



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-05221

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel

For Applicant: *Pro se*

03/03/2017

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On March 18, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. 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 DOD on September 1, 2006.

Applicant answered the SOR on March 30, 2016, and requested a hearing. I was assigned the case on July 15, 2016. The Defense Office of Hearings and Appeals

(DOHA) issued a notice of hearing on September 20, 2016, and I convened the hearing as scheduled on October 25, 2016. The Government offered exhibits (GE) 1 and 2, which I admitted into evidence without objection. The Government's discovery letter and exhibit list were marked as hearing exhibits (HE) I and II. Applicant testified and offered exhibits (AE) A through E, which I admitted into evidence without objection. I held the record open for Applicant to submit additional evidence. He timely submitted AE F and G, which were admitted without objection. DOHA received the hearing transcript (Tr.) on November 1, 2016.

### **Findings of Fact**

In Applicant's answer, he admitted all allegations in the SOR (with some explanations). I adopt those admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 26 years old. He is single, never married, and has no children. He has worked for his current employer, a defense contractor, since January 2015. He has a bachelor's degree.<sup>1</sup>

The SOR alleged: (1) Applicant used marijuana from approximately July 2009 to at least March 2015; (2) He purchased marijuana from about July 2009 to at least July 2014; (3) He intended to continue using marijuana, despite applying for a DOD security clearance in December 2014; and (4) His roommate uses marijuana daily. These factual allegations form the basis of the concerns under both Guideline H and Guideline E.

Applicant suffers from a condition known as Osgood-Schlatter disease (OSD). This condition leaves the recipient with a painful lump below the kneecap. It seems to happen to children, who are involved in active sports, and young adults, who are going through puberty and having spurts of growth. With children as the main target, OSD has been nicknamed "knobby knee". OSD affects the bone, cartilage, and tendon near the top of the shinbone that encompasses the tendon located where the knee attaches. OSD in adults is not common, but if they have had this disease when they were young they may keep getting it as an adult. Adults can also contract this disease if they participate in repetitive activities or experience pain when extending their leg.<sup>2</sup>

Applicant testified that he has had OSD since he was 16 years old. He presented documentation showing he was last diagnosed with OSD in 2013 by a medical doctor (M.D.). He admitted buying, possessing, and using marijuana starting in 2009 when in college. He stated the sole purpose of using marijuana was for pain management of his OSD. He claims he never used marijuana recreationally. Beginning in 2011 until about July 2014, he purchased about seven grams of marijuana per week and used one gram

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<sup>1</sup> Tr. 6, 19, 34; GE 1.

<sup>2</sup> Tr. 20; AE F; See: <http://www.newhealthadvisor.com/osgood-schlatter-in-adults.html>

a day. During this time, he was living in states where marijuana was illegal. He knew his use and possession of marijuana was illegal. In July 2014, he moved to a state where medical marijuana was legal. He received a prescription and began using marijuana to relieve his OSD pain. He purchased his marijuana at several authorized medical dispensaries. He purchased marijuana mainly in topical-lotion-form that could be applied directly to his knees. He still smoked marijuana on weekends when the pain was more severe. Applicant testified that using marijuana was the only alternative he had for pain management. He was not a candidate for surgery because of his age, and he was unwilling to have opioid pain medicine prescribed to him. His marijuana prescription expired in November 2016 and he has not renewed it.<sup>3</sup>

In December 2014, Applicant filled out his security clearance application. In it, he disclosed his extensive use of marijuana. He also stated that he intended to continue to use marijuana to relieve his OSD pain because it was legal in his residing state and was effective. He was hired by his defense contractor-employer in January 2015. Upon employment, he was aware the employer had a drug-free policy. He was drug tested when he was hired. He knew marijuana use was contrary to federal law. He continued using marijuana after his employment until about March 2015 when he had a background interview. During this period of use, he knew the use was against company policy. He did not inform his employer of his use. He claims he has not used marijuana in any form since talking to the investigator in March 2015. He stopped using then because it became clear to him that if he continued using marijuana he would not receive a clearance. He admitted that he still possessed some amount of the prescribed marijuana topical lotion on the date of the hearing. He testified that he is willing to stop using marijuana. He provided a written statement of his intent not to use it in the future. When asked how he would cope with his OSD pain without marijuana, he stated he would use over-the-counter pain medicine (ibuprofen), go to work, come home, and go to sleep.<sup>4</sup>

Applicant no longer lives with the roommate referred to in the SOR. They went separate ways in July 2015. He does not associate with this roommate, nor has he had contact with him since July 2015.<sup>5</sup>

Applicant presented letters of support from friends and family. All indicate that Applicant is a good person and deserving of trust. A coworker recommended that he be granted a clearance.<sup>6</sup>

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<sup>3</sup> Tr. 20-21, 23-24, 29-31, 33; GE 2; AE F.

<sup>4</sup> Tr. 24, 26-27, 34-35, 41, 44, 47; GE 1; AE G.

<sup>5</sup> Tr. 37.

<sup>6</sup> AE A-E.

## 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."

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 EO 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 drug involvement security concern:

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;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant purchased, possessed, and used marijuana at various times from 2009 to March 2015. In his December 2014 security clearance application, he expressed his intent to continue using marijuana. I find that all of the above disqualifying conditions apply.

I have considered all of the evidence in this case and the drug involvement mitigating conditions under 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 used marijuana on a regular basis between 2009 and March 2015. He continued to use marijuana after he was hired, knowing that his employer had a drug-free policy and that use was illegal under federal law. Given Applicant's stated pain from OSD and his previous reliance on marijuana to manage that pain, I cannot conclude that future use of marijuana will not recur. His failure to inform his employer about his

continued marijuana use after filling out his security application and after his hiring casts doubt on his current reliability, trustworthiness, and good judgment, as does his current possession of marijuana. AG ¶ 26(a) does not apply.

Applicant prepared a statement of intent not to use illegal drugs in the future. However, given his recent reliance on marijuana to deal with his OSD pain issues, and his continued possession of some amount of marijuana, his statement carries little weight. Applicant needs to establish a sustained period of abstinence in order for his stated intent to have validity. His dissociation from his marijuana roommate is sufficient to find in favor of Applicant regarding SOR ¶ 1.d. Otherwise, AG ¶ 26(b) does not apply to the remaining allegations.

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

AG ¶ 15 expresses the security concern pertaining to 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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.

The same analysis that applied to the disqualifying conditions under Guideline H, also applies under AG ¶ 16(c).

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's extensive use of marijuana through the years was not minor. Although the reason Applicant uses marijuana is unique, the evidence does not support a conclusion that a future recurrence is unlikely. His failure to inform his employer about his continued marijuana use after filling out his security application and after his hiring casts doubt on his current reliability, trustworthiness, and good judgment, as does his current possession of marijuana. Applicant's disassociation with his roommate makes AG ¶ 17(g) applicable, but AG ¶ 17(c) 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 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 facts and circumstances surrounding this case. I considered Applicant's medical situation and letters of support from friends and family. However, I also considered that he continued to use marijuana after filling out his security clearance application, being hired by a company that has a drug-free policy, and knowing such use was violating federal law. Applicant provided insufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and Guideline E, personal conduct.

### **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
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant

Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge