



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



In the matter of: )  
)  
) ISCR Case No. 09-00301  
SSN: )  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gregg A. Cervi, Esq., Department Counsel  
For Applicant: *Pro Se*

February 26, 2010

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Personal Conduct security concerns, but he has not mitigated Drug Involvement concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On October 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H and E, Drug Involvement and Personal Conduct. The action was taken under Executive Order (EO) 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 (DoD) for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 26, 2009, 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 January 11, 2010. 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 January 19, 2010. He responded on February 1, 2010. The case was assigned to me on February 19, 2010.

### Findings of Fact

Applicant is a 24-year-old employee of a defense contractor. He has worked for his current employer since September 2008. He is seeking a security clearance for the first time. He has a bachelor's degree, which was awarded in May 2008. He is single with no children.<sup>1</sup>

Applicant smoked marijuana on a regular basis while he was in college. From September 2003 until he graduated in May 2008, he used marijuana about once or twice a week. He used illegal mushrooms on two occasions in about 2004. He injured his foot in 2007, and was prescribed Darvocet for the pain. He used the painkiller for recreational purposes on about five occasions between January and March 2008. When his prescription ran out, a friend provided him with five painkillers. Applicant is unaware of what specific drug he received. He took the pills on five occasions in March 2008.<sup>2</sup>

Applicant worked for a department store from February 2005 to May 2007. He intentionally failed to list his illegal drug use on his employment application, because he was concerned that the company would not hire him if it was aware of the extent of his drug use. He passed a pre-employment drug test.<sup>3</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86) on September 24, 2008. Section 24a asked:

Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?<sup>4</sup>

Applicant answered "Yes," and stated that between "09/2003 (Estimated)" and "05/2008 (Estimated)," he used marijuana an "unknown" number of times. He stated that it was "[o]ccasional usage through college." He did not list his use of mushrooms and prescription drugs. Applicant denied intentionally providing false information. He stated that he rushed through the application while giving the most accurate answers possible.

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<sup>1</sup> Item 6.

<sup>2</sup> Items 4-6; Applicant's response to FORM.

<sup>3</sup> *Id.*

<sup>4</sup> Item 6.

He listed the marijuana use because it was by far his most prevalent use. He stated that if he intended to mislead the government he “would have left out everything including the marijuana usage.” Applicant also listed adverse criminal information under another question.<sup>5</sup> After considering all the evidence, I find that Applicant did not intentionally provide incomplete answers to Question 24a.

Applicant used marijuana after he submitted his SF 86. He moved to the state of his current residence in October 2008. He smoked marijuana with his brother the weekend before he moved.<sup>6</sup>

Applicant revealed his full drug use when he was interviewed for his background investigation in November 2008. He told the investigator that he had no plans to quit using marijuana unless he had to. He stated that he stopped using painkillers recreationally because he ran out of them. He stated that he would use them again in the future if he had them. He stated that he would also stop using marijuana if it started affecting any other aspect of his life.<sup>7</sup>

When Applicant responded to the SOR in October 2009, he stated “I intend to quit [marijuana and painkillers] if I have to. I now have to for clearance. I will quit.” Applicant clarified his position in his response to the FORM. He stated that the people he met when he moved to his current location are not drug users. He stated:

Though during the investigation I did not say that I intended to quit, in the year and a half I have been in a professional environment I have been led to understand that in order to thrive in a drug-free environment, I must give up my “party days” and become a responsible member of the environment I have become a part of. Not just for my clearance, but to succeed in an atmosphere that is unforgiving of someone under the influence of an unclear mind.<sup>8</sup>

There is no evidence of any illegal drug use after Applicant moved and started his new job in October 2008. Applicant’s friends and some of his family members are aware of his drug use.<sup>9</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

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<sup>5</sup> Items 4-6; Applicant’s response to FORM.

<sup>6</sup> Items 4, 5; Applicant’s response to FORM.

<sup>7</sup> *Id.*

<sup>8</sup> Applicant’s response to FORM.

<sup>9</sup> Item 4; Applicant’s response to FORM.

potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 EO 10865 provides that adverse 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Three are potentially applicable in this case:

- (a) any drug abuse;<sup>10</sup>
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant's possession and use of marijuana, illegal mushrooms, and prescription drugs for recreational purposes are sufficient to raise AG ¶¶ 25(a) and 25(c) as disqualifying conditions. He told a background investigator in November 2008 that he had no plans to quit using marijuana unless he had to, and that he might use painkillers again. Those statements generated security concerns under AG ¶ 25(h).

Two Drug Involvement mitigating conditions under AG ¶ 26 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; and
- (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 used marijuana regularly in college. He also used illegal mushrooms on two occasions and prescription drugs for recreational purposes on about ten occasions. He continued to periodically use marijuana after college, including on at least one occasion after he submitted his SF 86 in September 2008. He moved to another state

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<sup>10</sup> Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

and started his current job in October 2008. He told the investigator in November 2008 that he had no plans to quit using marijuana unless he had to, and that he would use painkillers recreationally in the future if he had them. When he responded to the SOR in October 2009, he stated he intended to quit marijuana and painkillers because he had to for his clearance. He further clarified that position when he responded to the FORM. The people he knows at his current location do not use drugs, and there is no evidence of any illegal drug use after October 2008.

There is no bright-line rule as to whether conduct is recent. However, Applicant's drug use was extensive, occurred over several years, happened on at least one occasion after he submitted his SF 86, and he did not commit to being drug free until recently, and then because he "had to." Because Applicant elected not to have a hearing, I was unable to ask additional questions or assess his credibility. Based upon the limited information in the record, I am unable to find that Applicant's drug use is unlikely to recur. His drug use continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable. Applicant has stated that he does not intend to abuse drugs in the future, but he does not receive full mitigation under AG ¶ 26(b) for the same rationale discussed above.

#### **Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 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. 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 conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or

duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant submitted incomplete information on his SF 86, but as discussed above, it was not intentional. AG ¶ 16(a) is not applicable. SOR ¶¶ 2.a is concluded for Applicant.

Applicant provided false information about his drug use on his employment application for a department store in 2005. AG ¶¶ 16(b) and 16(e) are applicable as disqualifying conditions.

Applicant used marijuana after he submitted his SF 86 in September 2008. That conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant's falsification of his employment application was five years ago. He has not worked for the company for three years. He revealed his drug use during his background interview. There is no evidence of any illegal drug use after October 2008.

Friends and family members are aware of his drug use. He has taken positive steps to reduce his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable. Personal Conduct security concerns are mitigated.

### **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) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 24 years old. He regularly used illegal drugs while in college. He continued smoking marijuana after college, including on at least one occasion after he submitted his SF 86. He did not commit to being drug free until he saw it as a requirement for holding his clearance. Based upon the limited information available in the record, concerns remain about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated Personal Conduct security concerns, but he has not mitigated Drug Involvement concerns.

### **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
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraphs 1.e-1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For 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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Edward W. Loughran  
Administrative Judge