illegal drug in October 2015, January 2016, and June 2017. He was working for a federal contractor at that time and held a security clearance. The evidence established the above disqualifying conditions.

AG ¶ 26 lists conditions that could mitigate security concerns raised under this guideline. Three may potentially apply:

(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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;  
and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility; 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.

Applicant did not present evidence to establish mitigation under any of the above conditions. He used marijuana from October 2015 into June 2017, and the last alleged incident having occurred about two years ago. There is insufficient evidence to conclude that his illegal use of marijuana happened under unusual circumstances, such that it does not cast doubt on his current trustworthiness. He consistently lied to the Government about the extent of his marijuana use during this investigation, until the Government reviewed his medical records, which documented a history of marijuana abuse that was against, not consistent with, his doctor's advice. He did not voluntarily admit or acknowledge that he has a drug problem. He participated in an EAP, which included an eight-hour substance awareness course. There is no other evidence describing the elements of that program or indicating that he was evaluated and received a favorable prognosis from a duly qualified medical professional while participating in a treatment program or complying with aftercare requirements.

## **Guideline E: Personal Conduct**

AG ¶ 15 explains the security concerns relating 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 or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Two may be disqualifying in this case:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant deliberately concealed information from the Government in his August 2017 SCA and during his December 2017 interview about the extent of his illegal marijuana use and the fact that he had tested positive for the drug on two occasions prior to his June 2017 drug-related suspension. The evidence establishes the above disqualifying conditions and indicates that he intentionally omitted requested relevant information concerning his recent drug abuse.

AG ¶ 17 provides conditions that could mitigate security concerns. Four may potentially apply:

(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; and

(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.

Applicant presented insufficient evidence to establish mitigation under any of the above conditions. He failed to be candid and forthright about his history of marijuana use when he completed his August 2017 SCA, during his December 2017 interview, and in response to interrogatories in June 2018. He did not disclose or acknowledge his marijuana use problem until after the Government obtained his medical records documenting his history of marijuana abuse. He knew using marijuana was against federal policy and his employer's rules, and admitted that during his interview. He held a security clearance between 2015 and 2017, when he used marijuana and tested positive for it. His intentional omission of requested information on three occasions is not a minor offense, and casts serious doubt on his judgment and trustworthiness.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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 for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

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

Applicant is a mature man who honorably served in the Army for about 24 years. He held a security clearance during that time. After leaving the Army in 2004, he began

working for federal contractors and obtained an interim security clearance. He knew using marijuana was illegal, and violated his employer's and the federal government's policies, especially while holding a security clearance. His use of marijuana and attempts to conceal it during this investigative process raise serious questions about his reliability and trustworthiness. He further agreed not to use alcohol or marijuana while under the care of his physician and taking prescribed medication, and breached that agreement. Applicant failed to demonstrate rehabilitation, significant behavioral changes, or mitigate the security concerns raised. Overall, the evidence raises serious doubt as to Applicant's present eligibility and suitability for a security clearance.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM  
Administrative Judge