



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



In the matter of: )  
)  
) ISCR Case No. 10-04042  
)  
)  
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.

On December 21, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance 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 November 17, 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. Applicant received the SOR on November 23, 2010

Applicant answered the SOR on November 23, 2010. The SOR alleges that Applicant used marijuana from 1999 until January 2010 (SOR 1.a), that he purchased marijuana (SOR 1.b), and that he was arrested for two counts of possession of illegal drugs with intent to distribute but found guilty of possession of drugs and sentenced to jail or pay a fine (SOR 1.c). Applicant admitted to using marijuana occasionally but not on a regular basis from 1999 through December 2009. He also admitted to purchasing marijuana and being convicted of drug possession. The SOR also alleges under Guideline E that Applicant did not provide truthful information concerning his drug use on the December 2009 e-QIP.

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 three exhibits, which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 3. Applicant testified and introduced 15 documents, which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through O. DOHA received the transcript of the hearing (Tr.) on May 11, 2011.

### **Procedural Issues**

Applicant did not receive the notice of hearing because it was returned in error by his employer. 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. 6-7)

### **Findings of Fact**

Applicant admitted the three allegations under Guideline H with explanation. He denied the allegation under Guideline E. Applicant's admissions and explanations to the SOR allegations under Guideline H 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 28 years old and has been a technician/engineer for a defense contractor for approximately four years. Prior to working for his present employer, he worked for another defense contractor, but eligibility for access to classified information was not required. He is a high school graduate with certificates from a technical school. He also completed other courses offered by the military and civilian training companies to enhance his skills. He is single and has no children. He does not know his father and was raised by his grandparents. He recently moved back to the town in which he was

raised. (Tr. 19-21, 31-34; Gov. Ex. 1, e-QIP, dated December 21, 2009; App. Ex. H, Transcript, dated June 21, 2010; App. Ex. I, Certification Card, dated August 13, 2010; App. Ex. J, Resume, undated; App. Ex. L, Test Report, dated April 5, 2011; App. Ex. M, Certificates of Training, various dates)

Applicant presented various letters of recommendation from supervisors and coworkers. One of Applicant's work teammates, a retired Army sergeant first class, wrote that Applicant displays an outstanding work ethic and completes all assignments. He willingly accepts responsibility for his actions, understands his mistakes, and is working hard to right the wrongs in his past. He is honest and forthright. (App. Ex. A, Letter, dated March 3, 2011)

Applicant's supervisor wrote that he has known Applicant for about eight months, and has been impressed by Applicant's commitment to the job and the importance of his role with the company in support of the military. He finds Applicant to be reliable, dedicated, and honest. In the latest evaluation of Applicant, the supervisor rated him highly and noted Applicant became an excellent and hard-working electronics technician. (App. Ex. B, Letter, dated November 23, 2010; App. Ex. K, Evaluation, dated February 22, 2011)

Applicant's senior supervisor wrote that he has known Applicant for about 12 months and observed his performance. He rates Applicant as an outstanding performer with excellent work ethic and reliable attendance who accomplishes all of his tasks. He was impressed by Applicant's work ethic while on an overseas trip in support of the Marine Corps. He finds Applicant to be honest, focused, and determined. The supervisor also praised him for showing initiative and leadership. (App. Ex. C, Letter, dated March 4, 2011; App. Ex. E, e-mail, dated March 18, 2011)

A coworker wrote that Applicant is one of the top performers and a valued member of their team. His responsibilities on the team continue to grow. He is a proven leader who accepts challenges and achieves success. He is intelligent, capable, dedicated, and personable. (App. Ex. D, Letter, undated)

Applicant admitted to occasionally using marijuana from 1999 until December 2009. He remembers using marijuana last around the holidays of December 2009. Marijuana was prevalent in the town he grew up and it was used for something to do. He did not drink alcohol, so he used marijuana. He and his friends used marijuana to ease the pain from being stressed out from the situation of their life. Even though he has moved back to his home town, he no longer associates with those that he used drugs with in the past since they have moved from the area, entered the military, or died. He also believes that drugs are not as prevalent in the area. There is more of a police presence in the town and fewer opportunities to obtain drugs. His position with the defense contractor is very important to him and he has grown wise and more mature about considering his future. (Tr. 22-23, 34-35, 42-46; Gov. Ex. 2, Response to Interrogatories, dated February 29, 2010)

Applicant admits he purchased marijuana. Applicant and some friends would pool their funds and one of them would purchase marijuana for all to use. In May 2002, Applicant purchased marijuana over his lunch hour. One day, his mother was taken to the hospital in a town he was not familiar with. He left work to be with her forgetting that the marijuana he purchased was in the car. After seeing his mother in the hospital, Applicant left to purchase some items she needed. He met some people he knew at a gas station, and offered them a ride. Since Applicant was not familiar with the town, he turned down a one-way street the wrong way and simultaneously turned off his headlights. A police officer saw his actions and stopped him. Two of the occupants of the vehicle had been drinking and had open containers in the car. The police officer arrested the individuals and Applicant gave him permission to search the vehicle. In the search, the police officer found the marijuana Applicant purchased in ten small bags. He was arrested for possession of marijuana with intent to distribute. He pled guilty to drug possession and was sentenced to either one year in jail or a fine. Applicant chose the fine and paid \$400. (Tr. 24-26, 35-37; Gov. Ex. 3, Police Incident Report, dated July 9, 2010)

Applicant completed an e-QIP on January 4, 2010. He answered "No" to the question asking if in the last seven years he illegally used any controlled substance. Applicant explained that he read and completed the e-QIP quickly without completely reading the questions. He did not know he made a mistake answering "no" to the question until he received the form back. He tried to contact someone about the mistake but he did not know who to contact. On the same e-QIP in response to questions concerning criminal conduct, Applicant listed his arrest in 2002 for possession of marijuana with intent to distribute. (Tr. 26-28, 36-38)

Applicant completed a statement that he intends never to use illegal drugs in the future and will not be around other who use illegal drugs. If he violates this intention, he realizes his security clearance will automatically be revoked. Applicant also took drug tests in February, March, and May 2011, all of which were negative. (Tr. 28-31; App. Ex. F, Drug Test Results, dated February 26, 2011; App. Ex. G, Drug Test Results dated March 13, 2011; App. Ex. N, Statement of Intent, dated February 25, 2011; App. Ex. O, Drug Test Results, dated May 3, 2011)

## **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 is 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 1999 through December 2009, purchasing marijuana, and being arrested for possession of marijuana in 2002. Applicant’s marijuana use raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia).

The Government produced sufficient evidence to establish the disqualifying conditions in AG ¶¶ 25(a) and 25(c). 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). The mitigating condition at AG ¶ 26(a) does not apply, but the mitigating condition at AG ¶ 26(b) does 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 for over ten years from 1999 through December 2009. He also purchased marijuana for use by himself and his friends. He was arrested for possession of marijuana in 2002. There were no unusual circumstances leading to the drug use. He was a young person who admits he used the illegal drugs based on it being the thing to do in the area he was raised. There were no unusual circumstances or pressures leading to his use and purchase of marijuana. With Applicant now back in his home town, even if his old friends are not still around and drugs are not as prevalent, his use and purchase of drugs could recur. His past use of marijuana still casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply.

Applicant has a good job that he likes, which gives him a good future. He has not used an illegal drug for about 18 months and executed a document that he does not intend to use drugs in the future or be with people that do use drugs. This is some evidence of intent not to use drugs in the future, and a changed circumstance indicating reform or rehabilitation. AG ¶ 26(b) applies.

Applicant's good intentions must be set off against his use of marijuana willingly and voluntarily for over ten years, his purchase of marijuana with his friends for group use, and his presence now back in his neighborhood. The 18 months of no drug use is small in comparison to the over ten year period of use. Accordingly, Applicant has not met his burden to show changed circumstance or conduct that indicates 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 drug use questions on a security clearance application. 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.

Applicant completed a security clearance application on December 21, 2009. He answered "no" to all drug use questions. 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 denied that he intentionally failed to include his marijuana use from 1999 through 2009 in response to the drug use questions. 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 stated he simply made a mistake by answering "no" to the drug use question because he completed the form quickly without carefully looking at the accuracy of his answers. Applicant's theory that he simply made a mistake is bolstered by the fact that he did include on the form his arrest and conviction for marijuana possession in response to questions concerning criminal conduct. His inaccurate answers to the drug use questions were not deliberately with the intent to deceive. Applicant has mitigated the security concern about his inaccurate answers concerning drug use on the December 2009 e-QIP.

## **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 that Applicant is an excellent worker and is highly thought of by his supervisors and coworkers. I considered his intention not to use drugs in the future and the negative drug screen tests in 2011.

Applicant was open and candid at the hearing about his former lifestyle and his over ten years of marijuana use from 1999 through 2009. It is obvious that he is now working hard to change his life and become a good worker and productive citizen. He found a job he likes and is good at, he is well liked by his supervisors and coworkers, and he takes courses to improve his skills and leadership qualities. He should be commended for being well down the road to improve his life. However, for security clearance purposes, it has only been 18 months since his last use of marijuana. He used marijuana for over ten years. He is back in the same town where he used, bought, and possessed marijuana even though most of his drug-associated friends are no longer around. The environment in the town against drug use has improved with better police presence, but drugs are still available. Applicant has not presented sufficient information to establish there are changed circumstances or to his life style indicating he will not use illegal drugs in the future. His intentions are excellent but it is too soon to know if he will follow those intentions or again slip into drug use. Applicant has not met his burden to show that his drug use from 1999 through 2009 no longer reflects adversely on his reliability, honesty, trustworthiness, and good judgment. His ten year use of illegal drugs shows that he may not properly safeguard classified information. For all these reasons, I conclude Applicant has not mitigated the security concerns from illegal drug use. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

### **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
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a	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