



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



In the matter of: )  
)  
) ISCR Case No. 12-05028  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Stephanie C. Hess, Esq., Department Counsel  
For Applicant: *Pro se*

07/16/2015

**Decision**

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guidelines H (drug involvement) and E (personal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On October 3, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. DOD CAF took that action 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) implemented on September 1, 2006.

The SOR set forth reasons why DOD CAF could not find under the Directive that it is clearly consistent with the national interest to continue Applicant's security clearance. On October 20, 2014, Applicant answered the SOR and elected to have a decision based on the administrative record in lieu of a hearing. On February 28, 2015,

Department Counsel prepared a File of Relevant Material (FORM) that contained documents identified as Items 1 through 4. A complete copy of the FORM was mailed to Applicant on March 18, 2015, and he received it on April 1, 2015. He was given 30 days from its receipt to file objections or submit matters in refutation, mitigation, or extenuation. He did not submit a response. The case was assigned to me on May 20, 2015.

## **Findings of Facts**

### Background

Under Guideline H, the SOR alleged that Applicant failed a random drug test in June 2010 by testing positive for marijuana while holding a security clearance (SOR ¶¶ 1.a and 1.b). Under Guideline E, the SOR alleged that he was arrested and charged with Theft in the Second Degree in March 2011, pled guilty to a lesser included offense of Theft in the Fourth Degree, and was sentenced to probation, ordered to pay restitution, and the judgment was deferred (SOR ¶ 2.a). The two Guideline H allegations were cross-alleged along with the allegation in SOR ¶ 2.a in a separate Guideline E allegation (SOR ¶ 2.b). In his Answer to the SOR, Applicant did not address the specific allegations, but admitted to each guideline with comments.<sup>1</sup>

Applicant is a 54-year-old employee of a defense contractor. He has worked for his current employer since June 2006. He earned a bachelor's degree in 1982. He has not served in the military. He is divorced and has been living with a cohabitant since 2007. He has one adult child. He was granted a security clearance in 2006.<sup>2</sup>

### Drug Allegations

In his security clearance application (SCA) date May 4, 2011, Applicant disclosed that he was arrested and fined for the offense of "drug paraphernalia" in September 1997 and that he tested positive for marijuana in a urinalysis test in June 2010. In the Section on Illegal Use of Drugs or Drug Activity in his SCA, he described these incidents by stating he used marijuana "1" time in September 1997 and he "inhaled marijuana during one isolated incident" in June 2010. In his SCA, he also responded "Yes" to the question that asked whether he ever used a controlled substance while possessing a security clearance.<sup>3</sup>

In an interview with an Office of Personnel Management (OPM) investigator in August 2011, Applicant indicated that a police officer observed him and a friend passing a "one hit marijuana box" in September 1997. He was charged with possession of drug paraphernalia, pled guilty to that charge, and paid about \$1,000 as a fine and court

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<sup>1</sup> Items 1 and 2.

<sup>2</sup> Item 3.

<sup>3</sup> Item 3.

costs. He also indicated that he could not recall exactly when he started using marijuana, "but it was in college roughly late 70's or early 80's." He also stated he used marijuana recreationally about once every six months, but stopped using it after being arrested on the drug paraphernalia charge in September 1979.<sup>4</sup>

In the OPM interview, Applicant also indicated that he tested positive for marijuana in June 2010. He explained that shortly before the drug test an old friend from high school was visiting his town and called him to get together. The friend came to Applicant's house, pulled out a marijuana joint, and asked him if he wanted some. Applicant smoked about half of the joint. Applicant again indicated that this incident was the first time he had used marijuana since September 1997.<sup>5</sup>

Applicant has not been diagnosed as a drug abuser or as drug dependent. He has not received any drug treatment or counseling. He was placed on administrative leave after testing positive for marijuana. Since then, he has taken at least six random drug tests, all of which had negative results.<sup>6</sup>

In responding to interrogatories in October 2013, Applicant stated that he first used marijuana in 1978 and last used it in June 2010. He further stated that he used it "less than 4 dozen times in 32 year period," that he was not currently using it, and that he had no intention of using it in the future.<sup>7</sup>

### Theft Allegation

In the OPM interview, Applicant also discussed the theft and possession of stolen property charges brought against him in 2011. Applicant lived in State A. He indicated that he found an abandoned railroad site in State B and started taking railroad signs and other collectables and selling them on eBay. One prospective buyer made an arrangement to pick up a railroad sign at Applicant's house. During that transaction, Applicant showed the buyer his collection of items in a backroom. When they returned to the living room, four police officers were present. Applicant learned the purported buyer was an undercover officer. Upon questioning, Applicant admitted stealing the signs. His house was searched and stolen property was recovered.<sup>8</sup>

In March 2011, Applicant was charged with Theft in the Second Degree in State A. The charge indicated that Applicant exercised control over stolen property of a value over \$200 but under \$500, knowing such property was stolen and without the intent to restore it to its proper owner. This charge was categorized as a serious

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<sup>4</sup> Item 4.

<sup>5</sup> Item 4.

<sup>6</sup> Item 4.

<sup>7</sup> Item 4.

<sup>8</sup> Item 4.

misdemeanor. In June 2011, he pled guilty to a lesser included offense of Theft in the Fourth Degree pursuant to a plea agreement in which the State would recommend a deferred judgment. As part of the deferred judgment, he was ordered to pay a civil penalty of \$315, pay restitution to the railroad company of \$2,945, and was placed on probation for one year. In August 2012, the court discharged Applicant from probation and expunged the deferred judgment from his record.<sup>9</sup>

Applicant was also charged with theft in State B. This charge was categorized as a Class A misdemeanor. In June 2011, Applicant pled guilty to that charge. The court's disposition of the charge consisted of a one-year "continuance under court supervision" with the condition that he not violate any criminal or traffic law in that or any other jurisdiction, an assessment of \$500, and restitution (same as listed under the State A disposition).<sup>10</sup>

### Character Evidence

A director at Applicant's company recommended that Applicant retain his security clearance. The director indicated that Applicant continued to demonstrate an excellent work ethic and attitude since the incidents reflected in the SOR.<sup>11</sup>

### **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 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 access to classified information will be resolved in favor of national security." In reaching this

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<sup>9</sup> Item 4.

<sup>10</sup> Item 4.

<sup>11</sup> Item 2.

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, 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**

AG ¶ 24 sets forth the security concern for 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 it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) 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

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and find the following are potentially applicable:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

In June 2010, Applicant tested positive for use of marijuana while holding a security clearance. The evidence is sufficient to raise the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under AG ¶ 26. The following mitigating conditions are potentially applicable:

- (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) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's use of marijuana in June 2010 while holding a security clearance was a disregard of the law and a breach of a position of trust. He was 49 years old at that time. His questionable claim – that the only occasion in which he used marijuana since 1997 resulted in him getting caught in a urinalysis test – does not dispel the security concerns. From the record evidence, I am unable to find that his drug abuse happened under unusual circumstances, is unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment. In making that finding, I note that I did not have the opportunity to observe his demeanor or assess his credibility. AG ¶¶ 16(a) and 26(b) do not apply.

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

AG ¶ 15 sets forth the security concern for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying in this case:

(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 protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . .

In 2011, Applicant pled guilty to theft and possession of stolen property charges. In 2010, he tested positive for marijuana on a urinalysis test while holding a security clearance. AG ¶¶ 16(c) and 16(e) apply.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following are potentially applicable:

(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 caused 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.

In 2011, Applicant stole railroad signs and other collectables from an old railroad and attempted to sell those items. He was caught attempting to sell the stolen property in an undercover police operation. He pled guilty to charges in two jurisdictions for this misconduct. Although he was required to pay restitution of \$2,945 to the owner of the property, an unknown amount of other stolen property was recovered from his home during the undercover operation. The exact scope of the theft is unknown. Applicant complied with each court's deferred judgment. His police record in State A for this

misconduct has been expunged. Nonetheless, this theft was a serious offense that raises questions about his trustworthiness. Additionally, the analysis of the Guideline H allegations applies equally here. Insufficient evidence was presented to conclude that Applicant will not engage in questionable conduct in the future.

### **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):

- (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 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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant has worked for his current employer since June 2006. He is a valued employee. His employer recommends him for a security clearance. Considering the record evidence as a whole, however, he failed to provide sufficient evidence to mitigate the security concerns arising from his drug involvement and the theft. Applicant's disregard for the law raises doubts about his eligibility and suitability for a security clearance. For all the above reasons, I conclude Applicant has failed to mitigate the drug involvement and personal conduct security concerns.

### **Formal Findings**

Formal findings 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:	For Applicant <sup>12</sup>
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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James F. Duffy  
Administrative Judge

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<sup>12</sup> I found for Applicant on the allegation in SOR ¶ 1.a because the alleged conduct was fully encompassed in SOR ¶ 1.b.