



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-09583
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro se*

January 17, 2012

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**Decision**  
\_\_\_\_\_

MOGUL, Martin H., Administrative Judge:

On June 10, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. 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), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing, and he initially requested that his case be decided on the written record in lieu of a hearing. Department Counsel then requested a hearing before an Administrative Judge. I received the case assignment on October 5, 2011. DOHA issued a notice of hearing on October 13, 2011, and I convened the hearing as scheduled on November 9, 2011. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through D, at the time of hearing, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on November 14, 2011. I granted Applicant's request to keep the record open until

November 16 2011, to submit additional documents, and additional documents that were received have been identified and entered into evidence without objection as Exhibit E. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

### **Findings of Fact**

In his RSOR, Applicant admitted both SOR allegations 1.a. and 1.b. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 47 years old. He is married, and he has two children. Applicant was not employed at the time of the hearing, and he seeks a DoD security clearance in connection with employment in the defense sector.

### **Guideline H - Drug Involvement**

The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H.

1.a. The SOR alleges, and Applicant has admitted in his RSOR that he, "used marijuana, with varying frequency, from about January 2000 to at least September 10, 2010." At the hearing, Applicant testified that he had used marijuana two or three times during the period from 1983 to 2000. He used it more frequently after that period because his children were older and he was in positions where more opportunities were available. He estimated that during the 10 year period from 2000 to December 31, 2009, he used marijuana approximately five or six times, usually while riding his off-road motorcycle. (Tr at 32-36.)

1.b. The SOR alleges, and Applicant has admitted in his RSOR that he, "intend[s] to use marijuana in the future." Applicant testified that when he was questioned about the possible use of marijuana in the future, he did not rule out the possibility of using it again. However, at the hearing, Applicant averred credibly that he now has no intention of using marijuana in the future, as he had not previously realized the security clearance concerns of his using marijuana. (Tr at 37.)

Applicant reiterated, as he has stated in the past, that he never purchased marijuana, and only used it in a setting where it was passed among a group of people. He indicated that he has never used it at his home or around his children. He also stated that he has been in settings where it was offered to him and he had refused it on some of those occasions, so it would not be difficult to simply turn down marijuana any time it was offered to him. (Tr at 45.)

Applicant submitted a statement (Exhibit A), signed by him under penalty of perjury in which he wrote:

1. I have not used marijuana or any other controlled substance since January 2010.
2. I will not use and intend not to use marijuana or any other controlled substance in the future.
3. I understand and agree that any future use of a controlled substance will result in the automatic revocation of my security clearance.

Applicant also submitted three positive character letters from individuals who know him professionally and personally. He was described as “highly ethical, dedicated, competent, successful, hard working and loyal.” (Exhibit B.) Two Reports of Employee Performance of Applicant, for the periods from April 2009 to October 2009, and October 2009 to August 2011 were entered into evidence (Exhibit C.) Applicant’s overall evaluation was “Exceeds Expectations” on the former and “Meets Expectations” on the latter.

### **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 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 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 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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, specifically the use of marijuana for many years, is of great concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.”

However, I find credible his testimony and his written statement that he intends to abstain from using marijuana in the future. There also has been independent evidence from the two character letters and the evaluations that Applicant submitted that make his stated intentions more credible and convincing. Therefore, I conclude that ¶ 26(b) “a demonstrated intent not to abuse any drugs in the future,” including (3) “an appropriate period of abstinence;” and (4) “a signed statement of intent with automatic revocation of clearance for any violation,” is applicable and mitigating.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government's case against him. Accordingly, Guideline H of the SOR is concluded for Applicant.

## 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. Based on all of the reasons cited above as to why the mitigating conditions are applicable, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

### Formal Findings

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul  
Administrative Judge