



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



In the matter of:

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) ISCR Case No. 10-07312  
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Applicant for Security Clearance

**Appearances**

For Government: Fahryn Hoffman, Esquire, Department Counsel  
For Applicant: *Pro se*

August 22, 2011

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I deny Applicant's eligibility for access to classified information.

**Statement of the Case**

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on April 27, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on March 22, 2011, detailing security concerns under Guideline H, Drug Involvement, that provided the basis for its preliminary decision to deny him a security clearance. 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 For*

*Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on March 28, 2011. He answered the SOR on April 2, 2011 and requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on May 25, 2011. I received the case assignment on May 26, 2011. DOHA issued a notice of hearing on June 2, 2011, and I convened the hearing as scheduled on June 16, 2011. The Government offered exhibits marked as GE 1 and GE 2, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits marked as AE A and AE B, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 23, 2011. I held the record open for Applicant to submit additional matters. Applicant timely submitted AE C through AE E, which were admitted without objection.<sup>1</sup> The record closed on June 23, 2011.

### **Procedural Rulings**

#### **Notice**

Applicant received the hearing notice less than 15 days before the hearing. (Tr. 9-10.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (*Id.*)

#### **Procedural ruling**

At the hearing, Department Counsel motioned to amend the SOR to correct a typographical error. Specifically, the motion asked to renumber the third allegation from 1.b to 1.c. Applicant did not object. The motion was granted, and the SOR was corrected. (Tr. 9)

### **Findings of Fact**

In his Answer to the SOR, Applicant denied the factual allegations in the SOR.<sup>2</sup> He also provided additional information to support his request for eligibility for a security

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<sup>1</sup>AE D is a signed statement, dated June 17, 2011. Applicant submitted an unsigned statement (AE B), dated June 6, 2011, from the same individual. AE E is identical to AE A, except that AE E is signed.

<sup>2</sup>When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 58 years old, works as an engineering specialist for a Department of Defense contractor. He began his current employment as a contractor in December 2009, and his company hired him as a permanent employee in September 2010. His program manager describes him as technically “very capable” and a person with whom it is a pleasure to work. Applicant is reliable and dependable.<sup>3</sup>

Applicant married in 1985. He and his wife have two children, a 25-year-old son and a 22-year-old daughter. Applicant attended college and received a bachelor’s degree and master’s degree in engineering. He completed his course work, but did not complete the remaining requirements for his doctorate. He likes to backpack, bicycle, and run.<sup>4</sup>

After college, Applicant received small business grants, which he used to start a robotics company. He eventually sold his robotics company and began working with his father as an engineer. He designed ice rinks and refrigeration systems for his father’s business until his father was killed in an accident. He worked in computer systems technology for four years until he was laid off. He worked as a process programming engineer, then received a program management professional license. His license enabled him to obtain work with a well-funded start-up company. Before this company became operational, it closed. After this, he obtained his current employment.<sup>5</sup>

Applicant first smoked marijuana as a high school student at social occasions. Because this conduct occurred over 40 years ago, he is unsure of his frequency of use, guessing maybe once a month. In college, Applicant smoked marijuana. He did not smoke marijuana from 1981 to 1985, when he held a security clearance with another federal agency. Between 1985 and 1995, he smoked marijuana four to six times a year with his brother, who died in August 2009, his brother-in-law, and a friend at their residences or on backpacking trips. After 1995, he smoked marijuana one to two times a year with these individuals by sharing a marijuana joint with them, and taking two or three puffs over several hours.<sup>6</sup> He became relaxed and high. He never purchased the marijuana; rather, it was provided to him by his brother, brother-in-law or friend. Since 2007, Applicant smoked marijuana once, in December 2009, with his brother-in-law. At this time, he told his brother-in-law that he did not intend to use marijuana again and that he would not associate with his brother-in-law when marijuana was in use. His

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<sup>3</sup>GE 1; AE A; Tr. 21, 34.

<sup>4</sup>Response to SOR - resume; GE 1; Tr. 17, 21.

<sup>5</sup>GE 1; Tr. 17-20.

<sup>6</sup>Applicant testified to the same level of marijuana use at the hearing as he told the security clearance investigator. GE 2; Tr. 24-25, 37-38.

brother-in-law advised him eight or nine months ago that he had stopped using marijuana.<sup>7</sup>

Applicant never arrived at school or work high from marijuana usage nor did he work under the influence of marijuana. His marijuana use has never impacted his work performance, grades or finances. He was an honor student in high school and college and is still a member of an engineering honor society. His wife, brother-in-law, and a friend are aware of his marijuana use, but he has not told his children, employers, or neighbors. He has never been treated for drug abuse or problems related to drug abuse nor has he been arrested for drug-related criminal offenses.<sup>8</sup>

Applicant has never failed a drug test. When he became aware that a company or employer had a policy against drug use, Applicant refrained from smoking marijuana. His most recent prior employer had a policy against drug use on the job. When he owned his startup company, the company did not perform a pre-employment drug test and did not have a drug policy. His father's small business did not have a drug policy. He decided to stop smoking marijuana in 2007, as he understood that its usage could adversely impact future employment and he was seeking employment. As previously indicated, he again smoked marijuana on one occasion in 2009.<sup>9</sup>

Applicant characterizes his marijuana use as "very infrequent" and in a social context. In his opinion, the federal government's view on marijuana use differs significantly from his state and local government's view on marijuana use. He became aware of the federal government's concern about his infrequent use of marijuana shortly before the hearing. He testified to a firm commitment to not using marijuana in the future, and he signed a letter of intent not to use marijuana in the future on June 17, 2011. He has never used any other illegal drug or misused prescription drugs.<sup>10</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching

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<sup>7</sup>GE 2 - personal subject interview; Tr. 23-27, 29-30, 35-38, 42-43.

<sup>8</sup>Tr. 30-33, 44-45, 48-51.

<sup>9</sup>*Id.* 35-41, 42-43.

<sup>10</sup>AE C; Tr. 24, 27, 52-55, 58.

adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for 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 an 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**

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

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

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

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

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

Between 1970 and 1981, Applicant smoked marijuana socially. From 1985 until 1995, he smoked marijuana four to six times a year with his brother, brother-in-law, and a friend. From 1995 until 2007, he smoked marijuana one to two times a year with the same family members and friend. He smoked marijuana once in 2009. To smoke marijuana, he had to possess it. He has never tested positive for marijuana on a drug test nor has he been diagnosed with a drug abuse problem. His testimony that he did not smoke marijuana when he held a security clearance with another agency from 1981 to 1985 is credible. The Government has established its case under AG ¶¶ 25(a) and 25(c).

AG ¶ 26 provides conditions that could mitigate security concerns:

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

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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 has never been treated for drug abuse nor has he abused prescription drugs. Thus, the mitigating conditions under AG ¶¶ 26(c) and 26(d) are not applicable. Because Applicant used marijuana between 1970 and 1981, from 1985 until 2007, and then again in 2009, his behavior is recent, not infrequent, and not under unusual circumstances. Mitigating condition AG ¶ 26(a) is not applicable.

Applicant clearly stated at the hearing that he did not intend to use marijuana in the future, and he signed a letter of intent with revocation of his clearance for any violation. His primary companions when he smoked marijuana were his brother and his brother-in-law. He smoked marijuana on occasional visits to their homes or when they took backpacking trips. One of his two drug main associates for smoking marijuana is dead. He told his brother-in-law, his other primary drug associate, 20 months ago that he did not intend to smoke marijuana again and that he would not associate with him when he was smoking marijuana. In the last four years, Applicant smoked marijuana once, 20 months ago. Mitigating condition AG ¶ 26(b)(1)-(4) applies.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is highly educated and has had a long and successful career in engineering. He has been married for many years and has two adult children. His finances are solid.

For many years, Applicant smoked marijuana occasionally. He initially smoked marijuana as a student in high school and college. He first stopped his infrequent use of marijuana in 1981 because he held a clearance and knew he could not be involved with marijuana or other illegal drugs. When he left this job in 1985 and no longer held a clearance, he resumed smoking marijuana a few times a year. He did not seek out individuals who regularly used marijuana nor did he ever purchase marijuana. Rather, his marijuana use occurred primarily with his brother and brother-in-law during visits to their homes or while doing activities with them and sometimes a friend. He smoked marijuana because someone had it, and he was agreeable to using it.

Applicant voluntarily provided the information about his marijuana use to the Government. He testified openly and credibly about his use of marijuana and his future intent. He never tested positive for marijuana, an indication that his use is limited. His marijuana use never interfered with his work performance and his school performance. However, a concern remains about his future use of marijuana. Over the years, Applicant stopped smoking marijuana because he had a security clearance, or because he perceived his marijuana use would present a problem with obtaining employment. If he knew that his employer had a policy against drug use, he did not smoke marijuana. While he appears to have no strong need for marijuana, he chooses to abstain from smoking marijuana when he perceives it could create a problem with employment. Because he smoked marijuana for many years, and he only stopped using marijuana 20



months ago, there is a concern that Applicant will again smoke marijuana in the future under the right circumstances because he enjoys it. He knows marijuana is illegal, but he continued to smoke it. This knowledge raises a question about his judgment.

In weighing all the factors in this case, including the fact that the evidence of record supports the application of AG ¶ 26(b)(1)-(4), I find that the concern about how and when Applicant chooses to abstain from smoking marijuana and his long-time use of an illegal drug outweighs the other mitigating factors.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug involvement under Guideline H.

### **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:	For Applicant
Subparagraph 1.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARY E. HENRY  
Administrative Judge