



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



In the matter of: )  
)  
) ISCR Case No. 10-10976  
)  
Applicant for Security Clearance )

**Appearances**

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

06/26/2012

**Decision**

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Although Applicant’s most recent drug-related arrest occurred over three years ago, it continues to cast doubt on his current security worthiness, as do his repeated false statements about the circumstances of his 2009 arrest. Clearance is denied.

**Statement of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on December 2, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) explaining that it was unable to find that it is clearly consistent with the

<sup>1</sup> This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

national interest to grant Applicant access to classified information. The SOR, which detailed the reasons for the action under the drug involvement and personal conduct guidelines, recommended the case be submitted to an administrative judge for a determination to revoke or deny Applicant's access to classified information.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on February 7, 2012. The hearing took place as scheduled on April 2, 2012. At hearing, Government's Exhibits (GE) 1 through 6 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A and B, which were also admitted without objection. I received the transcript (Tr.) on April 10, 2012.

### **Findings of Fact**

Applicant is a 26-year-old employee of a federal contractor. Applicant is engaged and has no children. He is a high school graduate and has completed one year of community college. Since August 2010, he has worked as a security guard. This is his first security clearance application.<sup>2</sup>

Applicant admits that in 2006 he was arrested after being caught smoking marijuana in a park with his friends. He subsequently pleaded guilty to possession of marijuana. In April 2009, Applicant was arrested again and charged with possession of marijuana. Although he admitted in his security clearance application and in his subject interview the arrest and subsequent guilty plea to a disorderly conduct charge, he denied that he either possessed or used marijuana on the night he was arrested. He also denied, in his subject interview, any knowledge of the illegal drugs that were found in his car.<sup>3</sup>

On a late night in April 2009, a police officer observed Applicant and his passenger idling in the parking lot of an apartment complex in a smoke-filled car. The officer (PO1) approached the car and asked Applicant and his passenger what they were doing there. They claimed to be chatting and smoking cigarettes. When asked, both denied smoking marijuana. A second police officer (PO2) arrived on the scene and approached the car at the request of PO1. PO2 noted the smell of marijuana coming from the interior of the car and that the passenger had blood-shot eyes. Based on these observations, PO2 directed Applicant and his passenger to exit the car and sit on the curb. When Applicant exited the car, PO2 also smelled marijuana wafting from his clothes. After searching the vehicle, PO2 found a cigarette box containing a still-moist, partially-smoked, marijuana cigarette and three glassine baggies containing the drug underneath the passenger seat. On the ground outside the passenger side of the car, PO2 also found the innards of a cigar, which he believed was hollowed out to make a marijuana cigarette.<sup>4</sup>

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<sup>2</sup> Tr. 15-17; GE 1.

<sup>3</sup> GE 1, GE 3.

<sup>4</sup> GE 4.

Both Applicant and his passenger denied ownership of the drugs. PO2 told both men that if neither claimed responsibility for the drugs they would both be arrested and charged with possession of marijuana. As the two men sat on the curb, Applicant claims that his passenger asked him to take responsibility for the drugs. In response to his pleas, Applicant testified that he responded by sarcastically stating that the drugs were his. PO1 heard this statement and recorded it as an admission in his report. PO2 did not hear Applicant's statement, but recorded in his report that the passenger pleaded with Applicant to take responsibility for the drugs and that Applicant refused to do so.<sup>5</sup>

At hearing, Applicant continued to deny that he possessed, smoked, or knew of the marijuana in his car the night he was arrested. Blaming the passage of time, Applicant testified that he could not recall all of the details about the night in 2009 when he was arrested. When asked specifically about PO2's observations that the interior of Applicant's car and his clothes smelled of marijuana, Applicant responded that despite his previous marijuana use, he could not identify the drug's smell.

### **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.

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." 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 to obtain 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 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

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<sup>5</sup> Tr. 27-29, 41-43; GE 4.

applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

AG ¶ 15 explains why personal conduct is a security concern:

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.

Under AG ¶ 16, two disqualifying conditions are applicable to this case:

(a) deliberate omission, concealment, or falsification of relevant facts from a personnel security questionnaire, personal history statement, or similar form used conduct investigations, determine employment qualifications, award benefit status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

The SOR alleges that Applicant falsified his security clearance application by stating that the drugs found in his car in 2009 did not belong to him. The SOR also alleges that the Applicant made false statements in his subject interview when he stated that he never possessed any drugs and that he had no knowledge of the drugs found in his car during his 2009 arrest. A statement is false when it is made deliberately (knowingly and willfully). I find that Applicant did not falsify the statements in his security clearance application and during his subject interview that the drugs found in his car during the April 2009 arrest were not his. According to the police reports, the drugs and the innards of the cigar were found on the passenger side of the car. The evidence does not indicate that the marijuana belonged to or was placed in the car by Applicant.

However, I do find that Applicant falsified his statements denying knowledge of the drugs found in his car. Although Applicant has consistently maintained this position throughout the investigative and adjudicative processes, it is untenable given his testimony at the hearing. Despite previous marijuana use, Applicant claims that he does not know the drug’s distinct odor. As such, he was unable to tell that his passenger was smoking marijuana in his car and not a tobacco cigarette. Not only is Applicant’s testimony incredible, this false testimony at the hearing also provides sufficient circumstantial evidence of his intent to falsify the statements he made in his subject

interview. An applicant is expected to provide full, frank, and candid answers throughout the investigation and adjudication process. Anything less provides a rational basis for finding against an applicant's security worthiness. Given that Applicant has repeatedly made false statements during the adjudication process, none of the mitigating conditions available under AG ¶ 17 apply.

The SOR also cross-alleges Applicant's 2006 conviction and his 2009 drug-related arrest as disqualifying under the personal conduct guideline; however, these events are more appropriately addressed under the drug involvement guideline.

### **Guideline H, Drug Involvement**

The security concern for drug involvement is explained 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 judgment and because it raises questions about a person's ability or willing to comply with laws, rules, and regulations.

Under AG ¶ 25, two disqualifying conditions are applicable to this case:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of any drug paraphernalia.

Applicant admits using and possessing marijuana in June 2006. Although he pleaded guilty to a disorderly conduct charge, Applicant was also arrested in April 2009 for possession of marijuana.

None of the mitigating conditions available under AG ¶ 26 apply. Although Applicant's last contact with illegal drugs occurred over three years ago, the incident continues to cast doubts on Applicant's current reliability, trustworthiness, and good judgment. After being convicted of a drug-related crime in 2006, Applicant placed himself in a vulnerable position again when he allowed a passenger in his car to use marijuana. In addition to the doubts about Applicant's judgment as explained in the discussion of the personal conduct guideline, these incidents also raise doubts about Applicant's willingness to comply with the law.

Accordingly, I have reservations and doubts about Applicant ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. The 2006 and 2009 drug-related incidents occurred when Applicant was relatively young. At the time, Applicant was not employed as a federal contractor and understandably did not have the maturity and foresight to appreciate the consequences of his actions. However, it is not the underlying conduct, while serious in its own right, that is most troubling in this case; it is Applicant's actions during the investigative and adjudication processes that diminish his security worthiness.

On that night in April 2009, Applicant's passenger may have entered his car with an illegal drug in his possession, but Applicant condoned its use in his presence and in his car. His now-feigned ignorance of the circumstances that ultimately culminated in his arrest raises significant questions about his trustworthiness. Applicant's choice to protect his self-interest by repeatedly making false statements and eschewing responsibility for his actions, places his ability to safeguard classified information in doubt, especially when the consequences could have a detrimental effect on him. As a result, Applicant's request for access to classified information 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 - 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. - 2.b.:	Against Applicant
Subparagraph 2.c.:	For Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

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Nichole L. Noel  
Administrative Judge