



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-03033
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes Esquire, Department Counsel  
For Applicant: *Pro se*

11/21/2015

**Decision**

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 December 27, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on October 14, 2014, detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. 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 October 20, 2014; he answered it on January 28, 2015; and he signed his answer again on May 18, 2015 before a notary. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on July 31, 2015, and I received the case assignment on August 25, 2015. DOHA issued a Notice of Hearing on September 1, 2015, and I convened the hearing as scheduled on September 29, 2015. The Government offered exhibits (GE) marked as GE 1 and GE 2, which were received and admitted into evidence without objection. Applicant testified. He did not submit any exhibits. The record closed on September 29, 2015. DOHA received the hearing transcript (Tr.) on October 7, 2015.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. 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 39 years old, works as a technologist for a DOD contractor. He began his current employment in September 2013. He previously worked as a federal contractor from November 2001 through March 2013, when his job was downsized and he was laid off. He was granted a federal government security clearance in February 2005. The record lacks any evidence that he violated the rules for handling classified information.<sup>1</sup>

Applicant graduated from high school in 1994. He received a bachelor's degree from a major university in May 1998, and he received master's degree from another major university in January 2001. He studied computer science and software engineering while in school. The record evidence does not reflect that he experienced disciplinary problems while a student.<sup>2</sup>

Applicant and his wife married in September 2002, and they separated in September 2011, but they are not divorced. Applicant does not have any children.

In the summer of 2012, Applicant used marijuana for the first time with a girlfriend at his house on three or four occasions. She liked to smoke marijuana and brought the marijuana to his house. He did not pay her any money towards the purchase of the marijuana. He no longer dates her and has not seen her in some time as she is now married.<sup>3</sup>

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<sup>1</sup>GE 1; Tr. 14.

<sup>2</sup>GE 1; Tr. 13.

<sup>3</sup>GE 2; Tr. 15-16.

In January 2013, Applicant and three friends traveled out of the country for a short vacation. While on vacation, Applicant smoked marijuana twice with one friend who possessed the marijuana. He did not purchase the marijuana nor did he give his friend money to pay for the marijuana. Applicant has not used marijuana since January 2013. Applicant continues to associate with these friends. He believes his one friend continues to smoke marijuana, but not in Applicant's presence. Applicant does not have a criminal record related to drug use or any other criminal matter.<sup>4</sup>

Following his job loss in March 2013, Applicant began looking for a new job. He talked with his friends about whether his drug use would hurt his ability to get a job. His friends told him not to lie about the use of illegal drugs because lying would cause him more trouble. During his job search, Applicant completed a job questionnaire requested by a private industry company. He acknowledged his use of marijuana in 2012 and January 2013 on this form. Unbeknownst to Applicant, the private company created a security incident report about his admitted use of marijuana.<sup>5</sup>

When Applicant filled out his e-QIP application in December 2013, he answered "no" to the following questions in Section 23 - Illegal Use of Drugs or Drug Activity:

In the last seven (7) years, have you illegally used any drugs or controlled substances? and

Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?

When Applicant met with the Office of Personnel Management (OPM) investigator in March 2014, the investigator asked him whether he had ever illegally used or otherwise been involved with drugs or controlled substances while possessing a security clearance, and he again answered "no". When the investigator asked him if he used marijuana in the summer of 2012 and January 2013, he acknowledged his use of marijuana. He explained the circumstances of his marijuana use and advised that the use in the summer of 2012 was his first time. He also stated that he did not purchase marijuana, sell or manufacture the marijuana he used.<sup>6</sup>

At the hearing, Applicant acknowledged that he was not truthful on his e-QIP and that he was not fully truthful with the OPM investigator. He explained that he was not aware that an incident report had been created by the private company following his earlier revelation. Because it was in the past, he wanted to put his marijuana use behind him and chose not to reveal his use. Throughout the hearing, Applicant acknowledged that he lied on his e-QIP and that he lied to the OPM investigator about smoking

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<sup>4</sup>GE 2; Tr. 15-18.

<sup>5</sup>GE 2; Tr. 17.

<sup>6</sup>GE 2; Tr. 24-25.

marijuana while holding a security clearance. Applicant believes that his truthful answers to the SOR reflect his general honesty, but he acknowledged that his belief conflicts with his dishonest answers on the e-QIP.<sup>7</sup>

Applicant testified to his future intent not use marijuana or other illegal drugs in the future. He expressed the same intent not to use illegal drugs of any kind to the OPM investigator. He also acknowledged that he made a mistake in trying to hide his past drug use.<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

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<sup>7</sup>Tr. 18, 22-27.

<sup>8</sup>GE 2; Tr. 18-19.

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.

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; and

(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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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 with his girlfriend on three or four occasions in the summer of 2012 and with a friend in January 2013 while on vacation. To smoke the

marijuana, he had to possess it. During the times of his marijuana use, he held a security clearance. A security concern has been established under AG ¶¶ 25(a), 25(c), and 25(g).

The drug involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d), and the following are potentially applicable:

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

Applicant's last drug use occurred almost three years ago, His use is considered experimental, not reflective of regular use of marijuana. He has not been involved with marijuana since then. He has no relationship with his former girlfriend, although he continues to associate with his friend who he believes still smokes marijuana. His friend's marijuana use is not done in his presence. Applicant expressed an intent not to use marijuana or other illegal drugs in the future. He has mitigated any concerns about his future use of drugs under AG ¶¶ 26(a) and 26(b)(1-4). However, because he chose to use marijuana while he held a security clearance, he violated a special trust given to him by the Government. His decision raises lingering questions about his judgment. He has not fully mitigated the security concerns about his drug use.

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

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

For AG ¶¶ 16(a) and 16(b) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his December 2013 e-QIP, when he failed to acknowledge his past experimental use of marijuana. In his response to the SOR and at the hearing, Applicant acknowledged that he intentionally lied on his e-QIP about his past use of marijuana.<sup>9</sup> With this admission, the Government has established a security concern under AG ¶ 16(a) as to SOR allegations 2.a and 2.b.

When he met with the OPM investigator, he again denied that he had used marijuana while holding a security clearance. He knew this information was incorrect. The Government has established a security concern under AG ¶ 16(b) as to SOR allegation 2.c.

SOR allegation 2.d relates to Applicant's use of marijuana while he held a security clearance. This issue has been previously addressed under Guideline H.

The personal conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

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

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

Applicant is given partial mitigation credit under AG ¶ 17(d) because he finally acknowledged his use of marijuana at the hearing and he candidly acknowledged that he lied about his past use of marijuana. He is not given full credit because he only revealed the information once he realized that an incident report existed. Because Applicant intentionally lied, no other mitigating condition applies under the facts of this case.

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<sup>9</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

## 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 has never been arrested for drugs, alcohol misuse, or any other criminal conduct. He has not violated the rules for handling classified information nor has he been disciplined at school or work. The record lacks any information indicating that he has financial problems. Applicant made a serious error in judgment when he decided to experiment with marijuana, an illegal drug, while holding a security clearance. He compounded his error when he decided to lie about his marijuana use after being told by friends not to lie about his drug use. His decision to lie on his e-QIP and to the OPM investigator reflects a serious lack of judgment made in an effort to hide his drug use. He acknowledged his drug use only after he realized that an incident report existed following his admission of its use in a job questionnaire in 2013. His frankness at the hearing about his decision to lie is tempered by his testimony that the existence of the incident report spurred him to come clean about his marijuana use. In assessing the evidence of record as a whole, I find that Applicant has not fully mitigated the security concerns raised about his marijuana use while holding a security clearance and his subsequent intentional lies about his past marijuana use. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guidelines H and E.



## 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:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	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 a security clearance is denied.

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MARY E. HENRY  
Administrative Judge