



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



In the matter of:	)	
	)	
	)	ISCR Case No. 18-02116
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

06/24/2019

**Decision**

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate the drug involvement and substance abuse and personal conduct security concerns. National security eligibility for access to classified information is denied.

**History of the Case**

Applicant submitted a security clearance application (SCA) on July 6, 2017. On September 7, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H, Drug Involvement and Substance Abuse. Applicant answered the SOR on October 9, 2018, and requested a hearing before an administrative judge (Answer). On October 30, 2018, the Government sent Applicant an amendment to the SOR alleging security concerns under Guideline E, Personal Conduct. Applicant answered the amendment on November 12, 2018, which I marked as Hearing Exhibit (HE) I.

I was assigned to the case on March 8, 2019, and on April 3, 2019, I issued an order to both parties to produce their documentary evidence by April 29, 2019. On April 8, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 15, 2019. I convened the hearing as scheduled.

Government's Exhibits (GE) 1 through 4 were admitted, without objection. Applicant testified, and Applicant's Exhibits (AE) A and B were admitted, without objection. I received the complete transcript (Tr.) on June 3, 2019, and the record closed.

### **Findings of Fact**

Applicant is 59 years old, single, and has no children. He lives with his mother and is her primary caregiver. Applicant received a high school diploma in 1978 and has attended approximately three years of college. He served in the U.S. Navy (USN) from 1986 until 1992, when he was honorably discharged. Applicant also actively drilled in the U.S. Navy Reserve (USNR) in 1995. (GE 1 at 16; GE 2 at 23-24; GE 3 at 4; AE A; Tr. 10-15, 21-23)

Applicant held a secret security clearance when he served on active duty in the USN. He has worked for defense contractors since 2005, and he has held a clearance since 2007. He currently works casually for a defense contractor as an electrician technologist and requires a clearance for his continued employment. (GE 1; GE 2; GE 3; AE A; Tr. 10-15, 21-23)

Applicant started using marijuana in 1977 while he was in high school. (Tr. 26) From 1980 until he joined the USN in 1986, he used marijuana once every two to three months. He did not use marijuana again until he left active duty in 1992. (Tr. 26) After he was discharged from the USN, Applicant returned to his family's farm and resumed using marijuana socially with friends. From 1992 until 1995, he was in the USN's individual ready reserve (IRR), and he was not required to drill or take urinalysis tests. (GE 3 at 8; Tr. 26, 27-30)

In June 1995, shortly after Applicant joined the USNR, he took a random urinalysis, which tested positive for marijuana. As a result of the positive test, Applicant was discharged from the USNR with an other than honorable discharge (OTH). He testified that he never received the discharge paperwork from the USN; therefore, he was unaware that he received an OTH discharge. However, at the hearing, he admitted that he was ashamed of his positive urinalysis, and he did not investigate or request the discharge paperwork from the USNR. (Answer; GE 3 at 8; GE 4; Tr. 27-29)

Applicant continued to use marijuana after his 1995 discharge from the USNR, and he was arrested for possession of marijuana in 2000 or 2001 and fined. (GE 1 at 42; GE 2 at 28; GE 3 at 7-8; Tr. 31, 53) As stated above, Applicant started working for defense contractors in 2005. After he received a clearance in 2007, he continued to use marijuana. In 2008 and 2010, Applicant changed employers but continued to work for defense contractors and maintained a security clearance. (HE I; Tr. 32-33)

Throughout his time working for defense contractors, Applicant has worked for extended periods in various locations overseas and within the United States. He testified that while working at these temporary locations, he did not use marijuana, and his use was only when he was home and near his friends. Applicant continued to use marijuana socially despite being aware of the federal laws and his various employers'

policies regarding drug use while holding a clearance. (Answer; GE 1 at 9; GE 3 at 2-3, 8; Tr. 13, 31-34, 37, 42, 44-47)

Applicant testified that he stopped using marijuana in 2014 due to a scare associated with a work-related urinalysis before a deployment to Pakistan. He did not test positive for marijuana and “fell through the cracks.” He admitted that this was the only urinalysis he had taken since 1995, other than a pre-employment urinalysis for a previous employer. (HE I; Tr. 39-44, 49)

Prior to the hearing, Applicant reported his marijuana use in a November 2007 SCA, a July 2007 SCA, and in an October 2017 personal subject interview (PSI). Applicant was inconsistent in his reporting of his marijuana use. (GE 1; GE 2; GE 3)

In his November 2007 SCA, Applicant reported that he used marijuana 10 to 15 times between 1994 and 2001. At the hearing, he claimed that he was not trying to be deceptive in the 2007 SCA. He testified that his failure to disclose the full extent of his drug use in the 2007 SCA was the result of potential mental fatigue or misinterpretation of the relevant questions. (HE I; GE 2 at 29; Tr. 34, 36-38)

The following colloquy occurred during the hearing regarding Applicant’s disclosure of drug use in his 2007 SCA:

AJ: Do you think you minimized the number of times you used [marijuana]?

Applicant: I downplayed it. Really I don’t know how many times I’ve used [marijuana]. I never thought I had problem other than the fact that I, you know, I think I stated this that my problem was taking this too lightly. And thinking there was at time and place when it wasn’t bad. (Tr. 38)

In his July 2017 SCA, Applicant reported that he used marijuana 25 to 30 times between 1980 and 2014. At the hearing that he claimed he forgot what he had reported in his 2007 SCA regarding his drug use but was not trying to be deceptive. He also admitted during questioning that his use of marijuana was “closer to 100 times then closer to 25.” (GE 1 at 43-44; HE I; Tr. 35, 39, 54-55)

In his October 2017 PSI, Applicant told the investigator that he used marijuana one time in 1977; he used marijuana once every two to three months between 1980 and 1986; he did not smoke marijuana between 1986 and 1992 while he was on active duty in the U.S. Navy; he used marijuana two to three times a year between 1992 and 2010; and he used marijuana fifteen times between 2010 and 2014. (GE 3 at 8; Tr. 26, 35-36, 39)

At the hearing, Applicant admitted that he did not disclose to his current and former employers and facility security officers that he used marijuana while holding a security clearance. (Tr. 49-50) In his response to the SOR amendment, Applicant wrote, “During the process of background questionnaires and interviews I did not want to appear to have a problem with marijuana, but I’m basically very honest. I understated

the frequency of marijuana use.” He acknowledged that he used to have a problem with marijuana, but he has never sought treatment or counseling related to his marijuana use. (HE I; Tr. 52-53)

Applicant submitted an October 7, 2018 statement of intent to abstain from the use of drugs and testified that he intends to abstain from using marijuana in the future. (AE B; Tr. 49) At the hearing, Applicant testified that his drug use was immature, he is a changed person, and he regrets using marijuana as an adult. At this point he infrequently sees his friends with whom he used marijuana. (Answer; HE I; Tr. 17, 38, 48)

Applicant received the following awards and decorations when he was discharged from active duty in 1992: Good Conduct Medal; Humanitarian Service Medal; Southwest Asia Service Medal with bronze star; National Defense Service Medal; Sea Service Deployment Ribbon; and Joint Meritorious Unit Sward with oak cluster. (AE A; Tr. 15, 18-20)

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

¶ 25: The record evidence established the following disqualifying conditions under AG

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

The burden shifted to Appellant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

(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) 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.

AG ¶ 26(a) is not fully established. Although it has been approximately five years since he last used marijuana, Applicant's lengthy history of using marijuana while holding a clearance is concerning. His use occurred over an almost 40-year-period, and extended into his fifties, while he worked for multiple defense contractors and the USNR. Applicant's use of illegal drugs did not occur under unusual circumstances, each use occurred in a social setting.

AG ¶ 26(b) is not fully established. Applicant has expressed his intent not to use drugs in the future and provided a letter of intent to abstain from all drug involvement and substance misuse. However, his promises to abstain from illegal drug use are undercut by his testimony and the record evidence. Applicant used drugs while he was in the USNR and in 1995 tested positive for marijuana. Despite being ashamed by the positive urinalysis and subsequent discharge, Applicant used marijuana after he applied for and received a DOD clearance in 2007.

Applicant chose to use illegal drugs, and his decision to do so continues to reflect negatively on his current security worthiness. Applicant's decision to use illegal drugs, especially after being granted a security clearance, cannot be considered a minor lapse in judgment, but is, instead, a pattern of behavior that indicates an unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours;<sup>1</sup> off-duty conduct, especially where it reflects poor judgment,

---

<sup>1</sup> See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

provides a rational basis for the government to question an applicant's security worthiness.<sup>2</sup> Furthermore, Applicant's eventual self-reporting of his illegal drug use does not change the security significance of the underlying conduct. At this time his supervisor and facility security officer are still unaware that Applicant used marijuana while holding a security clearance. Applicant engaged in an activity he knew to be in direct contravention of federal law and his responsibilities as an individual holding a security clearance. His behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the Government when he was granted access to classified information.

### **Guideline E: Personal Conduct**

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following is potentially applicable 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, determine employment qualifications, award benefits or

---

<sup>2</sup> See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989).

status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant failed to disclose the full extent of his marijuana use in his November 2007 SCA. Although he claimed that he did not intend to deceive the Government, the totality of the record evidence demonstrates that he purposely minimized the length of time that he used marijuana and the frequency of his use. The evidence established the above disqualifying condition.

AG ¶ 17 describes conditions that could raise a security concern and be disqualifying. The following are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

Applicant held a clearance while he served on active duty in the USN and he did not use marijuana during his service from 1986 until 1992 while he held a security clearance. However, when he applied for a clearance in 2007, Applicant did not provide an accurate description of the history and frequency that he used marijuana. Although he provided some explanations that he was suffering from mental fatigue or misunderstood the relevant questions, upon further questioning, he admitted that he minimized his marijuana use in the 2007 SCA.

The SOR did not allege that Applicant falsified his 2017 SCA; however, the record evidence demonstrated that he minimized the frequency of use in his second security application as well. His failure to be honest in the second SCA further underscores that the failure to report was purposeful and not a mistake.

The SOR also did not cross-allege Applicant's use of marijuana while holding a clearance under Guideline E; however, his decision to use marijuana after he received a security clearance further demonstrates a pattern of behavior that indicates his unwillingness to follow rules and regulations. The evidence does not establish persuasive mitigation under AG under AG ¶¶ 17(a) and 17(c).

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the drug involvement concerns and the personal conduct concerns. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

### **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, Drug Involvement:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the interests of national security of the United States to continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

---

Caroline E. Heintzeman  
Administrative Judge