



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



In the matter of: )  
)  
) ISCR Case No. 18-02338  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Kent, Esquire  
For Applicant: *Pro se*

01/17/2020

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**Decision**

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LYNCH, Noreen A., Administrative Judge:

**Statement of the Case**

This case alleges security concerns raised under Guidelines H (Drug Involvement and Substance Abuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

On August 9, 2019, in accordance with DOD Directive 5220.6, as amended (Directive), the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).<sup>1</sup>

Applicant timely answered the SOR and requested a hearing before an administrative judge. (Answer) The case was assigned to me on October 28, 2019. The

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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 Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on or after September 1, 2006. Since that time, the AG were amended as *Guideline H: Drug Involvement and Substance Abuse*, and it is now in effect for any adjudications on or after June 8, 2017.

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 12, 2019, scheduling the hearing for December 13, 2019. I convened the hearing as scheduled.

The Government (GX) submitted four documents marked GX 1-4 and a discovery letter, which was marked as Hearing Exhibit I. There was no objection to the documents and they were entered into the record. Applicant submitted four documents, which were marked as Applicant Exhibits (AX) A-D and testified on his behalf.

### **Findings of Fact**

Applicant is 28 years old. He graduated from high school, has various certifications, and works as a security technician. He attended some college classes on a part-time basis. He has been employed with various companies since approximately 2010. He is in the Army National Guard. Applicant completed his latest security clearance application (SCA) on January 10, 2017. (GX 1)

The SOR alleges under Guideline H that Applicant used marijuana, with varying frequency, from approximately 2009 to May 2018, after being granted access to classified information in approximately September 2011 (1.a). The SOR further alleges falsification in his 2011 security clearance application (2.a) and falsification about the use of marijuana on his 2016 security clearance application (2.b) under Guideline E. Applicant admitted all the allegations under the guidelines but provided detailed explanations. At the hearing, the Government moved to withdraw SOR allegation 2.b and the motion was granted.

Applicant testified that he experimented with marijuana in 2009 while in high school. He and a friend smoked marijuana in the custodian's lounge. He was aware that smoking marijuana was illegal. (GX 3) Applicant and his friend were found by the principal and a drug test was administered. Applicant failed the drug test. (Tr. 19) When Applicant spoke to an army recruiter in 2011, he told him about the marijuana use and was told to not worry about it. (AX A, Tr. 13) He does not recall completing a security clearance application in 2011. He does not recall filling out or submitting any forms that asked about prior drug use. (Applicant's Answer to SOR, file)

Applicant recalls that his last drug use was at his bachelor's party in May 2018. (AX B) However, he admitted that he smoked marijuana due to peer pressure perhaps once a week before that time. He never bought the drug or grew the product. (Tr. 21) He used marijuana in the fields or woods with kids living in his neighborhood. He recalls in 2016, that after he was deployed, he used marijuana with a friend who he still sees occasionally. He does not feel dependent on the drug. He did not test positive after that use. (GX 3) He did not take drug education classes. He held a security clearance at the time of his 2018 marijuana use. (GX 3) He has no future intent to use marijuana. He stated that it was a weak moment on his part and bad judgement. His family is aware of his illegal use of marijuana.

Applicant completed another security clearance application in August 2016. He answered "No" to Section 23 - Illegal Use of Drugs or Drug Activity Illegal Use of Controlled substances in the last seven (7) years. (SOR 2.b) Have you ever illegally used a controlled substance while possessing a security clearance.? He did not list the marijuana use as alleged and admitted in SOR 1.a.

Applicant stated that when he was investigated he spoke to the investigator about the marijuana use. He realizes that the use of marijuana would reduce his employment opportunities and present hardship to his family. (Tr. 46) He did not intentionally try to mislead the Government. He apologizes for the situation and states that since 2009, he was up-front with the Army recruiter about the 2009 marijuana use. He also told an investigator about the incident in 2016. In 2018, he reached out to the investigator and told him of his use of marijuana at his bachelor party in 2018. He realized that it was a selfish mistake to accept the marijuana at the party. He was credible in his testimony. He has not had any drug counseling.

Applicant submitted three character references from military personnel who have worked with him. Each attests to his polite and respectful manner, strong character and judgment. (AX C) Applicant has worked for the Government in a military and contracting capacity and has shown great pride in his work and an ability to lead.

### **Policies**

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 used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied 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 access to classified information will be resolved in favor of 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

mitigate facts admitted by applicant or proven by Department Counsel and 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

## **Analysis**

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

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. This is 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. Such use also raised questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Here, Applicant admitted he used marijuana with varying frequency from 2009 to 2018. He failed a drug test in 2009, while in high school. This is sufficient evidence to raise AG ¶ 25(a): any substance misuse, and ¶ 25(b): testing positive for an illegal drug. The Government’s substantial evidence, as provided by Applicant’s admissions, thus raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant’s 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 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.

Applicant's last use of marijuana, an illegal substance, took place in 2018. He acknowledged using marijuana with varying frequency during the period from 2009 through 2018. He also held a security clearance at the time of his use. He sometimes associates with one of the persons with whom he smoked marijuana. In the life of this Applicant, in terms of age, maturation, and work history, sufficient time has not passed to deem his marijuana usage as remote. I find AG ¶ 26(a) and 26(b) (1)-(3) do not apply.

### **Guideline E, Personal Conduct**

The security concern for personal conduct 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.

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

(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 classified or sensitive information.

Here, Applicant answered "No" on his 2011 (SCA) in response to a question inquiring whether he had illegally used any controlled substance, for example marijuana, in the last seven years or while holding a security clearance. (Section 23) His reasoning was credible in that he had informed investigators and army recruiters as early as 2009 and was told not to worry. However, he did continue to use marijuana, but I find him credible in that he did not intentionally mislead the Government when responding to the questions in Section 23 on his security clearance application. Consequently, these two disqualifying conditions do not apply.

AG ¶ 17 describes conditions that could mitigate security concerns. Potentially applicable in this matter is AG ¶ 17(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, untrustworthiness, or good judgment.

Here, Applicant exhibited various incidents of unreliable conduct reflecting questionable judgment. These include the few instances he used marijuana between 2009 and 2018. His failure to disclose on his 2011 SCA that he had used marijuana was not intentional. His explanation was credible and I find that if he violated the security concerns under the Personal Conduct Guideline, he has mitigated them with his credible admissions to an Army recruiter.

### **Whole-Person Concept**

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(d). The final determination must be an overall commonsense judgment based on 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, and conducted a whole-person analysis based on the record.

Applicant is a 28-year-old who serves in the U.S. Army National Guard. He has a son. However, he still associates with the friend who smokes marijuana. He seemed very casual about his illegal use of marijuana, including while holding a clearance. His use was from 2009 to 2018 with varying frequency. He stated that he does not smoke anymore. Applicant was apologetic about his illegal use.

However, he did not intentionally falsify a 2011 SCA regarding his use of marijuana. The reasons he gave are credible. I have no doubts as to Applicant's trustworthiness, judgment, and reliability. Under these circumstances, I find Applicant has not mitigated drug involvement and substance misuse, but has mitigated the personal conduct security concerns. Clearance is denied.

### **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:

FOR Applicant

Subparagraph 2.a:

For Applicant

Subparagraph 2.b:

WITHDRAWN

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Noreen A. Lynch  
Administrative Judge