



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-10606
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: Steve Gardella, Esquire

January 17, 2012

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

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on July 22, 2010. On June 14, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, J and E for the 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 after September 1, 2006.

The Applicant acknowledged receipt of the SOR on June 22, 2011. He answered the SOR in writing through counsel on July 8, 2011, and requested a hearing before an Administrative Judge. DOHA received the request on July 11, 2011, and I received the case assignment on September 26, 2011. DOHA issued a notice of hearing on September 21, 2011, and I convened the hearing as scheduled on October 26, 2011. The Government offered Exhibits (GXs) 1 and 2, which were received without

objection. The Applicant testified on his own behalf and submitted Exhibits (AppXs) A through N, which were received without objection. DOHA received the transcript of the hearing (TR) on November 2, 2011. The record closed on that same date, November 2, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Procedural and Evidentiary Rulings**

#### **Motion to Amend SOR**

Department Counsel moved to amend the SOR by deleting the words “and 1.b.” from Subparagraph 2.a. The motion was granted. (TR at page 45 line 20 to page 46 line 11.)

#### **Request for Administrative Notice**

Department Counsel submitted a formal request that I take administrative notice of the Controlled Substance Act as it defines “marijuana,” and as it lists the drug on the Schedules of Controlled Substances. (Title 21, Chapter 13, Sub-Chapter 1, Part A, Section 802(15); and Title 21, Chapter 13, Sub-Chapter 1, Part B, Section 812(C)(C)(10).) The request was granted. The facts administratively noticed are set out in the Findings of Fact, below.

### **Findings of Fact**

In his Answer to the SOR, the Applicant admitted the factual allegations in Paragraph 1 of the SOR, with explanations. He denied the factual allegations in Paragraphs 2 and 3 of the SOR.

#### **Paragraph 1 - Drug Involvement, Paragraph 2 - Criminal Conduct, & Paragraph 3 - Personal Conduct.**

The Applicant is a retired Master Sergeant from the Marine Corps. (TR at page 21 lines 8~12, at page 38 lines 5~11, and AppX L.) He has held a security clearance since March of 2002. (TR at page 35 line 25 to page 36 line 4.)

Upon his separation from the Marine Corps in September of 2005, his sister picked him up at the airport. (TR at page 19 line 7 to page 25 line 23.) Wanting to bond once again with her brother, she offered him a marijuana joint, from which he took a puff. (*Id.*) He knew this was wrong, and has since asked his sister not to use marijuana in his presence. (TR at page 29 line 21 to page 30 line 6.)

In July of 2009, the Applicant, who has 30% retired disability due to injuries to his back and shoulder, was offered medical marijuana by his next door neighbor, to see if the drug would relieve his pain. (TR at page 19 line 7 to page 25 line 23.) The neighbor, not the Applicant, had a prescription for the marijuana. (*Id.*) He took several

puffs from a joint, but it did not reduce his pain. (TR at page 19 line 7 to page 25 line 23.) He has not used any marijuana since this July 2009 incident, and his neighbor has since moved away. (TR at page 29 line 21 to page 30 line 6.)

More recently, in July of 2011, the Applicant signed a "STATEMENT OF INTENT" with "automatic revocation" for any involvement with "illegal drugs" in the future. (TR at page 28 lines 13~20, at page 44 line 18 to page 45 line 19, and AppX K.)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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 commonsense decision. According to AG Paragraph 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 Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the Applicant is responsible "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 Paragraph 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 judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), “*any drug abuse*,” may be disqualifying. In addition, “*any illegal drug use after being granted a security clearance*” under Subparagraph 25(g) may be disqualifying. Here, the Applicant illegally used marijuana twice, in September of 2005 and again in July of 2009, after having been granted a security clearance in 2002. However, these are countered by the mitigating conditions found in Subparagraphs 26(a) as “*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*”; and 26(b) when there is “*a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation.*” Here, the Applicant last used marijuana more than two years ago; his total usage was only twice, and the circumstance of the usage, first bonding with his sister upon retirement and then treating his back pain, are unlikely to recur; and he has signed a statement of intent with automatic revocation in the event of any future drug involvement.

### **Guideline J - Criminal Conduct**

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to Criminal Conduct:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that “*a single serious crime or multiple lesser offenses,*” may raise security concerns. He smoked marijuana on two separate occasions. Paragraph 31(c) provides that an “*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,*” may also raise security concerns. He knew his conduct was illegal. However, these are clearly countered by the mitigating condition in Subparagraph 32(a) as “*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.*” The Applicant’s limited usage was more than two years ago, and the circumstances of that usage are unlikely to recur.

### **Guideline E - Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(d), “*credible adverse information that . . . may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment . . . This includes but is not limited to consideration of: (3) a pattern of dishonestly or rule violations,*” may be disqualifying. Again, the Applicant illegally smoked marijuana on two occasions. However, this is clearly countered by the mitigating condition in Subparagraph 17(c) as “*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.*” Again, the Applicant’s limited usage was more than two years ago, and the circumstances of that usage are unlikely to recur.

### **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. Under AG Subparagraph 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 Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Those who know the Applicant from the Marine Corps and in the workplace speak most highly of the Applicant. (AppX A~I.) Thus, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his admitted Drug Involvement, Criminal Conduct and 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	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.

Richard A. Cefola  
Administrative Judge