



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



In the matter of:	)	
-----	)	
	)	ISCR Case No. 09-07759
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel

For Applicant: *Pro se*

March 7, 2011

---

**DECISION**

---

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions (SF86), on May 8, 2009. (Item 4.) On May 7, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant detailing the security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on May 20, 2010, and requested a decision without a hearing. Department Counsel submitted a File of Relevant Material (FORM) to Applicant on July 12, 2010. Applicant received the FORM on July 20, 2010, and was given 30 days to submit any additional information. He elected not to submit anything further. The case was assigned to another administrative judge on September 23, 2010. It was reassigned to me on October 21, 2010. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

## **Findings of Fact**

Applicant is 36 and single. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

### **Paragraph 1 (Guideline H - Drug Involvement)**

The Government alleges under Guideline H that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all of the allegations under this paragraph in the SOR. These admissions are deemed findings of fact.

Applicant admits he used marijuana. In an unsworn declaration regarding an interview taken on July 22, 2009, it was stated, "The subject [Applicant] used marijuana off and on recreationally from approximately 98 to 02/09. He would use marijuana once to twice a day for two to three weeks every three to four months." (Item 6 at 4.) He also purchased marijuana on multiple occasions during the time that he used it.

Applicant tested positive for marijuana in 2000 and was terminated from his job. He was working for a different company when he again tested positive for marijuana in May 2008. Applicant received a five day suspension and was required to work with his employer's Employee Assistance Program. He attended counseling and Narcotics Anonymous meetings until February 2009. In February 2009 Applicant again tested positive for marijuana and was terminated. Applicant maintains that he stopped using marijuana in February 2009 and has no intention of using marijuana or any other illegal drug in the future. (Item 4 at 22, 55-56.)

### **Paragraph 2 (Guideline E - Personal Conduct)**

The Government alleges under Guideline E that Applicant is ineligible for clearance because he has engaged in conduct which displays questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

As part of this allegation, the Government states that Applicant's conduct in testing positive for marijuana at two different employers (SOR 1.c., 1.d. and 1.f.) is cognizable under this paragraph as well. Accordingly, the findings entered under Paragraph 1 concerning those allegations will be considered in determining the issues under this paragraph as well.

In addition, Applicant admits that he has not told his parents the truth about his February 2009 termination from employment due to a positive drug test. (Item 6 at 1.) He stated during his interview, "It is not something he (Applicant) wants everyone to know however he states if someone were to attempt to blackmail or coerce him, he would tell those people himself." (Item 6 at 5.)

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted

no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

## **Policies**

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and find that the following conditions apply given the facts in this case:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The Applicant used marijuana on a consistent basis for ten years, ending two years ago. He obviously had a problem because he tested positive for marijuana three times, with the result that he was suspended once and terminated from two different jobs due to his marijuana use. All of the above disqualifying conditions apply to the facts in this case.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and find that none of them apply to the facts in this case concerning Applicant's long-

term marijuana use. AG ¶ 26(a) states that it may be mitigating where “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 reliability, trustworthiness, or good judgment.” The Applicant’s drug abuse was of long duration, and was intense during that period. As stated, according to Applicant, it ended just two years ago. I find that, under the facts of this case, it is still too soon for this condition to apply.

Further, under AG ¶ 26(b), it may be mitigating where an applicant has “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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.” The Applicant did not submit any evidence showing a demonstrated intent not to use drugs in the future. He did not submit a signed statement concerning an automatic revocation of his clearance, which would be mitigating. Finally, his period of abstinence, in this particular case, is insufficient. Paragraph 1 is found against the Applicant.

## **Paragraph 2 (Guideline E - Personal Conduct)**

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.

The entirety of the Applicant’s conduct set forth under Paragraph 2, brings into play the following disqualifying condition under Guideline E ¶ 16:

(c) credible adverse information in several adjudicative 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, 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.

The following mitigating conditions under Guideline E ¶ 17 arguably apply to his conduct:

(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, and

(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.

Applicant's positive drug tests and their aftermath, as described under Paragraph 1, above, is clearly inappropriate and cognizable under this Guideline. His decision to not tell his parents why he was terminated from his last job shows that he is vulnerable to coercion. The record is simply too thin for me to find that the Applicant is eligible for a security clearance at this time. It is his burden to show that the mitigating conditions apply. He failed to do so. This guideline is found against the Applicant.

### **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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has engaged in marijuana use for ten years. He was terminated from two different jobs for testing positive for such use. Under AG ¶ 2(a)(3), Applicant's conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is a high likelihood of recurrence (AG ¶ 2(a)(9)).

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 has not mitigated the security concerns arising from his Drug Involvement and Personal Conduct.

On balance, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a denial of his request for a security clearance.

### **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 THE APPLICANT
Subparagraphs 1.a. through 1.f.:	Against the Applicant
Paragraph 2, Guideline E:	AGAINST THE APPLICANT
Subparagraphs 2.a. and 2.b.:	Against the 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.

WILFORD H. ROSS  
Administrative Judge