



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



In the matter of: )  
)  
) ISCR Case No. 10-02617  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: William T. O'Neil, Esquire, Department Counsel  
For Applicant: Alan V. Edmunds, Esquire

August 8, 2011

**Decision**

CREAN, THOMAS M., Administrative Judge:

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

Applicant submitted a Questionnaire for Investigations Processing (e-QIP) on October 1, 2007, to obtain a security clearance while on active duty with the United States Marine Corps. He was granted a security clearance. On October 7, 2009, Applicant submitted an e-QIP to maintain eligibility for access to classified information as part of his employment with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued an interrogatory to Applicant to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's response to the interrogatory, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On October 28, 2010, DOHA issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline E). 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

The SOR alleges that Applicant used marijuana three to five times weekly from about 2001 until 2006 (SOR 1.a), that he used psilocybin one or two times weekly from about June 2001 until August 2001 (SOR 1.b), and that he used marijuana three times in August 2009 subsequent to being granted a security clearance and while still on active duty in the Marine Corps. (SOR 1.c). The SOR also alleges under Guideline E that Applicant did not provide truthful information concerning his drug use on the October 1, 2007 e-QIP, and that he omitted drug involvement information in response to questions on an October 6, 2010 DOHA interrogatory. In his December 16, 2010 response to the SOR, Applicant admitted using marijuana until June 2005 but not until 2006. He admitted using psilocybin in 2001 and marijuana three times in August 2009. He admitted deliberately failing to disclose his drug use from June 2001 until 2005 on the October 1, 2007 e-QIP. He denied deliberately omitting his August 2009 marijuana use in response to the October 2010 interrogatory.

Department Counsel was prepared to proceed on January 27, 2011, and the case was assigned to me on February 22, 2011. DOHA issued a Notice of Hearing on April 18, 2011, scheduling a hearing for May 3, 2011. I convened the hearing as scheduled. The Government offered two exhibits which were marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 and 2. Applicant and one witness testified. He introduced seven documents which were marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through G. DOHA received the transcript of the hearing (Tr.) on May 11, 2011.

### **Procedural Issues**

Applicant did not remember when he received the notice of hearing. Applicant is entitled to 15 days advance notice of a hearing (Directive E3.1.8.). Applicant and his counsel discussed with Department Counsel the hearing date of May 3, 2011, prior to the Notice of Hearing being mailed on April 18, 2011. Applicant and his counsel were ready to proceed and had sufficient time to prepare. Applicant, through counsel, affirmatively waived the 15-days notice requirement. (Tr. 5-6)

### **Findings of Fact**

Applicant admissions and explanations to the SOR allegations under both Guideline H and Guideline E are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 28-year-old high school graduate who has been a systems analyst for a defense contractor since August 2009. After graduating from high school in 2001, he attended various community colleges and universities but did not receive a degree. During the time he attended school, he was also employed at various jobs in the

community. He joined the United States Marine Corps in August 2005 and served on active duty until August 2009 when he received an honorable discharge as a Lance Corporal (E-4). While on active duty, he made three deployments overseas with his unit and served an infantry tour in the Afghanistan combat zone. He received an award for his combat service. He has never married and has no children. Applicant served two tours as a civilian with the defense contractor in Afghanistan training Marines at forward bases in the use intelligence gathering software. (Tr. 25-26, 35-38; Gov. Ex. 1, e-QIP, dated October 7, 2009; App. Ex. G, Award Recommendation, dated April 5, 2008)

Applicant admitted using marijuana from 2001 until June 2005 just prior to entering active duty with the Marines. When he started using marijuana he was approximately 18 years old. He stopped using when he was approximately 23 years old. He denied he used marijuana until June 2006. The information concerning marijuana use until June 2006 was from Applicant's response on the drug use question on the October 13, 2010 response to interrogatory. Applicant listed his marijuana use until "2005/06". His response was to show use until June 2005 not through 2006. I find that Applicant used marijuana three to five times weekly from 2001 until June 2005.

After graduating from high school, Applicant was living by himself or with friends. He was in his early twenties, attending school, and working at a casino or other businesses. He used marijuana mostly with the people he worked with at the casino and with his college friends, including his brother. He attributes his use of illegal drugs to pressure and being with the wrong people. Since he joined the Marine Corps in 2005, he has not had any contact with the people he previously used drugs with the exception of his brother. The friends live in different parts of the country and not where Applicant now lives. As noted below, he does stay in contact with his brother. Applicant executed a document that he does not intend to use illegal drugs in the future and that if he does he will lose his security clearance. He has not used marijuana since August 2009. (Tr. 26-32, 38-43, 51-53; App. Ex. F, Document, dated March 31, 2011)

Applicant admits that he purchased over the internet a kit to grow psychedelic mushrooms (psilocybin). He was 19 years old at the time. Applicant admits he grew and used the mushrooms. He only used the drug a few times because of peer pressure and being with the wrong people. (Tr. 29-31, 40-44)

Applicant admits he used marijuana three times with his younger brother in August 2009. His brother is now 25 years old. At the time, he was on terminal leave from the Marine Corps for three weeks and was with his family before being formally released from active duty. He was not at a Marine installation. He had taken his brother to live with his grandparents and had been with his brother for about two weeks. He stayed too long and was pressured by his brother to use marijuana. In August 2009, he was still subject to drug testing by the Marines. He was seeking employment but had not been hired by a company. He did not know if he would have to undergo drug screening if he received a job. He now sees his brother less than once a year but is still in contact with him by phone. His brother still uses marijuana and he can expect that his brother will again ask him to use illegal drugs. He will not use marijuana again because of the effect his use will have on his access to classified information. (Tr. 30-32, 48-55)

Applicant completed an e-QIP on October 1, 2007, to gain a security clearance for an active duty position as a company-level intelligence cell leader. In response to drug use questions, Applicant answered "no" to all the drug use questions including the question asking if he used any illegal drugs since the age of 16 or in the last seven years. He answered "no" to all other drug use questions. He was concerned and scared that if he disclosed his drug use he would be released from the Marine Corps. He admitted that he used marijuana from 2001 until 2005 and psilocybin from June 2001 until August 2001, so he did use illegal drugs since the age of 16 or in the last seven years.

Applicant admitted that he intentionally did not include his drug use on this e-QIP. In 2005, his recruiter specifically told him not to list his drug use. In 2007, he again followed that deceptive advice when completing the form in 2007. After basic training, Applicant was screened by the Marine Corps for duty on a Presidential detail. He was questioned by an officer concerning his suitability for the position. He told the officer about his pre-Marine Corps drug use because he did not want the Presidential detail position. (Tr. 45-48)

On the e-QIP he submitted on October 7, 2009, Applicant listed his marijuana use from 2001 until 2005, his use of psilocybin in June through August 2001, and his marijuana use in August 2009. Subsequently, Applicant received an interrogatory from DOHA questioning him about his drug use and requesting that he complete a form listing his drug use. He responded to the interrogatory on October 13, 2011, and provided drug use information. He did not list his August 2009 use of marijuana. He listed his marijuana use from 2001 to 2005 and the 2001 use of psilocybin (psychedelic mushrooms). He denied that he deliberately failed to list the August 2009 drug use in the response to the interrogatory with the intent to deceive. He said his answer was a mistake. He thought the form only wanted him to list habitual drug use and not one time use. After submitting the form, he was questioned by a security investigator concerning his drug use and he informed him of the August 2009 marijuana use. (Tr. 27, 46-47, 55-58; Gov. Ex. 1, e-QIP, dated October 7, 2009)

Applicant's supervisor testified that Applicant worked for him for over two years. Part of Applicant's work is performed overseas and part of it is at the home station. He has observed Applicant at the home station and received reports about Applicant's overseas performance. He has no reservations about Applicant having access to classified information. Applicant's work performance is exemplary and he has high integrity. The reports he received concerning Applicant are exceptional and complementary. Applicant has been commended by his supervisors overseas and recommended by them for promotion. His supervisor is aware of the allegations pertaining to illegal drug use and personal conduct and has no reservations concerning Applicant. (Tr. 17-24)

Applicant presented letters of recommendation from superiors and co-workers. A Marine officer wrote that he worked with Applicant in combat situations when Applicant was a civilian supporting Marines. Applicant was reliable and extremely trustworthy in all

matters. He has no concerns about Applicant's loyalty or reliability. (App. Ex. A, Letter, dated March 15, 2011)

Another Marine Corps officer, serving as a Regimental Combat Team intelligence officer, wrote that he worked with Applicant when he was a civilian in combat situations for almost a year. Applicant was knowledgeable and dedicated to the mission of supporting Marines. He worked tirelessly to insure that the Marines received intelligence they needed, and would frequently make trips to remote dangerous areas to support Marines. This support exceeded the support he was required to provide under his contract. (App. Ex. B. Letter, dated March 15, 2011)

A coworker wrote that he worked with Applicant for two years. Applicant is motivated, dedicated, and determined. His work ethic is positive and unquestioned. Applicant is trustworthy, conscientious, motivated, and a valuable team member. (App. Ex. C, Letter, undated)

Applicant's former platoon sergeants wrote that Applicant was in his unit for over three years. Applicant deployed with the unit in a combat environment. Applicant performed professionally, and was trustworthy and dependable. He was always assigned duties above his pay grade and his performance was exemplary. He never had any disciplinary or other issues with Applicant. (App. Ex. D, Letter, dated December 5, 2010)

A Marine Corps major, who Applicant worked with in a combat situation, wrote that Applicant's performance was highly proficient and showed dedication to supporting Marines. He has no questions concerning Applicant's integrity or trustworthiness. (App. Ex. E, Letter, undated)

Applicant also included letters of recommendation with his response to the SOR. Some of these letters were from the same individuals that provided letters as noted above. Other supervisors, friends, and coworkers wrote on Applicant's behalf. All of these individuals praised Applicant's work ethic and dedication to duty. They stated that Applicant was trustworthy and reliable. They had no reservations concerning his access to classified information. (See Applicant's Response to SOR, dated December 16, 2010)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 common sense 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. 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 burden of persuasion 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. Decisions include, by necessity, consideration of the possible risk 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.

## **Analysis**

### **Guideline H, Drug Involvement**

The use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, because it may impair judgment and raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior altering substances, and include those listed in the Controlled Substances Act of 1970. Marijuana and psilocybin are listed in the Act. Drug abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction (AG ¶ 24). Applicant admits marijuana use from 2001 until 2005, use of psilocybin (psychedelic mushrooms) in 2001 which he cultivated and grew himself, and marijuana again on three occasions in August 2009. Applicant’s use of marijuana in August 2009 was after receiving a security clearance in 2007. Applicant’s drug use raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia); and AG ¶ 25(g) (any illegal drug use after being granted a security clearance).

The Government produced sufficient evidence to establish the disqualifying conditions as required in AG ¶¶ 25(c), 25(c), and 25(e). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under drug involvement. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. Applicant raised conditions that may mitigate the security concern

I considered Drug Involvement Mitigating Conditions AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and AG ¶ 26(b) (a demonstrated intent not to abuse 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). These mitigating conditions do not apply. While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant admits using marijuana while in his early twenties from 2001 until 2005. He also admitted cultivating and using psilocybin or psychedelic mushrooms in a two month period in 2001. There were no unusual circumstances leading to the drug use. He was a young person who admits he used the illegal drugs based on peer pressure and being with the wrong people. While in the Marine Corps from 2005 until 2009, he did not use illegal drugs. However, he used marijuana in August 2009 while on terminal leave from the Marine Corps when it was offered to him by his younger brother. At the time, he was technically in the Marine Corps even though he would complete his active duty tour within a week. He has not used illegal drugs since August 2009 but he also spent time deployed overseas in support of Marines. Applicant's use of illegal drugs was willful and voluntary, and could recur at any time. The four years that he was on active duty may be sufficient time to show a changed circumstance. But the essence of why he had a changed circumstance was his active duty Marine tour and his devotion to the Corps and its values and principles. As soon as he was no longer under the tutelage of his leaders and the restrictions placed on him as a member of the Marine Corps, he succumbed to his brother's temptation to use marijuana. He did not use marijuana once but three times. He has not used illegal drugs in the last two years but most of that time was spent overseas in support of Marines.

Applicant no longer associates with his work and school friends that used marijuana with him and urged him to grow and use psychedelic mushrooms from 2001 until 2005. Applicant no longer sees or associates with these friends because they live in a different part of the country than Applicant. However, he continues to see his brother, although infrequently. His brother still uses illegal drugs. Applicant has not

presented sufficient information to show that his brother or any other peers would not persuade him to use illegal drugs in the future. Applicant did complete a form showing his intent not to use illegal drugs in the future and the loss of his security clearance if he did so. Applicant previously pledged not to use drugs while he was in the Marine Corps. He had a security clearance at the time he used marijuana in August 2009 and was still a Marine. He broke that pledge as he was leaving the Marine Corps. He presented insufficient evidence to show that he would not break his new pledge not to use drugs.

The passage of time and the period of abstinence until August 2009 are sufficient to find that his use of marijuana and psychedelic mushrooms in 2001 to 2005 is no longer a security concern. However, his use of marijuana in August 2009 is a security concern. Peer pressure led him to use marijuana in August 2009 and peer pressure could again lead him to use illegal drugs. Applicant has not presented sufficient information that the passage of time or the period of abstinence since August 2009 are sufficient changes of circumstance to show he has reformed and will no longer use illegal drugs.

## **Personal Conduct**

A security concern is raised for personal conduct based on Applicant's responses to questions on drug use on a security clearance application and in response to interrogatories. Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, 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). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States government.

In 2005, when Applicant joined the Marine Corps, he was not honest about his prior illegal drug use. This conduct can be attributed to an individual following his recruiter's advice. Two years later, Applicant completed a security clearance application on October 1, 2007 while still on active duty in the Marine Corps. He answered "no" to all drug use questions and did not list his use of illegal drugs from 2001 until 2005 before joining the Marine Corps. In October 2010, when Applicant completed a drug use form in response to an interrogatory from DOHA, he listed his 2001 and 2005 illegal drug use but did not list his August 2009 use of marijuana. Applicant's inaccurate and incomplete answers to drug use questions raise a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).



Applicant admitted that the omission of his 2001 to 2005 drug use when he completed the October 2007 e-QIP was intentional. When he entered the Marine Corps, his recruiter told him not to list his prior drug use, and in 2007 he continued that deception. He was afraid to disclose his drug use because he had not done so in the past. He feared disclosing his drug use would compromise his Marine service. His fears fails to justify his conduct. Applicant has not mitigated security concerns for his failure to provide full information on his October 2007 e-QIP.

Applicant denies he intentionally falsified his response to the interrogatory in October 2010 by failing to list his August 2009 marijuana use. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Applicant thought he was to list only habitual drug use in response to the questions asked on the interrogatory form. While this is an inaccurate reading of the question, Applicant had already disclosed his August 2009 drug use earlier when he completed an October 2009 e-QIP. Security investigators did not question him concerning his August 2009 marijuana use when they interviewed him in December 2009. Since Applicant had already disclosed his August 2009 drug use, there was no reason for him not to include the use on the interrogatory form. I find that Applicant's failure to list his August 2009 marijuana on the interrogatory was not a deliberate attempt to deceive. His incomplete answer to the October 2010 interrogatory is mitigated.

### **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 four years

of honorable service as a Marine. I considered that he has willingly served as a civilian in war zones in support of United States Marines and has previously been granted eligibility for access to classified information. I also considered the very favorable comments made by Marine Corps officers and others with whom Applicant served.

Applicant used marijuana from 2001 to 2005 and psychedelic mushrooms for two months in 2001. He stopped using drugs when he entered active duty with the Marine Corps in 2005 and did not use illegal drugs again until he was on terminal leave in August 2009. At that time, succumbing to peer pressure from his brother, he used marijuana three times. This was the last time he used illegal drugs. Since August 2009, he has been deployed for a part of the time overseas in support of Marines. Applicant pledged not to use illegal drugs when he entered the Marine Corps. He fulfilled this pledge until the last three weeks of his active duty tour. He executed a document indicating he does not intend to use drugs in the future. He violated a no-use pledge once when he received peer pressure from his brother to use illegal drugs. and presented insufficient information to establish he would not violate the no-use pledge again.

Applicant has not presented sufficient information to establish changed circumstances or change in life style sufficient to establish he will not use illegal drugs in the future. In addition, he deliberately hid his illegal drug use from his Marine Corps superiors in 2007. This intentional failure to disclose is partially mitigated by the voluntary disclose of his August 2009 drug use. In essence, Applicant has failed to meet his burden showing his 2009 drug use in August 2009 and his 2007 failure to provide full and complete accurate information about drug use does not reflect adversely on his reliability, honesty, trustworthiness, and good judgment. His use of illegal drugs in August 2009 and his deliberate actions in choosing to provide inaccurate information raises a concern that he will not properly safeguard classified information. For all these reasons, I conclude Applicant has not mitigated the security concerns from illegal drug use in August 2009 and personal conduct. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. Access to classified information is denied.

### **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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a	Against Applicant
Subparagraph 2.b:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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THOMAS M. CREAN  
Administrative Judge