



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



In the matter of: )  
 )  
----- ) ISCR Case No. 14-01669  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: Philip G. Mylod, Esq.

10/14/2014

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under the guidelines for drug use and personal conduct. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On June 4, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) 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; 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 DOD on September 1, 2006.

In a June 26, 2014, answer to the SOR, Applicant responded to the allegations in narrative form and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. The case was assigned to me on August 1, 2014. DOHA issued a notice of hearing on August 15, 2014, setting the hearing for September 10, 2014. The hearing was convened as scheduled. The Government

offered three documents, accepted into the record without objection as Exhibits (GX) 1-3. Applicant gave testimony and introduced 14 files of material, which were accepted without objection as Applicant's exhibits (AX) A-M. Applicant was given until September 16, 2014, to submit any additional evidence. On September 16, 2014, Applicant submitted a revised Ex. L, plus a proposed Ex. N and a brief. These materials were accepted as revised Ex. L, Ex. N, and, for the brief, Ex. O. The transcript (Tr.) of the proceeding was received on September 17, 2014. The record was then closed.

### **Findings of Fact**

Applicant is a 60-year-old principal member of an engineering staff at a company where he has worked for 19 years. He has earned a master's degree in operations research. Applicant is married and has no children. He served in the United States military for a decade before receiving an honorable discharge. He also served as a reservist for several years. Tr. 32. Applicant has maintained a security clearance since 1977. Tr. 17. He was most recently granted a security clearance in September 2007.

Aside from some drug experimentation as a teen, where he used marijuana with a fellow member of his youth group, Applicant has no history of illegal drug abuse. Tr. 45. He knew that it was illegal to use drugs like marijuana. Tr. 47. In May 2013, Applicant chose to use marijuana on three occasions. He chose to use marijuana rather than alcohol because he does not believe in abusing alcohol, and because he had previously stopped drinking alcohol because of a family history of heart disease. He obtained the drug while attending a house party where he observed a guest or guests using marijuana. He asked a guest with marijuana to sell him some. A quantity of marijuana was thus acquired for \$20. Tr. 49-50, 52, 62.

The first two times Applicant used the purchased marijuana, he was at home alone. He used the drug to offset "a great deal of stress related to work and layoffs at work." Tr. 24. He believed the stress was causing him to have chest pains, which concerned him. He noted that the "threat of layoff is very real and very many people who are valuable . . . were terminated," and that stress and the threat of layoffs remain on-going. Tr. 38-39. On his third occasion using marijuana, one early Friday evening at the end of that May, he was pulled over by police while driving a motor vehicle and smoking a marijuana cigarette. Applicant was using marijuana because he had been "anxious and stressed from a hard, but relatively normal day of work." Tr. 20 When he was pulled over, he "became extremely anxious to the point of having a panic attack where [he] was very, very upset." Tr. 20. He was subsequently charged with (1) Possession of Marijuana Under 50 Grams, and (2) Disorderly Conduct.

On the following Monday, Applicant reported the incident to his supervisor. Tr. 22. He offered to resign, but it was suggested that his offer "might be an overreaction." Tr. 42. In August 2013, Applicant pled guilty to the second count, to a traffic charge of blocking traffic, and was fined; the marijuana possession charge was dismissed. In September 2013, Applicant was interviewed by investigators about the incident.

In November 2013, Applicant was being treated for diabetes when concerns regarding chest pains led to the administration of an ECG. The results were abnormal and showed he was experiencing atrial fibrillation. He was sent to a local hospital. Applicant attributes his drug abuse to his medical situation at the time and his own judgmental error. Tr. 26. Applicant has not used illegal drugs since his May 2013 arrest. Focusing on his health since May 2013, he refrains from illegal drugs and alcohol, and has been watching his diet and exercise regimen. Tr. 27. He has been watching his diet and exercise program for over three years. Tr. 67. Applicant disclosed his marijuana use to his personal physician, but he was not referred for drug counseling. He did, however, receive telephonic counseling through his workplace, which has gone from a weekly meeting to once every three weeks, where he addresses stress. Tr. 30, 64-65.

Applicant describes himself as a valued employee. He has an excellent work record. Two letters of recommendation, at AX G and AX H, are highly complementary. One of his two references knew about Applicant's drug abuse. Applicant has signed a statement of intent not to use illegal drugs again, acknowledging that subsequent drug abuse will result in automatic revocation of any security clearance granted. AX I; Tr. 41-42. Despite the circumstances of his obtaining the marijuana at issue, he stated that he does not associate with people who use drugs or frequent places where drugs are used. He obtained the marijuana from an associate with whom he does not normally socialize. Applicant concedes that he is still stressed due to work. Tr. 68. His job responsibilities and title have not changed. Whether the possibility of a layoff is possible depends on "who you talk to." Tr. 68. Applicant believes it would affect his professional standing at work if "word got out that [he] had used marijuana." Tr. 69.

### **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 derived from 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 and has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard 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).

## **Analysis**

### **Guideline H - 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. (AG ¶ 24) “Drugs” are defined as mood and behavior altering substances and include 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 inhalants and other substances. (AG ¶ 24(a)(1-2)) “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 ¶ 24(b))

Applicant admits purchasing marijuana, then using it on multiple occasions in 2013 while maintaining a security clearance. Such facts are sufficient to raise Drug Involvement Disqualifying Conditions AG ¶ 25(a) (*any drug abuse*); 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and 25(g) (*any illegal drug use after being granted a security clearance*). With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

Over 40 years ago, Applicant used marijuana as a teen. He knew the drug was illegal. He then quit using marijuana, serving honorably in the military while maintaining a security clearance. Based on this experience, Applicant knew or should have known drug use was antithetical to the maintenance of a security clearance. At age 59, he purchased marijuana from a fellow guest at a house party, and smoked the drug on

three occasions in May 2013. On the third occasion, he was arrested in connection with his possession of the drug. Consequently, his illegal drug use was recent and not limited to an isolated incident.

Applicant used the drug to relieve stress related to his job and the fear of losing his job in a layoff. While he is receiving some telephonic stress counseling, his job remains a source of stress and the prospect of future layoffs still exists; therefore, the chances for recurrence remains. He also attributes his drug use, in part, to his health issues -- diabetes, chest pains, and, six months after his arrest, a diagnosis of atrial fibrillation. While he is to be commended for choosing to make healthier life choices and being more aggressive in pursuit of medical attention since his arrest, it cannot be clearly discerned whether worries about his health led him to seek calm through cannabis, or whether his arrest and limited disclosure of his drug use added to his fear of losing his job and led him to seek medical improvements. The nexus between these concerns and his drug use is unclear.

Moreover, Applicant stated that he quit using drugs in May 2013 to focus on health and exercise, yet he also testified that he had begun focusing on health and exercise a few years earlier due to his family history of heart disease. Therefore, it is unclear whether his shift in health regimens was related to his post-May 2013 drug abstinence, his family medical history, or previous health concerns (*ie. diabetes*). Also raising questions is the choice to self-medicate with marijuana as a healthier alternative to alcohol, counseling, or prescription medications for stress management. Under these facts, Drug Involvement Mitigating Condition 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*) does not apply.

Although Applicant does not generally associate with drug abusers, he found himself at a house party where drug users were invitees and drugs could be purchased. In the future, he intends to disassociate himself from those who use drugs and to not frequent places where drugs are used, thus raising AG ¶ 26(b)(1) (*disassociation from drug-using associates and contacts*) and AG ¶ 26(b)(2) (*changing or avoiding the environment where drugs were used*). Applicant has only been abstinent from his marijuana use for about 16 to 17 months, obviating application of AG ¶ 26(b)(3) (*an appropriate period of abstinence*). He executed a Statement of Intent not to use drugs in the future in conformance with AG ¶ 26(b)(4), which is sufficient to raise AG ¶ 26(b)(4) (*a signed statement of intent with automatic revocation of clearance for any violation*).

## **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15. It states that 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.

Applicant's drug use while maintaining a security clearance is clearly a concern. The AG does not have a specific guideline for behavior antithetical to the maintenance of a security clearance. However, the following Personal Conduct Disqualifying Condition is plainly noted under AG ¶ 16(d) (*assessment of questionable judgment, 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 untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicting that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . .*).

Guideline H for Drug Involvement, however, has clearly reserved a disqualifying condition specifically for the type of behavior exhibited by Applicant: AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*) (emphasis added). Under that section, the facts presented are explicitly covered under Guideline H and are sufficient for an adverse determination. Discussion of that disqualifying condition and the related facts are discussed thoroughly *infra* and *supra* with regard to both Guideline H and the whole-person. Therefore, none of the Guideline E disqualifying conditions are needed or apply

### **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 the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under the two above-referenced guidelines in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a 60-year-old senior-level engineer who has spent nearly two decades with the same defense contractor. He had a lengthy and distinguished career in the active duty military and in the reserve. He was granted his first security clearance in 1977, not long after he ceased using marijuana as a high school student. For some, almost imperceptible reason, he decided to illegally use marijuana to address his ongoing work-related stress. That stress was not new, nor was the threat of layoffs. He chose not to resort to alcohol, citing it as unhealthy, and apparently chose not to seek therapy or doctor-monitored therapy or pharmaceutical treatment to address his issues.

When Applicant made this decision, he knew that marijuana was illegal. He knew its use and purchase presented security concerns. Most importantly, he knew his responsibilities as one maintaining a security clearance included being drug-free. He had known all of this for decades. Given his age, maturity, and experience, plus the added fact that he was already entrusted with a security clearance, his behavior was

reckless and betrayed many, many years of trust. The security concerns raised are further sustained by the fact that the factors giving rise to the behavior (*i.e.* work-related stress, threats of layoffs, health issues) remain existent. More than 16 or 17 months is needed to demonstrate the renewed resolve demanded for one seeking to maintain a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the drug involvement and personal conduct guidelines.

### **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-1.c:	Against Applicant
Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.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 national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Arthur E. Marshall  
Administrative Judge

KEYWORD: Drugs; Personal Conduct

DIGEST: Despite over a decade of military service and years maintaining a security clearance while working for a Defense contractor, Applicant chose to purchase and use marijuana in May 2013. He used it to quell work-related stress, which still remains existent. More time is needed to demonstrate he has the resolve to remain drug-free. Given the coverage of such facts under guideline H, there is no need to repetitive review under Guideline E. Clearance is denied.

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DATE: