



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



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-07235

**Appearances**

For Government: Ray T. Blank, Jr., Esquire, Department Counsel  
For Applicant: *Pro se*

November 22, 2010

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

**Statement of Case**

On February 11, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR on February 26, and elected to have his case decided on the basis of the written record. Applicant received the FORM on April 21, 2010, and submitted supplemental materials within the time permitted. The items received are identified as Items 7 through 10 and are admitted for consideration.

## **Summary of Pleadings**

Under Guideline H, the government alleged that Applicant (a) used marijuana with varying frequency from about May 2000 until at least February 2009; (b) purchased marijuana, (c) misused Promethazine with codeine in about July 2007; and used marijuana after he had been granted a security clearance in December 2007.

Under Guideline E, Applicant is alleged to have (a) used marijuana after he had been granted a security clearance in December 2007 (by incorporation); (b) falsified his security clearance application (e-QIP) of August 2007 by omitting his drug usage before and after he was granted a security clearance; and (C) been removed from access consideration in March 2009 from another government agency's special program by his employer due to information covered under Guideline H.

In his response to the SOR, Applicant admitted each of the allegations. He provided no explanations.

## **Findings of Fact**

Applicant is a 26-year-old engineer for a defense contractor who seeks to obtain a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is single and has no children (Item 1). He completed two years of college at an accredited institution (Item 1). He started his employment with his current employer in March 2007. (Items 1 and 6).

Applicant was introduced to illegal drugs in high school. He used illegal drugs in varying amounts between 2000 and February 2009. (Items 4 and 6) He admits to using marijuana three times a month with varying frequency during this period (an estimated 318 times altogether). In the most recent e-QIP he completed in May 2009 (Item 4), he committed to avoiding the use of marijuana and other illegal drugs in the future.

In college, Applicant smoked marijuana alone most of the time, but occasionally he used the substance with friends and acquaintances in college dormitories, outside, and at parties. (Item 6) Aware of DoD policy against drug use, he continued to use marijuana after joining his current employer and obtaining a security clearance in December 2007. (Items 5 and 6) Beginning in 2004, Applicant purchased marijuana in small quantities of about 1/8 ounce once or twice a month. Smoking marijuana made him feel differently and more relaxed. (Item 6) He shared his marijuana once or twice a year with others during this period at his expense, or in exchange for money. (Item 6)

In July 2007, Applicant misused Promethazine with codeine (a prescription cough syrup) with soda water. (Item 6) A friend freely supplied the prescription drug. Applicant

experimented with the drug with others albeit at a reduced frequency of once or twice a month on average. (Item 6)

Asked to complete an e-QIP in August 2007, Applicant omitted his prior use and purchases of illegal drugs. (see Items. 5 and 6) He attributed his omission to nervousness and concern over having his job application rejected. (Item 6) In a follow-up e-QIP he completed in May 2009, he fully admitted to using illegal drugs between May 2000 and February 2009. (Item 4). He reconfirmed his use of illegal drugs between May 2000 and February 2009 when interviewed by an agent from the Office of Personnel Management (OPM) in August 2009. (Item 6). In this interview, he assured the OPM agent that he has no intentions of future drug use. (Item 6) Applicant has never received any drug-related treatment or counseling. And he has never tested positive in any administered drug test. (Item 6)

Records report that Applicant was removed from access consideration in March 2009 from another government agency's special access program by his employer due to his admitted drug activities. He assures he learned from his experiences associated with his removal and can be counted on to avoid all illegal substances in the future. Concerned about the implications of his prior drug use on his clearance application, Applicant appeared for a voluntary drug test in April 2010. (Item 7) The test produced negative results. (Item 8)

Applicant is well-regarded by his supervisors and coworkers who have worked with him. (Item 9) They credit him with active professional involvement in all phases of his engineering responsibilities. Co-workers stress his maturity, leadership, and work ethic and find him reliable and trustworthy. (Item 9) Outside of his work duties, Applicant has proven to be a valuable mentor in his employer's youth program. Friends familiar with his efforts describe him as a valuable resource to high-school students taking part in the mentoring program. (Item 9)

## **Policies**

The AGs for Determining Eligibility for Access to Classified Information list Guidelines to be considered by judges in the decision-making process covering DOHA cases. These Guidelines require the judge to consider all of the "[c]onditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial commonsense decision.

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that

could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Drug Involvement**

*The Concern:* 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. AG ¶ 24.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, 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, ¶ 15.

### **Burden of Proof**

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Applicant is a well regarded engineer who has worked in the defense industry for several years with a good record of achievement and performance. Security concerns are raised over his recurrent involvement with drugs and misrepresentations over his past involvement with marijuana use and purchases.

#### **Drug concerns**

Over a nine-year period (between 2000 and at least February 2009), Applicant used and purchased marijuana intermittently in social situations (three times a month on

average with friends and acquaintances) before permanently discontinuing his use in February 2009. Use and purchase of illegal drugs (inclusive of marijuana) are proscribed by both state law and federal law. (see 21 U.S.C. § 802, *et seq.*) In addition to his using and purchasing marijuana over an extended period, Applicant misused Promethazine with codeine for a short time in 2007.

Applicant's admissions of using marijuana before and after applying for and being granted a security clearance raise judgment issues and initial security concerns over risks of recurrence. On the strength of the evidence presented, several disqualifying conditions of the AGs for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," and DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Judgment concerns exist over Applicant's continued drug use after applying for and receiving a security clearance in 2007. These actions reflect both judgment lapses and disregard of the DoD's rules and policies for clearance holders. Applicant's actions are expressly covered by Guideline E, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (App. Bd. April 10, 2008).

Where (as here) there is additional probative adverse information covered by Guideline E that is not covered by Guideline H, and *vice versa*, and which reflects a recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior, independent grounds exist for considering questionable judgment and trustworthiness allegations under Guideline E as well as Guideline H. Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the AGs.

So, under Guideline E, core judgment and trustworthiness concerns covered by D.C. ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information," have some applicability to this case in addressing the security significance of Applicant's using marijuana after being granted a security clearance.

Generally, though, misconduct predictions may not be based on supposition or suspicion. See ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used marijuana since his last recorded use, or based on his past use, is likely to resume usage in the future. See ISCR Case No. 02-08032 (May 2004).

Because of the extent and recency of his acknowledged use of illegal drugs, Applicant may take only limited advantage of the mitigating conditions. MC ¶ 26(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,” is disjunctive and can be partially applied to Applicant’s situation. Applicant’s demonstrated intent not to abuse drugs in the future has some application as well. Available considerations under ¶ 26(b) include “(3) an appropriate period of abstinence,” and “(4) a signed statement of intent with automatic revocation of clearance for any violation.”

Since quitting drugs altogether in March 2009, Applicant ceased contact with persons who use drugs. Accordingly, he may fully invoke MC ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” and MC ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” to the merits of his situation. In fairness to Applicant, he has exhibited candor about his past marijuana use and his associations with persons who have used the substance.

Because of the relative recency of Applicant’s marijuana activity, Applicant’s expressed intentions not to use illegal drugs, while probative, cannot immunize him from considered recurrence risks. Given his considerable history of drug use, and the relative recency of his last use (February 2009), risks of future recurrence cannot be discounted.

From a whole-person perspective, Applicant has established independent probative evidence of his overall reliability and trustworthiness with his employer and community sponsors and understanding of DoD policy constraints on the use of illegal substances. His positive endorsements from his colleagues and friends who have worked with him in his employer’s mentoring program are impressive.

Still, less than two years have elapsed since Applicant quit using illegal drugs. Considering the record as a whole, at this time there is insufficient credible seasoning of Applicant’s mitigation efforts (over a year of claimed abstinence without any probative evidence of recurrence) to avert foreseeable risks of recurrent marijuana use. Taking into account all of the facts and circumstances surrounding Applicant’s drug use and judgment lapses, Applicant does not mitigate security concerns related to his marijuana use and purchases under both Guideline H and Guideline E. Favorable conclusions warrant with respect to the allegations covered by subparagraph 1.c of Guideline H.

### **Personal conduct concerns**

Additional security concerns over Applicant’s judgment, reliability and trustworthiness are raised under Guideline E as the result of his determined (a) knowing and wilful omissions of his recurrent marijuana use and misuse of Promethazine in the e-QIP he completed in August 2007 and (b) his removal from access consideration in March 2009 from another government agency’s special program by his employer for using illegal drugs. Applicant withheld information about his illegal drug involvement for over two years after he completed his 2007 e-QIP. By omitting his recurrent drug use and

purchases, Applicant failed to furnish materially important background information about his drug use that was needed for the government to properly process and evaluate his security clearance application.

Applicant's omissions are attributable to some concerns about losing his job and clearance. His omissions, as described, reflect his conscious decision to omit material information concerning his drug use history and purchases while holding a security clearance.

Concerned about the status of security clearance application, he fully disclosed his illegal drug activities in the updated e-QIP he completed in May 2009. Applicant may be credited with voluntary disclosures of drug activities. His good-faith disclosures entitle him to some benefit from pertinent mitigating conditions covered by the personal conduct guideline. MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," has some application to Applicant's situation. Because he did not provide his drug use corrections until two years later, he is not able to satisfy the prompt prong of MC ¶ 17(a). Still, his corrections were sincere and complete, and are entitled to consideration.

From a whole-person standpoint, Applicant is widely trusted by his supervisor, coworkers, and friends who have worked with him and know him well. Their positive impressions of his judgment and trustworthiness are entitled to a great deal of consideration in making an overall assessment of his trustworthiness. Considering that Applicant (a) corrected his omission in his second e-QIP without any evidence of prompting or confrontation with the facts, (b) cooperated with the follow-up questioning by the OPM investigator, and (c) is highly regarded for his displayed judgment and trustworthiness by his colleagues, his updated disclosures are sufficient to enable him to convincingly mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations reflect core policy security concerns of the personal conduct guideline (AG ¶15).

Whole-person considerations recounted above are all evident under the facts and policy considerations developed under this Guideline. Overall, Applicant's explanations of his omissions and the voluntary corrections he made in his updated e-QIP are enough to warrant favorable conclusions relative to the falsification allegations pertaining to his drug-related e-QIP questionnaire and ensuing corrections in the updated e-QIP he completed in 2009. See ISCR Case No. 09-05655 at 2 (Aug. 24, 2010).

Because of the drug-related circumstances that prompted him to be removed from another government agency's special program in March 2009, Applicant's removal is not mitigated. While Applicant's endorsements weigh heavily in his favor, they are not enough to surmount recurrent drug use risks associated with his active marijuana activities. These risks are the same ones that prompted his access removal. More time is needed to neutralize access risks associated with his past drug activities.



## **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT):           AGAINST APPLICANT

    Subparas. 1.a, 1.b, and 1.d:               Against Applicant  
    Subpara. 1.c:                               For Applicant

GUIDELINE E: (PERSONAL CONDUCT):        AGAINST APPLICANT

    Subpara. 2.a and 2.c:                   Against Applicant  
    Subparas. 2.b:                           For Applicant

## **Conclusions**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge

