



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



In the matter of:	)	
	)	
	)	ISCR Case No. 13-00907
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Candace Le'i Garcia, Esq., Department Counsel  
For Applicant: *Pro se*

04/08/2014

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**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on March 22, 2013. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on October 28, 2013, 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; DOD 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* (AG), implemented on September 1, 2006.

Applicant received the SOR on November 4, 2013, and he answered it on November 15, 2013. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on January 24, 2014, and I received the case assignment on February 10, 2014. DOHA issued a Notice of Hearing on February 25, 2014, and I convened the hearing as scheduled on March 26, 2014. The Government offered exhibits (GE) marked as GE 1 through GE 4, which were received and admitted into evidence without objection. Applicant testified. He submitted three exhibits (AE) marked as AE A through AE C, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on April 2, 2014. I held the record open until April 2, 2014, for Applicant to submit additional matters. Applicant timely submitted AE D, which was received and admitted without objection. The record closed on April 2, 2014.

### Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.b and 1.c of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶ 1.a of the SOR.<sup>1</sup> He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 33 years old, works as a procurement manager for a DOD contractor. He began working for his employer in December 2002. His employer promoted him to his current position in 2009. DOD granted Applicant a security clearance in 2005. Applicant never worked on the project for which he obtained the clearance, but his clearance remained active and valid until 2012 when it was revoked by the DOD for admitted marijuana use.<sup>2</sup>

Applicant graduated from college with a bachelor's degree in industrial technology in 2002 and received a master's degree in business administration in 2007. After dating for three years, Applicant and his wife married in August 2012. They have a one-month-old daughter.<sup>3</sup>

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<sup>1</sup>When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

<sup>2</sup>Response to SOR; GE 1; GE 2; GE 4; Tr. 18-20.

<sup>3</sup>GE 1; GE 2; AE C; Tr. 17-18.

As a college senior, Applicant smoked marijuana on three separate occasions between the fall of 2001 and graduation in 2002. Applicant reported his college use of marijuana on his November 7, 2005 security clearance application. After receiving the job offer from his employer, Applicant submitted to a pre-employment drug test. The test results were negative. Four years later, in 2006, Applicant attended a gathering of his younger brother's college friends or acquaintances at his brother's house. He took a few puffs on a marijuana cigarette and ate a cupcake containing marijuana that evening. He also smoked marijuana once in 2007, 2008, and 2010, the details unknown. Applicant does not have any contact with the friend or friend of a friend with whom he smoked marijuana or ate it in baked goods. His brother does not have contact with his college friends who used marijuana.<sup>4</sup>

In 2011, Applicant's wife purchased a small amount marijuana to try because she had not previously smoked marijuana. Applicant and his wife smoked one marijuana cigarette over two nights. Applicant and his wife honeymooned in Europe in the fall 2012. Applicant legally purchased the marijuana at a store in the Netherlands after he lost his security clearance. They smoked the marijuana during the three days they visited the Netherlands. Applicant and his wife decided not to smoke marijuana in the future as they wanted to start a family. Applicant has not used marijuana since 2012 and has changed his lifestyle to include healthy eating and exercise.<sup>5</sup>

After Applicant learned that a self-drug test could be admitted into evidence, he called his doctor on February 7, 2014 and requested his doctor to schedule a drug test for him. He appeared for his drug test on February 10, 2014. The results were negative for any drugs.<sup>6</sup>

Applicant believes his employer has a drug policy, but he has not seen the policy. He knows that illegal drug use is against company policy. He received his security clearance in 2005, but he does not remember any training directly related to illegal drug use. He does recall coworkers receiving training about use of classified systems just before they began working on a classified program. He had some security training over the years, but he was not specific about the type. He knows that he must abide by the laws and that he could not be involved in criminal activity after he received his security clearance. Applicant acknowledged that marijuana was illegal and that he knew it was illegal for him to use it.<sup>7</sup>

Applicant explained that he decided to purchase and use marijuana in the Netherlands because he had lost his security clearance and did not expect that he would ever regain his security clearance. After the hearing, Applicant signed a letter of

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<sup>4</sup>GE 1; GE 2; GE 4; Tr. 19, 22-23, 26-27, 29-32, 42-44.

<sup>5</sup>GE 1; GE 4; Tr. 23-24, 40.

<sup>6</sup>AE A; Tr. 25-26.

<sup>7</sup>Tr. 20-22, 30, 32-36.

intent not to use marijuana again. He made a similar statement in his personal subject interview and on his March 2013 e-QIP. He does not crave or desire marijuana.<sup>8</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 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 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, 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. . . ." An applicant has the ultimate burden of persuasion for obtaining 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 an 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.

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<sup>8</sup>GE 1; GE 4; AE D; Tr. 37-38, 47.

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**

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.

(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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(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 smoked marijuana three times as a college student. Four years after college graduation and after he had been granted a security clearance, Applicant again smoked marijuana and ate a brownie containing marijuana at a party with his brother's college friends. Applicant smoked marijuana about once a year in 2007, 2008, 2010, and 2011. A security concern is raised under AG ¶¶ 25(a), 25(c), and 25(g). Because marijuana is legal in the Netherlands, he did not violate any laws and a security concern is not raised by his use of marijuana in 2012.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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; and,
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's casual and infrequent use of marijuana occurs in social situations. His last use of marijuana occurred less than 18 months ago. His brother no longer associates with his college friends who smoked marijuana, and Applicant does not associate with individuals who smoke marijuana. Applicant expressed an intent not to smoke marijuana or use other illegal drugs in the future. Based on his testimony and a review of the record, I find that there is little likelihood that Applicant will use marijuana in the future. SOR allegations 1.a and 1.b are found in favor of Applicant.

However, Applicant has not fully mitigated the security concerns raised under this guideline because he smoked marijuana, an illegal drug, while holding a security clearance. When he carried out this conduct, he betrayed a sacred trust given to him by the United States government. He exercised poor judgment when he decided to use illegal drugs. He did so when he knew it was against the rules at work and would impact his eligibility for a security clearance. The SOR allegation in ¶ 1.c is found against Applicant.

### **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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant experimented with marijuana as a college student, which was over 12 years ago. His experimentation in college is not a security concern.

In 2006, after four years of abstinence, Applicant decide to smoke marijuana with his brother at a party. Approximately once a year since 2006, he smoked marijuana socially. During this time he held a security clearance, even though he was not working on classified projects. He generally understood the rules of conduct for holding a security clearance, which included maintaining his finances, avoiding criminal conduct, and following the law. He chose not to comply with the rules for holding a security clearance or the law, which reflects on his trustworthiness and reliability. While the purchase of marijuana is legal in the Netherlands, his decision to smoke it because he was not going to have a security clearance reflects an attitude favorable to the use of marijuana. His recent expression of an intent to avoid marijuana use in the future indicates a move in the right direction. At this time, it is too soon to determine if he is willing to stay away from marijuana.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement under Guideline H.

### **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:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARY E. HENRY  
Administrative Judge