



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 15-04400

**Appearances**

For Government: Andre M. Gregorian, Esquire

For Applicant: Alan V. Edmunds, Esquire

06/02/2017

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

**Statement of the Case**

On March 25, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).<sup>1</sup> Applicant answered the SOR on April 25, 2016. He admitted the allegations under Guideline H and Guideline J, denied the allegation under Guideline E, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on January 10, 2017. DOHA issued a notice of hearing on March 6, 2017, setting the hearing for April 6, 2017. The hearing was convened as scheduled.

The Government offered six documents, accepted without objection as exhibits (Exs.) 1-6. Applicant offered testimony and eight files of documents, accepted without objection as Exs. A-F. The record was kept open through April 14, 2017, in the event the parties wished to submit additional materials. Applicant timely submitted five

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<sup>1</sup> 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) effective within the DOD on September 1, 2006.

additional documents on April 11, 2017. Those items were accepted as Exs. G-K without objection. The transcript (Tr.) was received on April 14, 2017, and the record was closed.

### **Findings of Fact**

Applicant is a 56-year-old optical engineer who was first granted a security clearance in November 2009. (Ex. 4) He has been in his present position since December 2014. Well educated, Applicant earned a bachelor's degree in 1983 and a master's degree in 1987. He is single and has no children.

In July 2013, Applicant attended a party hosted at a neighbor's home. When marijuana, an illegal drug, was passed around amongst a group of people, he "foolishly" smoked the substance. (Tr. 16) He used it twice that weekend, on two separate days. (Tr. 30-31) He had not otherwise used the drug "for a long time."<sup>2</sup> (Tr. 31) At the hearing he noted: "at the time I did not make the connection that smoking marijuana was going to impact my [security] clearance or that we would wind up here today." (Tr. 16) He also described these incidents as a "lapse of judgment." (Tr. 32) He did not report the incidents to his employer after the fact because he thought to do so would lead to "consequences." (Tr. 32)

Applicant does not intend to use the drug again. (Tr. 16) He submitted a signed statement of intent indicating that he will never use illegal drugs again, or either be around or involved with anyone who uses illegal drugs. It also includes his consent to automatic revocation of his security clearance should he fail to adhere to these commitments. (Tr. 16; Ex. B) Today, Applicant does not intentionally associate with the people from the party. He only sees them if he passes by the neighbor's home.

Around July 3, 2014, Applicant consumed "some beers" while visiting a beach house. (Tr. 34) Later, he went to a local sports bar for dinner. There, he had two beers. (Tr. 34-35) At the time, Applicant was "somewhat, not heavily" intoxicated. (Tr. 35) While on his way back from dinner, he was pulled over by an officer who had noted that Applicant's car had a nonfunctioning headlight. Smelling alcohol, the officer asked Applicant to voluntarily undergo a breathalyzer test, which he declined. Applicant was charged with driving under the influence of alcohol (DUI) and driving or attempting to drive a vehicle while impaired by alcohol (DADWI). He pled guilty to the latter charge and was sentenced to probation for one year, from September 2014 through September 2015. He has since completed all court requirements. (Tr. 22; Exs. D-E)

Applicant was referred to an alcohol counseling center as a "social drinker," where he successfully completed the program with the advice not to drink and drive in the future. (Tr. 21, 37; Ex. C) Since then, he has been intoxicated "a few" times. (Tr. 37) In emphasizing that this situation would not be repeated, Applicant stated: "I've learned my lesson. I've realized the weight of this and the gravity that it's brought to the situation

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<sup>2</sup> Although past drug use was indicated, it is unclear when Applicant last used an illegal drug. (see Tr. 31)

that I'm in right now." (Tr. 19) He acknowledged that both the marijuana and alcohol incidents demonstrated "poor judgment." (Tr. 19)

In the job he held before his current position, Applicant was subject to a drug policy, and random drug testing was conducted. (Tr. 29) He was subject to initial drug screenings at both his current job and his prior workplace. (Tr. 29) In reviewing his 2009 security clearance application, Applicant noted the questions concerning illegal drugs and "thought that [drug abuse] would impact [his] ability to get the clearance. . . ." (Tr. 28) He knew marijuana was illegal. (Tr. 28) Despite that fact, he used marijuana in 2013 because he "did not retain a clear memory of [this information] or a clear perception of [its] impact . . . ." (Tr. 28) Applicant eventually disclosed his 2013 drug use when he completed a 2014 security clearance application.

On December 9, 2016, Applicant submitted a urine sample for drug screening. The lab results for that sample proved to be negative for a variety of substances, including the marijuana metabolite. (Ex. A) The results of a March 17, 2017, sample were similarly negative. (Ex. K)

Applicant submitted multiple letters of reference. His security officer wrote of Applicant's "excellent" record with their company and of his "stellar" work performance. (Ex. F at 1) She recommended Applicant be granted a security clearance. (Ex. F at 1) A former roommate cited Applicant for being "an amazing support system" throughout their friendship, and wrote that Applicant loves his work. (Ex. F at 2) A co-worker mentioned that Applicant has a "spotless two year record of working in a classified environment." (Ex. E at 3) Applicant's neighbors note that he is a good, quiet, helpful, and thoughtful neighbor. (Ex. F at 4) Another co-worker wrote that Applicant is a loyal and valuable team member who is reliable. (Ex. F at 5)

## **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. 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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.”

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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

## **Analysis**

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

The security concern for this guideline is set forth in AG ¶ 24:

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.

Drugs are defined as mood and behavior altering substances, and include:

(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.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Under AG ¶ 25, the following potentially applicable disqualifying conditions could raise a security concern:

(a) any drug abuse.(see above definition);

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(g) any illegal drug use after being granted a security clearance.

Here, Applicant received marijuana while it was passed around at a party. He ingested the drug, then passed it on to others. This occurred twice over one weekend, several years after he had been granted a security clearance. Under these facts, AG ¶ 25(a), (c), and (g) apply.

The Government's substantial evidence has thus raised security concerns under Guideline H. Under Directive ¶ E3.1.15, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. To that end, Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant's case:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and 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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

The two separate uses of marijuana at issue occurred about three-and-a-half years ago. Applicant had not otherwise used marijuana "for a long time," although that depiction is sufficiently vague as to undermine an assessment as to how long he had abstained between his last marijuana usage and the incidents at issue. Regardless, it is sufficiently recent to raise issues as to his judgment, reliability, and ability to comply with the law. This is true because he knew the drug was illegal, he knew he was subject to a drug policy at work, he was aware that illegal drug use was antithetical to the maintenance of a security clearance, and he knew his misuse of the drug could have adverse professional repercussions. Indeed, it was his choice to use marijuana with such knowledge that helps sustain the security concerns at the heart of Guideline H. Consequently, AG ¶ 26(a) does not apply.

On the other hand, Applicant has expressed his intent not to use marijuana in the future. It is unclear whether he associates with any other individuals who use drugs. His intermixing among the individuals with whom he used marijuana remains, but it is incidental to his continued residence in his present neighborhood. Therefore, AG ¶ 26(b)(1) is raised in part. Applicant has also signed a statement of intent with automatic revocation of clearance for any future violations regarding illegal drug abuse, thus giving rise to AG ¶ 26(b)(4).

## **Guideline J, Criminal Conduct**

The concern raised by 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.

Applicant was charged with DUI and DADWI on approximately July 3, 2014. He pled guilty to DADWI and was sentenced to one year of unsupervised probation, from September 2014 through September 2015. Consequently, the following disqualifying conditions apply:

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.

Under these facts, I find the following mitigating condition potentially relevant:

AG ¶ 32(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.

Although Applicant's admitted illegal abuse of marijuana constitutes a criminal act, the SOR only reflects the alcohol-related driving incident from 2014 in its allegations. With regard to that instance, the event occurred less than three years ago. However, Applicant is clearly contrite over the incident. He credibly discussed how it has affected his life, the danger involved, and the gravity of his conduct. He continues to imbibe, but there is no indication he follows his drinking with driving or other criminal conduct. Since the time at issue, he has continued successfully at work. He has completed all components of the court's order concerning his criminal act, and he has completed his probation. Given the time, expense, and frustrations resulting from his action, it is highly unlikely such behavior will recur. AG ¶ 32(d) applies.

## **Guideline E, Personal Conduct**

The security concern for personal conduct 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 disqualifying conditions are potentially applicable:

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

Applicant's drug use, as well as his drug use while maintaining a security clearance, was explicitly covered under Guideline H. His alcohol-related criminal driving incident was sufficiently addressed under Guideline J. At best, such activities could affect his personal, professional, or community standing, but there is no indication that they have. As the incidents at issue have been thoroughly discussed under other guidelines, I find that Guideline E does not apply.

## Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(a). The final determination must be an overall commonsense judgment based on 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, and conducted a whole-person analysis based on the record. In addition to Applicant's past illegal drug involvement, alcohol consumption, and personal conduct, I considered his present life, candor at the hearing, and credible explanations.

Applicant is a 56-year-old optical engineer who has served in his present position since December 2014. In the 1980s, he earned both a bachelor's degree and a master's degree. He is single and has no children.

While in his 40's, Applicant was granted a security clearance in November 2009. He was in his 50's in 2013, when he twice used marijuana at his neighbor's home. At the time, he knew marijuana was illegal. He knew the use of illegal drugs, such as marijuana, was inconsistent with the expectations of his present and past employers, and that it was antithetical to his obligations as one who maintains a security clearance. Applicant knew reporting this drug use to his employer after the fact could be problematic. He admits that his choice to use marijuana on two separate occasions one weekend in 2013 was a foolish "lapse of judgment."

Although it is unclear when Applicant last used marijuana, mitigation on this guideline could fall in Applicant's favor had the facts been somewhat different. He has certainly made strides in demonstrating behavior and practices consistent with mitigating drug-related security concerns, in general. However, the fact he knew that marijuana was illegal, that its use was inconsistent with his work and his security obligations, and that he used the drug not once, but twice, reflects that his drug use was not simply a momentary indiscretion. Indeed, he knowingly abdicated his security clearance obligations, then failed to immediately report the matter. Applicant had been subject to certain obligations and responsibilities as a holder of a security clearance for four years when this incident occurred. It is not unreasonable to expect an equal period of demonstrated abstinence to demonstrate his rehabilitation, renewed reliability, and willingness to follow rules and regulations.

With regard to the alcohol-related criminal conduct cited, Applicant has successfully completed all court ordered requirements and is unlikely to again find himself in the same situation. It seems to be an isolated incident in terms of alcohol and, with the exception of the above-referenced drug use, criminal activity. Therefore, criminal conduct and personal conduct security concerns are mitigated. Drug involvement security concerns, however, remain unmitigated.



### **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 J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	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. Eligibility for access to classified information is denied.

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Arthur E. Marshall, Jr.  
Administrative Judge