



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 14-00013  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

June 30, 2014

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on August 14, 2013. (Government Exhibit 1.) On February 20, 2014, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), E (Personal Conduct), and F (Financial Considerations) concerning Applicant. The action was taken 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 3, 2014 (Answer), and requested a decision without a hearing by an administrative judge. On April 15, 2014, pursuant to Paragraph E.3.1.7 of Enclosure 3 of the Directive Department Counsel requested that this case be heard by an administrative judge. Department Counsel was prepared to proceed on April 29, 2014. This case was assigned to me on May 2, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May

6, 2014. I convened the hearing as scheduled on May 22, 2014. The Government offered Government Exhibits 1 through 5, which were admitted without objection. Applicant submitted Applicant Exhibits A through C, which were admitted without objection, and testified on his own behalf. Applicant asked that the record remain open for the receipt of additional documents. DOHA received the transcript of the hearing (Tr.) on May 28, 2014. Applicant timely submitted Applicant Exhibits D and E, which were admitted without objection. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 34, and single. He has been employed by a defense contractor since August 2013 and seeks to obtain a security clearance in connection with his employment. (Government Exhibit 1 at Section 13A.) Applicant admitted allegations 1,a, 1.b, 3.a, and 3.b of the SOR, with explanations. He denied allegations 2.a, and 2.b. Applicant's admissions are incorporated into the following findings of fact.

#### **Paragraph 1 (Guideline H, Drug Involvement)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used illegal drugs.

1.a and 1.b. Applicant admits using and purchasing marijuana in 2012 and 2013, but denies that his use and purchase were illegal. In 2012 Applicant was in college. He began having issues sleeping in April or May of that year. A friend suggested that Applicant try marijuana and gave him some at that time. Applicant used the marijuana he was given at least once and found that it helped him sleep. (Tr. 33-34.)

Applicant lives in a state where the possession and use of medical marijuana is legal under state law with a doctor's written permission. In September 2012 Applicant went to a clinic, paid a fee, was evaluated, and received a medical marijuana card valid for one year. The card expired on September 19, 2013. (Applicant Exhibit B.) While the procedure was legal, Applicant expressed the belief that the entire experience was "iffy." (Tr. 34-38.)

Once Applicant had the card he purchased marijuana from a legal medical marijuana dispensary. Applicant states that he used marijuana once or twice a week from September 2012 to approximately May 2013, about the time he finished school and was looking for a job. (Tr. 38-41, 45.)

#### **Paragraph 2 (Guideline E - Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has made false statements to the Department of Defense during the clearance screening process.

2.a. Applicant filled out a Government questionnaire on August 14, 2013. (Government Exhibit 1.) Section 23 of that questionnaire asked Applicant, “**In the last seven (7) years**, have you illegally used any drugs or controlled substances.” (Government Exhibit 1.) (Emphasis is original.) Applicant answered, “No.”

Applicant maintains that he did not have to answer this question, “Yes,” because he had a medical marijuana card, which made his use legal in his state. However, Applicant acknowledged that Federal law continues to make marijuana use illegal. (Tr. 42-43.) In addition, as stated above, Applicant admits using marijuana given to him by a friend in 2012. This usage, before the time Applicant had a medical marijuana card, even if only one time, was required to be reported.

2.b. Section 23 of the same questionnaire also asked Applicant, “**In the last seven (7) years**, have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?” (Government Exhibit 1.) (Emphasis in original.) Applicant again answered, “No.”

As before, Applicant maintains that he did not have to answer this question, “Yes,” because he had a medical marijuana card, which made purchases from authorized dispensaries legal in his state. However, once again, Federal law prohibited transfer and purchase of marijuana. In addition, Applicant was given marijuana by a friend in 2012. This transfer and handling, even one time, came under the rubric of this question and was required to be reported.

### **Paragraph 3 (Guideline F - Financial Considerations)**

3.a Applicant did not file his Federal income tax returns for tax years 2010, 2011, and 2012. During those years Applicant was a full-time student and did not have any income at all. He believed that because he did not have any income he was not required to file returns for those years. (Tr. 48-52, 55-59.) He is correct. Only people whose gross income is over a certain figure are required to file returns.<sup>1</sup> In 2010 the figure was \$9,350;<sup>2</sup> the figure in 2011 was \$9,500;<sup>3</sup> and in 2012 \$9,750.<sup>4</sup> However, in order to receive his Earned Income Tax Credit, the Applicant has now prepared tax

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<sup>1</sup>Internal Revenue Service, *Publication 17 (2013) Your Federal Income Tax*, [http://www.irs.gov/publications/p17/ch01.html#en\\_US\\_2013\\_publink1000170407](http://www.irs.gov/publications/p17/ch01.html#en_US_2013_publink1000170407) (accessed June 26, 2014).

<sup>2</sup>Yahoo, *Tax - Need You File a Tax Return for Your 2010 Income?* <http://voices.yahoo.com/tax-file-tax-return-2010-income-7682566.html?cat=3> (January 23, 2011).

<sup>3</sup>Jackson Hewitt Tax Service, *What are the 2011 minimum filing requirements?* [https://jacksonhewitt.custhelp.com/app/answers/detail/a\\_id/2756/~/-/what-are-the-2011-minimum-filing-requirements%3F](https://jacksonhewitt.custhelp.com/app/answers/detail/a_id/2756/~/-/what-are-the-2011-minimum-filing-requirements%3F) (updated December 27, 2013).

<sup>4</sup>Jackson Hewitt Tax Service, *What are the 2012 minimum filing requirements?* [https://jacksonhewitt.custhelp.com/app/answers/detail/a\\_id/2756/~/-/what-are-the-2011-minimum-filing-requirements%3F](https://jacksonhewitt.custhelp.com/app/answers/detail/a_id/2756/~/-/what-are-the-2011-minimum-filing-requirements%3F)

returns for 2010, 2011 and 2012. (Applicant Exhibit D.) This allegation is found for Applicant.

3.b Applicant had a state tax lien filed against him for the 2007 tax year. This was due to an administrative oversight on Applicant's part. He has since paid his back taxes and the lien has been released. (Applicant's Exhibits A and C; Tr. 46-48.) This allegation is found for Applicant.

## **Mitigation**

Applicant submitted an email from his direct supervisor. This person has worked with Applicant since August 2013. He states that Applicant "seems to be very reliable and trustworthy," and that Applicant can be "a valuable and trusted asset." He recommends that Applicant receive a security clearance. (Applicant Exhibit E.)

## **Policies**

Security clearance decisions are not made in a vacuum. 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 as appropriate 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(a) describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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. 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, "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Paragraph 1 (Guideline H - Drug Involvement)**

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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. 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; 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 especially considered the following:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admits using marijuana in 2012 and 2013. It appears that most of this use occurred in the context of Applicant having and using a physician-issued, state-authorized medical marijuana card. However, Applicant did not have this card when he began using marijuana in April or May 2012, after he was given marijuana by a friend. Moreover, Applicant acknowledged that he knew the purchase, possession, and use of marijuana was criminally prohibited by Federal law throughout this period. Both of these disqualifying conditions apply.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

(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 offered insufficient evidence that would support mitigation under AG ¶¶ 26 (a), or (b). Applicant's marijuana use ended approximately a year ago. Whether it was legal under state law or not, marijuana use and possession continues to be illegal under Federal law. While Applicant stated that he did not intend to use marijuana in the future, it is simply too soon to find that he has mitigated this allegation. Paragraph 1 is found against Applicant.

### **Paragraph 2 (Guideline E - Personal Conduct)**

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The following mitigating condition under AG ¶ 17 may apply to the facts of this case:

(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.

Applicant is an intelligent young man. He knew at the time he completed the questionnaire that his possession and use of marijuana also included the marijuana given to him by a friend before he had a medical marijuana card. Under any reading of the question those facts needed to be revealed. Under the circumstances, particularly given the time of use and when he filled out the questionnaire, the offense cannot be seen as minor. It also goes without saying that Applicant was also required to tell the Government about his drug use with a medical marijuana card, which was still illegal under Federal law. Paragraph 2 is found against Applicant.

### **Paragraph 3 (Guideline F - Financial Considerations)**

As discussed above, there is no current security significance to the allegations under this paragraph. Paragraph 3 is found for 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 applicant's conduct and all the circumstances. 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In a nutshell, the Government expects and requires applicants to be truthful and accurate in their communications with

it, especially concerning the use of illegal substances. After reviewing all the evidence under the clearly consistent standard, I cannot find that Applicant has been truthful and accurate with the Government. In addition, his use of drugs in 2012 and 2013 cannot be mitigated at this time. Under AG ¶ 2(a)(3), Applicant's conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is an unacceptable likelihood of recurrence (AG ¶ 2(a)(9)).

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

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons. As stated above, Paragraph 3 is found for Applicant.

### **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.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraph 3.a.:	For Applicant
Subparagraph 3.b.:	For 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.

WILFORD H. ROSS  
Administrative Judge