



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



In the matter of: )  
)  
) ISCR Case No. 12-09774  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: William F. Savarino, Esq.

05/23/2016

**Decision**

MASON, Paul J., Administrative Judge:

Applicant’s evidence in mitigation is insufficient to surmount the adverse evidence under the guidelines for drug involvement and personal conduct. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) in July 2008. He was interviewed by an investigator from the Office of Personnel Management (OPM) in September 2008. He completed a second e-QIP in May 2012, and was interviewed again in the same month. On March 18, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under drug involvement and personal conduct. The action was taken pursuant to 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) implemented by the Department of Defense on September 1, 2006.

Applicant's answer to the SOR was signed and notarized on April 1, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 20, 2015, for a hearing on November 18, 2015. The hearing was held as scheduled. Six Government exhibits (GE) 1-6 and Applicant's 18 exhibits (AE A-R) were admitted in evidence without objection. Applicant and two witnesses testified. The transcript (Tr.) was received on December 3, 2015. The record closed on the same day.

### **Rulings on Procedure**

On June 19, 2015, the Government filed a motion to amend the SOR as follows:

1) Modification of SOR 1.b to state:

"You used marijuana while holding a security clearance from approximately January 2009 to June 2011."

As verification of his denial to the amended SOR 1.b allegation, Applicant encircled "DENY" and placed his initials to the right of the encircled word.

(2) Addition of SOR 2.b to state:

"You falsified your 2008 Electronic Questionnaire for Investigations Processing for National security Positions, signed by you on July 26, 2008. In response to the language of the question in Section 24, you answered "yes" and disclosed using marijuana from approximately January 2000 to June 2004. In truth, you used marijuana through the date of your 2012 e-QIP, signed by you on May 2, 2012." The proposed amendment is poorly drafted in that Applicant's drug use account in his May 2012 e-QIP is only relevant to the seven-year time period before Applicant executed his July 2008 e-QIP. In addition, there is no evidence in the government's exhibits to support the claim that Applicant used marijuana through the date of his May 2012 e-QIP. The only record reference to the 2012 date was during Applicant's testimony. Therefore, under ¶ E3.1.17 of the Directive, the last sentence of this allegation is modified to read:

"In truth, you used marijuana to June 2011, as set forth in your May 2, 2012 e-QIP."

The change is made to bring the allegation into agreement with the information Applicant entered in response to Section 23 of the May 2012 e-QIP and his May 2012 summary interview (GE 3, 5).

Applicant's first answer to proposed SOR 2.b was "DENY." Then, he changed his answer to "ADMIT" by encircling the word and placed his initials to the immediate right of the encircled word. He provided his signature and date (June 29, 2015) on the first page of his three-page answer. The motion is hereby granted. The two-page motion to amend and Applicant's three-page answer and attachment are admitted in evidence as Hearing exhibit (HE 1).

### **Findings of Fact**

Applicant denied SOR 1.a of the original SOR that alleges he used marijuana about three times a year from approximately January 1996 to June 2011. He mistakenly admitted SOR 1.b that alleges he used marijuana while holding a security clearance from November 2008 to January 2009. The government documentation supports Applicant's claim that he was not in possession of a security clearance when he used marijuana between November 2008 and January 2009. SOR 1.b is withdrawn.<sup>1</sup> See GE 6. As noted in Rulings on Procedure, Applicant denied proposed amendment SOR 1.b. His original denial to proposed amendment SOR 2.b became his final position because he believed that he falsified no information in his July 2008 e-QIP. (GE 2 at 29-30; Tr. 51-52, 59-62)

Applicant is 33 years old. He has been married since May 2010, and has one daughter. He received a bachelor's degree in January 2006. He has been employed as an operations program manager with a defense contractor since November 2013, and received a promotion in July 2015. He was a supply chain program planner during an earlier period of employment for this contractor between 2006 and 2010. He seeks a continuation of his security clearance that was granted in January 2009. (GE 1 at 12, 16; GE 6; Tr. 25)

### **Background of Security Investigation**

In July 2008, Applicant (26 years old) executed an e-QIP. In response to Section 24 (Illegal Use of Illegal Drugs and Drug Activity), he acknowledged that he used marijuana while in college between 2000 and 2004. The drug was available and other friends used it. He indicated that he used the drug less than 30 times and described his use as recreational, not habitual. In his September 2008 OPM interview, Applicant confirmed the use that he described in his July 2008 e-QIP. He indicated that he stopped using the drug in 2004

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<sup>1</sup> This ruling is made under ¶E3.1.17 of the Directive.

because he did not like it and no longer had an interest in it. He had no intention of using the drug in the future. (GE 2 at 30; GE 4 at 3)

At the age of 29, Applicant executed an e-QIP in May 2012. He was applying for a contract manager's position. In response to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant estimated that he first used marijuana in January 1996, and he estimated that his most recent use was in June 2011. In response to the instruction to provide nature of use, frequency, and number of times used, Applicant responded "recreational-less than 3x per year." Regarding future intentions, Applicant stated "I no longer use this drug recreationally, so I do not have any intention of using it in the future." (GE 3 at 32-33)

Applicant was interviewed a second time in May 2012. He essentially confirmed marijuana use between January 1996 and June 2011. He described singular puffs at social gatherings. He combined marijuana with alcohol to lower his inhibitions. He was never involved in the sale or purchase of marijuana. He never had a positive drug test. At a subsequent point in the same paragraph of his summary interview, he provided a statement that between November 2008 and January 2009, he used marijuana while possessing a security clearance.<sup>2</sup> Applicant indicated that he stopped using marijuana and had no future intentions of drug use. He opined that his use was isolated and sporadic. (GE 5 at 5)

In his April 2015 attached response to the original SOR, Applicant emphasized that he was trying to be open and honest during the May 2012 OPM interview. He recalled using marijuana on one occasion between November 2008 and January 2009, not three times a year from January 1996 to June 2011, as set forth in the summary interview. He believed that there may have been a misunderstanding of his verbal responses or he may not have understood the line of questioning from the OPM investigator. (April 2015 answer and attachment)

In his June 29, 2015 answer to the amended SOR, he denied the SOR 1.b amended allegation of using marijuana between January 2009 and June 2011, while holding a security clearance. In response to SOR 2.b, Applicant reiterated his contention that after 2004, he only used marijuana once in November 2008. (Answer to SOR)

On the second page of his June 29, 2015 answer to the amended SOR, Applicant provided more reasons why the marijuana use information appearing in his May 2012 interview was inaccurate. He again stated he was trying to be open and honest when he disclosed his drug use. He stated, "I mis-recalled information and made statements that were not specific and seemingly ambiguous." Applicant noted that during the interview he

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<sup>2</sup> The statement was the basis for the original allegation 1.b of the SOR. That allegation has been withdrawn. (GE 6)

became confused and distracted in linking some of the questions and time periods. He stated subsequently in the paragraph that the May 2012 e-QIP “was submitted at a time when I was under certain duress due to family obligations and concerns, as well as certain employment stress and unhappiness.” (Answer to Amended SOR, Attachment)

At the hearing, Applicant agreed with the contents of the July 2008 e-QIP and September 2008 interview. He also provided some additional information about his discussions with a friend who bolstered his belief that his last use of marijuana was in November 2008. (AE O; Tr. 36-46, 55-56)

Concerning the May 2012 e-QIP, Applicant testified that he completed the security application truthfully and answered the pertinent drug use question (Section 23) affirmatively because he recalled only a single use of marijuana between his 2008 e-QIP and his May 2012 e-QIP, though he was unsure when the use occurred. He picked the June 2011 date arbitrarily “because it seemed to cover the period of 2008 to 2012.” (Tr. 49) Then, Applicant claimed that his affirmative response to the follow up drug use question while holding a security clearance applied to his single use which he ultimately concluded was in November 2008, the date he mistakenly believed he had a security clearance. He subsequently received information showing that his security clearance was not issued until January 2009. He provided no additional information about the purported employment-related and family-related stress and unhappiness he was experiencing when he executed the 2012 e-QIP. (GE 3 at 32-33; GE 6; Tr. 47-52, 56)

Applicant was asked why he provided more drug use information on the 2012 e-QIP than on the 2008 e-QIP. His reply was because he did not have possession of the first e-QIP. Then, in explaining his reason for selecting January 1996 as the date he began using marijuana, and addressing the overall wording of the drug use question, Applicant testified:

Sir, this statement reads [“]provide an estimate of the year and first month of first use.[”] I would interpret that as the first use ever since the dawn of time. The question is phrased: you answered yes to in the last seven years. There is no subsequent follow up to item number one that says in the last seven years provide an estimate of the month and year of your first use in the last seven years. I disclosed that this was my first, probably the first time of use ever. (Tr. 71-72)

Applicant’s explanation for the January 1996 beginning date in Section 23 of the 2012 e-QIP has just been quoted. As explained earlier, Applicant chose the termination date of June 2011 arbitrarily. The third portion of the question is directed to the nature, frequency and number of times used. By indicating “recreational - less than three times a year,” the most logical interpretation of the information furnished by Applicant is that he admitted using marijuana less than three times a year between January 1996 and June 2011. One

explanation for his affirmative response to the very next question (use of marijuana while holding a security clearance) is that he only used the drug one time in November 2008. However, the most reasonable inference based on the information he provided on the previous page is that he used the drug while holding a security clearance between January 2009 and June 2011. The information he provided in his 2008 e-QIP and his explanations in his answers and testimony for marijuana use and use while holding a security clearance are not credible, specifically because of his confirmation of the information in his subsequent May 2012 OPM interview. I find he used marijuana between 2004 and 2008, and his use continued until June 2011. (GE 1 at 32-33)

Applicant was asked whether he provided the June 2011 date during the May 2012 interview. His response was, "Sure, yes I don't recall telling him specifically that June 11<sup>th</sup> was neither a definitive date nor an estimate." (Tr. 54) He told the investigator that he had used marijuana on one occasion between November 2008 and January 2009, while holding a security clearance. Applicant provided no additional testimony about his purported misunderstandings to the investigator's line of questions and his ambiguous responses during the interview. (GE 5 at 5; Tr. 53-57)

Applicant realizes that using marijuana is illegal. While he still socializes with the individual he used marijuana with in November 2008, that individual no longer uses drugs. Applicant has purchased his second house and is more focused on his career and raising his family. On November 18, 2015, Applicant signed a statement of intent with automatic revocation of clearance for any violation. (Tr. 46, 58; AE O, R)

## **Character Evidence**

Applicant's friend, witness A, met him in college as a roommate in 2002. They lived together after college for a few years until witness A married and moved. They have remained in regular contact. Witness A is aware of the drug use allegations involving Applicant using marijuana with another friend. In the personal friendship they have developed, witness A has no reason to doubt Applicant's honesty and integrity. Witness A does not believe that Applicant has used marijuana since college, except for the use in 2008. (Tr. 17-23)

Witness B has worked in the engineering, manufacturing, and logistics division, as an operations program manager. She has held a security clearance for 35 years. She hired Applicant in November 2013 and is his supervisor. She considers Applicant to be one of her top four operation managers because of his attention to detail and thoroughness. She considers him trustworthy and dedicated. (Tr. 23-31)

Of Applicant's 18 character references, 10 references are from coworkers or employees who have interacted with Applicant at work. The work references, who have

known Applicant for up to seven years, have found him to be reliable, trustworthy, honest, and a good family man. (AE A, B, G, H, I, J, K, L, M, N)

Four character references are from friends and neighbors who have known Applicant and his family for up to 31 years. Applicant is described as being honest, responsible, and a good family man. The fifth character reference is from Applicant's father who indicated that he shared the amended SOR with Applicant. He was proud that Applicant decided to tell the truth about his November 2008 use of marijuana in his 2012 e-QIP. (AE C, D, E, F, P)

In Applicant's 2014 performance evaluation, witness B noted in her overall comments that Applicant was a team player dedicated to improving department procedures. Applicant provided a signed statement expressing his intention to refrain from drug use or consent to a revocation of his security clearance. (AE R, Q)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the disqualifying and mitigating conditions of the AG. These conditions must be evaluated in the context of the nine general factors of the whole-person concept to bring together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision for security clearance eligibility. Such decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion of establishing that it is clearly consistent with the national interest to grant him a security clearance.

### **Analysis**

#### **Drug involvement**

Paragraph 24 of the AG 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 for willingness to comply with laws, rules and regulations;

The pertinent disqualifying conditions under AG ¶ 25 that may be disqualifying are:

- (a) any drug use;<sup>3</sup>
- (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 a careful examination of Applicant's certified May 2012 e-QIP, which is corroborated by his May 2012 OPM interview, I conclude that Applicant began using marijuana in January 1996. He used the drug at a frequency of less than three times a year between 2004 and July 2008, when he executed his initial e-QIP. He continued to use the drug until he stopped in June 2011. In order to use the drug, he had to possess it. Between January 2009 and June 2011, he used the drug while holding a security clearance. AG ¶¶ 25(a), 25(c), and 25(g) are applicable.

The potentially mitigating conditions under AG ¶ 26 of the drug involvement guideline are:

- (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 are used, (3) an appropriate period of abstinence, and (4) a signed statement of intent with automatic revocation of clearance for any violation.

Though there is no evidence of marijuana use by Applicant since June 2011, his infrequent use of the drug less than three times a year lasted for about 15 years. His marijuana use in social settings did not occur under unusual circumstances. AG ¶ 26(a) has only limited application.

Applicant has provided meaningful evidence under the four factors of AG ¶ 26(b). There is evidence that he stopped associating with drug-users and no longer interacts in an environment where drugs are used. The absence of marijuana use in the last four years is

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<sup>3</sup> Drug use is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (Directive at 34)



supported by Applicant's signed statement of intent to forego future marijuana use. However, Applicant's failure to fully disclose his marijuana history in his 2008 e-QIP reduces the mitigation he receives under AG ¶ 26(b).

## **Personal Conduct**

The security concern for personal conduct is set forth 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 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.

The potentially pertinent disqualifying condition under AG ¶ 16 are:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, . . . used to conduct security investigation, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative 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 he may not properly safeguard classified information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other behavior in the workplace; (3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of government or other employer's time or resources.

Applicant's deliberate falsification of his certified July 2008 e-QIP is based on the information he provided in his certified May 2012 e-QIP indicating that he used marijuana between 2004 and 2008, and thereafter until June 2011, at a frequency of less than three times a year. Applicant's certified May 2012 e-QIP responses regarding his marijuana use, substantiated by his OPM interview later in May 2012, support application of AG ¶ 16(a). Assuming that there is insufficient evidence to invoke AG ¶ 16(a), then the incomplete picture Applicant provided about his marijuana use in his July 2008 e-QIP represents credible adverse information representative of poor judgment and a lack of candor within the scope of AG ¶¶ 16(c) and 16(d).

The potentially pertinent mitigating conditions under AG ¶ 17 are:

(c) the offense was 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

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's view of his marijuana use is that it was minor because after his college use between 2000 and 2004, he claimed he used the drug one additional time in November 2008. Had the record supported that account, then the favorable character evidence would likely warrant a continuation of his security clearance eligibility. However, Applicant's more recent e-QIP discloses that he used marijuana from 1996 to June 2011. He had an opportunity to correct the erroneous information in the May 2012 e-QIP, but declined when he was interviewed by the OPM investigator in the same month. AG ¶ 17(c) does not apply.

Though Applicant has provided considerable character evidence that demonstrates positive changes in his behavior, he has not acknowledged that his 2008 e-QIP was an incomplete picture of his drug use. Furthermore, his lifestyle changes must be balanced against his denial of drug use information that he furnished in his May 2012 e-QIP, that he confirmed in his May 2012 interview, but is currently denying. Applicant receives only limited mitigation under AG ¶ 17(d).

## Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of drug involvement and personal conduct. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

There is positive evidence supporting Applicant's security clearance. He received a bachelor's degree in January 2006. He has been married since May 2010, and has a daughter. In the two years that she has supervised Applicant, witness B testified that Applicant is one of her top operation program managers. His coworkers, neighbors and friends believe Applicant is trustworthy, honest, reliable, responsible and a good family man. Applicant's father believes that his son has been honest during the security investigation.

The foregoing favorable evidence is insufficient to overcome Applicant's drug use and use while holding a security clearance. Applicant contends that he arbitrarily selected the June 2011 termination date (May 2012 e-QiP) because he was not sure when he last used marijuana. If he could not remember the last date of use, I do not understand how he remembered when he began using marijuana. Nor do I understand why he would arbitrarily enter information about his termination date and the frequency of use. Applicant's explanation (one-time use in November 2008) for his "yes" answer to the question of using marijuana while holding a clearance does not make sense given the information he provided on the previous page of the May 2012 e-QIP. Considering the totality of the evidence, Applicant's evidence in mitigation is insufficient to overcome the ongoing security concerns based on the drug involvement and personal conduct.

At the conclusion of his closing argument, Applicant's counsel provided me with two DOHA Appeal Board cases for my review before reaching a decision in this case. In his opinion, both cases were reversed because the administrative judge did not fully assess the

period of abstinence and changed circumstances since the applicant's last drug use. The primary holding of the Board in each case is that an administrative judge cannot substitute his negative credibility determination for record evidence. Those two cases are distinguishable in that both cases were decided on the record as there was no opportunity to weigh witness demeanor. In the first case, ISCR Case No. 02-08032 (App. Bd. May 14, 2004), the guidelines for drug involvement and personal conduct were alleged. However the personal conduct guideline was resolved in Applicant's favor. In the second case, ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004) drug involvement was the only guideline alleged. My adverse findings in this case are based on Applicant's admissions in his May 2012 e-QIP and interview that he used marijuana until June 2011.

### **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:

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|------------------------------------|-------------------|
| Paragraph 1 (Guideline H):         | AGAINST APPLICANT |
| Subparagraph 1.a:                  | Against Applicant |
| Subparagraph 1.b:                  | Withdrawn         |
| Subparagraph 2 (Personal Conduct): | 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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason  
Administrative Judge