



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 15-08780
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Andre M. Gregorian, Esquire, Department Counsel  
For Applicant: *Pro se*

06/06/2017

**Decision**

HOGAN, Erin C., Administrative Judge:

On May 22, 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. The action was taken 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 within the Department of Defense on September 1, 2006.

On August 11, 2016, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on August 29, 2016. The FORM was forwarded to Applicant on August 30, 2016. Applicant received the FORM on September 6, 2016. He had 30 days to submit a response to the FORM. He did not submit matters in response to the FORM. On October 31, 2016, the FORM was forwarded to the Hearing Office and was assigned to me on June 1, 2017. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

## **Findings of Fact**

In his answer to the SOR, Applicant admits the SOR allegations. (Item 1)

Applicant is a 47-year-old employee of a Department of Defense contractor. He has worked for his employer since October 1997. He has held a security clearance since 2005. His highest level of education is a Master's degree. He is married and has two children, ages 13 and 11. (Item 2, Item 3)

### **Guideline H – Drug Involvement**

On May 7, 2010, Applicant submitted a Questionnaire for National Security Positions (SF 86) as part of a periodic background investigation. In response to Section 23: Illegal Use of Drugs or Drug Activity on his SF 86, Applicant listed that he used marijuana in June 2006. He indicated he only used marijuana on that one occasion. (Item 2, Section 26) He subsequently received a security clearance.

On April 28, 2015, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) for another periodic background investigation. In response to Section 23, Illegal Use of Drugs or Drug Activity, "In the last 7 years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling swallowing, experimenting with or otherwise consuming any drug or controlled substance?" Applicant answered "yes." He explained: "Socially I have used marijuana on rare occasions. Only 3 times in the last 20+ years and twice in the last 7 years." He listed marijuana use in July 2011 during his 40<sup>th</sup> birthday party and in April 2015 while out with friends in Colorado. (Item 3, Section 23)

In response to the statement in section 23: "Provide explanation of why you intend or do not intend to use this drug or controlled substance in the future." Applicant responded:

I have no specific plans or intentions to use marijuana again. However, I am not opposed to it and the possibility remains that I would use it again.

In response to the SOR, Applicant admitted his marijuana use in July 2006, July 2011, and April 2015. He also admitted that he used marijuana in 2015 after being granted a DOD security clearance. (Item 1)

### **Guideline E - Personal Conduct**

The allegation under the Personal Conduct concern involves Applicant's unauthorized use of an Apple operating system on his non-Apple personal computer. He copied, installed, and used a proprietary Apple operating system on his non-Apple computer, circumventing Apple's copyright. In his response to the SOR, Applicant admits that he did this, but states that he stopped using Apple operating systems on non-Apple computers in 2016. (Item 1)

Applicant listed this conduct in response to Section 27: Use of Information Technology Systems on his May 2010 security clearance application. He circumvented a lawfully purchased retail copy of the Apple Snow Leopard operating system on his personal computer to get around a copy protection scheme Apple used to prevent installation on non-Apple hardware. This occurred in September 2009. (Item 2, Section 27)

Applicant also listed that he circumvented copyright protection by means of decryption at various times since January 2005. Applicant acknowledged that this is a violation of the Digital Millennium Copyright Act. He indicates in section 27 of his May 2010 security clearance application:

This was done for personal entertainment reasons and the decrypted data was never provided to others. The specific reasons are enumerated include: [1] digitally enhancing DVD movies that I legally purchased (up-conversion to high definition) [2] copying DVD movies for use in my SUV (to prevent media damage in the vehicle) [3] copying DVD movies for use on my iPod [4] removing DRM from music purchased on iTunes to allow unrestricted use of the music on operating systems that weren't supported by Apple (namely Linux). This is something I have done many times (> 100) and will continue to do as long as DRM or copy protection inhibit my personal use of lawfully purchased media.

### **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 useful 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 over arching 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 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 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).

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

The security concern relating to the guideline for Drug Involvement is set out 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.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant’s case.

AG ¶ 25(a) any drug abuse;

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g) any illegal drug abuse after being granted a security clearance.

Applicant used marijuana in July 2006, July 2011, and April 2015. He used marijuana on a recreational basis. AG ¶ 25(a) applies. AG ¶ 25(c) also applies because Applicant possessed marijuana in conjunction with his use. AG ¶ 25(g) applies because Applicant used marijuana after being granted a security clearance.

It is noted that Applicant's last use of marijuana in April 2015 occurred in a state where marijuana use is legal. On October 25, 2014, a Director of National Intelligence Memorandum, "Adherence to Federal Laws Prohibiting Marijuana Use," advises that legislative changes by some states and the District of Columbia do not alter federal law or existing National Security Adjudicative Guidelines. An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. Marijuana is identified as a controlled substance under the Federal Controlled Substances Act (title II of the Comprehensive Drug Abuse Prevention and Control Act) 21 U.S.C. 801-971 (1970). In other words, under federal law, use of marijuana remains unlawful. Therefore, Applicant's April 2015 marijuana, while legal in the state where it occurred, remained illegal under federal law.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to Applicant's case:

AG ¶ 26(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

AG ¶ 26(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.

AG ¶ 26(a) does not apply. Applicant's last illegal drug use occurred in April 2015. I consider this use to be recent. His marijuana use occurred while possessing an active security clearance. The use occurred in April 2015, the same month that Applicant completed his most recent security clearance application. Applicant indicated on his April 2015 security clearance application that he has no specific plans or intentions to use marijuana again. However, he further stated that he is not opposed to

it and there is a possibility that he may use marijuana again. Based on his statements about future use, I cannot conclude that any future marijuana use by Applicant is unlikely to recur.

AG ¶ 26(b) does not apply because Applicant did not demonstrate an intent to stop abusing marijuana in the future. On his 2015 security clearance application, he equivocates and says he might use marijuana in the future. He did not present a signed statement of intent to refrain from marijuana use with an acknowledgement any violation would result in an automatic revocation of his security clearance. Applicant was given a break during his security clearance re-investigation in 2010. He was allowed to keep his security clearance despite his disclosure of marijuana use in 2006. He continued to use marijuana after the 2010 re-investigation. Applicant does not appear to understand the concerns related to his illegal marijuana use or the security concerns related to his use of marijuana while holding a security clearance. Applicant did not mitigate the security concerns raised under Guideline H, Drug Involvement.

### **Guideline E – Personal Conduct**

The security concern relating to the guideline 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.

The following disqualifying condition applies to Applicant's case:

AG ¶ 16(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.

Between 2006 to 2015, Applicant circumvented Apple's copyright protections in order to use a proprietary Apple operating system on his non-Apple personal computer. He also admits to violating the Digital Millennium Copyright Act pertaining to the downloading of movie DVDs and music.

The following mitigating condition applies to Applicant's case:

AG ¶ 17(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.

Applicant stopped circumventing Apple's copyright protections in 2015. While his behavior is not condoned, his actions were for his own personal use. Applicant mitigated the issues raised under Guideline E.

### **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 the facts and circumstances surrounding this case. I considered Applicant's lengthy career with a DOD contractor. I considered that Applicant fully disclosed his illegal drug use on his security clearance applications. I considered that he used marijuana while holding a security clearance. While Applicant has not used marijuana since April 2015, his statement indicating that he could not rule out the possibility of using marijuana in the future on his security clearance application provides reason for concern. Applicant did not submit a statement of intent to refrain from illegal drug use. For these reasons, concerns remain under the drug involvement concern. Applicant mitigated the security concerns raised under 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

Subparagraph 1.a:

Against Applicant

Subparagraph 1.b:

Against Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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ERIN C. HOGAN  
Administrative Judge