



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 08-02503
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel  
For Applicant: *Pro Se*

February 10, 2009

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**Decision**  
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CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on January 24, 2006. On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E 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 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 acknowledged receipt of the SOR on October 28, 2008. He answered the SOR in writing on November 17, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on November 21, 2008, and it was assigned to another Administrative Judge on December 16, 2008. I received the case assignment on January 20, 2009. DOHA had issued a notice of hearing on January 5,

2009, and I convened the hearing as scheduled on January 21, 2009. The Government offered Exhibits (GXs) 1 and 2, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A through D, without objection. DOHA received the transcript of the hearing (TR) on February 2, 2009. I granted Applicant's request to keep the record open until February 4, 2009, to submit additional matters. On February 3, 2009, he submitted Exhibit E, without objection. The record closed on February 4, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all of the factual allegations of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

#### **Guideline H - Drug Involvement & Guideline E - Personal Conduct**

The Applicant is a 54 year Electrical Engineer, married with two grown children (TR at page 15 line 23 to page 18 line 16). He has worked in the defense industry for about 28 years, and has held a security clearance for that period of time (TR at page 19 line 20 to page 20 line 10).

1.a.~1.c. and 2.a. From January of 2001 until about January/February of 2006, the Applicant used marijuana "[a]bout 15 times" (TR at page 22 line 1 to page 25 line 16). His last usage was during the Super Bowl in 2006 (TR at page 58 line 20 to page 60 line 2). His usage was always in a social setting, where the marijuana was passed to the Applicant, and he would smoke the illegal substance (TR at page 22 line 1 to page 25 line 16). He smoked this marijuana while holding a security clearance, and his last usage was after he submitted his e-QIP in January of 2006 (TR at page 25 line 22 to page 29 line 10). The Applicant has disavowed any future drug abuse, and has signed a written statement of intent to that end (TR at page 32 line 4 to page 34 line 14, and AppX E at page 3).

#### **Guideline E - Personal Conduct**

2.b. The Applicant failed to file his Federal and State income tax returns for tax years 2002 and 2003, in a timely fashion (TR at page 35 line 5 to page 37 line 8). The Applicant asked his spouse to file their tax returns, but she refused to do it (*Id*). This was a "battle of stubbornness," which is corroborated by a statement from Applicant's wife (TR at page 35 line 5 to page 37 line 8, and AppX E at page 2). They subsequently paid their taxes, along with the penalties and interest their tardiness incurred (*Id*).

2.c. In 2001, the Applicant went to a foreign country for 5~6 days to meet potential investors for a private business proposition (TR at page 42 line 20 to page 52 line 18). This trip was during Christmas break on short notice, and he verbally informed his employer's security office of his intended trip (TR at page 42 line 20 to page 52 line

18, and at page 55 line 14 to page 56 line 3). Prior to his trip, he did not know what potential investors he would meet, but one of them turned out to be a retired General of the foreign country (*Id*). The Applicant did not discuss any sensitive information with this General or with any other potential investor (TR at page 42 line 20 to page 52 line 18, and at page 55 line 14 to page 56 line 3). [The trip attracted no meaningful foreign investment.] He reported his foreign national meetings “two or three months” after his return from the trip (*Id*). No disciplinary action was taken vis-a-vis the Applicant as a result of this trip.

## **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.

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 Paragraph 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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), “*any drug abuse*” may be disqualifying. In addition, “*any illegal drug use after being granted a security clearance*” under Subparagraph 25(g). Here the Applicant used marijuana about 15 times, after being granted a security clearance, with his last usage being in January/February of 2006. This is countered, however, by the mitigating condition found in Subparagraph 26(a). The Applicant’s Drug Involvement “*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.*” Here, the Applicant last used marijuana about three years ago. Subparagraph 26(b) is also applicable, as Applicant has shown “*a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent*” to disassociate from those who use illegal substances, and “not [to] knowingly partake in any illegal substance while holding any security clearance.”

### **Guideline E - Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(c), “*credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment . . .*” Here, the Applicant used an illegal substance, marijuana, about 15 times, used it once after executing his e-QIP, and failed to file 2002 and 2003 tax returns in a timely fashion. He should have also reported his 2001 foreign contacts in a more timely fashion. However, this is countered by Subparagraph 17(c) as “*so much time has passed, or the behavior so infrequent, or it happened under such unique circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.*” Again, the Applicant’s last marijuana usage was about three years ago; and his other faux pas, the untimely tax filings and tardy foreign contact report, occurred 4~8 years ago. Furthermore, the Applicant has formally and credibly eschewed any future drug involvement.

### **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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of his Senior Program Manager and of his Section Manager (AppX A). Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his Drug Involvement and Personal Conduct.

### **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

Subparagraph 1.a:

For Applicant

Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola  
Administrative Judge