



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



In the matter of: )  
 )  
----- ) ISCR Case No. 12-04433  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

03/28/2014

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns for drug use. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On January 5, 2012, Applicant completed a security clearance application (SCA). On December 30, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement). The action was taken under Executive Order 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 DOD on September 1, 2006.

In a January 23, 2014, response to the SOR, Applicant admitted all allegations raised under Guideline H. He also requested a hearing before an administrative judge. The Government was ready to proceed on February 12, 2014. The case was assigned to me on February 20, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 28, 2014, setting the hearing for March 19, 2014. The hearing was convened as scheduled. The Government offered two documents,

accepted into the record without objection as Exhibits (GX) 1-2. Applicant gave testimony and introduced one witness. Applicant was given until March 27, 2014, to submit any additional materials. The transcript (Tr.) of the proceeding was received on March 25, 2014. Between March 26, 2014, and March 27, 2014, Applicant submitted three documents, which were accepted into the record without objection as Applicant's Exhibits (AX) 1-3. The record was then closed.

### **Findings of Fact**

Applicant is a 51-year-old product development manager who has been with his present employer for two-and-a-half years. He has never had a security clearance. His January 2013 SCA is his first application for a security clearance. Applicant has earned both a bachelor's degree and a master's degree in electrical engineering. He has been married to his current wife for about two years. He has a grown child from a previous relationship. Applicant introduced a character witness who gave complimentary testimony regarding Applicant's character. (Tr. 43-50) Applicant has received favorable performance reviews.

While in high school, circa 1978, Applicant began using marijuana. From 1978 to about 1981, he used the drug about two times. He also tried lysergic acid diethylamide (LSD) and methaqualone during this time frame. (Tr. 28, 30-31) From 1981 to 1991, Applicant used marijuana about twice a week. From 1982 to 1987, he used cocaine once or twice a month. He also used psilocybin mushrooms (mushrooms) occasionally from 1982 to 1988 and a couple of times between 1991 and 1999. In the interim, from 1991 until 2011, his illegal use of marijuana was reduced to about twice a year. He thinks there may have been years during this final period when he did not use illegal drugs. (Tr. 23) He usually used marijuana on dates or with friends at concerts. He was never "concerned about legal consequences or being caught or arrested or anything like that." (Tr. 26)

Applicant completed his SCA on January 5, 2012. Under Section 23 (Illegal Use of Drugs or Drug Activity), Applicant wrote that he had last used marijuana at a June 2011 concert held at a local park. In response to the question as to whether he intended to use this drug in the future, he answered, "no." (GX 1, SCA, at 33 of 38) After completing the SCA, Applicant "made the assumption that [DOD] would consider [subsequent drug use] improper and [he] recognized that at the time. . . ." (Tr. 26-27)

In May 2012, while entertaining guests from out of town, Applicant used marijuana on the night before his wedding. Also in 2012, Applicant accepted one dose of his wife's prescribed Xanax medication to help calm his nerves before a speech. (Tr. 29-30) Applicant again used marijuana in March 2013 at a birthday party he and his wife were hosting. The drug was supplied by the same out-of-town guests with whom he had used marijuana before his wedding. (Tr. 22-24)

Regarding the two instances of using marijuana after completing his January 2012 SCA, Applicant stated that they were "not intention-driven. They were

opportunistic.” (Tr. 56) He maintains that he had the intent not to use marijuana, but explained that situations came up where he did. (Tr. 57).

In the recent past, Applicant has only used marijuana with the out-of-town friends noted above. He last used marijuana 12 months ago. He recently was offered marijuana at a concert, but declined to use the drug. (Tr. 37) Applicant acknowledges that drugs are present at outdoor concert events, but stated, “it is not my intention to be around [illegal drugs], but I can’t control the person next to me.” (Tr. 36, 38) He attends concerts for enjoyment, not for work. His 2011 marijuana use was at an outdoor concert venue. At these events, he pursues his hobby of recording concerts.

Applicant stated that it is a “personal choice” whether he uses drugs, and he noted that he is no longer around regular drug abusers or those with whom he used drugs before he married. (Tr. 32, 34) He maintains close and daily social contact, however, with someone who “smokes a little weed once in a while . . . .” (Tr. 32) Most of the time, other people have provided Applicant with drugs. He has, however, contributed to its purchase at times in the past. (Tr. 34) At the hearing, Applicant stated that it is his present intent not to use drugs in the future. (Tr. 40) A licensed clinical psychologist has determined that Applicant does not have chemical dependency issues. (AX 3)

### **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. Instead, 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 derived from 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 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.

Section 7 of Executive Order 10865 provides that 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**

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. (AG ¶ 24) “Drugs” are defined as mood and behavior altering substances and include drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (*e.g.*, marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and inhalants and other substances. (AG ¶ 24(a)(1-2)) “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24(b))

Applicant used marijuana with varying frequency from about 1978 until March 2013. In 2012, he used a medication prescribed to his wife. Of less recent interest, Applicant used cocaine once or twice a month from 1982 to 1987, and used psilocybin mushrooms on multiple occasions between 1982 and 1988. He again used such mushrooms on one or two occasions between 1991 and 1999. Applicant also admits to contributing to the purchase of marijuana. Such facts are sufficient to raise Drug Involvement Disqualifying Conditions AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

Although Applicant’s past use of mushrooms and cocaine is remote in terms of time, his abuse of marijuana remains worrisome. He has never been concerned about legal consequences related to his illegal drug abuse. His marijuana use continued after he stated his intention in his January 2012 SCA not to use drugs in the future. Indeed,

after completing the SCA, Applicant admitted that he assumed DOD would consider subsequent drug use improper. That abuse of marijuana continued until almost exactly one year before the hearing, so his drug use is very recent. Applicant's only explanation for not maintaining the intention he expressed in his January 2012 SCA of not using marijuana in the future is that his 2012 and 2013 lapses were "not intention-driven," but only "opportunistic."

In his January 2012 SCA, Applicant recorded his last date of marijuana use as having been in June 2011. Eleven months later, he used the drug in May 2012. Ten months later, he used marijuana in March 2013. As of the hearing date, 12 months had passed without recurrence. His most recent intervals of illegal drug abuse reflect a recurrence of drug use about every year, despite a continuing expression of intent not to use drugs again in the future. What is needed is a demonstrated intent fortified by a proven record for successful abstinence, not merely the continued expression of an intent that is subject to incidental caprice. Moreover, Applicant continues to go to venues where he knows drugs will be present. While he has reduced his drug-using contacts, a close and daily contact continues to use marijuana. Further, he has employed no safeguards to help him avoid relapse. Finally, he has yet to demonstrate that he appreciates that his drug use is not just antithetical to the qualities expected of one maintaining a security clearance, but illegal. In light of these considerations, I find that none of the drug involvement mitigating conditions apply.

### **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(a). Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for 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 the facts and circumstances surrounding this case. I incorporate my comments under the above-referenced guideline in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a 51-year-old product development manager who has been with his present employer for two-and-a-half years. He has earned both a bachelor's degree and a master's degree in electrical engineering. Married for two years, he is the father of a grown child from a previous relationship. Character witness testimony regarding Applicant was highly favorable. Applicant showed that he is successful in his work. He has never held a security clearance.

Applicant started using marijuana in high school. After high school, he used cocaine and psilocybin mushrooms on a few occasions, through 1987 and 1999, respectively. He also used his wife's prescription Xanax in 2012. The one-time use of

Xanax appears to have been an isolated event, and the cocaine and mushroom abuse are very dated. The most worrisome issue in this case concerns Applicant's marijuana abuse through March 2013, barely one year ago.

Applicant provided scant evidence of rehabilitative efforts to refrain from illegal drugs or indicating his future ability to successfully remain drug-free without "opportunistic" relapse. At best, he has reduced the number of his drug-using contacts. However, his January 2012 statement of intent to not use drugs in the future was nullified with his marijuana-using lapses in May 2012 and March 2013. Insufficient time has passed for him to demonstrate that his ongoing expression of intent and current abstinence can be sustained. In light of the regularity of his recent past lapses into drug use, more than one year is needed to demonstrate his ability to sustain a drug-free lifestyle. For these reasons, I conclude Applicant failed to mitigate drug involvement security concerns.

### **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
Subparagraph 1.b-1.d:	For 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 a security clearance. Eligibility for access to classified information is denied.

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Arthur E. Marshall  
Administrative Judge