



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



In the matter of:

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ISCR Case No. 11-08631

Applicant for Security Clearance

**Appearances**

For Government: Philip Katauskas, Esq., Department Counsel  
For Applicant: Richard Murray, Esq.

10/25/2012

**Decision**

LYNCH, Noreen, A., Administrative Judge:

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline E (Personal Conduct). The SOR was dated July 12, 2012. 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) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on September 13, 2012. DOHA issued a notice of hearing on September 20, 2012, scheduling the hearing for October 12, 2012. Government Exhibits (GX) 1-2 were admitted into evidence, without objection. Applicant testified and presented two witnesses. He submitted Applicant Exhibits (AX) A-C, which were admitted without objection. DOHA received the transcript (Tr.) on October 18, 2012. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

## Findings of Fact

In his answer to the SOR, Applicant admitted five factual allegations under Guideline E (Personal Conduct). He denied SOR 1.c, 1.e, 1.h and 1.i. with explanations.

Applicant is a 30-year-old employee of a defense contractor who works as a computer scientist. After receiving his undergraduate degree in 2005, he obtained his Ph.D in 2009. ( Tr. 17) He is married and has no children. Applicant has worked for his current employer since February 2010. He held an interim security clearance in 2003. (GX 1) He has completed several security clearance applications. (Tr. 58)

### Personal Conduct

Applicant admitted using marijuana in 2004. (Tr. 21) He also smoked marijuana with friends socially in high school and college. He has never used any other illegal drug. He also acknowledged that he intended to stop before the spring of 2009 but made a more concerted decision after April 2010 (his polygraph interview). GX 2

In June 2009, Applicant used marijuana at a party. (Tr. 23) He stated that he had no intention of using marijuana but decided to “inhale” the marijuana in a bathroom filled with the smoke so that technically he might later say he did not use the drug. (Tr. 24) He claims that he did not use marijuana on a regular basis in 2009.

He admitted the allegation that he continues to associate with persons who use drugs but qualified the answer stating that he has not been around friends using drugs since June 2009. He noted that he would leave the area if someone started using an illegal drug. He was candid stating that his college and graduate school friends used illegal drugs but he would try not to be around them. (Tr. 30)

Applicant described an incident where he used an open wireless network for internet access without permission from the owner about four times from 2003 to 2007. He used his personal computer at home or a coffee shop. He believed he was using someone 's wireless, but he was not sure that was illegal. He notes that is willing to follow the rules.

Applicant admitted that he gave his step-mother a prescription drug (pain killer). He knew that she wanted to use the drug for recreational purposes. He believes the time frame was 2001 - 2005. He recalls that he gave her a bottle of percocet or vicodin. (Tr. 31) He also noted that he would not care if someone stole the drug from him or took it out of his trash. (Tr. 32) He stated that he would give a prescription drug to someone if the circumstances called for it. He believes that if there is a medical need and he has the prescription drug, that would be fine.

Applicant began using alcohol in high school. He would drink with friends socially once or twice a week. He knows that he becomes intoxicated with six or seven drinks. He acknowledges becoming intoxicated in the past. He admits that he did drink and

drive, but does not do so now. He has also limited his intake of alcohol. (Tr. ) He does not have any alcohol-related incidents. He does not go to bars to drink and believes that he drinks responsibly.

As to the unauthorized access to another person's computer account and changing the password, he was credible in that this was a practical joke that he played on his girlfriend. (Tr. 36) He recalls that it was 2000 or 2001. He thought that it would be funny if she could not get into her email. He has never done anything like that again.

Applicant acknowledged that he charged approximately 40 hours at work to the wrong budget from May 2009 until August 2009. When he arrived at the lab, he was told to charge everything to one budget. ( Tr. 37) He explained that he charged hours from an internal source. He wanted to preserve the budget as much as possible because the project manager wanted to preserve it. The procedure for budgeting according to Applicant was somewhat gray. He told his supervisor about the method he used. He also noted that he was following his office-mate as a role model. (Tr. 38) When Applicant told his supervisor, the supervisor stated that was fine. The billing procedure has been clarified and the problem rectified. (Tr. 53) Applicant was not reprimanded or disciplined.

Applicant completed an SF-86 security clearance application in March 2010. In response to Question 23, he disclosed his 2004 use of marijuana but did not list the 2009 use of marijuana. At first, he stated that he did not believe it would constitute using marijuana. In his answer to the SOR, he denied that he intentionally falsified in failing to disclose the recent use. However, at the hearing he admitted that he should have disclosed the 2009 use. Moreover, he believes that he had a secret clearance when he started his current job. He knew that a recent use of marijuana would not allow him to have a security clearance. He acknowledged after questioning that he did not put the 2009 marijuana "inhaling" because he was scared that he would not get a clearance. (Tr. 67) He was trying to convince himself that it did not count. He admitted that he had an intention to not fully disclose the 2009 marijuana incident. (Tr. 68) He acknowledged that he read the question, which clearly states that "inhaling" is considered use.

During an April 2010 interview, Applicant reported that at a party (June 2009) after consuming an excessive amount of alcohol, his friends asked him to smoke marijuana. He told the interviewer that he had no intention of smoking marijuana. He elaborated that he intentionally inhaled the second-hand smoke in a bathroom. He now believes that he was high on the marijuana. He noted that he mentioned telling his friends they should "hotbox" the bathroom so that he could get high and still get a security clearance. (GE 2) He also stated in the interview that he did not list the information on his security clearance application because he feared that he might not get his clearance, which would mean that he would not get a job. He also noted that he was not being honest with himself.

When questioned at the hearing, Applicant stated that he was concerned about question 23 because he believed that any drug use in that year would affect his ability

to obtain a security clearance. (Tr. 25) He explained that he was motivated to “not put it on there.” (Tr. 26) He rationalized that he did not have to list the use because he was not using a pipe. At the hearing, he stated that he recognized that it was a “non-candid” thing to do. (Tr. 26) He knew that he would get denied for a security clearance if he noted a 2009 marijuana use.

A former classmate of Applicant testified that Applicant is an honorable person who strives to do the best. He and his family socialize with Applicant. (Tr. 95) Applicant revealed the SOR allegations to him and he believes that Applicant knew he did some things wrong but does not believe he would do them again. He believes Applicant to be an honest, highly intelligent, creative, and ethical person. (Tr. 97)

Applicant’s wife, who possesses a security clearance, testified that Applicant is aware of mistakes that he has made. She discussed the SOR with Applicant. She noted that he went over the allegations in careful detail. She noted that he put time and energy into the unpleasant task of combing through his entire history and presenting all necessary information. She believes he is a kind and genuine person. She states that he is an honest person. (Tr. 110) She noted that he was trying to decide whether or not to list the 2009 marijuana incident on his security clearance application. (Tr. 114)

Applicant submitted character references from his supervisors. He is described as a meticulous, extremely hard-working, dedicated employee. His supervisor stated that Applicant’s judgment has matured during the clearance process. She has observed his personality, integrity, and judgment. (AX A-C) Applicant has been recognized as the Most Outstanding Graduate in 2005. He has received scholarships. His peers describe him as persevering and talented.

Applicant’s supervisor addressed the issue of the budget-charging procedures that is referred to in the SOR. She explained in her letter that Applicant is now meticulous in his timekeeping activities and carefully charges budgets at very fine-grained increments. (AX A)

## **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 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>1</sup> The burden of proof is something less than a preponderance of evidence.<sup>2</sup> The ultimate burden of persuasion is on the applicant.<sup>3</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>4</sup> “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>5</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>6</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 E, Personal Conduct**

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<sup>1</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>2</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>3</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>4</sup> See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

<sup>5</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>6</sup> *Id.*

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:

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

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

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and 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, 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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

As discussed above, Applicant intentionally falsified his 2010 security clearance by not disclosing his use of marijuana in 2009. He also rationalized and failed to provide candid and truthful answers during the security process. He acknowledged his poor judgment in regard to the other allegations. AG ¶¶ 16(a),16(b),16(d)(3) and 16(g) apply. His conduct shows a pattern of poor judgment.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant denied any intentional wrongdoing concerning the non-disclosure of the 2009 marijuana incident until direct questioning at the hearing. As to the other allegations, he has mitigated them based on the passage of time. He has not presented any other information to persuade me that he has mitigated personal conduct concerns regarding the falsification. I have doubts about his judgment, trustworthiness, and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct as to allegation 1.c.

### **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 a 30-year-old professional who works as a computer scientist. He is highly educated and well regarded in his field. He is married and has no children. He loves his work and looks forward to a career in his field. He acknowledges his poor judgment and behavior concerning illegal drug use. He realizes that alcohol use needs to be responsible. He believes that the majority of these above-noted incidents occurred during or right after college. He is now married and would like to start a family.



Applicant admitted that he intentionally falsified his security clearance application in 2010. He did not disclose th drug use to the Government on his SF-86. He rationalized that he did not have to because he just inhaled and had no intention of becoming high. He knew that it would cause him to be denied a security clearance. The other choices he made over the years indicate immaturity, but he has acknowledged his behavior. He understands the consequences of that behavior. His recent falsification outweighs any other behavior and is not mitigated. I have doubts about his judgment. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under personal conduct. 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 E:	AGAINST APPLICANT
Subparagraphs 1.a- 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d:-1.i:	For 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