



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



In the matter of:	)	
	)	
	)	ISCR Case No. 16-01200
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

08/29/2018

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**Decision**

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HEINTZELMAN, Caroline E., Administrative Judge:

Applicant mitigated the drug involvement and personal conduct security concerns. National security eligibility for access to classified information is granted.

**History of the Case**

Applicant submitted security clearance applications (SCAs) on June 2, 2015, and June 10, 2017. On December 18, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H, drug involvement and substance abuse, and Guideline E, personal conduct. Applicant answered the SOR on January 5, 2018, and requested a decision based upon the written record. The Government converted the case to a hearing on January 31, 2018, and was ready to proceed on February 28, 2018. The case was assigned to me on March 16, 2018. On April 26, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 22, 2018. I convened the hearing as scheduled.

Government's Exhibits (GE) 1 through 4 were admitted, without objection.<sup>1</sup> Applicant testified. I received the completed transcript (TR) on June 7, 2018. I held the

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<sup>1</sup> On February 23, 2018, a discovery package was sent to Applicant. I marked that as Hearing Exhibit (HE) I, but did not admit it into evidence.

record open until June 8, 2018, to allow Applicant to submit additional documentation. He timely submitted AE A through AE C, which are admitted without objection.

### **Findings of Fact**

Applicant is 41 years old. He has worked as an aircraft painter for a defense contractor since February 2017, and requires a clearance for his employment. This is his first security clearance adjudication. Applicant has been married to his wife since 2009, and they have two young children. He also has two teenage stepchildren. In 1994, he served in the U.S. Air Force for approximately five months and received an honorable discharge. He received his associate's degree in 2011, and shortly thereafter, he obtained a Federal Aviation Administration (FFA) license as an aircraft sheet metal mechanic.

### **Guideline H**

In January 2013, Applicant started working for a company (Company A) as an aircraft sheet metal mechanic. Company A is not a defense contractor, but it did have a zero drug policy, and Applicant was required to participate in random urinalyses. Between January 2013 and late 2013, Applicant participated in approximately three to five urinalyses. (Tr. 23-24, 27-29)

In August 2013, Applicant started experiencing sporadic blood in his stool. His wife, who is Native American, recommended that he seek treatment from a traditional Native American medicine man. Applicant had health insurance through his employer, but he chose to take his wife's advice and seek an alternative medical solution to his problem. (Tr. 30, 36-37)

During his Christmas vacation, Applicant traveled six to eight hours to his wife's family's reservation. The visiting medicine man gave him a liquid Native American healing concoction. He drank this substance from a thermos for approximately five days. (Tr. 89-91) Applicant did not ask the medicine man what ingredients were in the substance, rather he trusted the medicine man. Nor did he ask if there were any drugs or illegal substances in the liquid. (Tr. 94) He did not feel like he was under the influence of drugs while he took the substance. (Tr. 23-24, 27-33, 39, 93) Applicant had no further contact with the medicine man. (Tr. 42)

When Applicant returned to work after his holiday vacation, he took a urinalysis. The urinalysis tested positive for THC, and in January 2014, Applicant was terminated by his employer. He disclosed this incident in both of his SCAs and gave very detailed information as to why he believed he tested positive for marijuana. Applicant's two SCAs, December 2015 statement to a government investigator, Answer, and testimony are consistent regarding this issue. (Answer; GE 1; GE 2; GE 3)

After he was terminated from Company A, Applicant sought employment at Company B. During the application process, he disclosed his positive urinalysis. To qualify for a position, Company B recommended that he attend a level 1 treatment

program. He completed the program in April 2014 and was cleared to return to safety sensitive duties. He was not diagnosed as a drug abuser or drug addict. Applicant used marijuana one other time in his life, while he was in high school. (Answer; Tr. 26, 44-45, 77-82, 97-98; GE 3 at 6)

Applicant credibly testified that there would be no further incidents affecting his FAA license and record. "There is a domino effect on the decisions that I make. They don't just affect me; they affect my family." (Tr. 26) Applicant knows that he cannot participate in his wife's rituals and ceremonies because it may jeopardize his FAA license or security clearance. If he were to have a recurrence of the medical issue, he intends to seek treatment from a traditional physician. (Tr. 77)

### **Guideline E**

Applicant did not list three arrests in his June 2015 and June 2017 SCAs. He failed to disclose a 1996 arrest for cocaine possession; a 2002 arrest for driving while intoxicated (DWI); and a 2006 possession of drug paraphernalia arrest. Applicant credibly testified why he did not disclose these arrests in both of his SCAs.

Applicant was arrested in 1996 for drug possession, and the charge was dismissed after he fulfilled the terms of his probation. (Answer; Tr. 49-56) He was unaware it was a felony-level arrest. An employee at the public defender's office told him this incident would not appear on his permanent record; which is why he did not disclose this information in his 2015 SCA. He voluntarily disclosed this arrest, without confrontation, during his 2015 interview. (Tr. 45-50, 57, 95-96; GE 3 at 8)

In 2002, Applicant was arrested for DWI, although his blood alcohol level was .02. He was under the impression that this arrest was expunged from his record. He voluntarily disclosed, without confrontation, this arrest during his 2015 interview. In his Answer, he provided documentation showing the charges were dismissed. (Answer; Tr. 60-63; GE 3 at 9)

Applicant disclosed his 2006 arrest for DWI in both of his SCAs, and his subsequent treatment, and incarceration. He was unaware that he was also charged with possession of drug paraphernalia. This charge was dismissed. (Answer; Tr. 66-68, 110-111; GE 4)

Applicant had assistance from his employer when he completed his first SCA, and he was under the impression he had disclosed all necessary derogatory information. He misread the questions and therefore disclosed convictions, but not all arrests. Applicant did not intend to falsify his SCA. (Tr. 18, 70, 75, Answer)

Applicant explained that the two SCAs are virtually identical due to advice he received from his aunt. Applicant's aunt, a retired 20-year veteran, who held a security clearance, advised him when he completed his second SCA not to deviate in answering questions and to clarify matters during his interview. (Tr. 17, 59, 101) Other than giving information regarding his 1996 and 2002 arrests to the investigator in his December 2015

interview, Applicant did not make any substantive changes to his 2017 SCA, except for updating his address information. (Tr. 58)

Applicant provided potentially derogatory information in both SCAs. He disclosed the positive urinalysis and subsequent treatment. He disclosed his use of marijuana one time while he was in high school. He disclosed that he was fired by several employers, negative financial information, and an unalleged domestic violence situation with his wife. He also disclosed that he was arrested in 2006 and charged with DWI. During the personal subject interview, Applicant volunteered, without confrontation, information regarding the 1996 arrest and 2002 arrest.

Applicant acknowledged that he needed to make improvements in his life and has made efforts to change his environment, the people with whom he associates, and make better choices. (Tr. 72, 98-99) He volunteers and is involved in community service. (Tr. 100) He provided four recommendation letters attesting to his positive character, integrity, and honesty. (Answer; AE A; AE B)

## **Policies**

This case is adjudicated 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), which became effective on June 8, 2017.

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 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 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 national security eligibility will be resolved in favor of the national security."

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 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, but 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 ¶ 25 describes conditions that could raise a security concern and be disqualifying in this case. The following is potentially applicable:

(b) testing positive for an illegal drug.

Applicant’s testimony and the documentary evidence establish the above conditions.

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut or prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

(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; and

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

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

(2) changing or avoiding the environment where drugs used; and

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

Applicant credibly testified that he did not intentionally use marijuana in late 2013. He acknowledged that his choice to seek alternative medical treatment from a Native American medicine man was not prudent. He stated he would not repeat that behavior and recognized the potential risk to both his FAA license and security clearance. Applicant does not have an extensive history of drug abuse, and the 2013 incident was an isolated event that does not cast doubt on his current reliability, trustworthiness, or good judgment. Additionally, the positive urinalysis is mitigated by the passage of time. He attended drug counseling to rehabilitate his FAA license and has taken steps to prevent a recurrence of this issue. There is no evidence that he associates with drug abusers. Mitigation under AG ¶¶ 25(a) and 25(b) was established.

### **Guideline E: Personal Conduct**

The concern under this 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications,

award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

When a falsification allegation is controverted, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.<sup>2</sup> An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.<sup>3</sup> In this case, Applicant denied intentionally falsifying his SCAs.

Applicant failed to disclose derogatory information regarding his criminal history in two SCAs. However, he credibly testified that the omissions were unintentional. In both SCAs, he disclosed derogatory information regarding his employment history, finances, drug treatment, and criminal history. He also volunteered information regarding his arrests to the government investigator, without confrontation. Finally, Applicant relied on advice from a family member and others when he completed his SCAs, which contributed to his failure to disclose all of his arrests. Based upon the totality of the evidence, Applicant's omissions were not deliberate. AG ¶ 16(a) is not applicable. Personal conduct security concerns are concluded for Applicant.

### **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(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. I have incorporated my comments under Guidelines H and E in my whole-person analysis. I also considered Applicant's favorable character evidence,

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<sup>2</sup> See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

<sup>3</sup> ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

including his letters of recommendation. He forthrightly disclosed adverse derogatory information and he was not evasive during his testimony.

Applicant met his burden of proof and persuasion. He mitigated the drug involvement and personal conduct considerations security concerns and established his eligibility for a security clearance.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

### **Conclusion**

It is clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is granted.

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CAROLINE E. HEINTZELMAN  
Administrative Judge