



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-09655
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gina L. Marine, Esquire, Department Counsel  
For Applicant: *Pro se*

September 9, 2009

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana about five to six times yearly from December 31, 2005, to December 31, 2007. He also took the prescription drug Vicodin at least once in 2006 when it had not been prescribed for him. Applicant has not abused any drugs since he started working for a defense contractor, and he intends no future involvement. Clearance is granted.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 20, 2008. On January 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR)<sup>1</sup> to Applicant detailing the security concerns under Guideline H that provided the basis for its preliminary decision to deny him a security clearance. 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*

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<sup>1</sup>The SOR was corrected at the hearing to reflect the proper spelling of Applicant's surname.

*Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

In answers to the SOR dated February 19, 2009, and March 30, 2009, Applicant requested a decision based on the written record. The government requested a hearing, and on May 15, 2009, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On June 2, 2009, I scheduled a hearing for June 30, 2009.

I convened the hearing as scheduled. Three government exhibits (Ex. 1-3) and 14 Applicant exhibits (Ex. A-N) were entered into evidence without any objections, and Applicant testified, as reflected in a transcript (Tr.) received on July 9, 2009.

### **Findings of Fact**

DOHA alleged under Guideline H (drug involvement) that Applicant used marijuana about five or six times per year from December 2004 to December 2007 (SOR 1.a) and that he used the prescription drug Vicodin on various occasions when it had not been prescribed for him (SOR 1.b). Applicant admitted the abuse of marijuana. He also acknowledged he had used Vicodin when it had not been prescribed for him, but only on a single occasion. After considering the evidence of record, I make the following findings of fact.

Applicant is a 30-year-old senior help desk technician who has worked since late June 2008 as a contractor on a military installation (Ex. J, Tr. 86). He stayed on in his position when the contract was taken over by another defense contractor in February 2009 (Ex. J, Tr. 87). He seeks a secret security clearance for his present employment (Tr. 91).

Applicant graduated from high school in June 1996. From July 1996 to November 1997, he was a sales associate in electronics for a discount retailer. In November 1997, he enlisted in the U.S. military with the hope of making his career in the service (Tr. 63). On February 12, 1998, he completed a security clearance application (SF 86) for a security clearance for his duties in electronic warfare (Ex. 2). He was granted a top secret clearance with access to sensitive compartmented information in about July 1998 (Ex. 1, Tr. 90).

Applicant and his spouse married in November 1998. They had two children while Applicant was in the military, sons born in August 1999 and March 2001 (Exs. 1, J). Applicant had medical issues through most of his four-year enlistment term. Due to his specialty code, his duty was extended after September 11, 2001, until November 2002 (Exs. 1, J, Tr. 62).

Following his release from active duty, Applicant and his family returned home. Applicant collected unemployment until October 2003, when he got a job as a manager for a video company (Ex. 1, Tr. 63). In or before March 2005, he and his spouse bought

their current residence (Ex. 1, Tr. 59, 63).<sup>2</sup> Applicant's brother, who was a user of marijuana, began to "hang out" with his friends at Applicant's new home. In November 2005, his brother was thrown out of their parents' home because of his "antics" and "disreputable" associates (Ex. J). Applicant and his spouse took him into their home (Tr. 63). On or about December 31, 2005, while under the influence of alcohol at a party, Applicant succumbed to peer pressure and smoked marijuana with his brother (Tr. 60, 63-64). With little in the way of career plans at that time, Applicant used marijuana while socializing with his brother and at times also with his brother's friends on an estimated five to six occasions per year through December 31, 2007 (Exs. 1, 3, Tr. 92). Applicant's marijuana use was limited to circumstances where it was offered to him and he did not seek out the drug (Tr. 97). His spouse, who did not smoke marijuana, did not approve of his use ("She knew and she yelled at me day in and day out about it." Tr. 117). Applicant knew it was "wrong" for him to smoke the marijuana (Tr. 64).

In the summer of 2006, while helping his parents put in a pool, Applicant injured his back where he could not get off the couch. His mother gave him one of her prescription Vicodin pills for pain (Tr. 108-09. 118-19).

In October 2006, Applicant was terminated from his job for reasons unrelated to drug use, and he started college studies toward an associate degree in science (Ex. 1, Tr. 64). In June 2007, he began working part-time as a customer service representative for a bank while continuing to pursue his studies full-time at night in electronics (Exs. 1, J, Tr. 65, 100). Applicant declined some, but not all, offers from his brother to smoke marijuana (Tr. 106). Applicant did not use marijuana while he was studying, when he had to work, or if his children were around (Tr. 95-96). As he was entering his last semester of college, Applicant realized that he needed to provide a "good foundation" for his children and family. He resolved to forego any future involvement with marijuana. He finished his studies in March 2008 (Ex. 1, Tr. 86), and in May 2008, he graduated on the Dean's List with a cumulative grade point average higher than 3.6. He was elected to a national honor society (Exs. B, C, Tr. 65-66).

In late June 2008, Applicant started working as a defense contractor on a military base. He was required to take a drug test on commencing his employment and it was negative for all substances tested (Tr. 87).

On June 20, 2008, Applicant completed an e-QIP that he subsequently signed on November 20, 2008. He responded "Yes" to question 24.a on the e-QIP concerning any illegal drug use in the last seven years, and disclosed "occasional infrequent use" of

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<sup>2</sup>According to his SF 86, Applicant has resided at the same residence since March 2005 (Ex. 1). Yet Applicant's father indicates that Applicant and his spouse bought their home in February 2004 (Ex. J). The date that Applicant purchased their current residence is significant, given his testimony (correcting earlier representations of an initial use of marijuana on December 31, 2004) that he did not begin smoking marijuana until after his brother moved into their home in November 2005. Since Applicant had been unemployed from November 2002 to October 2003, it is difficult to see where he would have been financially able to buy a home in February or March 2004. Applicant's father corroborated the November 2005 date as when Applicant's brother moved from his home and began residing with Applicant. The available information tends to support an initial usage of marijuana by Applicant on December 31, 2005.

marijuana between the estimated dates of December 2004 and December 2007 (Ex. 1).<sup>3</sup>

On August 25, 2008, Applicant was interviewed by a government investigator about his illegal drug involvement. Applicant related that on New Year's Eve in 2004, he accepted an offer of marijuana from his brother, who was a regular user of the drug. Applicant estimated that between December 2004 and December 2007, he smoked a marijuana cigarette about five or six times per year on holidays and social gatherings at his home. Applicant denied any purchase of marijuana. He averred that he stopped using marijuana after New Year's Eve 2007 as he decided to pursue employment with the U.S. government or a government contractor and knew that it would not be tolerated. Applicant admitted that he still socialized with his brother and brother's friends who use marijuana but he denied any intent to use marijuana himself. Applicant indicated that in the last seven years, he had accepted his mother's offer of her Vicodin medication after he had injured his back while helping her. He did not consider his use of the drug to constitute abuse under the circumstances (Ex. 3).<sup>4</sup>

Applicant's brother was a source of stress in the family household. He paid rent and helped out with caring for Applicant's children, but his unreliability and lying led Applicant to "evict" him from the home several times (Ex. J, Tr. 72, 107). Because he was family, Applicant gave him second chances and took him back in. As of November 2008, Applicant's brother was living in Applicant's home but with the understanding that drug use or being under the influence of drugs would not be tolerated in the household (Ex. 3, Tr. 107). In response to DOHA interrogatories about his drug use, Applicant on November 4, 2008, indicated that he used marijuana from December 2004 to December 2007, when he stopped in order to secure a more stable future and reliable income for his family (Ex. 3).

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<sup>3</sup>Applicant now recalls that his first use of marijuana was on December 31, 2005, rather than on December 31, 2004, as he had previously reported (Tr. 59-60). He does not recall using marijuana with his brother until after he and his spouse had taken his brother into their home, which they purchased in March 2005 (Tr. 93).

<sup>4</sup>The investigator reported the following with respect to Applicant's involvement with Vicodin:

THE SUBJECT HAS TAKEN PRESCRIPTION PAIN MEDICATION, SPECIFICALLY VICODIN, ON VARIOUS OCCASIONS (EXACT AMOUNT UNKNOWN). AFTER INJURING HIS BACK WHILE HELPING HIS MOTHER MAINTAIN A RESIDENCE, THE SUBJECT ACCEPTED THE PRESCRIPTION MEDICATION FROM HIS MOTHER IN AN EFFORT TO REDUCE BACK PAIN. THE SUBJECT DID NOT PAY FOR THE DRUG AS HE WAS GIVEN THE DRUG COMPLEMENTARY. (Ex. 3).

Applicant asserted at his hearing that he told the agent about the one-time use, which he had failed to recall when he completed his SF 86. He denies that he took it more than once and has no explanation for why the agent had indicated he used it on various occasions (Tr. 123). Applicant had the opportunity to review the investigator's report in October/November 2008. Asked why he did not correct the record to accurately reflect that he had used the Vicodin only once, Applicant responded, "I may have missed that part." (Tr. 126). Whether or not Applicant took one pill or more than one, the record evidence shows it was limited in time.

In November 2008, Applicant was placed on medications for diagnosed insomnia and sleep apnea (Tr. 77-78). He understands that any illegal drug use would be incompatible with his medications and is not willing to risk his health “just for a few hours of entertainment” (Tr. 78).

As of February 2009, Applicant’s brother had been “evicted” from Applicant’s home. He was around the household only when he was watching Applicant’s children. He had completely removed his personal belongings from Applicant’s home as of sometime in March 2009 (Answer, Tr. 112). As of late June 2009, Applicant’s brother was no longer watching his children for him (Tr. 113).

In February 2009, the company employing Applicant lost the contract for the information technology services at the military base. Applicant’s employment was transferred to a new defense contractor. He was required to again submit to a drug test, which he passed (Tr. 87). On February 19, 2009, Applicant executed a statement of intent to not abuse any drugs in the future with the understanding that his clearance would be automatically revoked for any violation (Ex. A).

As a member of a 20-person department, Applicant proved to be highly committed, focused, and reliable. Due to his “unique skill sets,” Applicant worked on several projects for a rear admiral for six months. The admiral, aware that Applicant had used an illegal drug on several occasions while he was pursuing his associate’s degree, believed it appropriate to view Applicant’s drug use “as a single event” to be weighed against an otherwise solid career (Ex. D).

In the spring of 2009, Applicant was selected as one of a handful of individuals privileged to attend a three-week training class in systems security (Ex. E). He has the support of supervisory personnel and colleagues, including his immediate and second-level supervisors, who have found his performance “nothing less than stellar.” (Exs. F, G, M, N). Applicant has not held a security clearance so he has accessed no classified information, but he has appropriately safeguarded the private information of more than one thousand customers (Ex. F). In May 2009, Applicant received positive feedback for his support during an academic accreditation assessment. The information resource department was recognized for providing excellent service to the assessment team and throughout the organization (Ex. K).

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the 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 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. 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 that 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 about 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.

(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.

Applicant smoked marijuana with his brother on an estimated five or six times per year from December 31, 2005, to December 31, 2007, while his brother lived with him. Applicant also took Vicodin that had not been prescribed for him in 2006 after he injured his back helping his parents. AG ¶ 25(a), “any drug abuse,” applies.

Applicant did not seek out the marijuana or the Vicodin. He used marijuana only when it was offered to him by his brother or his brother’s friends with whom he was socializing at the time, and his mother gave him the Vicodin which had been prescribed for her. AG ¶ 25(c), “illegal drug possession, cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” applies only in the limited sense that Applicant can be said to have had physical custody or possession of the drugs when he ingested them.

Applicant’s abuse of marijuana and Vicodin may reasonably be characterized as infrequent. However, his last involvement with marijuana is still relatively recent. His case for mitigation under AG ¶ 26(a), “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is likely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” is not particularly persuasive.

Concerning whether Applicant has demonstrated an intent to forego future drug abuse sufficient to satisfy AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” he understood as of early 2008 that he could no longer use any marijuana if he was to pursue employment with a defense contractor or with the government. Yet, despite rocky relations with his brother and the stress his brother caused in the household, Applicant allowed his brother to return to the house after he had evicted him. He had made it clear to his brother that no illegal drugs would be tolerated at the house, but at the same time, Applicant was aware that his brother and brother’s friends were still active drug users. As recently as August 2008, Applicant admitted to a government investigator that he was continuing to associate with his brother and brother’s friends, whom habitually used marijuana. As of November 2008, his brother was still residing in his home, although by then his brother was spending less time there. By February 2009, Applicant’s brother was in the process of moving out. He had all his belongings removed from the premises by late March 2009. As of late June 2009, Applicant had little contact, if any, with his brother. Applicant has completely dissociated himself from his brother’s friends, but it is difficult to fully apply AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” because of the fraternal relationship and the fact that he has given his brother second chances in the past.

A demonstrated intent may also be shown by “changing or avoiding the environment where drugs were used.” (AG ¶ 26(b)). Applicant’s drug use took place in his own home, but the environment has changed in that the opportunity to use illegal drugs is no longer present since his brother moved out. Even before his brother vacated, Applicant had made it clear that his home was no longer an environment where drugs would be permitted. AG ¶ 26(b) applies.

In February 2009, Applicant signed a statement of intent to refrain from drug abuse with the understanding that any violation would result in automatic revocation of his security clearance. AG ¶ 26(b)(4), “a signed statement of intent with automatic revocation of clearance for any violation,” clearly applies, although it could mean little if unaccompanied by substantive changes reflective of a drug-free lifestyle. As Applicant entered his final semester in college, he resolved that marijuana use was incompatible with his family’s future. He completed his studies with a high academic average and there is no evidence that he has used any illegal drugs since he went to work for a defense contractor. It is debatable whether 18 months is “an appropriate period of abstinence” (AG ¶ 26(b)(3), given he used marijuana with his brother, in his own home, and despite the disapproval of his spouse. But he also passed two drug tests. He regrets his past drug use, and understands it is incompatible with his obligations to his employer, the government, and his family. Recent medications for his insomnia and sleep apnea could pose a risk to his health if combined with marijuana, and his health is a significant factor that makes him even less likely to abuse any drug in the future. Based on all the evidence, AG ¶ 26(b) applies.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate Applicant’s eligibility for a security clearance by considering the totality of his conduct and all the circumstances in light of 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.

Applicant showed poor judgment in using marijuana, even if it was limited to no more than five or six times a year over a two-year span. While he apparently did not realize that his misuse of his mother’s Vicodin prescription was a problem, he knew that



his marijuana use was “wrong” and incompatible with his obligations to his spouse and children. As Applicant became focused in his college studies and began to envision a future career in government or government contract work, he gave up his social use of marijuana. He has demonstrated maturity and reliability in the performance of his duties on the military base since June 2008 to where his supervisors and colleagues are confident that he can abide by the responsibilities of a security clearance. Based on all the circumstances, I conclude it is clearly consistent with the national interest to grant Applicant access to 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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

### **Conclusion**

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

ELIZABETH M. MATCHINSKI  
Administrative Judge