



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-02357
	)	
Applicant for Security Clearance	)	

**Appearances**

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

12/31/2014

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, 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 September 11, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on July 11, 2014, detailing security concerns under Guideline H, drug involvement, Guideline J, criminal conduct, 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 August 20, 2014. He submitted a notarized, written response to the SOR allegations dated August 21, 2014, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on September 29, 2014. Applicant received the FORM on October 23, 2014. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response. I received this case assignment on December 15, 2014. The Government submitted seven exhibits, which have been marked as Items 1-7 and admitted into the record. Applicant's response to the SOR has been marked as Item 4, and the SOR has been marked as Item 1.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.d, 2.a, and 3.a of the SOR. His admissions are incorporated herein as findings of fact. He also provided some 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 53 years old, works as a senior field engineer for a DOD contractor. He has held a security clearance since 2003. He has worked for this employer or the predecessor companies since August 1983. He graduated from high school in 1979, and he graduated from college, date unknown. He and his wife married in July 1995. They have two daughters, ages 16 and 10.<sup>1</sup>

In June 2012, Applicant consumed at least four beers at a bar. Since he felt that he could drive, he left the bar and started to drive home. The police pulled him over for a back light problem and not having a front license plate. The police asked him if he had been drinking, and he told them yes. He failed the field sobriety test, and the police arrested him for driving under the influence (DUI). Applicant appeared in court in October 2012 and pled guilty to a misdemeanor DUI. As his sentence, the court fined him \$1,901, directed him to take alcohol classes, and placed him on three years of probation. Applicant has not provided documentation to indicate that he has been released from probation early or complied with the other terms of his sentence. I find that he remains on probation and will do so until October 2015. Applicant told the security investigator that he does not drink anymore nor does he intend to do so.<sup>2</sup>

In February 2013, Applicant failed a random drug test at work. The test results were positive for marijuana. His human resources officer issued a letter of reprimand and suspended him from work for one week without pay. Except for this incident,

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<sup>1</sup>Item 5.

<sup>2</sup>Item 4; Item 6.

Applicant had not been disciplined at work in the last seven years. Applicant acknowledged the discipline and the reason for the discipline on his e-QIP. During his personal subject interview, Applicant advised the security investigator that he had used marijuana recreationally with friends from 1977 until February 2013. He would purchase small amounts of marijuana at times for his use. He has not used marijuana since he failed the drug test in February 2013, but he continues to associate with friends who use marijuana. There is no other evidence that he uses other illegal drugs.<sup>3</sup>

Applicant reported his DUI arrest to his facility security office (FSO). The FSO filed an incident report on July 22, 2013, concerning Applicant's DUI arrest. The FSO also reported the fact that Applicant failed a drug test in February 2013. Applicant suffered a heart attack around April 2013. He advised that because of his heart attack, he no longer consumes alcohol or uses marijuana.<sup>4</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

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<sup>3</sup>GE 4; GE 6.

<sup>4</sup>Response to SOR; GE 6; GE 7.

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 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;

(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);

- (b) testing positive for illegal drug use;
- (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 used marijuana for many years at a recreational level. At times, he purchased some for his own use. Almost two years ago, he failed a random drug test because of his marijuana use. He has held a security clearance since at least 2003. 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;
- (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; 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.

I have reviewed the mitigating conditions and concluded that none apply. Applicant has not been diagnosed with drug abuse or drug dependence necessitating drug treatment. He indicates that he is no longer using marijuana, but he has not signed a statement of intent about his future use. He continues to associate with people who use marijuana, which means he is in an environment where drugs are used. He stopped using marijuana less than two years ago after regular use of marijuana for more than 35 years. Most importantly, he used marijuana, an illegal drug, while holding a security clearance, breaching a trust given to him. Sufficient time has not passed to conclude that his drug use is so long ago that it will not happen again.

## **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

Applicant was charged with a DUI in June 2012 and pled guilty to the charge in October 2012. He remains on “informal” probation until October 2015. A security concern has been raised under AG ¶¶ 31(a), 31(c), and 31(d).

The Criminal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 32(a) through ¶ 32(d), and the following are potentially applicable:

- (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.

Applicant has not been arrested for DUI or any other offense since his arrest in June 2012. There is no evidence that he has a long-term problem with alcohol, so another DUI arrest is unlikely. However, he remains on probation for 10 more months. Thus, he has not mitigated the security concerns raised by his DUI arrest.

## **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:

(d) 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 assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and,

(g) association with persons involved in criminal activity.

Applicant's long-term use of marijuana in violation law and company policy raises questions about his judgment and trustworthiness. More importantly, he used marijuana

while holding a security clearance. Although he has never been arrested for using this drug, marijuana is an illegal drug and even recreational use is against the law. He continues to associate with friends who use marijuana. A security concern is raised under AG ¶¶ 16(d)(3), 16(e), 16(f), and 16(g).

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:

(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;

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

The record lacks any evidence of counseling concerning his drug and alcohol use and concurrent rehabilitation. He states that he no longer consumes alcohol or uses marijuana, but he has not provided documented support for his statement. His use of marijuana occurred over a very long period of time and during some of this time, he held a security clearance. He continues to associate with friends who illegally use marijuana. This association reflects negatively upon his judgment and does not show that he has taken positive steps to eliminate any vulnerability he may have to exploitation, manipulation or duress because of his past drug use. He has not mitigated the security concerns of the Government under Guideline E.

### **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.

Because Applicant chose to have this matter handled administratively, I am unable to evaluate his demeanor, appearance, or credibility. In requesting an administrative determination, Applicant chose to rely on the written record. Although allowed, he failed to submit any documentation to refute the record evidence and material facts in support of a denial of his clearance, and to mitigate the security concerns raised.

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 been married nearly 20 years and has two daughters. He has a long work history with his employer. His only disciplinary action of record is the letter of reprimand for using marijuana, which is against company policy. Applicant chose to use marijuana as a young person, and he chose to continue to use it for many years as an adult. He used marijuana, an illegal drug, while holding a security clearance. His use of marijuana reflects a breach of a sacred trust given to him by the Government and demonstrates poor judgment by him. He has provided insufficient evidence to show that he has changed his behavior. He remains on probation, thus, he has not mitigated a security concern raised by his arrest for DUI in 2012.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under guidelines H, J 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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARY E. HENRY  
Administrative Judge