



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-02189
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Robert J. Kilmartin, Esq., Department Counsel  
For Applicant: *Pro se*

05/29/2015

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant’s history of drug-related conduct, in particular, his use and possession of marijuana after he was granted eligibility for a security clearance, continues to raise security concerns. His lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information. Clearance denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on April 24, 2012. On August 1, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant stating security concerns under Guideline H (drug involvement), Guideline J (criminal conduct), and Guideline E (personal conduct).<sup>1</sup> Applicant answered the SOR on August 22, 2014, and requested a hearing before an administrative judge. The case was assigned to me on January 27, 2015. The Defense

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<sup>1</sup> The DOD acted 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* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Office of Hearings and Appeals (DOHA) issued the notice of hearing on January 30, 2015, scheduling a hearing for February 25, 2015.

At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant testified, presented the testimony of one witness, and submitted two exhibits (AE 1 and 2). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on March 9, 2015.

### **Procedural Issues**

At the hearing, the Government moved to amend the SOR by striking Paragraph 3 in its entirety, and adding the following subparagraphs: ¶ 2.b. (cross-alleging SOR ¶ 1.a), ¶ 2.c. (cross-alleging SOR ¶ 1.b), and ¶ 2.d. (cross-alleging SOR ¶ 1.c). Applicant did not object and I granted the motion. (Appellate Exhibit 1)

### **Findings of Fact**

Applicant admitted all the amended SOR allegations, with explanations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, including his testimony and demeanor at hearing, I make the following additional findings of fact:

Applicant is a 46-year-old logistics analyst employed by a defense contractor. He graduated from high school in 1986, and enlisted in the U.S. Navy in 1992. He was honorably discharged as a third class petty officer in 1998. He has been married for 19 years and has two children, a daughter, age 22, and a son, age 14. Applicant's daughter enlisted in the U.S. Air Force and is currently attending basic training.

Applicant started working with his current employer, a government contractor, in 1997, shortly before his discharge in 1998. He was granted a secret level security clearance in 2000. His clearance was revoked in 2008, because of some of the criminal incidents alleged in the SOR.

Applicant's security concerns are based on a number of criminal incidents. In 1986, Applicant was charged with felony embezzlement. While working as a cashier, he allowed his friends to take merchandise without paying for it. He pled guilty to petit larceny, a misdemeanor offense, and was required to make restitution of \$3,600. In 1993, while in the Navy, Applicant was arrested for possession of a concealed weapon and marijuana. A shipmate admitted it was his weapon and marijuana, and Applicant was exonerated of any responsibility.

In 2008, Applicant was charged with illegal possession of marijuana and drug paraphernalia. Applicant explained that he went fishing with a relative and they smoked a marijuana cigarette together. His relative left and Applicant stayed alone fishing. A police dog alerted to the presence of drugs in Applicant's car and he was charged with possession of 17 grams of marijuana. Applicant pled not guilty, and claimed the

marijuana belonged to his relative. He was convicted of possession of marijuana. The sentence was suspended and he received probation before judgment.

Applicant possessed a secret-level security clearance when he illegally smoked the marijuana cigarette in 2008. He reported the offense to his supervisors, and he was placed on psychiatric counseling for substance abuse by his employer. After successful completion of his counseling, Applicant returned to work, but his clearance was not reinstated.

In 2011, Applicant was convicted of possession of marijuana. He explained that he was on his way to work on a Saturday morning when he was stopped by a police officer because his car windows were tinted too dark. When he opened the glove compartment searching for the car registration, a half-smoked marijuana cigar fell out. He was charged with possession of marijuana. Applicant pled not guilty, and claimed that it was not his marijuana cigar. He averred that his daughter's friends likely left the marijuana cigar in his car when she borrowed it the night before. He was convicted and received probation before judgment. Applicant successfully completed the subsequent court-mandated substance abuse counseling.

At his hearing, Applicant admitted he smoked marijuana in 2008, but claimed that the marijuana found in his car belonged to his relative. He denied that the marijuana cigar found in his car in 2011 was his or that he knew it was there.

Applicant submitted his most recent SCA in April 2012. He disclosed his 2008 and 2011 convictions for possession of marijuana, and that he used marijuana in 2008 while possessing a security clearance. At his hearing, Applicant claimed that his last use of marijuana was in 2008. He denied using any other illegal drugs. He claimed he has not used marijuana since and does not intend to use marijuana, or any other illegal drugs, in the future. Applicant testified that his 2008 use of marijuana was a stupid mistake that he greatly regrets. He believes he let himself, his family, and his peers down because of his mistake.

Applicant repeatedly expressed his need for a security clearance to retain his job and to be able to support his family. He noted that he is a highly regarded subject-matter expert within his company. He provides direct logistics support to the Navy and deployed sailors. Applicant's program manager confirmed his outstanding performance. In his opinion, Applicant has no equal in his job because of his dedication, knowledge, and outstanding support of the warfighters. He recommended Applicant receive access to classified information.

Applicant testified that he was recently diagnosed with multiple sclerosis. He is taking medications, seldom consumes any alcohol, and he is living a healthier life doing exercise and eating well. He claimed he has learned his lesson, and that he changed his lifestyle to avoid illegal drugs.

Applicant expressed regret and embarrassment for the irresponsibility he demonstrated with his illegal drug use. Because of his Navy service he knew that the use of marijuana was illegal and frowned upon by his employer.

Applicant considers himself to be trustworthy, reliable, dependable, and a subject-matter expert. He highlighted that he was candid during the security clearance process. He noted his outstanding performance and his technical knowledge. Applicant also noted that his last marijuana-related conviction was in 2011. He believes that his completion of substance abuse treatment, the passage of time without any further misconduct, and his outstanding performance show his rehabilitation efforts, commitment, and good judgment.

### **Policies**

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the

loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Guideline J, Criminal Conduct**

Under Guideline J, the concern is that criminal activity “creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30.

In 1986, Applicant was charged with felony embezzlement. He pled guilty to petit larceny. In 1993, Applicant was arrested and charged with possession of a weapon and marijuana. He was later exonerated when his shipmate took responsibility for the weapon and the marijuana. In 2008, Applicant illegally smoked marijuana while possessing a secret-level security clearance. He was convicted of possession of 17 grams of marijuana and received probation before judgment. In 2011, Applicant was convicted of possession of a marijuana cigar and received probation before judgment.

Applicant's criminal behavior raises security concerns under AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Considering the record as a whole, I find that both mitigating conditions partially apply, but do not fully mitigate the security concerns. Applicant's 1986, 2008, and 2011 offenses were serious and violated the trust placed in him by his employers and the Government.

Because of his age, service, and job experience, Applicant knew that the use and possession of marijuana was illegal and against his employer's and the Government's

policies. Applicant's criminal conduct violated the trust placed in him by his employers and the Government. There is no evidence of Applicant being involved in any additional criminal conduct after 2011. Applicant's good service to his employer and the United States during the last four years serves as some evidence of his possible rehabilitation.

Notwithstanding, Applicant's past criminal behavior is aggravated by his service experience and his experience working for a government contractor and possessing a security clearance. Applicant knew that his use and possession of marijuana would adversely impact his eligibility for a clearance and his job. Nevertheless, Applicant used and possessed marijuana in 2008 and 2011. His actions demonstrate lack of judgment, reliability, and trustworthiness. It shows Applicant's lack of reform and rehabilitation after 2008, and his unwillingness to comply with laws, rules, and regulations.

### **Guideline H, Drug Involvement**

AG ¶ 24 articulates the security concern for 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.

In 2008, Applicant illegally smoked marijuana while possessing a secret level security clearance. He was convicted of possession of 17 grams of marijuana and received probation before judgment. He participated in substance abuse psychiatric treatment. In 2011, Applicant was convicted of possession of a marijuana cigar and received probation before judgment. He used marijuana knowing it constituted a criminal offense to do so. He used marijuana knowing his employer and the Government had a policy against it. He used marijuana after he was granted a secret level security clearance in 2000, and knowing that his illegal use of marijuana could adversely impact his eligibility to hold a clearance.

AG ¶ 25 describes conditions related to drug involvement that could raise a security concern and are applicable in this case:

- (a) any drug abuse;
- (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.

AG ¶ 26 provides three 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;
  - (4) a signed statement of intent with automatic revocation of clearance for any violation; 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.

For the same reasons discussed above under the Guideline J, incorporated here, I find that none of the Guideline H mitigating conditions fully apply. Applicant's most recent possession of marijuana conviction occurred in 2011. As such, his illegal drug-related behavior could be considered somewhat dated. However, Applicant illegally used marijuana in 2008 – 10 years after he started working for his employer and after possessing a clearance for eight years. Applicant had full knowledge of his employer's and the Government's policies against illegal drug use. He was placed on notice of the illegality of use and possession of marijuana when he was arrested and charged for possession of marijuana in 1993. (He was later exonerated of that charge.) He was made aware of the Government's security concerns about the use of illegal drugs when he completed his security clearance applications. Moreover, his clearance was revoked in 2008 for his marijuana-related offenses. Notwithstanding, he illegally possessed marijuana again in 2011.

I considered Applicant's age, experience, and maturity at the time of the offenses. I also considered that he received substance abuse treatment after his convictions in 2008 and 2011. I further considered Applicant's claims that the marijuana in 2008 belonged to his relative, and that he did not know the marijuana cigar was in his car, and that it was not his. Notwithstanding his assertions, Applicant was convicted by a court of both offenses. On balance, I find that Applicant failed to establish his rehabilitation and that his illegal drug behavior is not likely to recur. At this time, his illegal drug behavior continues to cast doubt on his current reliability, trustworthiness, judgment, and his ability to comply with the law, rules and regulations.

Applicant promised to never use or possess illegal drugs in the future. Applicant was aware of the criminal prohibition against the illegal use and possession of marijuana, and of the adverse consequences to his ability to hold a security clearance or his job if he illegally used or possessed drugs. That did not stop him from possessing and using marijuana. Applicant's illegal drug use and possession are a violation of the trust placed in him by his employer and the Government.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is a 46-year-old employee of a government contractor. Notwithstanding his outstanding work performance, his history of drug-related criminal conduct, in particular his use and possession of marijuana after he was hired by his employer and granted a security clearance, continues to raise security concerns. Considering the evidence as a whole, Applicant's lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information.

### **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 J:	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, and 1.d:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a - 1.d:	Against Applicant

### **Conclusion**

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

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JUAN J. RIVERA  
Administrative Judge