



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 14-01800
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: *Pro se*

09/15/2015

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**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on November 21, 2013. On July 10, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing the 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) implemented within the Department of Defense on September 1, 2006.

On August 4, 2014, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on March 25, 2015. The FORM was forwarded to Applicant on April 22, 2015. Applicant received the FORM on May 6, 2015. He had 30 days to submit a response to the FORM. He did not submit matters in response to the FORM. On July 30, 2015, the FORM was forwarded to the Hearing Office and was assigned to me on July 31, 2015. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

## **Rulings on Evidence**

Item 4 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The five-page document is a summary of an interview of Applicant on December 19, 2013, in conjunction with his background investigation. DoDD 5220.6, enclosure 2, ¶ E3.1.20 states, “An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.” (See ISCR Case No. 11-13999 (App. Bd., February 3, 2014)). Item 4 is not authenticated. Department Counsel noted in a footnote on page 2 of the FORM:

The Government recognizes that Item 6 is objectionable under DODD 5220.6, Paragraph 20 if the Government does not provide the interview agent. However, Applicant is free to waive the objection and/or make corrections to Item 6 if he would like his summary of interview considered. If Applicant does not address Item 6, the Government requests it be admitted.

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. Applicant’s failure to mention this issue in a response to the FORM is not a knowing waiver of the rule. Waiver means “the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage. The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Black’s Law Dictionary* 1717 (Bryan A. Garner, 9<sup>th</sup> ed., West 2009).

While the Government attempted to explain why Applicant could object to the admissibility of Item 4, I cannot conclude Applicant was expressly informed of the requirement in ¶ E3.1.20 of the Directive because it was explained in a footnote. It is not unusual for Applicants to forego reading footnotes in a FORM. I cannot conclude Applicant expressly waived this rule because he did not submit a response to the FORM and there is no way to conclude that Applicant was aware of the requirement in ¶ E3.1.20. I find Item 4 is not admissible and will not be considered in this decision.

## **Findings of Fact**

In his answer to the SOR, Applicant admits to all of the allegations in the SOR. (Item 2) His admissions are incorporated into the Findings of Fact.

Applicant is a 28-year-old employee of a Department of Defense contractor. This is his first time applying for a security clearance. He is a high school graduate and has some college credit. He is single and has no children. (Item 3)

Applicant admits to using and purchasing marijuana from 2005 to 2009 and once in July 2013. (Item 2) In response to section 23 on his security clearance application, dated November 21, 2013, he listed his marijuana use from May 2005 to September 2009. He listed the frequency as once a year. (Item 3, section 23)

Applicant admits that he did not disclose his marijuana use in July 2013 on his security clearance application. He states he did not remember the July 2013 marijuana use at the time of answering the security clearance application. He admits the oversight was inexcusable and he apologizes for the omission. (Item 2)

In his Response to the SOR, Applicant stated that between 2005 – 2009, he used marijuana only a few times during cookouts. He usually only took three inhales. He admits he was young and irresponsible. He exercised weak character in July 2013 by giving into peer pressure. He admits his reasons do not justify his usage, but hopes it shows that he “is not some type of junky.” He has not used any illegal drugs since July 2013 and intends to remain drug free. (Item 2)

Applicant admits his illegal marijuana use was a poor reflection of his character and wishes he had made better decisions in the past. He believes he has made great improvements and believes he is a person of trust. (Item 2)

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over arching 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, 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 as to 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 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.

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).

### **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.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶ 25(a) (any drug abuse); and

AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia).

Applicant used marijuana on sporadic occasions from 2005 to 2009 and on one occasion in July 2013. AG ¶ 25(a) and AG ¶ 25(c) applies.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and

the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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.

AG ¶ 26(a) applies because more than two years have passed since Applicant's last illegal use of marijuana in July 2013. Applicant did not use marijuana on a regular basis. Between 2005 and 2009, he used marijuana only once a year. His last use of marijuana was on one occasion in July 2013. Applicant appears to understand the security concern involving illegal drug use. It is unlikely that he will jeopardize his future by returning to illegal drug use.

AG ¶ 26(b) applies because Applicant has not used illegal drugs for over two years. Most of his illegal drug use occurred when he was a college student. He has matured and is focused on his future. While he did not provide a signed statement of intent with automatic revocation of clearance for any violation, he did express his intent to never use marijuana again in his response to the SOR. Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

## **Guideline E – Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out 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 following disqualifying condition potentially applies to Applicant's case:

AG ¶ 16(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).

Applicant admits he did not list his July 2013 marijuana use in response to section 23 on his security clearance application. In his response to the SOR, Applicant states with regard to this omission, "It's a fact that did not dawn on me at the time of answering the questionnaire. It is inexcusable. I apologize for it." (Item 2) For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. I find Applicant did not deliberately omit his July 2013 marijuana use. He did not remember to list it at the time he completed the security clearance application. Applicant put the government on notice about his marijuana use when he listed his use of marijuana between 2005 and 2009. Once he realized the omission of his 2013 marijuana use on his security clearance application, he volunteered that he used marijuana in 2013 and apologized for the oversight.

Even if Applicant's omission was considered deliberate, the mitigating condition AG ¶ 17(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) applies. Applicant fully disclosed his marijuana use to the Government. He has not used marijuana in over two years. Applicant does not intend to use marijuana in the future. Applicant's full disclosure of his marijuana use, all of which occurred in his twenties before he applied for a security clearance does not raise questions about his reliability, trustworthiness, and good judgment. The Personal Conduct concern 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 the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant disclosed his illegal marijuana use on his security clearance application and later volunteered his July 2013 illegal marijuana use, which he forgot about at the time he completed the security clearance application. More than two years have passed since Applicant's last use of marijuana. He does not intend to use illegal drugs again. His failure to list his use of marijuana in July 2013 was an oversight. Applicant mitigated the security concerns raised under Drug Involvement and Personal Conduct.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2 Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ERIN C. HOGAN  
Administrative Judge