



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



In the matter of: )  
)  
) ISCR Case No. 11-10154  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Philip J. Katauskas, Esquire, Department Counsel  
For Applicant: *Pro se*

05/05/2012

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant is a life-long illegal marijuana user. He used marijuana after he submitted his May 2011 SCA, and after he was questioned by a government investigator about his illegal marijuana use in June 2011. He continues to associate with his illegal drug-using friends and relatives. He presented no documentary evidence of a recent diagnosis or prognosis related to his illegal drug use. His recent behavior casts serious doubt on his reliability, judgment, and ability to comply with the law. Clearance is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 5, 2011. On January 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).<sup>1</sup> Applicant answered the SOR on

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<sup>1</sup> DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the

January 18, 2012, and requested a hearing before an administrative judge. The case was assigned to me on February 7, 2012.

DOHA issued a notice of hearing on February 13, 2012, convening a hearing for March 5, 2012. At the hearing, the Government offered exhibits (GE) 1 and 2. Applicant testified and submitted exhibits (AE) 1 through 4. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on March 9, 2012.

### **Findings of Fact**

Applicant admitted the single factual allegation under SOR ¶ 1.a. He denied the single allegation under SOR ¶ 2.a. His admission is incorporated as a finding of fact. After a thorough review of the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 62-year-old entrepreneur, owner, and senior manager (chairman of the board, chief executive officer) of several companies. One of the companies handles government contracts and it is sponsoring Applicant (its Chief Executive Officer) for a security clearance to qualify for a facility security clearance. Applicant was awarded a bachelor's degree in 1973-1974. He married his wife in 1973, and they have three grown daughters. This is his first security clearance application.

Applicant described himself as a product of the "60's" when everybody grew up using marijuana. He has illegally used marijuana since he was in high school to present. In 1967, at age 18, Applicant and a friend purchased several ounces of marijuana in an Asian country. They travelled to a second Asian country where the marijuana was discovered in his luggage. He was arrested, held in jail overnight, and deported. Applicant disclosed this incident in his SCA and discussed it with a government investigator during a June 2011 interview. Except for the above incident, Applicant has never been arrested or charged with any criminal offense.

During college, Applicant smoked marijuana or hashish every weekend. He also purchased marijuana for his personal use. He reduced his marijuana use after he started his company in 1974, but he has continued his marijuana use through the years to present. Applicant testified that with age, his use of marijuana has diminished. He currently smokes marijuana on an average of three times a year. The marijuana is supplied by friends, and shared with other people, usually at a social event.

Applicant's most recent marijuana use occurred during a family reunion and skiing trip in December 2011-January 2012. He smoked marijuana with one of his daughters while in a ski lift chair. During his June 2011 interview, Applicant told the

investigator that, in the future, he intends to take a puff of marijuana when he feels like it.

Applicant has always known that marijuana use is illegal. He believes it ought to be decriminalized. He enjoys using marijuana, and he ignored the law because it is a misdemeanor offense in most states, just like a speeding ticket. Applicant has not participated in any substance abuse counseling. He presented no documentary evidence of a recent diagnosis or prognosis related to his illegal drug use.

Applicant failed to disclose in his answer to question 23a of his May 2011 SCA that during the preceding seven years he had illegally used marijuana. He also failed to disclose in his answer to question 23c, that during the preceding seven years he had illegally possessed marijuana. (The last omission was not alleged in the SOR.)

Applicant credibly testified that his omission was an innocent mistake and not made with the intent to mislead the Government. He explained that he submitted his hand-written SCA (AE 2), in which he admitted his recreational marijuana use to present, to his security advisor for review and comments. The security advisor incorrectly transferred Applicant's information into an electronic SCA. The security advisor made the mistake of answering "No" to question 23a, and did not include Applicant's comment about his present use of marijuana. Applicant failed to review the electronic SCA before it was submitted to another Government agency. Applicant's security advisor submitted a sworn statement (AE 4) indicating that he "inadvertently made an error in transposing the information."

Applicant candidly discussed his past and present illegal marijuana use with a government investigator during his June 2011 interview. He also was candid and forthcoming during his hearing. Applicant submitted a statement promising to abstain from the use of any illegal drugs in the future. He also promised that if he were to use any illegal substance, he would report such use to his facility security officer.

Applicant testified that he has been an old-school businessman all of his life, and his word is his bond. He has learned to make sacrifices all of his life to be successful in his business. He does not consider abstaining from marijuana use a sacrifice because he only uses marijuana infrequently. He is willing to make the necessary lifestyle changes to remain abstinent.

## **Policies**

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

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

AG ¶ 24 articulates the security concern about drug involvement:

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.

Applicant, who is 62 years old, has illegally used marijuana from high school to present. His most recent marijuana use occurred in December 2011-January 2012, with his daughter, while on a family holiday vacation. He used marijuana after he submitted his May 2011 SCA, and after he was questioned by a government investigator in June 2011, about his illegal drug use.

At age 18, Applicant was arrested in a foreign country for possession of several ounces of marijuana. Applicant has always known that his possession and use of marijuana was illegal, and that his drug-related behavior would adversely affect his ability to possess a security clearance. Notwithstanding, he chose to ignore the law because he enjoyed using marijuana. He has not participated in substance abuse counseling. He presented no documentary evidence of a recent diagnosis or prognosis related to his illegal drug use.

Two drug involvement disqualifying conditions raise security concerns in this particular case: AG ¶ 25(a) “any drug abuse”;<sup>2</sup> and AG ¶ 25(c) “illegal drug possession including cultivation, processing, manufacture, purchase.”

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (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;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used;
  - (3) an appropriate period of abstinence; and
  - (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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<sup>2</sup> AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including: (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), and (2) inhalants and other similar substances.

I find that none of the Guideline H mitigating conditions apply. Applicant's life-long illegal marijuana use is recent and frequent. Because of his age, education, and experience working with the Government, he was aware of the illegality of his actions and the adverse consequences he would face because of his misconduct.

Applicant continued to use marijuana after he submitted his May 2011 SCA and after his June 2011 interview with a government investigator. He also continues to associate with his drug-using friends and relatives. He presented no documentary evidence of a recent diagnosis or prognosis related to his illegal drug use. He has not implemented realistic lifestyle changes to help him remain abstinent. Under the circumstances, more time without using illegal drugs is necessary before drug involvement concerns can be mitigated.

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

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

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.

Applicant failed to disclose his illegal marijuana use during the preceding seven years on his May 2011 SCA.

Applicant's failure to disclose the above information, trigger the possible applicability of the following disqualifying conditions under AG ¶ 16:

(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; and

(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.

Applicant credibly testified that his omission was an innocent mistake and not made with the intent to mislead the Government. His security advisor incorrectly transferred Applicant's information into an electronic SCA. Applicant candidly discussed his past and present illegal marijuana use with a government investigator during his June 2011 interview. He also was candid and forthcoming during his hearing.

Guideline E mitigating condition AG ¶ 17(f): "the information was unsubstantiated," applies and it mitigates the personal conduct security concerns. In sum, I find that Applicant's omission was not deliberate or made with the intent to mislead the Government. His disclosures to the government investigator, and at his hearing, eliminate any possible vulnerability to exploitation, manipulation, or duress. His omission does not cast doubt on Applicant's reliability and trustworthiness.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant is life-long illegal marijuana user. He most recently used marijuana after he submitted his May 2011 SCA, and after he was interviewed about his illegal marijuana use in June 2011. He continues to associate with his illegal drug-using friends and relatives. He presented no documentary evidence of a recent diagnosis or prognosis related to his illegal drug use.

Considering the record evidence as a whole, I find Applicant's recent questionable behavior casts serious doubt on his reliability, judgment, and willingness and ability to comply with the law. He failed to mitigate the Guideline H security concerns.

### **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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

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JUAN J. RIVERA  
Administrative Judge