



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



In the matter of:

ISCR Case No. 15-02854

Applicant for Security Clearance

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel

For Applicant: *Pro se*

August 26, 2016

**Decision**

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Drug Involvement, Criminal Conduct, and Personal Conduct security concerns. Security concerns arose out of Applicant's marijuana use between 1999 and July 2013, to include its use while holding a security clearance after 2004. He tested positive for marijuana on a random urinalysis conducted in July 2013. Additionally, he was counseled for underage drinking in 2005; and violated orders to abstain from alcohol use in February 2006 and June 2006. He also was terminated by an employer in 2009 for wrongful behavior. Eligibility for access to classified information is denied.

**Statement of the Case**

On September 23, 2014, Applicant completed an e-QIP. On December 11, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement; Guideline J, Criminal Conduct; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR on January 20, 2016, and requested a hearing before an administrative judge. The case was assigned to me on April 8, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 8, 2016, and the hearing was convened as scheduled on May 19, 2016. The Government offered Exhibits (GE) 1 and 2, which were admitted without objection. (Tr. 13-14.) The Applicant offered Exhibits (AE) A through AE C, which were admitted without objection. Applicant testified on his own behalf. DOHA received the hearing transcript (Tr.) on May 31, 2016.

### **Findings of Fact**

Applicant is a 31-year-old government contractor. He has worked for his employer since 2009. He was a member of the Marine Corps from 2004 through 2009, and the Marine Corps Reserve from 2009 to January 2014, when he received a general discharge. He achieved the rank of E-5. (GE 1; AE B.)

The Government alleged that Applicant is ineligible for a security clearance under the guidelines for Drug Involvement and Criminal Conduct because he used marijuana, with varying frequency from 1999 through July 2013, to include its use while holding a security clearance after 2004. He tested positive for marijuana on a random urinalysis conducted in July 2013, which led to a general discharge for misconduct from the Marine Corps Reserves in January 2014. Personal Conduct security concerns arose out of Applicant's marijuana use, outlined above; and his underage consumption of alcohol in violation of a lawful order in March 2005, February 2006, and June 2006. Additionally, his previous civilian employment was terminated in 2009 as a result of wrongful behavior toward a client. All of these facts raise questions about his reliability, trustworthiness, and ability to protect classified information. Applicant admitted SOR ¶¶ 1.b. 3.a, 3.b. 3.c, 3.d, and 3.e. He denied SOR ¶¶ 1.a, 1.c, and 2.a. (Answer.)

Applicant used marijuana from 1999 to 2003 while in high school, prior to joining the Marine Corps. (Tr. 25.) He testified that he has not used marijuana since entering the Marine Corps. (Tr. 36-37.)

Applicant joined the Marine Corps in 2004. (AE B.) He was approximately 18 years old at that time. In March 2005 Applicant was counseled for underage consumption of alcohol, after his platoon sergeant observed him consuming alcohol. In February 2006, and again in June 2006, Applicant was charged with violating Article 92 of the Uniform Code of Military Justice (UCMJ), for failure to obey a lawful order to abstain from underage consumption of alcohol. As a result of his third infraction, Applicant was required to complete three alcohol education classes. (GE 2; Tr. 28-34.) Applicant acknowledged that he made "bad choices in drinking under age obviously against the regulations in the Marine Corps." (Tr. 18.)

In August 2009 Applicant was terminated by his previous employer for wrongful behavior toward a client. Applicant was working for a Government contractor at that time. He had been consuming alcohol with military members on the evening in question. One member of their party became intoxicated. Applicant brought the intoxicated Sailor to the barracks and tried to put him to bed. However, a physical altercation ensued with another Sailor who thought Applicant was being too loud. Applicant admitted to pushing the Sailor. As a result of this incident, Applicant was suspended from his position for two weeks, and subsequently terminated. (GE 2; Tr. 19-22, 34-35.)

In July 2013 Applicant's unit was subject to a random urinalysis. Applicant's urine sample tested positive for Tetrahydrocannabinol (THC), a chemical compound found in marijuana. Applicant requested a new test, but he was not provided any additional testing. Applicant was administratively separated from the Marine Corps Reserve with a general discharge in January 2014, as a result of this incident. (GE 1; GE 2; Tr. 35-39.) Applicant claimed, for the first time at hearing, that he must have consumed food laced with marijuana at a 4<sup>th</sup> of July party he attended that year. He no longer associates with the host of that party. (Tr. 23-25, 39-46.) He provided results of self-procured urinalysis, dated May 10, 2016, that tested negative for THC. (AE A.)

Applicant received a number of decorations during his military service, including: the Navy and Marine Corps Achievement Medal and the Sea Service Deployment Ribbon with 2 stars. (AE B.) He received a certificate of commendation in September 2012. (AE C.)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the 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, which are to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2(a) describing 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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 the applicant may deliberately or inadvertently fail to protect or 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 EO 10865 provides that adverse 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. The following are potentially applicable:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR ¶¶ 1.a-1.c). Applicant used marijuana from at least 1999 to 2003. He tested positive for THC in July 2013. His use of marijuana in July 2013 occurred after having been granted a security clearance in 2004. The facts,

established through the Government's evidence and Applicant's admissions, raise security concerns under all of the above disqualifying conditions.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26. The following are potentially applicable:

(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 claimed that his 2013 marijuana use was the result of accidental ingestion. However, I do not find this claim credible. He made this argument for the first time at hearing, and offered no corroborating evidence to support it. He did not take responsibility for his positive drug test. I cannot find that future use is unlikely to occur. In this instance, Applicant's behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. The evidence does not support the application of AG ¶ 26(a).

AG ¶ 26(b) provides limited mitigation. Applicant claimed that he no longer associates with the drug user who held the 4<sup>th</sup> of July party in 2013. This is a factor that weighs in Applicant's favor. However, Applicant has a history of illegally using marijuana that began in 1999, while he was in high school. Despite his assurances that he is not a drug user, based on his past conduct and positive drug test, I am not confident he will abstain from marijuana use in the future. He knew of the Marine Corps zero tolerance policy concerning illegal drug use. Applicant has not provided sufficient evidence to meet his burden of proof to overcome the concerns raised by his poor judgment in using illegal substances, especially while holding a security clearance.

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

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is applicable:

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant used marijuana illegally from 1999 to 2003. He used it again in July 2013. His marijuana use led to no formal charges, but represents criminal conduct nonetheless. The facts, established through the Government's evidence and Applicant's admissions, raise security concerns under the above disqualifying condition.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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.

Applicant presented minimal evidence of rehabilitation. Only three years have passed since his last marijuana use. He has not been fully forthright with the Government about the circumstances surrounding that use. I cannot find that such criminal behavior is unlikely to recur. AG ¶¶ 32(a) and 32(d) were not established.

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

The security concern for the Personal Conduct guideline 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following is applicable:

(d) credible adverse information that is not covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combine 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:

(3) a pattern of dishonesty or rule violations.

Applicant has a long history of not following rules and laws. From 1999 to at least 2003, he illegally used marijuana, a federally controlled substance. He consumed alcohol underage, despite the military regulations and direct orders prohibiting it. He used marijuana again in 2013, while holding a security clearance, which is in violation of federal laws and security policies. He was terminated from his employment in 2009 for wrongful behavior toward a client. These actions indicate Applicant has questionable judgment, lacks candor, and demonstrates an unwillingness to comply with rules and regulations. The above disqualifying condition has been established.

AG ¶ 17 provides conditions that could mitigate security concerns under this guideline. The following are potentially applicable:

(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; and

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

Applicant exhibited a pattern of poor judgment involving alcohol abuse, employee misconduct, and marijuana abuse from 1999 to at least 2013. He violated laws and security policy by using marijuana after obtaining a security clearance only three years ago. Those offenses are not minor. He has failed to acknowledge that misconduct or to produce sufficient evidence that similar lapses in judgment are unlikely to recur. Mitigation under AG ¶¶ 17(c) and 17(d) was not established.

Applicant presented no credible evidence of rehabilitation. He has not met his burden to establish positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. AG ¶ 17(e) does not apply.

### **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 relevant 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 pertinent facts and circumstances surrounding this case. Applicant served in the Marine Corps and received a number of decorations during his military service. He testified he has not used marijuana since graduating high school and produced one negative urinalysis administered in 2013. However, I find his testimony that he did not knowingly ingest marijuana prior to his positive urinalysis test in 2013 lacks credibility, after listening to his testimony and observing his demeanor. He has a 14-year history of rule violations, including the illegal use of marijuana and alcohol. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement, Criminal Conduct, and Personal Conduct 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-1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a-3.e:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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Jennifer I. Goldstein  
Administrative Judge