



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



In the matter of: )  
)  
) ISCR Case No. 10-06437  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

01/04/2013

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On May 24, 2012, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing 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 effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant's answer to the SOR was undated, and he elected to have his case decided on the written record. On August 29, 2012, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant and it was received on September 24, 2012. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not provide additional information. The case was assigned to me on November 29, 2012.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegations in ¶¶ 1.a, 1.c(2), 1.d, 1.e, 1.f, and 1.g. He denied the allegations in SOR ¶¶ 1.b and 1.c(1). After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 52 years old. He is married and has two adult children. He has worked for the same federal contractor since 1994. He has held a security clearance since May 2007.

During Applicant's April 2010 security interview he admitted he began using marijuana in 1979 while in high school. From 1979 to 1981, he used marijuana about once a week at parties. After high school he used it three to four times a year at social gatherings. He never purchased it. He used it until sometime after he had children (between 1983 and 1986).

Applicant failed a drug test, administered by his employer, sometime in the 1990s. Applicant could not recall the exact circumstances of his use, but surmised it likely occurred at a social gathering in his neighborhood. There is a land easement area that is used for summertime neighborhood parties. The land is located near his home and it is mutually used by him and his neighbors. During the summer months, his neighbors set up tents and bring food and beverages to the area. There are two to three dozen people who participate in these gatherings. He knows some of the people who attend, but not all of them. The gatherings start around 6:00 p.m., and they have food and consume alcoholic beverages. It was at one of these gatherings when a marijuana cigarette was offered to him, and he accepted. He likely was drinking alcohol at the time. His employer conducted a random drug test shortly after his use, and he tested positive for marijuana. He was told by his employer's human resource department to attend drug counseling, which he did. The counseling consisted of weekly meetings. He completed the requirements of the counseling. Applicant did not hold a security clearance during this period.<sup>1</sup>

On his March 2010 security clearance application, Applicant admitted that in August 2009, he had "casual infrequent use a couple of times" of marijuana. During his security interview, he explained that his August 2009 marijuana use occurred at two social gatherings over two weekends at the land easement area where he and his

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<sup>1</sup> Item 6.

neighbors gather each summer. During the occasions that Applicant used marijuana, his wife would leave around 11:00 p.m. and he remained. Someone offered Applicant a marijuana cigarette, and he went into one of the tents, where the cigarette was passed around, and he smoked it. He believed he had about three to four beers before he used marijuana and admitted his judgment was impaired. Sometime within one or two weeks of this incident, Applicant repeated his actions under the same scenario. Subsequently Applicant failed an employer administered drug test. Applicant held a Secret security clearance during this period.<sup>2</sup>

Applicant's employer's human resource department requested that he attend drug counseling. He attended group sessions once a week from September 2009 to November 2009. He completed the program. A prognosis or diagnosis from the counseling center was not provided. He was given three to four drug tests during this time period. He passed them. Applicant's supervisor at the time was not made aware of his failed drug test or counseling.<sup>3</sup>

During his security interview Applicant indicated that the only time he used marijuana after his high school years was at the neighborhood social gathering in the late 1990s, as referenced above, and on the two occasions in August 2009. It was after both of these times that he failed his employer's drug test. He indicated in his security interview that he has not used marijuana since August 2009, and he does not intend to use marijuana in the future.

Applicant disputed that he was charged on June 3, 1979, for possession of marijuana. He stated he was at a party on this date and marijuana was found in the house. He explained he was not in possession and was not guilty. His arrest record shows the charge was dismissed.<sup>4</sup>

In his security interview Applicant indicated he was arrested on June 3, 1979, for driving under the influence of alcohol (DUI). He stated he subsequently pled guilty to the charge. He was required to perform community service and pay a fine, which he did. He also had his license suspended, which was eventually restored.<sup>5</sup>

Applicant stated during his security interview that in September 1981 he was charged with possession of a controlled substance and operating a motor vehicle under the influence of alcohol. He indicated the marijuana found in his car did not belong to him and was not over 25 grams. He pled guilty to the charges and was sentenced to

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<sup>2</sup> Item 6.

<sup>3</sup> Item 6.

<sup>4</sup> Item 6, 7.

<sup>5</sup> Item 6. Applicant's Federal Bureau of Investigation record does not indicate a DUI conviction.

pay a fine and court costs, complete community service, and his license was suspended.<sup>6</sup>

Applicant continues to consume alcohol. He estimated he has about one to two drinks a week during dinner or at social gatherings.

### **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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

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<sup>6</sup> Item 6. Applicant's Federal Bureau of Investigation record does not include this conviction. I find the date discrepancy with SOR ¶ 1.c is minor.

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. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and conclude the following have been raised:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant used marijuana while employed by a federal contractor in the 1990s and had a positive test result. He again used marijuana on two occasions while holding a Secret security clearance in August 2009 and had a positive test result. I find all of the above disqualifying conditions apply.

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

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; and

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

Applicant used marijuana in the 1990s while working for a federal contractor. He used it again on two occasions while holding a security clearance. On each occasion he used the drug while attending neighborhood parties. No evidence was provided to determine if he continued to attend the parties regularly between the 1990s and 2009. There is insufficient evidence to determine if he continued to attend these social gatherings after he used marijuana in 2009. There is insufficient evidence to conclude Applicant's actions are unlikely to recur. There is no evidence to conclude he has disassociated himself from the people and the place where he used illegal drugs in the past. Applicant attended drug counseling after he tested positive for illegal drugs in the 1990s. There is evidence of recurrence of illegal drug use when he smoked marijuana twice in 2009. There is no evidence that Applicant received a favorable prognosis by a duly qualified medical professional after either of his drug counseling programs. Applicant used marijuana on two occasions after he held a Secret security clearance. His actions cast doubt on his reliability, trustworthiness and good judgment. I find AG ¶¶ 26(a) and 26(d) do not apply. There is insufficient evidence to conclude Applicant has demonstrated his intention not to abuse drugs in the future. I find there is insufficient evidence to apply AG ¶ 26(b).

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

I considered the disqualifying conditions under AG ¶ 16 that could raise a security concern and conclude the following has been raised:

(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's used marijuana while holding a security clearance. This is the type of personal conduct that creates a vulnerability to exploitation, manipulation, or duress and could affect his personal, professional or community standing. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

The same analysis for Applicant's drug use involvement as discussed above applies to his personal conduct. His actions were not minor, and there is no evidence that his actions happened under unique circumstances or that they are unlikely to recur. Applicant attended drug counseling after he tested positive in the 1990s, yet he used illegal drugs again in 2009. There is insufficient evidence to conclude he has taken positive steps to change his behavior or to reduce his vulnerability to exploitation, manipulation or duress. His actions cast doubt on his reliability, trustworthiness and good judgment. I find none of the above mitigating conditions apply.

### **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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant used marijuana while in high school and continued until after his children were born. He has worked for a federal contractor since 1994. He tested positive for marijuana use twice while working for his employer. He attended drug counseling. He was granted a Secret security clearance in 2007, and in 2009 at the age of 49, on two occasions he used marijuana. His actions cannot be dismissed as youthful indiscretions. He was aware that drugs were available at the neighborhood summer social gathering because that is where he used them in the 1990s. It was during the same neighborhood social gathering and under the same circumstances that he again used marijuana. No evidence was provided to conclude that he no longer attends the neighborhood social gatherings. No evidence was provided to show he no longer associates with those who use drugs. He failed to provide evidence to show his actions are unlikely to recur. Applicant was a mature man when he was granted a security clearance. He failed to act responsibly. Overall, the record evidence leaves me with serious questions and doubts as to 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, and Guideline E, 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
Subparagraphs 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c:	Against Applicant



Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge