



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-09402
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

03/15/2012

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**Decision**

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LYNCH, Noreen A., Administrative Judge:

On October 27, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) listing security concerns arising 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 (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested an administrative determination. Department Counsel submitted a File of Relevant Material (FORM), dated February 2, 2012.<sup>1</sup> Applicant received the FORM on February 7, 2012, and submitted a response to the FORM, which is admitted into the record without objection as AE A. On March 9, 2012, the Director, DOHA, forwarded the case for assignment to

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<sup>1</sup>The Government submitted nine items in support of its case.

an administrative judge. I received the case assignment on March 9, 2012. Based on a review of the case file, submissions, and exhibits, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance is denied.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the factual allegations under Guideline H (Drug Involvement), and Guideline E (Personal Conduct).

Applicant is a 31-year-old employee of a defense contractor. He graduated from high school and received his undergraduate degree in 2008. Applicant is married and has one child. Applicant served in the United States Navy from November 2001 through August 2007. He received an honorable discharge. He earned the good conduct medal and the global war on terrorism medal during his military service. He has worked for his current employer since January 2010. (Item 4) Applicant has held a security clearance since approximately January 2000. (Item 1)

Applicant states that he is proud of his current employment and believes that it is a great personal accomplishment. He wants to continue his work, and does not intend to do anything to jeopardize his position.

Applicant apologizes to the Government and states that he is an honest person and is humbled with the prospect of losing his eligibility for access to classified information, as his career depends on it. He regrets any wrong decisions that he has made. He regrets not being "clearer" in his responses to the SOR. He is sorry that he did not seek advice from his company Facility Security Officer (FSO). (Letter dated, February 29, 2012)

Applicant submitted letters of recommendation from his wife, facility security officer, supervisor, former supervisor, and colleague. He is described as professional, prompt, dependable, and trustworthy. Applicant has gained the respect of his peers. (AE A) He is a valued member of the team. Applicant also submitted his 2011 annual performance review, which notes that he met or exceeded expectations in most areas.

### **Drug Involvement**

In March 2001, Applicant was charged with Possession of Marijuana. He believes he was in the wrong place at the wrong time. He was in an apartment with another friend when police arrived with a search warrant. (Item 8) According to Applicant, marijuana was found in the apartment, but not on his person. Despite that fact, he was charged with possession of marijuana. After appearing in court regarding the charge, the charge was nolle prossed. (Item 7) In his Answer to Statement of Reasons, he admitted the March 2001 charge.

Applicant tested positive for marijuana on June 11, 2009, during a pre-employment screening. (Items 3, 6, and 9) Applicant maintains that he could provide no reason why his test was positive for marijuana, and initially claimed the test was a false

positive. He also stated that he never used any illegal drugs. (Item 4) He did not provide another sample, and he also did not request that the same sample be retested. (Item 6)

Applicant's Response to the FORM contained a signed Statement of Intent not to use any illegal substance in the future with revocation of his security clearance should he use illegal drugs. He emphasized that he has never used drugs nor had any desire to use drugs. In his Answer to the Statement of Reasons, Applicant admitted that he tested positive for marijuana in 2009, but he did not provide any reason why the test was positive.

## **Personal Conduct**

In Applicant's Answer to the Statement of Reasons, he admitted that he deliberately falsified material facts by failing to disclose his 2001 drug charge on his February 2010 SF-86 and in response to 2011 DOHA interrogatories. (Item 5) He also admitted that he falsified material facts during an OPM interview in 2010. (Item 3)

Applicant completed his security clearance application (SF-86) on February 3, 2010. In response to Section 23. Illegal Use of Drugs or Drug Activity, he answered "No", and did not disclose the June 2009 positive test result for marijuana. He claims he did not use it.

In that same SF-86, in response to Section 22: Police Record, he answered "No" and did not list the charge of Possession of Marijuana in 2001. Also, in his May 2010, OPM interview, he stated that he had never used any illegal substance, despite the positive test result for marijuana in June 2009.

It is troubling that Applicant's Answer to the SOR admits to all alleged falsifications. However, his OPM subject interview, and DOHA interrogatories, and SF-86 provide denials of any charges or use of marijuana.

Applicant's Response to the FORM states that he did just use "admit" because he did not realize he could refute allegations in his own words. He has held a security clearance in the past and is familiar with the form. I do not find this a reasonable response. He provides another apology to the Government, and does not provide any information to refute the allegations.

Applicant's Response to the FORM contains the following statement: "I realize that by being honest about not using drugs is harder to do in my circumstance than to just go ahead and untruthfully say I experimented with drugs once or twice, especially with a positive drug test on my record." He also explains that he did not mention his 2001 marijuana charge because it was nolle prossed.

## **Policies**

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The United States Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." <sup>2</sup> The burden of proof is something less than a preponderance of evidence. <sup>3</sup> The ultimate burden of persuasion is on the applicant. <sup>4</sup>

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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." <sup>5</sup> "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>6</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be

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<sup>2</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>3</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>4</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>5</sup> See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

<sup>6</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

resolved in favor of protecting such information.<sup>7</sup> The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

## **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;

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<sup>7</sup> *Id.*

(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.

Applicant tested positive for marijuana in June 2009 on a pre-screening employment drug test. He had a 2001 marijuana charge that was nolle prossed. AG §§ 25(a), 25(b) and 25(c) apply.

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's positive test result for marijuana was in June 2009. He signed a Statement of Intent letter in 2012. He states that he has not used any illegal drugs. However, he did not obtain a current evaluation from a licensed professional which provides some collaboration of his non-drug use. He has not been forthright about his illegal drug use and this prevents mitigation of the security concern under the guideline.

## **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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Under AG ¶ 16(a), a disqualifying condition exists when there is "deliberate omission, concealment, or falsification of relevant facts from any personnel questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security eligibility or trustworthiness, or award fiduciary responsibilities." Under AG ¶ 16(b) a disqualifying condition exists when "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

Applicant's multiple recent admissions are sufficient to raise the disqualifying conditions. He deliberately misled the government by not including any information about his 2001 marijuana charge or 2009 positive drug test on his 2010 SF-86, his 2010 OPM interview, and his 2011 interrogatories. He did not provide prompt or good faith efforts to correct his falsifications, rather he continued to deny illegal drug use until his Answer to SOR. There is no record evidence supporting the application of any mitigating conditions. His behavior and personal conduct are disqualifying as they raise questions about his judgment, reliability, truthfulness, and willingness to comply with the law. I do not find his response to the FORM to be credible. I believe he used marijuana before his 2009 urinalysis test and he intentionally failed to disclose his 2001 marijuana charge.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude that none of them apply. Applicant did not make prompt or good-faith efforts to correct his falsification or concealment. He provided no information that indicates he was ill-advised. The intentional omissions occurred in 2010, and are too recent and serious to be mitigated by the passage of time. I have serious doubts about his good judgment and reliability. He has not provided information in this record to show that he has met his burden of proof to mitigate the personal conduct concern.

### **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 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 31 years old. He has letters of recommendation from his employer and others. He has done a good job in his position since 2010. He is married and has two children. He is proud of his work accomplishments and apologized to the Government. He claims he has not used any illegal drugs despite the 2009 positive test result for marijuana and the 2001 marijuana charge.

Applicant admitted deliberate falsifications in his Answer to the SOR. He then stated in his FORM response that he has never used illegal drugs. He now recants his admissions because he states he did not know that he could refute the allegations in his own words. Because of his dishonesty, his drug use history remains unclear. Without full, candid, and forthright information from Appellant, no valid evaluation can be done to determine the applicability of any mitigating conditions. He has not provided any prompt or good-faith efforts to correct his falsification. He just continues to deny any illegal drug use and states he is baffled by the positive test. Applicant shows a lack of candor and questionable judgment. I have doubts about his reliability.

Applicant failed to submit sufficient information or evidence to mitigate the security concerns raised in his case. He failed to offer any evidence that the test was a false positive. He admitted that he intentionally falsified his 2010 security clearance application. His retraction in his Response to FORM, leaves me with doubts, given the record. Accordingly, Applicant has not mitigated the security concerns. Clearance is denied.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a- 1b:	Against Applicant



Paragraph 2, Guideline E:           AGAINST APPLICANT

Subparagraphs 2.a through 2.e:           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 grant Applicant a security clearance. Clearance is denied.

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NOREEN A. LYNCH.  
Administrative Judge