



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-00968
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

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

September 24, 2010

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline H, Drug Involvement, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On April 12, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. DOHA acted 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).

Applicant answered the SOR on April 22, 2010, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material (FORM) on May 28, 2010. The FORM was mailed to Applicant, and he received it on June 14, 2010. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, and mitigation. Applicant submitted a reply that was received by DOHA on June 16, 2010. The case was assigned to me on July 26, 2010.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all the factual allegations. However, he disputes the deliberateness of his false security clearance information regarding SOR ¶ 2.a. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 54 years old. He is married and has two children. Since October 2009, he has worked for his current defense contractor. Prior to his current position, he also worked for a defense contractor and was granted a security clearance in February 2009. He did not serve in the military.<sup>1</sup>

Applicant's admitted conduct raised in the SOR includes: (1) using prescription pain medications without an authorized prescription on several occasions between January 2008 and June 2009, including when he held a security clearance; (2) using marijuana on three occasions between December 2007 and June 2008; and (3) failing to list the above described prescription drug and marijuana use when he completed his security clearance questionnaire on January 26, 2009.<sup>2</sup>

From 1975 to 1980, Applicant was a weekly user of marijuana. Beginning in 1980 and continuing through 1987, he reduced his marijuana use to once or twice a year. He used the marijuana at home and purchased it from two persons he knew. He used marijuana because he preferred the stimulation and relaxation it gave him over using alcohol. He stopped using marijuana in 1987 because his children were growing older and he had a financial obligation to support his children.<sup>3</sup>

Applicant came into possession of the prescription drugs Percocet and Vicodin when his mother-in-law passed away. She was prescribed both drugs and they were left over after she died. Applicant and his wife took control of his mother-in-law's possessions after her death and Applicant chose to keep these two prescription medications. Although Applicant was never authorized by a doctor to take these medications, between January 2008 and June 2009, he used Percocet and Vicodin

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<sup>1</sup> Items 5, 7.

<sup>2</sup> Item 4.

<sup>3</sup> Item 6.

three to five times. He took the medicine because of chronic back pain he experienced from exercising. He stopped using these drugs in June 2009, when he was going through the security clearance process because he did not think his actions were smart.<sup>4</sup>

Between December 2007 and June 2008, Applicant resumed smoking marijuana on three occasions. The first use of marijuana was in December 2007, when he was attending a party at his daughter's house. He inhaled marijuana one time from a metal tube that looks like a cigarette. He decided to smoke marijuana because he saw other people were doing it and because he was curious about whether marijuana had changed since he last used it in 1987. He felt sick after using the marijuana. The next two uses of marijuana occurred in June 2008, while Applicant was on a camping trip. He inhaled marijuana one time on the first night of the trip and inhaled marijuana several times on the second night of the trip. He used marijuana on these two occasions because he wanted to see if the marijuana was different from the marijuana he smoked in 2007. Once again the use of marijuana made Applicant feel sick.<sup>5</sup>

Applicant failed to list his 2007-2008 marijuana use and his 2008-2009 unauthorized prescription drug use on his January 26, 2009, security clearance questionnaire (e-QIP).<sup>6</sup> Applicant's explanations for these omissions are that he did not think the prescription drug use was illegal and he had forgotten about the marijuana use because he was impaired by his drinking at the time. He revealed his drug use for the first time when questioned by an Office of Personnel Management interviewer on December 2, 2009.<sup>7</sup>

In Applicant's response to the FORM, he states that he takes his security clearance seriously and would never put the country at risk through his actions. Additionally, he claims he has been marijuana-free for two years and has not used prescription drugs in 18 months.

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

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<sup>4</sup> *Id.*

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

<sup>6</sup> SOR ¶ 2.a mistakenly refers to the relevant security clearance question as "Section 24. Your Use of Illegal Drugs and Drug Activity". The correct reference is Section 23.

<sup>7</sup> Item 6.

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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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**

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse; and
- (g) any illegal drug use after being granted a security clearance.

Applicant used prescription drugs that were not prescribed for him on several occasions, including after he obtained a security clearance in February 2009. He also resumed using marijuana in 2007, after having given up marijuana use in 1987. He used marijuana on multiple occasions between 2007 and 2008. I find that both above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (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; and
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed and the abuse has since ended.

Applicant's marijuana use was recent and although infrequent (three uses), it occurred after Applicant had purportedly given up using marijuana for over 20 years. His resumption of use after such a long period of abstinence makes it more likely that future use could reoccur. Additionally, Applicant's resumption of use at this stage of his life, certainly calls into question his judgment, reliability and trustworthiness. Likewise, his recent use of prescription medications that were prescribed to his dead mother-in-law also casts doubt on his reliability, trustworthiness and good judgment. AG ¶ 26(a) does not apply.

Although Applicant states he intends to abstain from future drug use, insufficient time has passed to conclude that he has demonstrated such intent not to abuse drugs. AG ¶ 26(b) does not apply.

Applicant abused the prescription drugs Percocet and Vicodin that were prescribed for his mother-in-law not for him. AG ¶ 26(c) does not apply.

## **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern for personal conduct:

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; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress.

When Applicant completed his January 26, 2009 e-QIP, he failed to list his 2007-2008 marijuana use and his unauthorized prescription drug use. Applicant denied any intentional falsification stating that he did not remember his marijuana use because he was also drinking alcoholic beverages and because he did not think there was anything wrong with the prescription drug use. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. I am persuaded that Applicant was attempting to deceive the Government when he neglected to list this information. Additionally, Applicant used unauthorized prescription drugs while holding a security clearance. AG ¶¶16(a) and (e) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

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

Applicant failed to meet his burden to show that he put forth a good-faith effort to correct his drug use omissions prior to being confronted with the facts. The unauthorized use of another person's prescribed drug medicine is not a minor offense and Applicant failed to convince me that this behavior is unlikely to recur. Neither AG ¶¶17(a) or (c) apply.

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted to using marijuana and unauthorized prescription drugs. I find that the above disqualifying condition applies.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and especially considered the following:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal conduct was recent and happened under such circumstances that shows he disregarded the laws prohibiting using marijuana and taking prescription drugs intended for someone else. In the case of the prescription drug abuse, rather than engage proper medical professionals to seek relief, Applicant opted to use his dead mother-in-law's prescribed medication to relieve his back pain on multiple occasions. Applicant's behavior casts doubt on his reliability, trustworthiness and good judgment. Sufficient time has not passed to determine whether Applicant's rehabilitation has been successful. I find that neither of the above mitigating circumstances applies.

## **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 considered Applicant's written response to the FORM. Although Applicant stresses he has abstained from marijuana and unauthorized prescription drugs for two years and 18 months respectively, his resumption of marijuana use after 20 years of non-use and his using his mother-in-law's prescribed medicine show questionable judgment for someone of Applicant's age and life experience level. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, Drug Involvement; Guideline E, Personal Conduct; and Guideline J, Criminal 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:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant



Paragraph 3, Guideline J:

AGAINST APPLICANT

Subparagraph 3.a:

Against 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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Robert E. Coacher  
Administrative Judge