



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



In the matter of: )  
)  
) ISCR Case No. 10-03495  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: *Pro Se*

September 29, 2011

**Decision**

HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on June 4, 2009. On June 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H, Drug Involvement, and Guideline 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) implemented within the Department of Defense on September 1, 2006.

On July 4, 2011, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on August 8, 2011. The FORM was forwarded to Applicant on August 16, 2009. Applicant received the FORM on August 24, 2009. He had 30 days to submit a response to the FORM. He submitted a response to the FORM on September 6, 2011. On September 15, 2011, Department Counsel indicated they had no objection to Applicant's response to the FORM. On September 19, 2011, the FORM was forwarded to the Hearing Office and was assigned to me on September 20, 2011. Based upon a

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

### **Procedural Issue**

The Government moved to amend the SOR in accordance with ¶ E3.1.17 as follows:

SOR, subparagraph 1.a: Strike the words “at least January 2010” at the end of the sentence and replace with “about January 2011.”

Add subparagraph 1.e: “You used marijuana after being granted a security clearance in 1991 by another Government agency.”

SOR, subparagraph 2.f: Insert the words “and paragraph 1.e” after the words “subparagraph 1.c.”

Applicant had the opportunity to admit or deny the amendments in his response to the FORM. He did not do so. His lack of response is treated as a denial. The proposed language of the amendments conform with the evidence in the case. The motion to amend the SOR is granted.

### **Findings of Fact**

In his answer to the SOR, Applicant admits all of the allegations in SOR ¶¶ 1.a – 1.d and 2.a – 2.d and 2.f. He denies the allegation in SOR ¶ 2.e. (Item 3) His non-response to the Government’s amendments to the SOR are treated as denials. (Response to FORM)

Applicant is a 47-year-old information systems engineer with a Department of Defense contractor who has been employed with the contractor since June 2009. He held security clearances on various occasions between 1991 and 2002. He received his undergraduate degree in May 1986. He is married and has two children. (Item 4)

The SOR alleges and Applicant admits marijuana use from 1980 to January 2010. On March 23, 2010, Applicant was interviewed by an investigator conducting his background investigation. He indicated that from age 15 to his early 20s, he used marijuana approximately two times a month. During that same time period, he used hashish approximately ten times. He purchased small amounts of marijuana on approximately 15 to 20 occasions. Between his early 20s to 2009, Applicant used marijuana on an occasional basis, no more than two to four times a year. He told the investigator that he stopped using marijuana six months before the interview took place. (Item 7 at 6-7)

In December 2010, Applicant was provided a copy of the unsworn summary of his interviews with the investigator on March 23, 2010, and April 8, 2010. He was given

the opportunity to read the documents and asked whether the summary of the interviews accurately reflected the information he provided to the investigator conducting his background investigation. He was also given the opportunity to provide additional information. On January 28, 2011, Applicant indicated that the summary was an accurate assessment of what was discussed during the interview. He also indicated that "there had been a few additional uses of marijuana." Applicant indicated he used marijuana while socializing with friends. He stated that his marijuana use as an adult was never "habitual" and never interfered with the high quality of his work. (Item 7 at 9-10)

On October 31, 1995, Applicant submitted a Questionnaire for Public Trust Position (Standard Form 85P). He answered "No" in response to question 19a:

ILLEGAL DRUGS AND ALCOHOL. In the last 5 years, have you used, possessed, supplied, or manufactured any illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.) depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogens (LSD, PCP, etc.)

He admits that he deliberately omitted his occasional illegal marijuana used which occurred between October 31, 1990, and October 31, 2005. (Item 3; Item 6)

On December 6, 1999, Applicant submitted a Questionnaire for Public Trust Position (Standard Form 85P). He answered "No" in response to question 21a:

ILLEGAL DRUGS. In the last year, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbituates, methaqualone, tranquilizers, etc.), hallucinogens (LSD, PCP, etc.), or prescription drugs?

He admits that he deliberately omitted his occasional illegal marijuana use between December 6, 1998, and December 6, 1999. (Item 3; Item 5)

On September 11, 2002, Applicant completed a National Security Form (SF 86) to apply for a security clearance with another Government agency. He listed that he used marijuana on five occasions between January 1995 and April 2002. During the subsequent background investigation, Applicant stated during an interview in October 2002 that he used marijuana one to two times a year after graduating from college. His last use of marijuana was in April 2002. In May 2003, Applicant stated during a subsequent interview that he used marijuana once in May 2002. He later stated that he used marijuana on four or five occasions within the last two years. (Item 8 at 5 – 12)

During this same background investigation, Applicant's records were reviewed. In July 1991, he signed two drug policy forms after being granted access to classified

information. He used marijuana after being granted access to classified information from May 1991 to July 1997. On October 14, 2003, Applicant was denied access to classified information by the other Government agency because of drug involvement and personal conduct issues. (Item 8 at 5 – 12)

On June 4, 2009, Applicant completed his e-QIP application for his most recent request for a security clearance. He answered, “No” in response to Section 23a and 23b Illegal Use of Drugs or Drug Activity, which reads:

The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you. Neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding.

a. In the last 7 years, have you illegally used any controlled substance, for example, cocaine, crack cocaine, THC (*marijuana, hashish, etc.*), narcotics (*opium, morphine, codeine, heroin, etc.*), stimulants (*amphetamines, speed, crystal methamphetamine, Ecstasy, ketamine, etc.*) depressants (*barbituates, methaqualone, tranquilizers, etc.*), hallucinogens (*LSD, PCP, etc.*), steroids, inhalants (*toluene, amyl nitrate, etc.*) or prescription drugs (*including painkillers*)? Use of a controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any controlled substance.

b. Have you EVER illegally used a controlled substance while possessing a security clearance, while employed as a law enforcement officer, prosecutor, or courtroom official; or while in a position directly and immediately affecting public safety?

Applicant admits that he deliberately failed to disclose his illegal marijuana use that occurred within seven years of completing his e-QIP on June 4, 2009. He also admits that he failed to disclose his illegal marijuana use which occurred while possessing a security clearance. (Item 3; Item 4)

In his response to the SOR, Applicant states that he has the utmost respect for ensuring the public trust and the proper treatment of classified information. During his 25 year career, government agencies and corporations have trusted that he has their best interest in mind. He is proud of having served that trust through the dozens of projects that he has supported and led. (Item 3)

Applicant understands the Department of Defense’s concern over marijuana use. He admits falsifying information about his use of marijuana because he believed that “occasional use may have prevented me and my company from being able to utilize my services more fully (i.e., for projects requiring a higher clearance).” Because his

marijuana use was infrequent, he decided not disclose it on the security clearance and trustworthiness applications. (Item 3)

Applicant admits using marijuana on a regular basis during his teenage years. Even so, he was a solid student, graduating with honors in both high school and college. After college, he occasionally used marijuana while socializing with friends, ranging between a few times per year to a few times per month. If he is placed on a project requiring a clearance, Applicant states that he can and will commit to abstain from using marijuana. He is willing to take an oath of commitment. (Item 3)

With regard to the allegation in SOR ¶ 2.e, Applicant denies that he was denied access to classified information in 2003 by another Government agency for drug involvement and personal conduct issues. He claims that he was not certain why he was denied and thought it had to do with allegations that he was trying to manipulate the results of a polygraph test with controlled breathing. He was also diagnosed with sleep apnea and a rare heart condition. However, during the 2002 background investigation, he admitted that he used marijuana during a post-polygraph interview. (Item 3) In addition, in response to interrogatories on August 2, 2010, Applicant provided the denial letters from the other Government agency which indicates the denial was related to Drug Involvement and Personal Conduct concerns. (Item 8)

### **Policies**

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 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 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, 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. 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.

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**

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.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant’s case.

AG ¶25(a) (any drug abuse);

AG ¶25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia);

AG ¶25(g) (any illegal drug use after being granted a security clearance);  
and

AG ¶25(h) (expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use).

Applicant has used marijuana for over thirty years. He used marijuana even though he was aware that it is illegal. He continued to use marijuana after being granted a security clearance and after he signed two drug policy forms in 1991 for his employer. His marijuana use continued while holding a security clearance at various government agencies. In 2003, he continued to use marijuana after he was denied access to classified information by another Government agency for marijuana use and personal conduct. He admits occasionally purchasing small amounts of marijuana for his personal use in the past.

At present, he continues to use marijuana despite his past problems with obtaining or maintaining a security clearance because of his illegal marijuana use. After he was interviewed in March 2010 for his most recent background investigation, he subsequently admitted to a few additional uses of marijuana in response to interrogatories in January 2011. His behavior indicates an unwillingness to discontinue illegal drug use.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(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);

AG ¶ 26(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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.); and

AG ¶26(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.)

None of the mitigating conditions apply. AG ¶ 26(a) does not apply because Applicant has a long history of marijuana use. He continued to use marijuana after

losing his security clearance in 2003. In January 2011, he admitted using marijuana a few additional times after his background investigation interview in March 2010. This raises serious questions about his judgment, reliability, and trustworthiness. Applicant does not appreciate the security concerns raised by his illegal drug use.

AG ¶ 26(b) does not apply. Applicant's promise in his response to the SOR that he will abstain from using marijuana if placed on a project requiring a clearance does not demonstrate an intent to refrain from using marijuana in the future. He has provided no indication that he no longer socializes with his drug-using friends. In fact, his disclosure in January 2011 that he uses marijuana with friends in social situations indicates that he still socializes with his friends who use marijuana. His marijuana use is recent. As such, he has not demonstrated an appropriate period of abstinence. Although he indicates that he was willing to take an oath of commitment to abstain from marijuana use, his credibility is questionable considering his 30-year history of marijuana use including occasional use of marijuana while holding a security clearance during the past 25 years.

No evidence was presented that would apply toward AG ¶ 26(d). Applicant has not met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

## **Personal Conduct**

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

Conduct involving questionable judgment, 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.

The following disqualifying conditions apply to Applicant's case:

AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities); and

AG ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing .....



Applicant admits deliberately lying about his marijuana use in security clearance and public trust applications submitted on October 31, 1995, December 6, 1999, and June 4, 2009. His falsifications raise AG ¶ 16(a). AG ¶ 16(e) applies because his illegal marijuana use and his intentional omissions of his illegal drug use make him vulnerable to exploitation, manipulation and duress.

The following Personal Conduct Mitigating Conditions potentially apply to this case:

AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts);

AG ¶ 17(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

AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

AG ¶¶ 17(a) and 17(c) do not apply because Applicant lied on his applications for security clearance and trustworthiness positions on three occasions between 1995 and 2009. He did not admit his omissions until his response to the SOR. Deliberately providing false information on a security clearance application is a serious offense. Applicant admits that he omitted his marijuana use because he wanted a security clearance. By finally revealing his past illegal drug use, Applicant has reduced his vulnerability to exploitation, manipulation or duress which warrants the application of AG ¶ 17(e). However, it is not enough to mitigate the overall concerns under Personal Conduct. Serious concerns remain about Applicant's reliability, trustworthiness, and judgment.

### **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 relevant 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 work as a contractor for the Department of Defense and other Government agencies over the past 25 years. I considered Applicant's history of recreational marijuana use over a period of thirty years. Since 1980, he has used marijuana at least several times a year. He used marijuana after signing a drug policy agreement in 1991 and while holding a security clearance. He continued to use marijuana after another Government agency revoked his security clearance in 2003. During his current security clearance background investigation, he admitted to using marijuana after his background investigation interview in March 2010. While Applicant disclosed this use in January 2011, he deliberately lied about his marijuana use on two security clearance applications and one trustworthiness application. While he acknowledges that marijuana use is illegal and is not compatible with holding a security clearance, he continued using marijuana regardless of the past problems it has created for him. Applicant does not understand or appreciate the security concerns related to marijuana use. Serious concerns are raised about his judgment, trustworthiness, and reliability. Applicant has not mitigated the security concerns raised under drug involvement and personal conduct.

### **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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ERIN C. HOGAN  
Administrative Judge