



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



In the matter of: )  
)  
) ISCR Case No. 09-08555  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Paul M. DeLaney, Esq., Department Counsel  
For Applicant: *Pro se*

November 30, 2011

**Decision**

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COACHER, Robert E., Administrative Judge:

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

**Statement of the Case**

On March 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on March 30, 2011, and elected to have his case decided on the written record. Department Counsel submitted the Government’s File of Relevant Material (FORM) on May 20, 2011. The FORM was mailed to Applicant and

he received it on June 7, 2011. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit a reply. The case was assigned to me on October 31, 2011.

### **Procedural Issue**

Department Counsel amended the SOR in the body of the FORM. Applicant was given an opportunity to object or respond to the amendment, but did not do so. The amended SOR narrowed the alleged time frame of marijuana use in SOR ¶ 1.a to “daily use from the 1970s until at least March 2009” and cocaine use in SOR ¶ 1.b to “May 2007 to July 2007”. A new allegation (SOR ¶ 1.c) was added. It stated that Applicant cultivated marijuana. Since Applicant failed to respond to the amended allegations, his non-response will be taken as denials of all the allegations.

### **Findings of Fact**

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 divorced and has no children. He has an associate’s degree. He has worked for his current employer since 2009. He served in the Navy for six years from 1972 to 1978. He previously held a security clearance.<sup>1</sup>

Applicant’s conduct raised in the SOR includes: using marijuana with varying frequency, including periods of daily use from the 1970s to March 2009; using cocaine from May 2007 to about July 2007; and cultivating marijuana (See amended SOR ¶¶ 1.a – 1.c).

Applicant first began using marijuana in the 1970s when he was in the Navy. In 1977, he was fined for misdemeanor marijuana possession. More recently, he used marijuana on a daily basis for periods of time and his quantity of use was from one to three joints. He would take breaks from using marijuana from time to time throughout the years to prove to himself that he was not addicted to marijuana. In 1992, he was injured in a motorcycle accident. He suffered severe back, neck and head injuries. He suffers from severe back pain and migraines from the injuries and has been treated by doctors for the pain. He began using marijuana as a pain management tool. Applicant points out that he lives in a state that allows the use of marijuana for medical purposes. He failed to produce evidence that he had been authorized to use marijuana by a physician, a requirement by the state for allowing the legal use of marijuana. In 2008, he used marijuana on nearly a daily basis because of the pain he was experiencing. He grew marijuana in his home for his personal use, but he refused to provide the dates when he grew the marijuana. He claims his last use of marijuana was in March 2009.

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<sup>1</sup> Item 5.

He does not believe his use of marijuana is unlawful because his state has legalized the medical use of marijuana. He continues to associate with friends who use marijuana.<sup>2</sup>

Applicant first used cocaine in the 1970s. He used cocaine on several other occasions between then and May 2007. In May 2007, he used cocaine three times with friends while on a fishing trip. He was asked by an investigator about the names of the people involved, but he refused to supply that information or other specific information about his use of cocaine in May 2007. He claims he stopped using cocaine after May 2007.<sup>3</sup>

Applicant provided a written statement declaring his intent not to use drugs in the future. Applicant voluntarily attended a drug and alcohol awareness class in approximately 2005.<sup>4</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 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

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<sup>2</sup> Items 6-8.

<sup>3</sup> Items 6-7.

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

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 considered the following relevant:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation ... and possession of drug paraphernalia.

Applicant used marijuana and cocaine on a number of occasions. He also grew marijuana for his own use. I find the above disqualifying conditions apply.

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

- (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's use of drugs was frequent and recent (last use March 2009). The period of abstinence is insufficient to demonstrate Applicant's intent not to use in the future. He is not a young person experimenting with drugs. Rather, he is a middle-aged man who has a drug history dating back to the 1970s. He also was not forthcoming to the investigator about his specific cocaine activity. His unwillingness to provide this information casts doubt on his reliability, trustworthiness, and judgment. Additionally, he remains in contact with friends who are marijuana users. He has not met his burden to establish his intent not to use marijuana in the future, despite his statement to the contrary. AG ¶ 26(a) does not apply, and AG ¶ 26(b) partially 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 considered Applicant's statement of intent not to use drugs in the future. However, I also weighed that he used marijuana and cocaine on numerous occasions, and as recently as March 2009. Additionally, Applicant views his use of marijuana to be justified because his state allows for the medical use of marijuana. However, Applicant failed to provide evidence to show that he qualified for using marijuana under state law. Regardless, even if he had qualified, use

of marijuana is not legal under federal law which is controlling here. 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.

### **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

### **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