



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 14-04560

**Appearances**

For Government: Jeff A. Nagel, Department Counsel  
For Applicant: Catie E. Young, Attorney At Law, Griffith, Young & Lass

February 2, 2016

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing dated June 18, 2012. (Government Exhibit 1.) On October 17, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. 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 Department of Defense after September 1, 2006.

Applicant responded to the SOR on January 14, 2015, and he requested a hearing before a Defense Office of Hearings and Appeals Administrative Judge. This case was assigned to this Administrative Judge on June 23, 2015. A notice of hearing was issued on August 12, 2015, scheduling the hearing for September 22, 2015. At the hearing the Government presented one exhibit, referred to as Government Exhibit A. Applicant presented six exhibits, referred to as Applicant's Exhibits A through G. He also testified on his own behalf. The record remained open until close of business on October 7, 2015, to allow Applicant to submit additional supporting documentation.

Applicant resubmitted Exhibit A through G with two supplemental exhibits H and I, which were admitted without objection. The official transcript (Tr.) was received on September 30, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## **FINDINGS OF FACT**

Applicant is 44 years old and is married with one child. He has a Bachelor's degree in Aerospace Engineering and is working on his Master's degree. He is employed by a defense contractor as a Systems Engineer. He is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because he abused illegal drugs.

Applicant admitted allegations 1.a., and 1.c., and denied allegation 1.b., set forth under this guideline. (See Applicant's Answer to the SOR.) Applicant has used marijuana on two occasions, once in 2009 and once in 2011. He explained that from an early child, he suffered from severe migraines. His parents frequently took him to the hospital emergency room for pain treatment. Despite this debilitation, Applicant excelled in school, and eventually graduated from college with a 3.8 grade point average in Aerospace Engineering, and qualified for two honor societies. (Applicant's Exhibit F.) In 1997, Applicant began working for his current employer. His job requires extensive worldwide travel. He obtained a security clearance in September 2002.

In 2008, Applicant was diagnosed with a massive cancerous brain tumor, ranked at a Grade 3 or 4. Applicant took a medical leave from work and underwent surgery. He believes his physician to be the number one neurosurgeon in the world. In 2009, Applicant started a 13 month chemotherapy regime. (Tr. p. 34.) The experience was horrible. He explained that he would throw up every night for about 45 minutes. As the chemotherapy sessions continued, the intense vomiting subsided. In addition to medication to handle his GI tract problems, he was given pain killers to prevent constipation, and anti-nauseous medication. Applicant stated that he did not handle the treatment well, because he was not eating. This was a very difficult time for Applicant, as his body was suffering.

In May 2009, while on medical leave from work, Applicant's roommate, who saw the suffering that Applicant was going through, gave Applicant two brownies that contained marijuana to eat. A friend of Applicant's roommate had a medical prescription for the marijuana, and felt sympathy for Applicant.

In January 2011, Applicant was working in Israel for a short period. While walking home from work he slipped on black ice and broke three bones in his ankle and lower leg that required surgery. A metal rod with 13 screws was placed in this leg to hold it together. He had to walk with a cane and was in a lot of pain. In April 2011, Applicant was deployed to work in Israel on an extended stay. Although he had been

going to physical therapy in the United States up to that point, he was still in a lot of pain. In Israel, Applicant did not have a physician, and so he started using a pain medication he bought at a local pharmacy there. This medication made him tired, constipated, and disturbed his stomach.

In June 2011, while on vacation visiting his girlfriend in Amsterdam, Applicant shared a marijuana cigarette with her that she purchased at a coffee shop. Applicant explained that the marijuana provided a welcome relief from the pain in his leg. Applicant realizes that, despite the facts that he was on vacation and that marijuana use is legal in Amsterdam, it is not legal in the United States and it is against DoD policy while holding a DoD security clearance. Applicant acknowledges that his decision to use marijuana was stupid. He seriously regrets his past conduct and assures that it will never happen again.

Applicant states that he is no longer in contact with his girlfriend from Amsterdam, nor does he have any regular contact with anyone who uses marijuana or any other illegal drug. While working in Israel, Applicant met a woman that he eventually married, and they recently had their first child, a daughter. His wife does not use illegal drugs. Applicant credibly testified that he will never use marijuana again. He explained that if he is ever confronted with his illness again, in the future, he will be better prepared to handle his pain issues. He will be more insistent with his doctors to obtain and use the medication they prescribe, and to find something that is compatible with his system. Furthermore, with the advancements in chemotherapy over the last six years, if he ever has to undergo chemotherapy again, he hopes that it will have a milder effect on his body.

After using marijuana in 2008 and in 2011, Applicant reported this use to his employer's security department, and also disclosed it in his SF-86. (Government Exhibit 1.) His family and friends are also aware of his past drug use. He understands that his company has a 'no drug tolerance' policy and that the DoD clearly prohibits its use. He understands that marijuana is illegal and he promises never to use it again.

In January 2015, Applicant's oncologist stated that he has complete confidence that Applicant has beaten cancer. Applicant recently celebrated his six year anniversary in January, which is a longer survival rate than 50 percent of the people with his condition.

Applicant submitted a letter of intent dated September 22, 2015, indicating that he will never use illegal drugs again. Should there be a violation, he consents to automatic revocation of his security clearance. (Applicant's Exhibit A.) Applicant also underwent a Hair Follicle 5 Panel Drug Test dated September 14, 2015, with negative results. (Applicant's Exhibit B.)

Letters of recommendation from professional associates, coworkers, and his wife indicate that Applicant is quite accomplished at work, and is the nicest husband and father at home. He is said to be extremely intelligent, a natural leader, organized and a

capable engineer. He is responsible and trustworthy. He is highly respected by all who know him and considered to be an asset to the company. (Applicant's Exhibit D.)

A letter from Applicant's Manager dated October 2, 2015, indicates that Applicant is reliable and trustworthy. He has a positive attitude and is most knowledgeable in his field. He is highly recommended for a security clearance. (Applicant's Exhibit H.) Applicant's performance appraisals for the years 2012, 2013, and 2014, are all favorable. (Applicant's Exhibit E.)

## **POLICIES**

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

### Guideline H (Drug Involvement)

*The 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.

#### Conditions that could raise a security concern:

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.

#### Conditions that could mitigate security concerns:

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;

(b) demonstrated intent not to abuse drug in the future, such as:

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct, which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

## CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an applicant for clearance may be involved in illegal drug abuse that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government met its initial burden of proving that Applicant has engaged in drug involvement (Guideline H). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of Applicant. Because of the scope and nature of Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility. Considering all of the evidence, Applicant has introduced persuasive evidence in rebuttal, explanation, or mitigation that is sufficient to overcome the Government's case under Guideline H of the SOR.

First of all, the use of marijuana is illegal under Federal law, and also against DoD policy, while holding a security clearance. Under normal circumstances this conduct is disqualifying for security clearance. In this case, however, Applicant's use of marijuana on two occasions in his life, was not done for recreational purposes, but to handle excruciating pain involved in two life threatening, catastrophic medical conditions. After using marijuana, he reported his use to his company security department. He also disclosed it on his SF-86. He understands that his use of marijuana was against the law, against DoD policy, and his company policy. This misconduct normally raises serious questions about one's judgment, reliability and trustworthiness. In this case however, Applicant is not a recent college graduate, without sufficient experience or the know-with-all to comprehend the seriousness of his actions. He is, instead, a 44-year-old, intelligent, educated, well-respected engineer, who has worked in the defense industry for over 18 years. He has not used marijuana in over four years. He understands the responsibilities required of him in holding a security clearance. He knows the law, admits to making a serious mistake, and has no intention of ever using any illegal drug again, no matter the extent of his future pain and discomfort. His demeanor and testimony was credible and convincing.

Under Guideline H, Drug Involvement, Disqualifying Conditions 25.(a) *any drug abuse*; and 25.(c) *illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia* apply. Mitigating Conditions 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; and (b) demonstrated intent not to abuse drug in the future, such as: (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation are also applicable.*

I have also considered the "whole-person concept" in evaluating Applicant's eligibility for access to classified information. In this case, Applicant has demonstrated the level of maturity, responsibility, and characteristics expected of an employee who works for the defense industry and can be trusted with access to classified information. Applicant's illegal conduct was out of character, and occurred during two serious life crises.

Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, supports a whole-person assessment of good judgment, trustworthiness, reliability, candor, and a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information. I am convinced that Applicant will never use any illegal drug again.

A security clearance is a privilege, not a right. In order to meet the qualifications for access to classified information, it must be determined that Applicant is, and has been, sufficiently trustworthy on the job and in his everyday life to adequately protect the Government's national interest. Based upon the conduct outlined here, this applicant has demonstrated that he is trustworthy, and he does meet the eligibility requirements for access to classified information.

On balance, it is concluded that Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

## **FORMAL FINDINGS**

Formal findings For or Against the applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For Applicant.

Subpara. 1.a.: For Applicant.

Subpara. 1.b.: For Applicant.

Subpara. 1.c.: For Applicant.

## **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Darlene Lokey Anderson  
Administrative Judge