



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



In the matter of: )  
)  
) ISCR Case No. 14-01888  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Caroline Heintzelman, Esq., Department Counsel  
For Applicant: *Pro se*

08/21/2015

**Decision**

DAM, Shari, Administrative Judge:

In 2008 Applicant used and tested positive for marijuana while he held a security clearance during his service in the U.S. Navy. He was subsequently disciplined and discharged. In his 2012 security clearance application, he failed to disclose his marijuana use while holding a security clearance. He also misrepresented the nature of his termination, type of discharge, and position he held in the Navy. He mitigated the security concerns raised under the guideline for drug involvement, but not those raised under the guideline for personal conduct. Eligibility for access to classified information is denied.

**Statement of the Case**

In January 2005 Applicant submitted a security clearance application (SF 86-1). (GE 2.) In June 2012 Applicant submitted his second security clearance application (SF 86-2). (GE 1.) On September 15, 2014, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The SOR detailed reasons why the DoD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be denied, granted, continued, or revoked.

On November 10, 2014, Applicant responded to the SOR (Response), and requested a hearing. On May 27, 2015, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On May 29, 2015, DOHA issued a hearing notice, setting the hearing for June 15, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered five exhibits; Applicant did not offer any exhibits. There were no objections to the Government's exhibits (GE), and I admitted GE 1 through 5. On June 22, 2015, DOHA received the transcript of the hearing (Tr.).

### **Findings of Fact**

In his response to the SOR, Applicant admitted the allegations contained in Paragraphs 1.a, 1.b, and 1.d of the SOR. He denied the allegations contained in Paragraph 1.c. He also denied all allegations contained in Paragraphs 2.a through 2.d, and admitted the allegations contained in Paragraph 2.e. His admissions are accepted as factual findings.

Applicant is a 29 years old. He is divorced and has no children. He graduated from high school in 2004. He attended college for a short time.

In December 2000 Applicant was arrested and charged with retail theft. In October 2001 he was arrested and charged with burglary. He was in high school when both of these incidents occurred.

Applicant enlisted in the U.S. Navy in June 2005, at the age of 19. While serving he deployed to the Middle East for six or seven months. He received a sea service deployment medal and anti-terrorism medal.

In October 2008 Applicant received a non-judicial punishment for the use of an illegal substance after he tested positive for marijuana. In April 2009 he was disciplined and received an other than honorable discharge, as the result of the illegal drug use. His rank was E-3 when he left the Navy. He held a security clearance at the time of that drug offense .

Applicant said the last time he used marijuana was in October 2008, after which he was disciplined for testing positive for it. (Tr. 43.) He said that at the time of the incident he was associating with a bad crowd of people and was intoxicated when he used the marijuana. (Tr. 28.) Prior to that incident, he used synthetic marijuana (spice) on several occasions. That drug was not considered a controlled substance at the time.

He admitted that spice impaired his judgment. (Tr. 30; Response.) His last urinalysis was done in early 2015 for an employer. It was negative for drugs. (Tr. 24.)

Since leaving the Navy, Applicant has worked for a security company, an offshore drilling company, and done some construction work. (Tr. 21.) In February 2012 he worked in the Baltic states for six or seven months and then returned to the Middle East until January 2014. In May 2014 he began working in maritime security for a small cruise company. He has also worked for a defense contractor in the area of security for a period of time in 2014, until his interim security clearance was suspended. He recently returned from Africa, where he worked for an international company. He has obtained some certifications pertinent to security work. (Tr. 22-24.)

When Applicant completed the 2005 SF 86-1, he did not disclose the 2000 or 2001 arrests and charges in the SF 86-1, as required. (GE 2.) He was subsequently issued a security clearance. He said he did not disclose the information because he was a juvenile at the time of the incidents, and he thought the matters were expunged from his record and that he did not need to report them. (Tr. 38-39; Response.)

Applicant admitted that he did not truthfully answer the questions on the 2012 SF 86-2 inquiring into past illegal drug use and whether the illegal drug use occurred while holding a security clearance. He did not disclose his October 2008 use of marijuana, nor that he held a security clearance at the time. He said that he was “speeding through” the completion of the SF 86-2 because he was “eager” to work for the Department of Defense. (Tr. 41.) He was told by his security officer that after submitting the SF 86-2, he would have an opportunity to explain or clarify any discrepancies or wrong answers, and “be able to iron them out with an investigator.” (Tr. 37, 42.) He said that he wanted to speak to someone and explain the facts. (Tr. 37.) He acknowledged that he made a “foolish decision” by not being truthful. (Tr. 42-43.)

In the SF 86-2, Applicant noted that he had been investigated by DOD for a security clearance, but did not know the date it was completed or whether the clearance was granted. He checked the level of the clearance as secret in the SF 86. (GE 1.) He said, “I didn’t know I had a security clearance at the time.” (Tr. 39.) He knew he had applied for one, but did not know that he received it. (Tr. 39.)

When Applicant completed the 2012 SF 86-2, he indicated that he received an honorable discharge rather than an other than honorable discharge. (GE 1.) He said he did not intend to write that and told a government investigator of the error during a January 2014 investigative interview. (Tr. 33.) According to the investigative report, Applicant said he thought he listed the discharge correctly and had provided a copy of his DD Form 214 (Certificate of Release or Discharge From Active Duty) to his security officer. (GE 3, 4.) In his Response, he stated that he did not intentionally misrepresent the nature of his discharge.

In addition to wrongfully answering the question about the type of discharge he received, Applicant listed his status as “Active Duty: Officer” on the SF 86-2. He testified that he would never misrepresent himself and that it must have been a

computer malfunction. (Tr. 45.) In his Response, he said it was “an inadvertent selection and/or system error.” (Response.)

In answer to a question in the 2012 SF 86-2 regarding the reason for leaving the Navy, Applicant wrote “End of Enlistment.”<sup>1</sup> (GE 1.) He explained that he based that on the fact that the Navy expedited the end of his enlistment. (Tr. 35.)

Applicant emphasized during the hearing that he has not used an illegal drug since the October 2008 incident. He said he stopped because marijuana “messed up my life.” (Tr. 46.) He was “kicked out of the Navy . . . [which] was probably like (sic) the worst thing that could have happened in [his] life.” (Tr. 46.) He expressed remorse over his mistakes, including putting “some wrong answers on the electronic questionnaire, but I needed somebody to hear my case.” (Tr. 51.) He said he has not had any criminal incidents since October 2008, nor been fired from any position. (Tr. 71.)

Applicant submitted no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He provided no character references describing his judgment, trustworthiness, integrity, or reliability.

### **Policies**

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995) § 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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<sup>1</sup> The SOR does not contain an allegation regarding Applicant’s misrepresentation in the SF 86-2 of the reason he terminated from the Navy. Hence, this information will not be considered in the analysis of disqualifying conditions, but may be relevant in the analysis of mitigating conditions and whole person.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). 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. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Drug Involvement**

AG ¶ 24 articulates the drug involvement security concern:

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

- (a) any drug abuse (see above definition);
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

Applicant admitted that he used and tested positive for marijuana in October 2008 while in the Navy. He held a security clearance at the time. As a consequence, he received a non-judicial punishment for use of illegal substance. The evidence supports the application of the above three disqualifying conditions.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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;

(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.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

According to the evidence, the last time Applicant used or tested positive for marijuana was in October 2008, almost seven years ago. AG ¶ 26(a) provides mitigation for the security concerns raised under this guideline, as the offense occurred a long time ago. Those seven years also demonstrate an appropriate period of abstinence and establish mitigation under AG ¶ 26(b)(3).

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse a legal drug that was prescribed to someone else. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, or a favorable prognosis by a duly qualified medical professional.

### **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 a condition that could raise a security concern and may be disqualifying:

(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 SOR alleged that Applicant intentionally failed to disclose in his SF 86-1 that he had been arrested and charged with criminal offenses in 2000 and 2001. Applicant stated that he did not include that information because he committed those crimes when he was a juvenile and that they were expunged from his record. His explanation for the non-disclosure is sufficiently credible, such that this allegation is found in his favor.

The SOR alleged that Applicant intentionally failed to disclose information in his 2012 SF 86-2, relating to his prior illegal use of marijuana in 2008, and while holding a security clearance. Applicant admitted that he intentionally did not disclose the marijuana incident because he wanted an opportunity to discuss the information with an investigator. His explanation for non-disclosure of the October 2008 drug use and disciplinary action by the Navy is not credible. His assertion that he did not know he had a clearance is also not credible.

The SOR alleged that Applicant misrepresented in the SF 86-2 his military history in regard to his status and the type of discharge. Applicant claimed that he made a mistake regarding the description of his discharge and thought he entered other than honorable. He stated that the entry of his status as an officer was a computer mistake. Both explanations are not credible.

Applicant acknowledged that his judgment was impaired when he used synthetic marijuana on several occasions in 2008. He emphasized that he has not used any illegal drugs or substances since 2008.

AG ¶ 17 includes six conditions that could mitigate security concerns arising under this guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 did not make a prompt or good-faith effort to correct the misrepresentations he made in the 2012 SF 86-2. He waited for an investigator to schedule a meeting and then gave him more accurate information about some of his answers. AG ¶ 17(a) does not provide mitigation. Applicant stated that he did not disclose truthful information to some questions in the SF 86-2 because he was told by his security officer he would have an opportunity to provide clarifying information in a subsequent interview. His explanation is not credible and does not mitigate the allegations contained in SOR ¶¶ 2.a, 2.b, or 2.c. It is difficult to believe that a security officer advised him to misrepresent information on his SF 86-2 and wait until he was interviewed to tell the truth. AG ¶ 17(b) does not provide mitigation. Failing to intentionally disclose truthful information in a security clearance application is not a minor offense. AG ¶ 17(c) does not provide mitigation for said allegations.

AG ¶ 17(c) provides mitigation for the allegation that Applicant's previous use of synthetic marijuana on multiple occasions impaired his judgment, as recited in SOR ¶ 2.g. His conduct occurred seven years ago and there is no evidence that similar behaviors occurred since 2008.

### **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 the 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 have incorporated my comments under Guideline H and E in my whole-person analysis. Some of the factors in



AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 29-year-old man, who is intelligent and clearly loves working for DOD. He sincerely regrets his 2008 drug use, which resulted in his discharge from the Navy. He is determined to obtain a position with a defense contractor in order to resume his work with the military. Seemingly, out of that determination he made an impetuous and bad decision when he chose to misrepresent or not disclose requested information in his 2010 SF 86-2. While a mistake in one section of the SF 86-2 may be understandable, failing to disclose or misrepresenting facts in at least five areas of the form is not acceptable and demonstrates poor judgment. While he mitigated the security concerns raised under drug involvement, and a concern raised regarding previous drug use under personal conduct, the serious allegations relating to non-disclosure raised under personal conduct are not mitigated.

Overall, the record evidence leaves me with concerns as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his drug involvement.

### **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
Subparagraphs 1.a through 1.d:	For Applicant
Paragraph 2, Personal Conduct	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Shari Dam  
Administrative Judge