



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



In the matter of: )  
)  
) ISCR Case No. 09-07998  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: James F. Duffy, Esquire, Department Counsel  
For Applicant: John F. Mardula, Esquire

August 31, 2010

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, Drug Involvement and Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

On March 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and F. 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 answered the SOR on May 10, 2010, and requested a hearing before an administrative judge. The case was assigned to me on July 2, 2010. DOHA issued a Notice of Hearing on July 19, 2010. I convened the hearing as scheduled on August 11, 2010. The Government offered Exhibits (GE) 1 through 5. Applicant did not object and

they were admitted. Applicant and one witness testified on his behalf. Applicant offered Exhibits (AE) A through I, which were admitted without objection. After the record closed, Department Counsel received AE K. He did not object to its consideration and it was admitted. DOHA received the hearing transcript (Tr.) on August 18, 2010.

### **Findings of Fact**

Applicant admitted SOR allegations ¶¶ 1.a, 1.e, and 2.c. He admitted parts of SOR allegations ¶¶ 2.a and 2.b, and denied ¶¶ 1.b, 1.c, and 1.d. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 38 years old. He graduated from high school in 1990 and attended college for one year before beginning employment. He worked in retail from 1994 to 1995, and from approximately 1995 to 2000, in information technology at a law firm. At the same time he resumed attending college from 1995 to 1997, but did not earn a degree. He worked as an independent contractor from 2001 until approximately 2004, when he realized that he needed to complete his college degree. He reduced his expenditures and used his savings to pay for his schooling. He did not take out any student loans. Applicant completed his bachelor's degree in May 2006, and continued in school completing his master's degree in May 2009. He began working for his current employer in July 2009, as a systems administrator.<sup>1</sup>

Applicant used marijuana from 1990 to 2010. Some years he might not use it at all, other years he might use it more than twice, but on average over the years he used it two to three times a year. He did not consider his marijuana use a big part of his life. He did not use it at work and it did not impact his professional performance. He would usually use it at parties, social gatherings, or camping trips. He does not think he needs any type of drug counseling, and does not consider his marijuana use as a gateway to additional drug use. In the 1990s, Applicant purchased marijuana, but he has not purchased it since then.<sup>2</sup>

In July 1993, Applicant was arrested and charged with felony possession of a controlled substance, hallucinogenic mushrooms. Applicant's friend asked him to provide transportation so the friend could transact an illegal drug deal. Applicant admitted he knew that his friend was going to pick up illegal drugs and he was assisting him by providing a ride. The police arrested both Applicant and his friend. Due to Applicant's limited involvement in the transaction the charge against him was reduced to a misdemeanor for possession of a controlled substance. He was sentenced to six-months supervised probation. He successfully completed the probation and his record was expunged. His friend was convicted of a felony.<sup>3</sup>

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<sup>1</sup> Tr. 54-58.

<sup>2</sup> Tr. 60-62, 101-104, 115.

<sup>3</sup> Tr. 62-67, 120-121.

Applicant's most recent uses of marijuana were March 2009, mid-August 2009, and New Year's Eve 2009-2010. He was apprised during the interview process for his current employment that certain employees in the company held security clearances. He did not believe he would need to obtain a security clearance because he was not working on projects that required it, but rather was working at the headquarters of the company. Sometime after his August 2009 marijuana use, he was told by his employer that he needed to complete a security clearance application (SCA) and obtain a security clearance. He signed the SCA on August 28, 2009, and disclosed his prior drug use.<sup>4</sup>

In October 2009, Applicant was interviewed by an Office of Personnel Management (OPM) investigator. He explained he did not have future plans to use marijuana, but he would evaluate his use on a case-by-case basis. He would have to consider the circumstances at the time in order to decide if he would use marijuana. However, he would not use marijuana if he was granted a security clearance. At his hearing, Applicant provided a signed letter of intent not to use illegal drugs in the future and he consented to an automatic revocation of his security clearance if he committed any violation. He stated he does not associate with the people with whom he previously used marijuana.<sup>5</sup> At his hearing, Applicant confirmed that he did not intend to use illegal drugs in the future if he was granted a security clearance. He further stated: "If I'm not granted my clearance, there would still be serious questions. I'm—I'm not going to say that when I'm a 60-year-old man I'm—I'm—I'm still never going to be smoking."<sup>6</sup> He further stated: "It is not my intent to use regardless of whether I have the clearance or not. I am at this point in my life focusing exclusively on my professional career and that it has been made clear to me by this and other things that that can't be a part of my life anymore."<sup>7</sup>

Applicant acknowledged that after he completed his SCA in August 2009, and after he was interviewed by the OPM investigator, he used marijuana at a New Year's Eve party on December 31, 2009. He acknowledged he knew using marijuana is illegal.<sup>8</sup>

Applicant did not file his 2004, 2006, 2007, and 2008 federal and state income tax returns on time. He believes he filed his 2002 and 2003 federal and state income tax returns on time, but did not have the documents to verify it. He believes the Internal Revenue Service (IRS) would have indicated his failure to file, when he began resolving his tax issues.<sup>9</sup>

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<sup>4</sup> Tr. 67-68, 104-111.

<sup>5</sup> Tr. 119-120; AE A.

<sup>6</sup> Tr. 68-69.

<sup>7</sup> Tr. 69-74.

<sup>8</sup> Tr. 114-115, 122-124.

<sup>9</sup> Tr. 74-75, 124-125.

Applicant earned \$3,621 in 2004 and owed \$256 for federal taxes. He did not owe anything for state taxes. In 2006, he earned \$13,609, and owed \$953 for federal taxes, and \$121 for state taxes. In 2007, he earned \$11,044, and owed \$1,636 in federal taxes, and did not owe any state taxes. In 2008, he earned \$50,852, and owed \$12,091 for federal taxes, and \$2,155 for state taxes. Applicant stated that he did not believe he earned sufficient income in 2004, 2006, and 2007 that would have required him to file tax returns. He was unaware that he owed self-employment taxes on his income. Applicant explained that while he was attending school he was paying for all of his expenses by himself. He did not have any help or have loans. He did not actually do the math calculations to determine if he owed any taxes in 2004 because of his low income.<sup>10</sup>

Applicant acknowledged that he did not file his 2008 tax returns on time. He stated: "The time of filing 2008 is of course April 2009. That was at the apex of my final semester of my master's. I was in the middle of a project that I was literally [working] 12 hours a day."<sup>11</sup> He further stated:

I didn't file because I didn't have the time to gather again, this was all independent. I didn't have the time to gather the paperwork, all the independent invoices that I had to get them over to the accountant on time. And beyond that I knew that I was basically running on fumes in terms of finances and there was no way that I could pay any amount of tax that would have been due.<sup>12</sup>

Applicant knew he would not have the money to pay the taxes he owed so he chose not to file the returns. He explained he did not think about filing the returns because he was entirely focused on completing his studies and it was a very stressful time in his life. He received his master's degree in May 2009. He contacted an accountant in January or February of 2010. He filed all of his tax returns on May 10, 2010.<sup>13</sup> With his savings and a loan he acquired he paid all of his federal and state income taxes, including any penalties and interest he owed.<sup>14</sup>

Applicant filed his 2005 tax returns on time. He explained that his parents gave him money to hire someone to do his taxes that year. His earned income was \$30,669. He received a refund.<sup>15</sup>

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<sup>10</sup> Tr. 75-85, 125-127.

<sup>11</sup> Tr. 85.

<sup>12</sup> Tr. 86.

<sup>13</sup> Tr. 127-130; AE B, C, D, E, F.

<sup>14</sup> Tr. 85-92; AE B, C, D, E, F, G, J.

<sup>15</sup> Tr. 78-81, 95-98.

A vice president from Applicant's company testified on his behalf. She has known him for about 15 years. He is a friend of her daughter and has been to her house many times. She is not his supervisor, but they work for the same company. She has never heard any derogatory issues about Applicant. She considers him responsible, stable and he uses good judgment. She has no concerns about him handling classified material. She was never aware of any issues regarding his drug use. She believes that he would follow all prescribed rules.<sup>16</sup>

Applicant acknowledges he has made mistakes. He has always been careful with sensitive and proprietary information when working. He described himself as meticulous at work and his peers consider him well-adjusted and mature.<sup>17</sup>

Applicant provided a character letter from a retired Air Force officer who is a senior executive for his employer. Applicant is described as dependable, trustworthy, and a person of integrity. He has no reason to question his character and ability to protect classified information or loyalty to the United States. Applicant follows corporate processes and policies. He is capable of operating in the company's own sensitive environment and produce positive results. He sets the standard for the technical team. His candidacy for a security clearance is "fully endorsed."<sup>18</sup>

## **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.

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

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<sup>16</sup> Tr. 24-52.

<sup>17</sup> Tr. 58-60.

<sup>18</sup> AE H.

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, 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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. 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.”

The guideline notes several conditions that could raise security concerns. I have considered the following disqualifying conditions under AG ¶25 as potentially applicable:

- (a) any drug abuse;

(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 used marijuana from 1990 to New Year's Eve 2009-2010. He purchased marijuana during the 1990s and possessed it. He provided transportation for a friend whom he knew was conducting a drug transaction. He pled guilty to a misdemeanor for drug possession, received supervised probation, and his record was later expunged. In his interview with an OPM investigator, as part of his background investigation, he stated he was not sure if he would use marijuana in the future and he would have to evaluate the situation on a case-by-case basis. Subsequent to the interview, and after completing his SCA, he used marijuana at a New Years Eve party in 2009-2010. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following three are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant has a 20-year history of marijuana use. His last uses were in March 2009, August 2009, and on New Year's Eve 2009-2010. He used marijuana after he completed his SCA which casts doubt on his current reliability, trustworthiness, and good judgment. I find AG ¶ 26(a) does not apply. Applicant recently signed a statement of intent with an automatic revocation of clearance for any violation if he used illegal drugs. However, in October 2009, as part of his background investigation, he was uncertain if he would use illegal drugs in the future. He then proceeded to use marijuana less than three months later, demonstrating he was not committed to abstaining from future drug use, fully aware at the time that his use was a concern to the Government. He has not demonstrated an appropriate period of abstention or a genuine commitment to refraining from future use of illegal drugs. Although AG ¶ 26(b)(4) technically applies, Applicant has not demonstrated, through his actions, a true commitment to not abuse

any drugs in the future. Therefore, I find AG ¶ 26(b) does not apply. Applicant does not believe he needs any type of drug counseling or treatment program and has not attended or completed one. I find AG ¶ 26(d) does not apply

## **Guideline F, Financial Considerations**

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to provide proof that he filed his 2002 and 2003 federal and state income tax returns. After his hearing and after the record closed he provided a copy of his 2005 income tax return. He did not file his 2004, 2006, 2007, and 2008, federal and state income tax returns on time. He did not pay the taxes for these years on time. I find the disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under AG ¶ 20:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;



(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant did not provide documented proof that he filed his 2002 and 2003 federal and state income tax returns. Rather he relies on documents from the IRS reflecting his tax debts and resolution for subsequent tax years. There is insufficient evidence to show when and if his 2002 and 2003 tax returns were filed.

Applicant admitted he did not file his 2004, 2006, 2007, and 2008 federal and state tax returns on time. His explanation that he believed he was below the income threshold to file is believable based on his income in tax years 2004, 2006, and 2007. It is also believable that he was unaware that he was required to pay self-employment tax on his meager income for those tax years. However, in 2008, he earned more than \$50,000, and was aware of his tax responsibilities, but because he did not have the money to pay his taxes, he made a conscious and deliberate choice not to file his federal and state tax returns. He also explained he was too focused and busy with the final requirements for earning his master's degree. He completed the degree in May 2009, began employment in July 2009, but waited until May 2010, after receipt of the SOR to file his tax returns and resolve all of his tax issues. His behavior casts doubt on his trustworthiness, reliability, and good judgment. His tax issues were within his control. I find AG ¶¶ 20(a) and 20(b) do not apply.

As of May 2010, Applicant has filed and paid his delinquent federal and state income taxes and the problem appears to be resolved and under control. I find AG ¶ 20(c) applies. I find AG ¶ 20(d) does not apply because Applicant did not take action to resolve his tax issues until shortly before his hearing. I do not find his delayed actions constitute a good-faith effort. I find AG ¶ 20(e) partially applies because it was reasonable for Applicant to conclude that he did not have to file income tax returns in 2004, 2006, and 2007, because of his meager income and he was unaware of the self-employment tax requirement. I find AG ¶ 20(e) does not apply to his failure to file his 2008 federal and state income tax returns.

### **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. Applicant is a bright and articulate young man. He realized that he needed a college education to advance in his career and he devoted himself to his education for several years to complete his goal. He is a valued and trusted employee. Applicant has a 20-year history of illegal use of marijuana. He signed a statement that he did not intend to use illegal drugs in the future. However, Applicant's actions are a cause of concern. He completed an SCA in August 2009, and became aware that illegal drug use is a concern of the Government. He was not committed to refraining from drug use in October 2009, when he told the OPM investigator that he would decide on a case-by-case basis whether he would use drugs in the future. Three months later, he decided to use marijuana while his SCA was pending. It is too early to conclude Applicant is truly committed to refraining from future drug use. His most recent use was on New Year's Eve 2009-2010, less than a year ago. Applicant failed to file his federal and state income tax returns. Although he had a legitimate explanation for not filing during the years his income was low, his failure to file his 2008 tax return is a concern. He was aware of his obligation, but was too busy. I have considered that he recently filed his delinquent 2004, 2006, 2007, and 2008 tax returns and paid the amounts he owed. 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 the guidelines for Drug Involvement and Financial Considerations.

### **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.b:	Against Applicant

Subparagraphs 1.c-1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge