



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-01122

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel  
For Applicant: Jonathan Bell, Esq.

07/25/2016

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline H, Drug Involvement. Applicant's eligibility for a security clearance is granted.

**Statement of the Case**

On September 30, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement. DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented by the Department of Defense on September 1, 2006.

Applicant answered (Ans.) the SOR on October 27, 2015, and requested a hearing before an administrative judge. The case was assigned to me on March 2, 2016. DOHA issued a notice of hearing on March 7, 2016, and the hearing was

convened as scheduled on March 31, 2016. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Department Counsel's exhibit index was marked as Hearing Exhibit (HE) I. Applicant testified, presented one witness, and offered exhibits (AE) A through F, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on April 11, 2016.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted SOR ¶ 1.a, but denied SOR ¶ 1.b. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 33 years old. He lives with the mother of his two children. He has a high school diploma and obtained a technical apprenticeship level-3 certification. He has worked for several defense contractors since 2003. Since June 2010, he has worked for a defense contractor as an engineering aid. He has no military service, but has held a security clearance since 2006.<sup>1</sup>

Applicant's conduct raised in the SOR includes using marijuana on more than one occasion from June 2008 to at least September 2011, while holding a security clearance (See SOR ¶¶ 1.a and 1.b. Both allegations allege essentially the same conduct, except ¶ 1.b adds the element of holding a security clearance).

When Applicant was 23 years old, he was involved in a serious car accident. He suffered significant injuries from the accident, including injuring his shoulders, back, knees, and ribs. All these injuries led to chronic long-term pain. Additionally, Applicant's physically demanding job, involving construction work at U.S. facilities overseas, led to several other injuries over the years including a broken rib cage, sprained ankles, and broken elbows. He tried to deal with the constant pain through stretching exercises, and he used Vicodin, which was prescribed by his physician. In discussing his pain issues with his physician, he was told about alternative pain treatment using marijuana since he resided in a state that legalized the use of medical marijuana. Applicant obtained a medical marijuana prescription in December 2010 that expired in March 2011. Sometime around December 2010, he purchased 24 marijuana brownies using his prescription.<sup>2</sup>

Applicant never used marijuana before 2008, and he may not even have used it in 2008. He reported on his 2012 security clearance application (SCA) that he used marijuana in 2008 because he was attending a street festival in an overseas location and purchased a brownie that he believed was legitimate. Later, the concessionaire who sold him the brownie came up to him and asked how he liked the brownie. Applicant replied that it was fine, and then was told that it contained marijuana.

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<sup>1</sup> Tr. at 32, 65; GE 1-2.

<sup>2</sup> Tr. at 34-37; 41-43; Ans. and attachment.

Applicant informed his security manager the next day about what transpired. No drug testing was performed on Applicant to either confirm or rebut the presence of marijuana in his system. Applicant testified that if there was marijuana in the brownie purchased at the festival, this unknowing use was the only time he used marijuana until he received his medical marijuana prescription and bought the two dozen brownies in December 2010. He never bought any more marijuana, brownies or otherwise, after his December 2010 purchase.<sup>3</sup>

Applicant admitted ingesting marijuana brownies on several occasions between December 2010 and September 2011. He used the marijuana to relief his chronic pain. He would eat about one fourth of a brownie and that would relieve his pain for an extended time. Over this course of time, he ate 20 of the 24 brownies and threw away the remaining ones. When he used the marijuana he was never on a job or at an overseas location. His job involved working a particular project overseas, coming home when it was completed, then being essentially unemployed until the next job came up. He only used marijuana during these periods of unemployment between jobs. When he started a new job, he was always drug tested and always passed these tests. This was verified by the vice president of operations for one of his employers who testified for Applicant. Applicant credibly testified that he knew he had a security clearance during this time, but mistakenly believed his duty to remain drug free only applied when he was working on a U.S. government-sponsored contract. His last use of marijuana was in September 2011.<sup>4</sup>

Applicant testified that his security clearance interview summary was not accurate when it stated that he purchased the 24 brownies in June 2008. That purchase occurred in December 2010, as corroborated by the date of his medical marijuana prescription. He further testified that he was not given a chance to review his interview summary and make any corrections to it. I find Applicant's testimony more credible than a summarized interview, which Applicant was not given a chance to correct for any inaccuracies.<sup>5</sup>

Applicant has no friends who use marijuana. He manages his chronic pain now through regular exercise, a proper diet, and taking care of his body. There is no evidence that he was diagnosed as a drug abuser, as drug dependent, or that he has been through a drug treatment program.<sup>6</sup>

Applicant admitted the full extent of his drug use in his SCA and he also described in detail his drug use to a DOD investigator. He offered into evidence a urinalysis test that showed negative results for seven drugs including cannabinoid

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<sup>3</sup> Tr. at 37-41.

<sup>4</sup> Tr. at 23, 26, 28, 41, 43-49, 64; AE B.

<sup>5</sup> Tr. at 62; GE 2.

<sup>6</sup> Tr. at 59, 67; GE 1-2.

(marijuana). The test was reported on March 16, 2016. Applicant also stated that he does not intend to use marijuana in the future as long as it is a federally prohibited drug.<sup>7</sup>

As stated above, Applicant's employer's vice president of operations testified (and provided a reference letter) that he worked with Applicant on several contracts since 2006 and judged him to be a top performer and completely trustworthy. So much so that he asked Applicant to babysit his two young children while they were in a foreign country. He completely supports Applicant retaining his security clearance. Applicant also presented four other reference letters from supervisors and coworkers who all verified Applicant's professionalism, honesty, and job dedication. None observed him having any type of drug problem.<sup>8</sup>

### **Policies**

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 used 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 overarching 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, 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, and has the ultimate burden of persuasion to obtain a favorable security decision."

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<sup>7</sup> Tr. at 50; GE 1-2; AE A.

<sup>8</sup> Tr. at 21-29; AE B-F.

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 an applicant may deliberately or inadvertently fail to 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**

AG ¶ 24 expresses the security concern pertaining to 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and found the following relevant:

- (a) any drug abuse; and
- (c) illegal drug possession.

Appellant used and possessed marijuana on a number of occasions. I find the above disqualifying conditions apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and found the following relevant:

- (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; and
- (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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's marijuana use was relatively infrequent, since he used it during a short window from December 2010 to September 2011 (the evidence does not support that Applicant used marijuana in June 2008). During his window of use, he ingested medical marijuana for the purpose of treating his chronic pain issues. The treatment was suggested by his physician and he obtained a prescription for the marijuana. Although he held a security clearance when he used marijuana, his use occurred when he was between federally contracted jobs. He was under the mistaken belief that his duty not to use drugs only applied when he was actively employed on a federal contract. He has abstained from all drug use for nearly five years. That abstinence is partially corroborated by the drug test offered into evidence. Given the circumstances of his use (treatment for chronic pain), the uses happened under circumstances unlikely to recur. His change of lifestyle, the negative drug test, and the positive recommendation from the supervisors and coworkers all support the conclusion that his past use does not affect his current reliability, trustworthiness, or good judgment. AG ¶ 26(a) applies. His five years of abstinence is sufficient to demonstrate Applicant's intent not to use in the future. AG ¶ 26(b) applies.

### **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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered the Applicant's supportive character evidence and his negative drug test. I also considered Applicant's statement of intent not to use drugs in the future. I also weighed that he used marijuana

while holding a security clearance. Applicant provided sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline H, Drug Involvement.

### **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
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Subparagraphs 1.a-1.b:	For Applicant
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### **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.

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Robert E. Coacher  
Administrative Judge