



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-01915

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

12/09/2016

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant failed to submit sufficient evidence to mitigate falsifications of his 2014 security clearance application (SCA). He mitigated the criminal conduct security concerns. Clearance is denied.

**History of the Case**

Applicant submitted a SCA on July 1, 2014. On October 30, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct).<sup>1</sup> Applicant answered the SOR on December 12, 2015, and on April 1, 2016 (email), and requested a decision based on the written record.

A copy of the Government's file of relevant material (FORM) (containing the evidence in support of the denial), was provided to Applicant by transmittal letter dated April 21, 2016. Applicant received the FORM on April 26, 2016. He was allowed 30 days

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<sup>1</sup> DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant submitted a one-half page answer in response to the FORM that was received by the Defense Office of Hearings and Appeals (DOHA) on May 16, 2016. The case was assigned to me on March 31, 2017.

### **Findings of Fact**

In his answer, Applicant did not admit or deny any of the SOR allegations. His answer contained explanations, which included some factual admissions to the criminal conduct allegations. I considered all the SOR allegations denied. After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 39-year-old employee of a defense contractor. He completed high school in 1996, and attended a vocational-technical school between 2000 and 2004, where he received a machinist certificate. Applicant worked as a machinist for a private company between 2000 and 2014. His current employer, a federal contractor, hired Applicant in April 2014. He married his wife in 2013. He has no children.

In response to Section 22 (Police Record) of Applicant's July 1, 2014 SCA, asking whether he had EVER been charged with an offense involving drugs, Applicant answered "no". Applicant failed to disclose that in January 2002, he was charged with possession of marijuana and use and possession of drug paraphernalia; and that in January 2008, he was charged with possession of marijuana.

In response to Section 23 (Illegal Use of Drugs or Drug Activity) asking whether (1) in the last 7 years Applicant had purchased, handled, or use any illegal drugs or controlled substances; and (2) whether Applicant had EVER been ordered or asked to seek counseling or treatment as a result to his use of illegal drugs). Applicant answered "no" to both questions and failed to disclose that he illegally purchased, possessed, and used marijuana in January 2008 and was ordered to attend substance abuse counseling.

In August 2014, a Government investigator interviewed Applicant during his background investigation. At the start of the interview, Applicant volunteered that in January 2008 (within the past 7 years) he was charged with possession of marijuana. Applicant explained that following a traffic stop, he admitted to the police officer that he smoked marijuana at his employer's parking lot prior to driving home, and that he possessed 6 grams of marijuana. Applicant appeared in county court and after completing the mandated substance abuse counseling, the charge was dismissed.

Applicant told the investigator that he did not disclose the January 2008 drug offense and counseling in his 2014 SCA because he believed the offense occurred outside of the seven-year period asked by the SCA. After the investigator requested Applicant's criminal record, Applicant was provided with a copy of his criminal record. He claimed that was when he realized his 2008 drug offense was within the seven-year period asked in the SCA.

Applicant denied any other drug offenses. The investigator confronted Applicant with the 2002 offenses, where he was charged with possession of marijuana and possession of drug paraphernalia. Applicant admitted the offenses, but explained he did not disclose them because they occurred outside of the seven-year period for offenses in the 2014 SCA.

During his 2014 interview, Applicant disclosed he started to use marijuana at age 18 because of peer pressure. He used marijuana approximately two weekends a month until 2004. After starting his job in 2004, Applicant had money to purchase marijuana and he used it every Friday and Saturday. He spent about \$120 a month on marijuana. He continued his marijuana consumption until January 2008, when he was charged with possession of marijuana. Since 2008, Applicant claimed he used marijuana only two or three times. He did not recall his last use of marijuana, but claimed it was two or three years before 2014.

Applicant told the investigator that he used cocaine twice in his early 20s due to peer pressure. At age 20 or 21, Applicant participated in a pre-employment drug test that resulted positive for marijuana and he was not hired. Applicant stated that he has no future intent to use marijuana. He said he is too old to be using marijuana, that he is now married, and he and his wife are trying to have a child. Marijuana does not fit in his lifestyle. Applicant claimed that he did not list his use of marijuana in his 2014 SCA because he did not see any of the questions regarding illegal drug use.

### **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 E, Personal Conduct**

AG ¶ 15 articulates the security concern for 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. 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.

SOR ¶¶ 1.a and 1.b alleged that Applicant falsified his 2014 SCA when he answered “no” to Sections 22 and 23, and failed to disclose that he was charged with possession of marijuana in 2008 (SOR ¶ 2.b); and that in 2002, he was charged with possession of marijuana and drug paraphernalia (SOR ¶ 2.c). SOR ¶ 1.c alleged that Applicant failed to disclose to the investigator that he was charged with possession of marijuana in 2002.

Applicant initially claimed he failed to disclose his drug charges because he believed they were outside of the seven-year period for offenses in the SCA. When told that the 2014 SCA also asked whether he had EVER been charged with any drug offenses, Applicant claimed that he never saw any questions asking whether he was EVER charged with an illegal drug offense.

Considering the evidence as a whole, Applicant’s claims of innocent mistake are not sufficiently established by the scant evidence he submitted. At the start of his August 2014 interview, Applicant volunteered to a Government investigator that he failed to disclose in his 2014 SCA that he was charged with possession of marijuana in January 2008. Applicant explained that after the investigator requested his criminal background, Applicant was provided a copy of his criminal record and he noted his 2008 charge was within the seven-year period for offenses in the 2014 SCA.

According to the August 2014 summary of the interview, the investigator asked Applicant whether he had been charged with any other drug offenses, and he answered

“no.” Applicant did not disclose his 2002 charges for possession of marijuana and drug paraphernalia until he was confronted with his criminal record. Following the confrontation, Applicant admitted the 2002 charges and stated that he did not disclose it because it was outside of the seven-year period for offenses in the 2014 SCA. Following the confrontation, he admitted that he illegally purchased and used marijuana, with varying frequency, between 1997 and about 2012. He also admitted he was charged with possession of marijuana in 2002 and 2008.

Applicant’s behavior triggers the applicability 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 investigation, determine employment qualifications, award benefit status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibility;
- (b) deliberately providing false or misleading information concerning relevant fact 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 . . . .

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct 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; and

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

Considering the evidence as a whole, including Applicant's age, education, experience working for a government contractor, the period involving the drug offenses, the circumstances surrounding the submission of his 2014 SCA, and the August 2014 interview, I find that Applicant's evidence is insufficient to mitigate the Guideline E security concerns. Applicant's statements alleging an honest mistake and his failure to note that the question asked whether he had EVER been involved in any drug offenses, are not credible in light of the evidence as a whole.

### **Guideline J, Criminal Conduct**

Under Guideline J, the concern is that criminal activity "creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

The SOR alleged, and Applicant disclosed during his 2014 interview, that he illegally purchased and used marijuana, with varying frequency, between 1997 and about 2012 (SOR ¶ 2.a). He also admitted he was charged with possession of marijuana in 2002 and 2008 (SOR ¶¶ 2.b and 2.c).

Applicant's criminal behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

There is no evidence of any criminal misconduct or drug-related offenses since 2012. It appears that Applicant has changed his lifestyle – he is now married, employed full-time, and trying to raise a family. He stated his intent never to use illegal drugs again. I find that AG ¶ 32(a) and (d) apply and mitigate the criminal conduct security concerns.

### **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). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guidelines E and J, but some warrant additional comment.

Applicant is 39 years old, a certified machinist, and that he has worked for a federal contractor since 2014. Notwithstanding, Applicant did not submit sufficient evidence to mitigate the personal conduct allegations. His evidence failed to show that he provided truthful and candid answers during the security clearance process. Questions remain about his reliability, trustworthiness, and his ability to abide by rules and regulations and to protect classified information.

Once a concern arises regarding an Applicant's eligibility for a security clearance, there is a strong presumption against the grant or renewal of a security clearance. Unmitigated security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness. The personal conduct security concerns are not mitigated.

### **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.d:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a - 2.c:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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JUAN J. RIVERA  
Administrative Judge