



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 19-03376

**Appearances**

For Government: Benjamin Dorsey, Esquire, Department Counsel

For Applicant: *Pro se*

October 8, 2020

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**Decision**

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ROSS, Wilford H., Administrative Judge:

On October 20, 2017, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP). (Item 3.) On April 10, 2020, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse), and E (Personal Conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on April 30, 2020, and requested his case be decided on the written record in lieu of a hearing. (Item 2.) In his Answer he admitted all the allegations in the SOR, with explanations. On June 16, 2020, Department Counsel submitted the Department's written case. A complete copy

of the file of relevant material (FORM), consisting of Items 1 to 5, was provided to Applicant, who received the file on July 24, 2020.

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional material on August 22, 2020. Department Counsel had no objection, and the documentation is identified as Applicant Exhibit A and admitted into evidence.

The case was assigned to me on September 22, 2020. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 66 and married to his second wife. Applicant was employed by the Defense Department from 1971 until 2010, when he retired. Since that time he has been employed by the Defense Department as a contractor. He has held a security clearance almost continuously since 1971, and seeks to retain national security eligibility for access to classified information in connection with his employment. (Item 3 at Sections 13A and 25, Item 4.)

#### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted both allegations under this paragraph.

1.a. Applicant used marijuana at least ten times from January 1975 to January 1982. During all that time Applicant held a security clearance. (Item 2, Item 3 at Section 23, Item 5; Applicant Exhibit A.)

1.b. Applicant again used marijuana from approximately December 2016 to December 2019. He smoked marijuana approximately 60 times during that period. Applicant held a security clearance for the entire period. (Item 2, Item 3 at Section 23, Item 4, Item 5; Applicant Exhibit A.)

Applicant self-reported his drug use during an interview with an investigator from the Office of Personnel Management (OPM) on December 29, 2017. According to the investigator, “He [Applicant] decided to answer positively during the interview since he regretted not disclosing it on the case papers.” (Item 4.)

In response to a set of interrogatories, Applicant admitted to continuing to use marijuana until December 2019. This means he continued to use marijuana for two years after admitting his use to the OPM investigator. He also admitted to purchasing marijuana (Item 4.)

In his Answer (Item 2), Applicant stated, "I know that I did not have a medical prescription for it [marijuana use] and that it was not the right thing to do, but because I could not drink any alcohol, I used marijuana on occasion to help me relax."

### **Paragraph 2 (Guideline E, Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations. Applicant admitted both allegations under this paragraph.

Applicant filled out an e-QIP on October 20, 2017. (Item 3.) Section 26 of that questionnaire concerned Applicant's drug use history. Specifically, Applicant was asked if he had used any illegal drugs, including marijuana, within the last seven years. Applicant was also asked if he had "EVER" illegally used drugs while holding a security clearance. [Emphasis in original.] He answered both of these questions, "No." These were false answers to relevant questions concerning his drug abuse history.

Other than his own general description, Applicant did not submit any evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, the administrative judge applies the guidelines 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. 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, "Any doubt concerning personnel being considered for national security eligibility 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.

According to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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 information.

Finally, as emphasized in Section 7 of EO 10865, “Any 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The security concern relating to Drug Involvement and Substance Misuse is set forth in AG ¶ 24:

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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

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

Applicant has a history of purchasing and using illegal drugs. This occurred between 1975 and 1982, and again from 2016 and 2019. Applicant held a security clearance during both times in question. All three of the stated disqualifying conditions apply.

The following mitigating conditions under AG ¶ 26 have also been considered:

- (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.

Applicant had not used illegal drugs for about eight months when the record closed. Applicant is a smart, capable, and mature individual. He has been working for the Defense Department for many years, has had a security clearance since 1971, and has been investigated to renew his security clearance several times. He knew illegal drug use was wrong, and yet he continued to use marijuana for two years after admitting his drug involvement to an OPM investigator in 2017. Neither of the mitigating conditions apply. Paragraph 1 is found against Applicant.

## Paragraph 2 (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.

The following disqualifying condition is applicable under AG ¶ 16:

- (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.

The following mitigating condition is arguably applicable under AG ¶ 17:

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

Applicant admitted his recent drug use, and his falsification, to an OPM investigator two months after filling out his e-QIP. I weighed this fact together with Applicant's over forty-year history of holding a Department of Defense security clearance, which included filling out at least three prior security clearance questionnaires. He knew the obligation to tell the truth and blatantly ignored it. Under the particular circumstances of this case, his subsequent admission of the falsification is not sufficiently mitigating. Paragraph 2 is found against Applicant.

## 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 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 national security eligibility and 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 facts and circumstances surrounding this case. Applicant illegally used marijuana over 70 times during the almost 50 year period in which he held a security clearance. He falsely denied his drug involvement on his 2017 e-QIP. He understood the wrongfulness of his conduct, yet continued to use marijuana for two years after revealing it to the OPM investigator. Insufficient time has passed, since his recent misconduct, to demonstrate rehabilitation or reduce the likelihood of recurrence. Overall, the record evidence as described above leaves me with questions and substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the guidelines for Drug Involvement and Substance Misuse, and Personal Conduct.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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

## **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 national security eligibility and a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS  
Administrative Judge