



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



In the matter of:

ISCR Case No. 15-08485

Applicant for Security Clearance

**Appearances**

For Government: Andrea M. Correlas, Esq., Department Counsel

For Applicant: *Pro se*

10/23/2017

**Decision**

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, I find that Applicant failed to mitigate drug involvement security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

The case file shows that Applicant was interviewed by a security investigator from the Office of Personnel Management (OPM) on January 11, 2010. (Item 5, Personal Subject Interview (PSI))<sup>1</sup> The case file does not contain information to indicate that Applicant had submitted an Electronic Questionnaires for Investigations Processing (e-QIP) to trigger the interview, or why Applicant did not receive a security clearance at that time. There is evidence that Applicant may not have required eligibility for access to classified information at that time since he continued to work for the same defense contractor that is now sponsoring him for a security clearance.

The case file shows that Applicant submitted an e-QIP on February 16, 2012 (Item 4), to obtain a security clearance required for a position with the defense contractor. The February 12, 2012 e-QIP does not appear to have been processed. Applicant submitted another e-QIP on February 5, 2015 (Item 3). Applicant was interviewed again by an OPM security investigator on June 17, 2016. (Item 5)

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<sup>1</sup> The three PSIs are attached to Item 5, Response to Interrogatories.

Department Counsel sent Applicant an interrogatory concerning drug misuse which Applicant answered on June 17, 2016 (Item 5).

After reviewing the results of the background investigations and the responses to the interrogatories, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On August 8, 2016, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement under Guideline H. (Item 1) 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 in the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 14, 2016. He admitted the SOR allegation of daily marijuana use from August 2002 to September 2009, use of marijuana between five and 15 times in July 2015, and use of marijuana as recently as April 2016. (SOR 1.a). He admitted the SOR allegation that he purchased marijuana (SOR 1.b). He also admitted that in July 2015 and April 2016, he used marijuana after having been granted a security clearance in April 2012 (SOR 1.c). However, Applicant denied the SOR allegation that he was arrested in August 2007 for possession of drug paraphernalia. Applicant claims he was not arrested but received a citation for the offense. He admits he was sentenced to one year supervised probation, to perform community service, and he received a fine. (SOR 1.d) Applicant elected to have the matter decided on the written record. (Item 2)

Department Counsel submitted the Government's written case on October 31, 2016. Applicant received a complete file of relevant material (FORM) on November 8, 2016, and he was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. (Item 6) Applicant did not provide additional information in response to the FORM. I was assigned the case on October 1, 2017.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing National Security Adjudicative Guidelines for *Determining Eligibility for access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs, and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.

## **Procedural Issues**

Applicant was advised in the FORM that the summary of the PSIs (Item 5) were not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summaries to make them clear and accurate, and could object to the admission of the summaries as not authenticated by a Government witness. He was additionally advised that if no objections were raised to the summaries, the administrative judge could determine that he waived any objection to the admissibility of the PSI summaries. Applicant did not respond to the FORM, so he did not object to consideration of the PSIs. Since Applicant did not object to consideration of the PSIs, I will consider the information in them in my decision.

### **Findings of Fact**

After a thorough review of the case file, I make the following findings of fact. Applicant is 32-years-old. He graduated from high school in June 2004. He attended technical school for about 18 months but did not receive a degree or certificate. He married in March 2010 and has two children. He has worked for defense contractors since April 2009 as a computer technician. Prior to that time, he worked various jobs and had periods of unemployment. (Item 3, e-QIP, dated February 5, 2015)

Applicant admits, in response to question 23 of the February 16, 2012 e-QIP, that he purchased and used marijuana several times a day from August 2002 until September 2009. He also reported that he realized his error using illegal drugs and left the drug lifestyle. He stated that he does not intend to go back to using illegal drugs because he was a husband and father. (Item 3, February 2, 2012, at 32-33)

Applicant was interviewed by an OPM security investigator on January 11, 2010. He told the investigator that he first used marijuana in August 2000 and used about three times a week until August 2007. He received pleasure from smoking marijuana. His use did not cause him any issues and he was not diagnosed as a drug abuser. He failed a drug test for a job and was not hired because of the positive results. He also told the investigator that he was not arrested for having drug paraphernalia but only received a citation. (Item 5, January 11, 2010 Interview at 3)

Applicant did not list any illegal drug use on the e-QIP he submitted on February 5, 2015, because he believed his marijuana use was more than seven years previous. However, in the August 3, 2015 interview with the OPM agent, he admitted his daily use of marijuana from August 2002 until September 2008, and the failed drug test in 2007. He also again stated his intent not to use marijuana in the future. (Item 5, August 3, 2015 PSI, at 7)

In his response to the interrogatory from Department Counsel, Applicant admitted his use of marijuana from 2006 until September 2009. He admitted using marijuana less than 15 times in July 2015 and once in April 2016. He again said he did not intend to

use marijuana in the future. (Item 5, Response to Interrogatories, dated January 17, 2016)

Applicant admitted his use of marijuana in his response to the SOR. He stated that from 2000 to 2009, he was living the wrong lifestyle. His actions were idiotic and selfish. He was wrong and he made poor choices. He corrected his life style and now works hard to safeguard classified data. (Item 2, Response to SOR, dated September 14, 2016)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Administrative Guidelines. 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 common sense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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 avoided drawing 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, 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 burden of persuasion 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 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 decision 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 and sensitive information).

## **Analysis**

### **Drug Involvement**

The illegal use of a controlled substance to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above. (AG ¶ 24)

Applicant admits that he purchased marijuana and used the illegal drug daily from August 2002 until September 2009. He also admitted to using marijuana about 15 times in July 2015, and once as recently as April 2016. He had been granted eligibility for access to classified or sensitive information in April 2012. Thus, his use of marijuana in July 2015 and April 2016 was after being granted a security clearance. Applicant denied he was arrested for possessing drug paraphernalia. He does admit that he received a citation for possession of drug paraphernalia, appearing in court on the charge, and was sentenced. Applicant’s response that he was not arrested but only received a citation is a distinction without a difference. Marijuana is a controlled substance. These facts raise the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

(a) any substance misuse; and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

I considered the following Drug Involvement Mitigating Conditions under AG ¶ 26:

(a) the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not

cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome his problems, and has established a pattern of abstinence, including but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any further involvement or misuse is grounds for revocation of national security eligibility.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

The mitigating conditions do not apply. Applicant used marijuana daily for seven years, used again 15 times in one month just two years ago, and once just a year ago. His use last year and two years ago was while he had eligibility for access to classified information. Applicant stopped using marijuana for a time but relapsed into use in 2015 and 2016. This made his drug misuse frequent, recent, and deliberate.

Other than Applicant's statements that he does not intend to use marijuana in the future, there are no indications that he has stopped using illegal drugs. Applicant did not execute an agreement that he would not misuse controlled substances again. The only evidence of his intent is his statement. Applicant has not provided sufficient information for me to be convinced that he has stopped misusing marijuana and will not use the illegal drug in the future. There is no evidence of the extent of his participating in and the results of drug treatment and counseling programs. There are no evaluations from counselors as to his prognosis for not using illegal drugs in the future. He did not present any evidence that would bolster or corroborate his non-use of marijuana. His misuse could start at any time. Since Applicant provided no documentation to verify that he no longer uses illegal drugs or evidence that he successfully completed a drug abuse treatment program, his statement of intent not to use illegal drugs in the future is unreliable. Applicant has failed to mitigate drug involvement security concerns.

## **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(d):

(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. Applicant admitted substance misuse from August 2002 until September 2009, and then again in 2015 and 2016. He presented no evidence of counseling and rehabilitation. He stated an intent to not use marijuana in the future, but after the statement he relapsed into marijuana use in 2015 and 2016. Overall, these facts leave me with questions and doubts about Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for access to classified information. For all these reasons, I conclude that Applicant has not mitigated drug involvement security concerns. Eligibility for access to classified information is denied.

## **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.d:	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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THOMAS M. CREAN  
Administrative Judge