



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



In the matter of: )  
)  
) ISCR Case No. 11-06164  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: Jeffrey A. Denner, Esq.

11/14/2012

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana twice in 2009 after his state decriminalized possession of one ounce or less of the drug. He exercised poor judgment and violated the trust placed in him by the Department of Defense (DOD) when he used marijuana while possessing a secret security clearance. Yet there is little risk that he will use marijuana or any illegal drug in the future. Clearance granted.

**Statement of the Case**

On May 25, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct, and explained why it was unable to find that it is clearly consistent with the national interest to continue his security clearance. DOHA took action 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 on September 1, 2006.

Applicant answered the SOR allegations on June 19, 2012, and he requested a hearing. The case was assigned to me on July 13, 2012. On July 20, 2012, I scheduled a hearing for August 16, 2012. On July 31, 2012, counsel for Applicant entered his appearance and requested a continuance of the hearing because of his trial schedule and time to prepare Applicant's case. On August 6, 2012, I cancelled the hearing with no objection. On October 3, 2012, I rescheduled Applicant's hearing for October 25, 2012.

At the hearing, two Government exhibits (GEs 1-2) and one Applicant exhibit (AE A) were admitted without objection. Applicant, his spouse, and two of his coworkers testified, as reflected in a transcript (Tr.) received on November 5, 2012.

### **Findings of Fact**

The SOR alleged under Guideline H that Applicant used marijuana twice in 2009 (SOR 1.a) after he had been granted a DOD secret clearance around July 2002 (SOR 1.b). Applicant's use of marijuana after he had been granted his clearance was cross-alleged under Guideline E (SOR 2.a). Applicant admitted the use of marijuana as alleged, and that he had made a mistake in thinking that it was not an offense after the state's decriminalization. Applicant's admissions to using marijuana twice in 2009, and to using the drug after being granted a DOD security clearance, are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 45-year-old software engineer, who is a dual citizen of his native United Kingdom and the United States. (GE 1; Tr. 67.) He attended college in the United States. (Tr. 66.) While pursuing his undergraduate degree, he used marijuana a couple of times in the late 1980s. (Tr. 76-77.) He was awarded his master's degree in January 1994. (GE 1; Tr. 66.) Since April 2010, Applicant has been a principal member of the technical staff at a research and development laboratory involved in defense work. He previously worked for the same federal contractor from April 2001 to September 2005. (GE 1; Tr. 64-65.) Applicant has held a DOD secret clearance since 2001 or 2002.<sup>1</sup> (GE 1; Tr. 65, 77.)

Applicant and his spouse have been married since March 2004. They have two daughters, who were born in December 2004 and April 2008. (GE 1; Tr. 64.) Applicant and his spouse own their home in a small suburban town, and they socialize with others in their community at neighborhood parties. (Tr. A; Tr. 18-19, 23.)

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<sup>1</sup>There is conflicting evidence about when Applicant was granted his DOD security clearance. Applicant indicated on his e-QIP that he received a secret clearance around April 2001. (GE 1.) The SOR alleges that Applicant was granted his DOD clearance in about July 2002. Applicant testified at his hearing that he thought his clearance was issued in late 2001. (Tr. 77.) The Government presented no evidence, such as from the Joint Clearance and Verification System, to confirm the date of clearance grant alleged in the SOR. However, Applicant does not dispute that he was granted his security clearance well before he smoked marijuana in 2009.

Between October 2005 and February 2010, Applicant was employed by a company that provides software engineering services to other firms on a contract basis. Applicant worked on defense projects requiring classified access at times, and he retained his clearance eligibility. (GE 1; Tr. 64.) Client feedback was always positive and often superlative about Applicant's contributions to their programs, several of which required personal sacrifice to meet deadlines. Applicant gave his employer no reason for concern about his personal behavior at work-related social functions. (AE A.)

Around April 2009, Applicant smoked some marijuana passed around at a neighborhood social gathering. (GEs 1-2; Tr. 24, 68.) An acquaintance from across town unexpectedly offered the drug to Applicant and others sitting around a fire pit. (Tr. 34-35.) Believing it was legal because someone present mentioned that the state had decriminalized recreational use (Tr. 79.),<sup>2</sup> Applicant inhaled the marijuana to be social. He gave no thought to his security clearance obligations at the time. In light of the state's decriminalization, he thought his marijuana use was not an issue.<sup>3</sup> (Tr. 78.) Applicant did not enjoy the drug's effects. Yet, in an exercise of acknowledged "really bad judgment," he smoked marijuana at another neighborhood function in similar circumstances in May 2009. (Tr. 68-70, 80-81.) Applicant does not recall receiving any security training about the DOD's policy against drug abuse. (Tr. 77-78.)

Shortly after the second instance, Applicant told his spouse about his earlier use of marijuana around April 2009. (Tr. 32, 69, 81.) She was surprised to learn that he had smoked marijuana because she had never seen any drugs at the neighborhood parties. (Tr. 24, 30.) Also, Applicant exhibited no signs of being under the influence of a mood-altering substance on his arrival home the night in question (Tr. 25.), and to her knowledge, he was not a drug user. (Tr. 22.) Applicant's spouse made it clear to him that she disapproved because controlled dangerous substances were not part of their lifestyle or plans for their family's future. (Tr. 25, 34, 38, 81.) Applicant promised her that he would not use any marijuana in the future. (AE A; Tr. 29, 75.)

In February 2010, Applicant was laid off by the software services provider due to lack of work. He was unemployed until April 2010, when he returned to the research and development laboratory. (GEs 1-2; Tr. 64.) Around July 2010, Applicant was asked by his employer to complete an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his security clearance. Applicant informed his spouse at that time about using marijuana on a second occasion in 2009. (Tr. 32.) They both agreed that he had to disclose his marijuana use on the e-QIP, although they thought that it might be less of an issue because of the state's decriminalization. (Tr. 35-36, 67, 82.) On his July 7, 2010 e-QIP, in response to whether he had used any illegal drugs in the last seven years, Applicant reported that he had used marijuana twice at parties between April 2009 and

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<sup>2</sup>Under § 94C:32L of the state's Controlled Substances Act, effective January 2, 2009, the state decriminalized possession of one ounce or less of marijuana, making possession of one ounce or less a civil offense subject to a \$100 fine and forfeiture of the drug.

<sup>3</sup>He was working on an unclassified project for a defense contractor (Tr. 80.), although the nature of his work was not a consideration for him at the time. Likewise, although he had consumed beer, alcohol did not influence his decision to smoke marijuana. (Tr. 81.)

May 2009 after it was decriminalized in his state. He answered “No” when asked if he had ever illegally used a controlled substance while possessing a security clearance because he did not believe his use of marijuana was illegal. (GE 1.) Applicant provided his e-QIP to his employer’s security office for review. He received no feedback so assumed his marijuana use was not an issue. (Tr. 82-83.)

On September 10, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), in part about his drug use. Applicant admitted that he had tried marijuana twice at parties between April 2009 and May 2009, after it had been decriminalized. He explained that although it was “legal,” he wanted to disclose it. He denied any intent of future use. (GE 2.)

On receipt of drug interrogatories from DOHA in March 2012, Applicant first realized that his marijuana use might pose a problem for his continued security eligibility. (Tr. 84.) In his March 14, 2012, response to the interrogatories, Applicant admitted that he had used marijuana as detailed in the OPM report. He last used marijuana around April 2009 to May 2009 and intended no future use. (GE 2.) The DOHA interrogatories prompted Applicant to research the drug laws in his state. (Tr. 82.)

On May 25, 2012, DOHA issued an SOR to Applicant because of his use of marijuana in 2009, after he had been granted a DOD security clearance. By the time Applicant answered the SOR on June 19, 2012, he understood his error in thinking marijuana use was no longer an offense. He denied any intent to use marijuana in the future and any association with known drug users. Applicant also expressed his willingness to sign a statement of intent to abstain with automatic revocation of security clearance for any violation, and to undergo random drug testing if requested. (Answer.)

Applicant regrets his marijuana use. (Tr. 70.) He has apologized to his spouse several times for the stress his drug use has caused them over the past several months since his security eligibility has been questioned. (Tr. 29.) Applicant now understands that the state’s decriminalization did not affect DOD policy or federal law prohibiting illegal drug involvement. Should he find himself in a situation, such as another party where illegal controlled drugs are present, he intends to leave the environment. (Tr. 86.)

After Applicant received the SOR, he informed his supervisor about his marijuana use in 2009. (Tr. 45.) Applicant was “extremely remorseful” about his drug use, giving this supervisor reason to believe Applicant will not repeat the mistake. (Tr. 50.) He has never observed Applicant to be under the influence of a mood-altering substance at work. To the contrary, Applicant has demonstrated to him “the highest degree of reliability, professionalism, and trustworthiness” in all aspects of his work. Applicant has made significant technical contributions to a very important software task; provided solid leadership to the employees who report to him; diligently handled classified information; and brought innovative approaches that have benefitted the laboratory and the nation’s development programs. He has shown he can be counted on to complete his sensitive work on time and with the high quality expected by his supervisor. (AE A; Tr. 42- 49.)

Applicant also has the strong endorsement of a distinguished member of laboratory's technical staff. Familiar with Applicant's work from 2002 to 2005, she was delighted by his return to the laboratory. She solicited management to have him placed on her software team. Applicant consistently exercised diligence, attention to detail, leadership, technical expertise, security awareness, and a willingness to work long hours to ensure the success of a critical program. Because of his outstanding performance, Applicant transitioned into the technical lead on the software program, taking over her role as she recently assumed a consulting role. (AE A; Tr. 54-56.) This senior manager is aware that Applicant smoked marijuana twice in 2009. (Tr. 57.) She considers it "a privilege" to work with Applicant and believes that it would be a great loss to the country as well as to the laboratory if Applicant cannot continue in his key role because of a failure to maintain the security clearance needed for his position. (AE A; Tr. 59.)

Applicant's work is very important to him. (Tr. 71.) He has been very circumspect about his work in public and with his family. He has made it clear to his spouse that she is not to discuss his work other than to indicate that he is an engineer. (Tr. 27.) Applicant spends his free time with his family. He is an engaged parent who makes time for his daughters and their interests. Applicant and his spouse have volunteered their time in support of some community organizations. Applicant's spouse is an elected member of their School Committee with his support. She is currently serving her second term as committee chair. (AE A; Tr. 27.)

Close family friends, who have known Applicant for the past 11 years, have never observed or suspected him to use any drugs or mind-altering substances. In their opinion, Applicant possesses high moral and ethical character and is supportive of his family, friends, and the broader community. (AE A.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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, 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The security concern 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 judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Under AG ¶ 24(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),<sup>4</sup> and
- (2) inhalants and other similar substances.

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<sup>4</sup>Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Potentially disqualifying conditions AG ¶ 25(a), “any drug abuse,” and AG ¶ 25(g), “any illegal drug use after being granted a security clearance,” both apply. Applicant abused marijuana twice in 2009 while he held a DOD security clearance. Marijuana is a Schedule I controlled substance under the Controlled Substances Act (21 U.S.C. § 812). Under federal law, Schedule I controlled substances are those drugs or substances which have a high potential for abuse, no currently accepted medical use in treatment in the United States, and lack accepted safety for using the drug under medical supervision.

Mitigating condition AG ¶ 26(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,” is established because his abuse was infrequent. Applicant smoked marijuana only when it was offered to him at two social functions in his community in April 2009 and May 2009.

Applicant denies any intent to abuse drugs, including marijuana, in the future. Under AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” can be shown by “(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation.” Applicant’s marijuana use occurred while socializing with others in his community. He did not expect drugs to be present, and the town resident who brought marijuana to the party in April 2009 was not a close friend. It is unclear whether the same person brought marijuana to the May 2009 gathering. Nonetheless, AG ¶ 26(b)(1) is pertinent in that Applicant does not knowingly associate with drug users. It is more difficult to apply AG ¶ 26(b)(2) because Applicant and his spouse still attend parties in their small town. However, Applicant has resolved to leave any environment or situation if illegal drugs are around. Furthermore, Applicant’s present 3.5 years of abstinence is sufficient to apply AG ¶ 26(b)(3), given his limited involvement with marijuana. AG ¶ 26(b)(4) is implicated in that Applicant has expressed a willingness to execute a statement of intent to abstain from drug abuse with automatic revocation for any violation. Applicant’s intent to abstain is credible in light of other indicia of his honesty and trustworthiness, including his candor about his marijuana use on his e-QIP, during his interview with the OPM investigator, and in response to DOHA interrogatories. Applicant has also promised his spouse that he will not abuse any drug in the future. He is not likely to risk his loving family relationships or his personal and professional reputation for ethical behavior by abusing any drug, including marijuana, in the future. The drug involvement concerns are mitigated.

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

The security concern for personal conduct is set out in AG ¶ 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. 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.

Even though Applicant's marijuana use after being granted a security clearance is covered under AG ¶ 25(g) of Guideline H, the DOHA Appeal Board has held that security-related conduct can be alleged under more than one guideline, and, in an appropriate case, be given independent weight under each. See ISCR 11-06672 (App. Bd. Jul. 2, 2012). AG ¶ 16(c) provides as follows:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant has an obligation as a clearance holder to comply with DOD policy, including the prohibitions against drug involvement. His violation of DOD policy implicates disqualifying condition AG ¶ 16(c). Furthermore, Applicant clearly exercised poor judgment under the personal conduct concern outlined in AG ¶ 15 by using marijuana while he held a security clearance. Applicant equated the state's decriminalization with full legalization and did not appreciate that possession of an ounce or less of marijuana was a civil violation under state law. Even so, it is troubling that he gave no thought to his security clearance at the time and made no effort to inquire into whether his marijuana use was consistent with DOD policy or his security responsibilities.

Applicant now understands the seriousness of his error in judgment, and he does not intend to repeat the same mistake. He cites his disclosure of his marijuana use ("hoping complete honesty would serve best") as evidence that he can be trusted. Two mitigating conditions apply under AG ¶ 17 of Guideline E:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant made assumptions about the legality and propriety of his conduct largely on the representations of someone who likely also used marijuana around the fire pit. His acknowledged bad judgment in doing so is inconsistent with the behavior which must be expected of persons entrusted with the Nation's secrets, but it is also an aberration in a



record of considerable professional accomplishment and ethical behavior. The personal conduct concerns are mitigated

### **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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).<sup>5</sup> Applicant exhibited a naiveté inconsistent with his age (42 in April and May 2009), education (master's degree), and professional experience (engineer with a clearance since 2001 or 2002) when he smoked marijuana believing it legal without first checking to see whether it was consistent with DOD requirements. He smoked marijuana a second time in 2009 to be social, despite not enjoying the drug's effects on the previous occasion. The state's decriminalization does not justify or mitigate his failure to consider his security responsibilities. However, security clearance decisions are not intended to punish applicants for past transgressions. Applicant has a stable lifestyle that is inconsistent with future drug use, and he understands the ramifications for any future violation. He has demonstrated an ability to handle classified information appropriately while often working long hours to ensure that vital defense projects are completed with the highest quality and on time. Based on the evidence before me, I conclude that it is clearly consistent with the national interest to continue his security clearance eligibility.

### **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 E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

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<sup>5</sup>The factors under AG ¶ 2(a) are as follows:

(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.

## **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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Elizabeth M. Matchinski  
Administrative Judge