



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



In the matter of:	)	
	)	
	)	ISCR Case No. 12-08559
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: Nicole A. Smith, Esq.

05/14/2014

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**Decision**

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O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, her request for a security clearance is denied.

**Statement of the Case**

On December 30, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) citing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) of the Adjudicative Guidelines (AG).<sup>1</sup> In her Answer to the SOR, Applicant admitted the drug-related allegations, and denied the personal conduct allegation. She requested a hearing before an administrative

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<sup>1</sup> Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on March 24, 2014, and I convened the hearing on April 8, 2014. I admitted two Government exhibits (GE 1-2) and two Applicant exhibits (AE A-B). DOHA received the transcript on April 17, 2014.

### **Findings of Fact**

Applicant's admissions are incorporated as findings of fact. After a thorough review of the pleadings and the record evidence, I make the following findings of fact.

Applicant is 45 years old, married, and has one seven-year-old son. She completed bachelor's and master's degrees in the 1990s, and a law degree 2005. In 1991, she received her first security clearance when she worked as a contract specialist for a defense agency from 1991 to 1996. From 1997 to 2005, she worked for a defense contractor as director of contracts, where she also held a secret security clearance. From 2005 to 2007, she was director of federal contracts for another defense contractor. In 2007, she joined her current company as director of contracts. She is now executive vice president of contracts and business administration. She was granted a top secret security clearance in 2007. In 2012, she had a periodic reinvestigation for her top secret clearance. (GE 1, 2; Tr. 31-37, 41, 43, 49)

Applicant smoked a marijuana cigarette three times between 2000 and 2003, between the ages of 32 and 35. She used marijuana in 2000, while dating her future husband. She smoked marijuana two more times with him after they were married in July 2003. In 2003, Applicant was attending law school. She disclosed her marijuana use on her security clearance application and at her security interview during her investigation from 2005 to 2007. Applicant was granted a top secret security clearance in 2007. She testified that she did not receive any information or warnings about her marijuana use during or after that investigation. Applicant testified that she has received general security training annually, at the defense agency in the 1990s, at previous contractor companies, and at her current company. The annual presentation at her current company states that use of illegal substances constitutes a security concern. It also states, generally, that employees should address any concerns with the FSO. (GE 1; Tr. 31-41)

Applicant visits her family in another state about four times per year. In 2011, at age 41, Applicant attended a July 4<sup>th</sup> party with family members. Her mother had expressed curiosity about marijuana, which she had never used. At the party, Applicant's brother-in-law offered a marijuana cigarette to Applicant's mother and the other family members. Applicant decided to join in with her family, and she shared the cigarette. When her counsel asked Applicant if she was thinking about her security clearance when she used marijuana in 2011, Applicant testified, "Of course I knew I probably shouldn't have done it." (GE 1, 2; Tr. 44-45, 62, 70-72)

When Department Counsel asked about her thoughts at the time, Applicant testified,

A I don't really, I mean when it was presented I thought oh this is an issue -- well we all know it's not legal, right, we're sitting there and making a choice to partake.

Q So that was your choice even knowing you had a top secret security clearance?

A Right. That night I made a poor choice. (Tr. 62)

Applicant testified that the night she used marijuana, she did not think that if she smoked the cigarette and then disclosed it during her investigation, that she could lose her security clearance. (Tr. 45-47) Applicant testified,

[I] think because I had disclosed the three prior uses and still was granted a top secret clearance, I may not have fully appreciated the leeway that I apparently had been granted on being given the top secret security clearance in the first place. . . . (Tr. 46)

Applicant testified that her family members do not smoke marijuana in her presence, her husband and friends do not smoke marijuana, and she does not associate with illegal drug users. (Tr. 44)

In 2012, Applicant completed her current security clearance application for reinvestigation for her top secret security clearance. She testified that she takes the duty of honesty seriously, and knew she was required to disclose her marijuana use. The drug-related questions asked whether she had used illegal drugs during the previous seven years (2005-2012). She disclosed her 2011 marijuana use. She also disclosed that her 2000 to 2003 marijuana uses occurred while she held a secret security clearance. An authorized DOD investigator interviewed Applicant in March 2012. Applicant disclosed the instances when she used marijuana between 2000 and 2003, and in 2011.

Applicant also testified that at the time she used marijuana, it did not occur to her to disclose it to her FSO or her supervisor. She stated in her interrogatory response, "I could not be compromised by my choice to take part in the activity, nor am I embarrassed by it." Applicant informed the FSO about her drug use after she received the DOHA interrogatory in September 2013. A few months later, after she received the SOR in early 2014, she informed the company Chief Executive Officer (CEO) and Chief Operating Officer (COO) of her illegal drug use. She testified that her company has no policy requiring immediate disclosure of illegal drug use to company officials. (GE 2; Tr. 13-20, 41-44, 49, 63, 66-70)

Applicant testified she has never had a random drug test for any of her jobs. She has never received drug treatment or counseling, and has not used illegal drugs since 2011. She submitted a signed statement that she will abstain from drug abuse and that she understands future illegal drug use will result in revocation of any security clearance she is granted. She testified, "I can tell you very clearly that my sworn statement of no intent to smoke marijuana is made this time with full certainty and understanding of its relevance and its impact." (GE 1, 2; AE A, B; Tr. 27-29, 50-52, 64)

The founder and CEO of Applicant's company has known her for 13 years. They have had weekly contact since he hired her in 2007. Applicant holds a position of trust in the company and has never had issues of misconduct. Approximately two months before the hearing, she informed him of her 2011 illegal drug use. He testified that she was ". . . very remorseful, very embarrassed" about it, and Applicant ". . . said she was just embarrassed quite frankly." She was sorry that she had done something that affected herself and her company. He believes she has good judgment and he has relied on it in the past. He characterizes her marijuana use as a lapse in judgment, and considers her one of his most trustworthy employees. (Tr. 13-20)

The CEO stated that the company FSO provides employees with quarterly reminders regarding security clearance issues. When questioned about his company's drug policy, the CEO stated, "Well, there's no toleration of it internally" but drug problems have not arisen, except for the current adjudication. He stated that, to his knowledge, Applicant did not receive instruction about self-reporting negative information to the FSO. He also did not remember his FSO providing information about illegal drug use. However, he testified that the incompatibility of using illegal drugs while holding a security clearance is understood by his employees. (Tr. 20-29)

Applicant submitted character reference letters from friends and colleagues who have known her from 7 to 23 years. All were aware of Applicant's 2011 illegal drug use. One friend who has known her for 17 years called it "completely surprising" and out of character. As a colleague and close friend of Applicant's family, he stated that "I have never seen any use or indication of use of an illegal substance. . . ." He described Applicant as having exemplary character, trustworthiness, and judgment, and as a trusted advisor within the company. A coworker described Applicant as one of the most reliable and responsible people she has ever met. Another coworker attested to Applicant's honesty and integrity. The COO of Applicant's company has known her for 13 years, and became her direct supervisor 2 years ago. He stated that "[Applicant] is always the voice of reason and compliance, ensuring we do the right thing and follow the rules . . . [Applicant] has earned this position of responsibility and trust through repeated demonstration of good judgment and excellent performance." (AE B)

### **Policies**

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information,

and consideration of the pertinent criteria and adjudication policy in the AG.<sup>2</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines H (drug involvement) and E (personal conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest<sup>3</sup> for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the Government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.<sup>4</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as her or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.<sup>5</sup>

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 expresses the security concern about 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.

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<sup>2</sup> Directive. 6.3.

<sup>3</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>5</sup> See *Egan*; AG ¶ 2(b).

I considered the following disqualifying conditions listed at AG ¶ 25:

- (a) any drug abuse;
- (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.

After accepting a position with a defense agency, Applicant received her first secret security clearance in 1991. Subsequently, she possessed and used marijuana three times between 2000 and 2003, while she held the secret security clearance. After being granted a top secret security clearance in December 2007, she again used an illegal drug in 2011. AG ¶¶ 25(a), (c), and (g) apply.

Two of the four mitigating conditions are relevant under AG ¶ 26:

- (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.

Applicant's drug use is not recent, and it was infrequent. However, the circumstances in which she used marijuana are not unlikely to recur: she used marijuana with her husband and family members, whom she sees frequently. In addition, her use of marijuana after eight years abstinence is a concern. Applicant's decision to knowingly violate the law, and especially to engage in illegal conduct while holding a security clearance, raises serious concerns about her trustworthiness and judgment. AG ¶ 26(a) does not apply.

Some mitigation applies based on Applicant's abstention from marijuana use for the past three years, and her notarized statement that she will not use marijuana and other illegal drugs in the future, subject to revocation of any security clearance she might hold at the time. However, Applicant has continuing contact with her husband and family members with whom she used marijuana in the past. In addition, she used marijuana in 2011, after a long period of abstention. Her current period of three years' abstention is shorter than her past period of eight years' abstention. Applicant receives partial mitigation under AG ¶ 26(b).

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

AG ¶ 15 expresses the security concern about 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.

Under AG ¶ 16, the following disqualifying conditions are relevant:

(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 (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant engaged in illegal conduct by using marijuana three times between 2000 and 2003. Each of the instances occurred while she held a secret security clearance. She used the same illegal drug again in 2011, at a time when she held a top secret security clearance. Lack of candor is not at issue, as Applicant disclosed her illegal drug use on her security clearance applications and in her security interviews.

However, she showed poor judgment, and an unwillingness to obey the rule of law when she used illegal drugs. AG ¶ 16(c) applies.

Applicant failed to disclose her illegal conduct to her FSO or supervisor at the time it occurred. She testified that her company did not have a policy requiring disclosure. However, in 2011, Applicant had held a security clearance for more than two decades, sponsored by a military agency and several defense contractors; she had also received annual security training for years. It is not credible that she did not know security clearance holders are required to report changes in their circumstances that could affect their security clearance. Yet she did not reveal her 2011 marijuana use to the FSO until two years later, after she received the interrogatory in September 2013. She did not disclose it to her supervisor until 2014, after she received the SOR. Although she stated in her interrogatory response that she was not embarrassed by her illegal conduct, her supervisor testified that when Applicant informed him, she said she was embarrassed to report her illegal conduct to him. Applicant remained vulnerable to coercion during the two years she failed to disclose her illegal drug use. AG ¶ 16 (e)(1) applies.

Guideline E contains factors that can mitigate disqualifying conduct. The following conditions under AG ¶ 17 are relevant:

(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; and

(e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The rationale discussed under Drug Involvement, AG ¶ 26(a) applies under Guideline E, AG ¶ 17(c). In addition, under AG ¶ 17(c), Applicant's conduct in using an illegal drug while holding a security clearance cannot be considered minor. It was a breach of the obligations imposed on security clearance holders, and raises serious doubts about Applicant's reliability and judgment. AG ¶ 17(c) does not apply. However, Applicant has disclosed her illegal conduct to her FSO and supervisor, and is no longer vulnerable to exploitation. AG ¶ 17(e) applies.

### **Whole-Person Analysis**

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's history includes positive factors that weigh in her favor, including abstinence from marijuana use for the past three years, her intent not to use it in the future, her educational achievements, her professional accomplishments, and her laudatory character references from her supervisor, friends, and coworkers.

However, Applicant's illegal conduct outweighs these factors. She engaged in criminal activity by using an illegal drug. She used marijuana while she held a security clearance at both the secret and top secret levels. After her 2011 marijuana use, she did not reveal her illegal conduct to her employer until prompted by the security clearance process. Applicant's conduct is not mitigated, despite being granted a security clearance in 2007, after using marijuana. The Appeal Board has consistently held that prior favorable adjudications do not preclude subsequent adverse decisions; previous conduct is considered during each investigation and adjudication, especially when the most recent facts were not present, or as significant, during an earlier investigation.<sup>6</sup>

Applicant's use has been infrequent. However, on evaluating the whole person, I find that her four uses, all while holding a security clearance, show that she has repeatedly put her own wishes ahead of her duty to obey the law and uphold her obligations as a security clearance holder. Those who hold security clearances enter into a fiduciary relationship with the Government based on trust. Applicant's repeated illegal conduct while holding a security clearance does not demonstrate the

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<sup>6</sup> ISCR Case No. 01-24504 at 3 (App. Bd. Feb. 11, 2003). *See also*, ISCR Case No. 07-17383 at 2 (App. Bd. Feb. 12, 2009), "However, prior decisions to grant or retain a clearance do not undermine the legal sufficiency of a Judge's subsequent adverse decision. 'The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications.'" ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005); ISCR Case No. 04-01961 at 4 (App. Bd. Jul. 12, 2007).

trustworthiness and good judgment required in those granted access to classified information.

A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about her suitability for a security clearance. For these reasons, I conclude she has not mitigated the security concerns arising from the cited adjudicative guidelines.

### **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 as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 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 interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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RITA C. O'BRIEN  
Administrative Judge