



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



In the matter of: )  
)  
) ISCR Case No. 18-01340  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kelly Folks, Esq., Department Counsel  
For Applicant: *Pro se*

08/21/2019

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana in 2014 while holding a security clearance. He falsified his 2015 security clearance application (SCA) when he failed to disclose his use of marijuana while holding a clearance and he made false statements to a government investigator denying his marijuana use while holding a clearance. He failed to demonstrate reliability, trustworthiness, ability to comply with the law, and his ability to protect classified information. Personal conduct and drug involvement and substance misuse security concerns are not mitigated. Clearance denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on March 10, 2015, seeking the continuation of his clearance eligibility required for his position with a federal contractor. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) on May 30, 2018. Applicant answered the SOR on June 30, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on January 16, 2019, and issued a notice of hearing on May 14, 2019, setting the hearing for June 24, 2019. At the hearing, the Government offered nine exhibits (GE 1 through 9). All exhibits were admitted without objection, except for GE 5. (See Procedural Issue, below.) Applicant testified and submitted no exhibits or additional testimony. DOHA received the hearing transcript (Tr.) on July 8, 2019.

### **Procedural Issue**

Applicant objected to GE 5 (reports of four polygraph-assisted interviews) on the grounds that the documents were incomplete. He requested the physiological reaction report which reflects the polygrapher's assessment of whether Applicant was truthful when he answered questions during the interview. Applicant wanted to use the polygrapher's assessment to bolster his credibility at the hearing.

At the hearing, I held the admission of GE 5 in abeyance and gave Department Counsel and Applicant the opportunity to request a complete copy of the report of the July 11, 2016 polygraph assisted interview from another agency. (Tr. 19 – 27)

After a thorough review of the evidence and the hearing transcript, I find that the physiological reaction reports are irrelevant and provide little evidentiary value when considered or weighted in light of the evidence as a whole. Applicant's objection is overruled. GE 5 is admitted as evidence and will be considered in my decision.

### **Findings of Fact**

The SOR alleged under Guideline H that Applicant used marijuana in March 2014 while holding a security clearance since May 2010. (SOR 1.a) Under Guideline E, it alleged that Applicant falsified his 2015 SCA when he failed to disclose his illegal use of marijuana while holding a clearance (SOR 2.a and 2.b); and that he made false statements to a government investigator when he denied his marijuana use while holding a clearance (SOR 2.c and 2.d). Applicant denied all of the SOR allegations.

After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 36-year-old employee of a federal contractor. He graduated from high school in 2001, and received his bachelor's degree in 2015. He married in 2004 and divorced in 2018. He remarried in 2019, and his wife is expecting a child. He has three children from his prior marriage, ages 14, 12, and 7.

Applicant enlisted in April 2003 and honorably served on active duty until November 2012 when he was discharged as a staff sergeant (E-6). Applicant held a clearance during most of his service. He volunteered for an eight-month overseas deployment to a dangerous area where he performed a sensitive mission. When he

returned to the United States, he was recognized and awarded with an assignment to a leadership position normally reserved for individuals above his pay grade.

While in the service, Applicant was detailed to work for a government agency (Agency). After his discharge, he was immediately hired as an analyst by a federal contractor and assigned to work for the Agency. Upon his employment, the Agency required Applicant to read and sign a personnel security policy advisory in March 2013 (GE 4). The document specifically warned Applicant that the illegal use of drugs (use, possession, transfer, sale, and purchase) was strictly prohibited by the Agency and violation of the policy was grounds for disqualification for access eligibility.

In March 2014, Applicant's employer sponsored his (and other co-workers) trip to another country to attend a security conference. During a post-conference party at a nightclub, Applicant went outside to get some fresh air. He observed an unknown man, who was also at the conference, smoking a marijuana cigarette. While they were talking, the man offered Applicant the marijuana cigarette. Applicant took the marijuana cigarette, smoked two puffs from it, returned it to the man, and then went back inside the club.

Applicant participated in polygraph-assisted interviews in August 2005, September 2010, September 2014, April 2015, August 2015, and July 2016. During his August 2015 interview, Applicant was apparently having trouble passing the polygraph examination and reported smoking two puffs from a marijuana cigarette in March 2014. He explained to the interviewer that his intention at the time was to fit in. Applicant denied any other personal involvement with illegal drugs in the last seven years. Applicant also disclosed that his best friend, a cleared contractor, smoked marijuana in front of him all the time, including during the four days before his friend's successful polygraph examination.

When Applicant smoked the marijuana, he had a top-secret clearance with access to sensitive compartmented information (SCI), and he was aware of the Agency's policy prohibiting personnel involvement with illegal drugs. Applicant did not disclose his illegal marijuana use during his September 2014 polygraph examination because he was afraid he would lose his clearance and then be fired from his job. Applicant stated he did not intend to have personal involvement with illegal drugs in the future. (GE 5)

The Agency revoked Applicant's SCI access in 2015-2016. He appealed the revocation in March 2017 (GE 6), and the Agency affirmed the denial of SCI eligibility in June 2017 (GE 7).

Section 23 (Illegal Use of Drugs or Drug Activity) of Applicant's 2015 SCA asked him to disclose whether: (1) in the last seven years he had illegally used (including inhaling, swallowing, experimenting with, or otherwise consuming) any drugs or controlled substances; and (2) he had ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance. Applicant

answered “No” to both questions and failed to disclose his illegal use of marijuana in March 2014.

Applicant was interviewed by a government investigator in April 2016. During the course of the interview he denied any violation of security policies. He stated that he was removed from his work building with the Agency because his conditional certificate of authority was removed after three inconclusive polygraph examinations in 2013, 2014, and 2015. Applicant told the interviewer that he did not know why the tests were inconclusive and claimed he had done nothing wrong. (GE 8)

Applicant was interviewed by another government investigator on January 29, 2018. He was asked whether he had used illegal drugs in the last year, during the last seven years, and while possessing a clearance. Applicant adamantly denied any and all use of illegal substances or drugs. The investigator confronted Applicant with his previous admission to marijuana use in 2014 while possessing a clearance with SCI access. Applicant admitted to the investigator that he took possession of the marijuana cigarette and placed it in his lips, but he claimed for the first time that he did not inhale. (GE 8)

Applicant told the investigator that he had not reported the 2014 marijuana incident to his security office because he did believe that he actually used marijuana. Applicant stated to the interviewer that he omitted the 2014 marijuana incident from his 2015 SCA because he did not inhale, and thus, he does not believe that he illegally used marijuana. (GE 8)

During his hearing testimony, Applicant admitted that he took possession of the marijuana cigarette, took two puffs from it, and marijuana cigarette smoke came out of his mouth. (Tr. 36) Applicant explained the he answered “No” to both questions in Section 23 (Illegal Use of Drugs or Drug Activity) of his 2015 SCA, and denied any illegal drug use to the interviewer in January 2018, because he did not inhale and does not believe that he illegally used marijuana. (Tr. 37-40)

Although denying that he illegally used marijuana, Applicant acknowledged that “puffing” the marijuana cigarette in March 2014 was unacceptable behavior. He believes that this was an isolated incident, over five years ago, and should be mitigated with the passage of time. He highlighted his good service record, that he volunteered for a sensitive dangerous mission, and his good performance working for federal contractors. He also noted that he is actively involved in his community where he volunteers organizing activities and coaching children. Applicant noted that he disclosed that his best friend was a frequent marijuana user, and that he no longer associated with him or other people who use illegal drugs. Applicant also noted his changed circumstances including receiving his bachelor’s degree, getting married in 2019, and his wife expecting a child in the near future.

Applicant testified that his criminal misconduct continues to weigh on him since it happened. He does not intend on using any illegal drugs or controlled substances in the

future because he does not want to jeopardize his and his family's livelihood. Applicant has never sought or received any medical or psychological treatment or counseling for his substance abuse.

## Policies

The SOR was issued under Executive Order (Exec. Or.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

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, § 2. 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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 articulates the security concern for the illegal use of drugs:

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.

In March 2014, Applicant illegally possessed and used marijuana while holding a security clearance granted to him in 2010 and access to SCI granted in 2012-2013. AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
  
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
  
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record established the disqualifying conditions under AG ¶¶ 25(a), (c), and (f), requiring additional inquiry about the possible applicability of mitigating conditions under 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;
  
- (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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. Although Applicant's illegal use of marijuana could be viewed as an isolated incident that occurred five years ago, I find that when considering the totality of the facts and circumstances, it continues to cast doubts on Applicant's current reliability, trustworthiness, good judgment, ability or willingness to comply with laws, rules, and regulations, and his suitability to hold a clearance.

Because of his time in the service, rank, age, and education, Applicant knew that possession and use of marijuana is illegal under federal law. Furthermore, he was fully aware of the Agency's policy against the use of illegal drugs by its employees and contractors holding a clearance. Applicant deliberately failed to disclose his illegal use of marijuana to his security office when he returned from his trip in 2014. Even after revealing his marijuana use during his 2015 polygraph examination, having his access revoked by the Agency, and after his removal from the Agency facility, he failed to report his illegal use of marijuana to his security office.

Moreover, Applicant falsified his 2015 SCA and made false statements to government investigators in April 2016 (not alleged in the SOR) and in January 2018 to cover his illegal use of marijuana. His recent false statements to cover his illegal drug use undercuts any mitigation of the drug involvement and substance misuse concerns, even though his drug use is less recent.

Applicant stated his intent to never possess or use illegal drugs in the future. In light of the record as a whole, I consider Applicant's empty promises to be lacking weight and credibility. Applicant knew the adverse security clearance consequences of his substance misuse, and that did not dissuade him. Applicant failed to establish his reliability, trustworthiness, his ability to comply with laws rules and regulations, and his suitability for a clearance.

## **Personal Conduct**

Applicant falsified his 2015 SCA when he failed to disclose his illegal use of marijuana while holding a clearance (SOR 2.a and 2.b); and he made false statements to a government investigator when he denied his marijuana use while holding a clearance (SOR 2.c and 2.d).

AG ¶ 15 explains why personal conduct is a security concern stating:

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes two conditions that could raise a security concern and 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;

(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; 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;



(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States;

Applicant's illegal possession and use of marijuana while possessing a clearance, his falsification of the 2015 SCA, and making false statements to a government investigator satisfy the above disqualifying conditions.

AG ¶ 16 describes conditions that could 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 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;

(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.

For the same reasons discussed under Guideline H, none of the mitigating conditions is fully applicable to the facts in this case and they do not mitigate the personal conduct security concerns. Applicant did not disclose his illegal marijuana possession and use until the 2015 polygraph examination. After that, he falsified his 2015 SCA and made false statements to a government investigator.

Applicant continues to assert the naïve excuse that because he did not inhale he did not illegally use marijuana. Regardless, he illegally possessed marijuana, and the more serious misconduct are his falsifications. In light of the record as a whole, I

consider Applicant's "I did not inhale" excuse to be lacking weight and credibility. It does not explain or excuse his illegal possession of marijuana while holding a clearance and access to SCI. Applicant failed to establish his reliability, trustworthiness, his ability to comply with laws rules and regulations, and his suitability for a clearance. Applicant's use of marijuana and his falsifications continue to cast doubt on his reliability, trustworthiness, and good judgment.

### **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. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 36-year-old employee of a federal contractor. He served in the military for almost 10 years and has worked for federal contractors since 2012; has held a clearance since 2005; and has worked for his current employer since 2012. Except for the SOR allegations, his performance is considered to be a good.

The factors against granting a clearance are more substantial. Applicant's lack of judgment and his unwillingness to comply with rules and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. The substance misuse and personal conduct security concerns are not mitigated.

### **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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge