



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



In the matter of:

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) ISCR Case No. 12-06707  
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Applicant for Security Clearance

**Appearances**

For Government: David Hayes, Esquire, Department Counsel  
For Applicant: Charles Swift, Esquire

06/25/2014  
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**Decision**  
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WHITE, David M., Administrative Judge:

Applicant was discharged from the Army for drug abuse in 1984, and used marijuana for more than 30 years while holding a security clearance. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SF 86) on February 27, 2012. On November 19, 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant, 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in an undated writing (AR) that was received by the Defense Office of Hearings and Appeals (DOHA) on December 27, 2013, and

requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 1, 2014. The case was assigned to me on February 6, 2014. DOHA issued a Notice of Video Teleconference Hearing on March 11, 2014, and I convened the hearing, as scheduled, on April 25, 2014. Applicant, his counsel, and the court reporter attended the hearing in person. Department Counsel participated from DOHA Headquarters by video teleconference. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered Exhibits (AE) A through F, which were admitted without objection, and testified on his own behalf. Three additional witnesses testified for him by telephone. DOHA received the transcript of the hearing (Tr.) on May 7, 2014.

### **Findings of Fact**

Applicant is a 54-year-old employee of a defense contractor, where he has worked since October 2000. He is divorced, with no children. He enlisted in the Army after finishing his junior year of high school in 1977, and was honorably discharged for Drug Abuse - Rehabilitation Failure in March 1984. He held a security clearance during his Army service, except for several months in 1982 when it was suspended after his first positive urinalysis test, and continued holding a clearance during his post-service employment with several defense contractors. His father was a career Army officer. (GE 1; GE 2; GE 3; AE A; Tr. 96, 113.)

In his response to the SOR, Applicant admitted the allegations set forth in SOR ¶¶ 1.a through 1.d, except that he denied having been discharged from the Army for unsuitability. Applicant's admissions, including his statements in response to DOHA interrogatories (GE 2), are incorporated in the following findings.

Applicant started using marijuana while in the Army. He first tested positive on a urinalysis test in May 1982, and was command-referred to the Alcohol and Drug Abuse Prevention and Control Program. He attended 10 out of 14 scheduled counseling sessions, and was given an Early Program Completion at his commander's request in September 1982. Because he became disillusioned with his prospects for future service after transferring to overseas duty, he resumed marijuana use. He said that he bought and supplied marijuana to his fellow soldiers who also used it, but never sold it. When he refused additional drug rehabilitation after testing positive for marijuana again, he was discharged for Drug Abuse - Rehabilitation Failure in March 1984. (GE 1; GE 2; GE 3; AE A; Tr. 96-98.)

Applicant admitted in his February 2012 SF 86, and confirmed during his April 2012 interview with an investigator from the Office of Personnel Management (OPM), that he regularly smoked marijuana on a recreational basis once or twice a month from 1980 until he tested positive for it on a company-directed urinalysis test in October 2011. During his hearing testimony, he said that there were some unspecified periods of time during those 31 years that he did not smoke marijuana each month. He admitted knowing that his marijuana use violated his employer's drug-free-workplace policies,

was illegal, and was not permitted while holding a security clearance. (AR; GE 1; GE 2; Tr. 93-95, 106-107, 114, 120-121, 125.)

In October 2011, Applicant's employer ordered a company-wide urinalysis test after another employee had drug-related issues. When Applicant was informed of this test, he immediately called his supervisor and told him that he would fail the test because he had smoked marijuana. He took and failed the test, and was directed to take and pass another urinalysis by November 24, 2011, with the agreement that he would be terminated if he failed to do so. He did not take the test until December 30, 2011, for reasons that were unexplained, but was allowed to continue his employment when he passed that test. He also took and passed another urinalysis test for the company on November 15, 2013. (AR; GE 1; GE 2; AE C; AE E; Tr. 114-116.)

Applicant testified during the hearing that he could not remember his October 2011 marijuana use, which he thought happened at a going-away picnic gathering at which he had too much to drink and marijuana was present. He further testified that his last use of marijuana before 2011 was in 2005. He attributed his earlier statements about having been a regular marijuana user and having known that he would fail his urinalysis test to being "over-truthful" and "too truthful." (Tr. 90-94, 114-116.) Applicant's demeanor during this testimony did not enhance his credibility.

Applicant attended three hour-long counseling sessions beginning in March 2014 because he knew that it would help with the security clearance process. He testified that he found the counseling useful, and another session was scheduled for after the hearing. The individual who counseled Applicant is a Licensed Professional Counselor, a Nationally Certified Counselor, and a certified Alcohol and Drug Counselor. He testified that about 30% of his cases involve substance abuse. He holds a bachelor's of science degree in Christian Ministry, and a master's degree in Counseling and Theology. He is not a staff member of a recognized drug treatment program, although he did work as a substance abuse counselor at a substance abuse recovery and treatment center from 2007 to 2009. The counselor said that Applicant did not meet the criteria for drug abuse or dependence, but needed assistance with coping skills for stress. He is not participating in a drug treatment program or subject to urinalysis testing. (AE D; Tr. 72-88, 101-102, 116-117.)

Applicant submitted a signed statement of intent to refrain from illegal drug use, with waiver of the right to a future hearing and agreement to automatic revocation of his clearance for any violation. (AE F.) He testified that most of his time is now spent on assignment in a state distant from the one in which his family lives and where he used marijuana, so he no longer spends much time with former drug-using associates. He further testified that he has not used marijuana since October 2011. (Tr. 102,120.)

Two of Applicant's supervisors testified concerning the high quality of his professional performance, the level of responsibility his duties entail, and his good track record with respect to handling sensitive information and observation of security

procedures. They also described his good judgment, trustworthiness, integrity, and reliability.

## **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 (DCs) and mitigating conditions (MCs), 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, these guidelines are applied 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he 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." Section 7 of Executive Order 10865 provides: "[a]ny 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."

A person applying for access to classified information seeks to enter 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.

## Analysis

### Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The DCs supported by the evidence in this case are:

- (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.

Applicant admitted to regular recreational use of marijuana from 1980 through October 2011, resulting in two positive urinalysis tests while he was in the Army and another positive test in October 2011. He admitted purchasing the marijuana he used and sharing it with others, which is distribution regardless of whether he received money in return. Applicant held a security clearance throughout the more than 30 years that he used marijuana, while knowing that it was both illegal and contrary to security guidelines.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (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;
- (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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's last known drug use was in October 2011, after more than 30 years of regular recreational use despite his knowledge that it was illegal and contrary to Army and his subsequent employers' drug-free policies. He failed to convincingly demonstrate that this drug use is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or judgment.

Applicant claims that his move to another state for work caused disassociation from his drug-using contacts, but admitted that he returns home to be around them frequently. There is no evidence of his drug use after October 2011, but with a history of regular use over more than 30 years this period of abstinence is not compelling or persuasive. Applicant provided a statement of intent not to abuse drugs in the future, and his supervisors' faith in his integrity lends some weight to its mitigating effect. His drug use over many years in violation of clear company policies reduces the weight of those opinions, however.

Applicant has not undergone any drug treatment program, and his recently begun counseling program is not under the care of a duly qualified medical professional, as defined in the guideline. The counselor offered no prognosis, having only begun to see Applicant for three sessions before his hearing. This counseling is a positive step, but insufficient to establish a mitigating condition.

Finally, Applicant failed to convincingly establish either remorse for, or mitigation of, his disregard for the security implications of regular drug abuse while holding a security clearance, and the demonstrated unwillingness to comply with laws, rules, and regulations inherent in those choices.

### **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 pertinent facts and circumstances surrounding this case. Applicant regularly used marijuana for more than 30 years while holding a security clearance and knowing that such conduct was both illegal and in violation of security policies of his employers and the U.S. Government. He is a mature and experienced individual who is accountable for such choices. After being caught on a company urinalysis test, he asserts that he stopped his illegal activity. It is not clear that he would have done so otherwise, thereby supporting continuing concerns about his judgment and integrity.

Applicant's good work record and supervisors' praise indicate that he has good potential for rehabilitation, but insufficient time has passed to generate confidence that his 30-year history of knowing defiance of drug laws and policies is permanently behind him. Such surreptitious conduct while holding a position of trust and confidence subjects him to ongoing potential for coercion, exploitation, and duress. Overall, the record evidence creates ongoing doubt as to Applicant's present eligibility and suitability for a security clearance.

### **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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant <sup>1</sup>
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

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<sup>1</sup>Excepting the word, "unsuitability" and substituting the words, "Drug Abuse - Rehabilitation Failure." His clearance was suspended in 1982 and he was discharged in 1984. Both were "about" 1983, as alleged in the SOR. See Directive ¶¶ E3.1.17, E3.1.25; Tr. 107-113.

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

DAVID M. WHITE  
Administrative Judge