



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



In the matter of: )  
)  
) ISCR Case No. 07-13897  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ray T. Blank, Jr., Esq., Department Counsel  
For Applicant: *Pro Se*

April 22, 2008

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his illegal drug use. Eligibility for access to classified information is denied.

On January 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H, Drug Involvement. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 25, 2008, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on February 28, 2008. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the

security concerns. Applicant received the FORM on March 7, 2008. He responded on April 3, 2008, and enclosed performance appraisals. I received the case assignment on April 17, 2008. I have marked the performance appraisals as Exhibit (Ex.) A, and they are admitted.

### **Findings of Fact**

In his Answer to the SOR, dated December 5, 2007, Applicant admitted both factual allegations in the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 44-year-old engineer for a defense contractor. He has a Bachelor of Science degree in engineering. He has been with his current employer since 2005, and his previous company from 2001 to 2005. He has never been married and has no children.<sup>1</sup>

Applicant used marijuana with varying frequency, from about 1994 through October 2007. He would smoke the marijuana on weekends at his home or with friends at their homes.<sup>2</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86), certified as true on August 1, 2006. He listed his marijuana use from 1994 through February 2006, and stated:

My use of controlled substances is exclusive to Cannibus (sic). I'm willing to discuss this issue further if needed, in person. The take-away for you is that it is more important for me to modify my personal, private lifestyle and serve my country, than not.<sup>3</sup>

Applicant continued to smoke marijuana after he submitted his SF 86. He described his use of marijuana to a background investigator on February 5, 2007. He told the investigator that he made an effort to try and stop smoking the marijuana after February 2006, because he wanted a security clearance and wanted to be a law-abiding citizen, but he continued to smoke marijuana. He stated that he would continue to try and stop smoking marijuana, but he did not feel that the government had the right to make him stop, as his marijuana use was a personal choice and no one had the right to make that choice for him. He stated that he did not feel that he was dependent on the drug. He claimed marijuana allowed him to become very focused without any negatives. He expected to continue to smoke marijuana on the same basis as he had for the past 12 years, which was occasionally and only on the weekends.<sup>4</sup>

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<sup>1</sup> Item 4.

<sup>2</sup> Applicant's response to SOR; Items 4, 5; Applicant's response to FORM.

<sup>3</sup> Item 4.

<sup>4</sup> Item 5.

Applicant continued to use marijuana after his background interview on February 5, 2007. A statement was not provided but the interview was summarized in a Report of Investigation (ROI). He was sent Interrogatories containing the ROI and was asked if the ROI accurately reflected the information that he provided to the investigator. He certified on October 25, 2007 that it did. He was provided an opportunity to add additional information regarding the matters discussed during his interview and stated:

Having read the adjudicative guidelines within DoD Directive 5220.6, I now understand the government's position regarding drug involvement of security clearance applicants. I understand that disclosure of my personal consumption of cannabis may raise a security concern. In an effort to mitigate that concern, I submit herewith this signed statement of intent to immediately cease possession and consumption of cannabis.<sup>5</sup>

In his response to the FORM dated April 3, 2008, Applicant stated that in retrospect, he realized that his continued infrequent marijuana use between the time he submitted his SF 86 on August 1, 2006, and October 2007, was "an error in judgment." He wrote that his continued use was "the result of substantial-work related pressure." Applicant described a hectic and stressful work environment in which he was managing three major projects. He stated:

For over a year I have basically been in damage control mode. There are more days than not that I leave work completely, mentally exhausted. The job I have results in significant personal stress. It has been my experience that, when used sparingly and in balance, consumption of cannabis significantly attenuates the stresses I incur from performing my job.<sup>6</sup>

Applicant wrote "a signed statement of intent [not to use illegal drugs] with automatic revocation of clearance for any violation." He further stated that he no longer associates with individuals who use drugs. He has taken up a musical instrument and takes music lessons and practices during his leisure time. Applicant submitted performance appraisals which indicated that he is a conscientious, dedicated, and valued employee.<sup>7</sup>

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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.

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<sup>5</sup> *Id.*

<sup>6</sup> Applicant's response to FORM.

<sup>7</sup> Ex. B.

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 common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 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).

## **Analysis**

### **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.

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 conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

- (a) any drug abuse; and
- (b) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

Applicant's marijuana possession<sup>8</sup> and use are sufficient to raise the above potentially disqualifying conditions.

Two Drug Involvement Mitigating Conditions under AG ¶¶ 26(a) and (b) 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;
  - (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant admitted to using marijuana up until about October 2007. That is too recent to be mitigated under AG ¶ 26(a). Applicant wrote in his response to Interrogatories on October 25, 2007, and again in his response to the FORM, "a signed statement of intent with automatic revocation of clearance for any violation." He states he has disassociated from his drug-using associates and contacts and avoids the environment where drugs are used. I find Applicant has done enough to raise AG ¶ 26(b) as a factor in mitigation.

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<sup>8</sup> Marijuana must be possessed in order to be used.

## **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) 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 common sense 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. Applicant used marijuana until October 2007, without regard for the law. He was 43 years old when he last smoked marijuana. He continued to smoke marijuana after submitting his SF 86 in August 2006, and after his background interview in February 2007. I considered Applicant's positive job performance, the changes in his lifestyle, and his stated intent not to use illegal drugs in the future. However, he has not established a long enough track record of living drug-free to overcome the many years of drug use, poor judgment, and disregard for the law.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

## **Conclusion**

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

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Edward W. Loughran  
Administrative Judge