



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02012

**Appearances**

For Government: Rhett Petcher, Esq., Department Counsel  
For Applicant: *Pro se*

10/13/2017

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**Decision**

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KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse) or Guideline E (personal conduct). Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

On October 5, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. Applicant timely answered the SOR and elected to have his case decided on the written record.

Department Counsel submitted the Government's file of relevant material (FORM) on January 26, 2017. Applicant received the FORM on February 1, 2017, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence, and he provided a three-page response to the FORM, which included an amended answer to the SOR and a character reference letter attached (Response). The Government's evidence, identified as Items 1 through 5, is admitted into evidence without objection. The case was assigned to me on October 1, 2017.

In section III of the Government's FORM, Department Counsel amended the SOR in order to conform to the record evidence by adding paragraph 2 under Guideline E (personal conduct) and subparagraph 2.a to state:

You falsified material facts on an Electronic Questionnaire for Investigations Processing certified by you on January 16, 2009, in response to "Section 24, Your illegal use of drugs or drug activity. . . ." Applicant admitted the allegation of deliberate falsification contained in the amendment at SOR ¶ 2.a and initialed beside his answer.

### **Findings of Fact<sup>1</sup>**

Applicant is 29 years old. He obtained a bachelor's degree in 2010, and has been employed as a researcher by a federal contractor since June 2012. Applicant reports no military service, and he has never married. Applicant has held a previous security clearance since April 2009.

In May 27, 2015, Applicant completed a Security Clearance Application (SCA),<sup>2</sup> and in section 23 (illegal drug use) he disclosed his repeated use of various illegal drugs while he possessed a security clearance.<sup>3</sup> He also disclosed that he had been arrested in November 2006 for possession of drug paraphernalia and he was found guilty, but this conviction was later expunged in December 2006. Applicant became the subject of an internal investigation after his employer supposedly received an anonymous tip that he was using illegal drugs. When he was called in by an investigator for the company on April 9, 2015, he admitted to his long-term use of marijuana (MJ) and a variety of other illegal drugs. The illegal drugs, and prescription pharmaceuticals that Applicant admitted to using, which include MDMA, acid, cocaine, OxyContin, psychedelic mushrooms, opium-suboxyn, and Adderall, are listed in the JPAS entries made in April 2015.<sup>4</sup> Applicant corroborated this extensive illegal drug use in his Answer to the SOR and his clearance interview.<sup>5</sup>

In his response to the FORM and his Answer to the SOR dated December 22, 2016, Applicant admitted all of the allegations in SOR ¶¶ 1.a through 1.i, with explanations. He also admitted to the deliberate falsification on section 24 of his January 16, 2009 SCA.<sup>6</sup> In his response to SOR ¶ 1.a, he stated "I affirm. I intend to use marijuana

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<sup>1</sup> Unless stated otherwise, the source of the information in this section is Applicant's May 27, 2015 Security Clearance Application (SCA) (Item 3) and his summary of clearance interview by a background investigator dated March 8, 2016 (Item 4).

<sup>2</sup> Item 3.

<sup>3</sup> Item 3.

<sup>4</sup> Item 5.

<sup>5</sup> Item 4.

<sup>6</sup> Item 2.

in the future when I am legally and contractually able to.” In SOR ¶¶ 1.b and 1.c, he responded “I affirm. Only LSD and mushrooms” (¶1.b) and “only cocaine” (¶1.c). In response to SOR ¶¶ 1.d and 1.e, he clarified that it was “only Adderall and MDMA (molly)” and “only opium” (SOR ¶ 1.e). Applicant elaborated in his Answer to the SOR that much of his substance abuse was while he held a security clearance, which he understood was against the rules. Further, he was reprimanded by his employer and he took a substance-abuse course and counseling from May to June 2015. Through counseling, he learned that he is self-medicating for anxiety. He wanted to be honest and say, “I would use marijuana in the future, but only if federally legalized . . . to cope with my anxiety.”<sup>7</sup> In his clearance interview in March 2016, he stated that he last used MJ with his brother, around the holiday season in late 2015, after he had been reprimanded and completed a substance abuse course.

In regard to the Amendment to the SOR at section III of the FORM, Applicant admitted the allegation that he deliberately falsified section 24 of his earlier, January 2009 SCA, by only identifying MJ and claiming to have used it only “from 08/2006 to 11/2007 . . . during my freshman year in college . . . I have not used it since and have no intention of using it again.”<sup>8</sup> In fact, as he has now admitted, Applicant had engaged in pervasive and long-term, illegal-drug use, and he used MJ about three to five times a week after completing his 2009 SCA. In his clearance interview in March 2016, Applicant stated that he has used MJ less than 12 times since his security clearance was suspended or revoked in 2015. He also added that he not only intentionally provided false information about his illegal drug use on his 2009 SCA, but he also lied about that drug use to the clearance investigator in 2009. He told that investigator that he had stopped using MJ, when in fact, he was still using it.<sup>9</sup>

In his March 2016 clearance interview, Applicant also stated that he had never been drug tested by his employer and he has not been diagnosed as addicted to or dependent on narcotics. Applicant attached a letter dated December 20, 2016, from a senior research engineer at his employer, stating that Applicant is a key employee of the federal contractor and “he has shown to be trustworthy and diligent in maintaining and adhering to security guidelines and regulations.”<sup>10</sup>

## **Policies**

DOD took action in this case 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,

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<sup>7</sup> Response to Form.

<sup>8</sup> Item 2, section 26.

<sup>9</sup> Item 4, p. 7.

<sup>10</sup> Response to Form – attachment.

1992), as amended (Directive); and the adjudicative guidelines (AGs) implemented by DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017.<sup>11</sup> Accordingly, I have applied the June 8, 2017 AGs in this decision.

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, 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(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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, 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 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 an applicant may deliberately or inadvertently fail to safeguard classified information.

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<sup>11</sup> Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either AG.

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 and Substance Misuse**

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

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 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana and other illegal drugs while holding a security clearance. He also expressed an intent to continue using marijuana in the future to treat his anxiety, under certain circumstances. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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 were 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 has continued to use MJ as recently as December 2015, even after he was reprimanded for illegal drug use and lost his security clearance. He has not abstained and appears to be philosophically opposed to current federal drug laws. In addition to MJ, he used an assortment of other illegal or unprescribed drugs, including OxyContin, cocaine and Adderall. He has now admitted to deliberately failing to disclose this illegal drug use on his 2009 SCA. He provided no evidence of completion of a substance abuse-course or rehabilitation or a favorable prognosis from a medical professional. Moreover, he seems recalcitrant and bent on continuing his illegal drug use in the future under certain circumstances. He was candid in stating that he may continue to use MJ to treat his anxiety if it is legalized.

Applicant appears to be sincere, but that is insufficient to mitigate the well-established pattern of illegal drug use. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable, and AG ¶ 26(b) is partially applicable.

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

The security concern for personal conduct is set out in AG ¶ 15, as follows:

The Concern. 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. The following normally will result in

an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security 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, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; 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. The following disqualifying conditions are potentially applicable:

(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant has admitted to falsifying the 2009 SCA about the extent and duration of his illegal drug use, and he lied to the OPM clearance interview investigator about it. AG ¶ 16 (a) and (b) apply and the focus shifts to a determination of which, if any of the mitigating conditions apply.

Conditions that could potentially mitigate security concerns include:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

My analysis above under administrative guideline H is the same under this administrative guideline E and is herein incorporated by reference. Applicant deliberately falsified his 2009 SCA and later lied in the clearance interview about his drug use. He claims to have completed a substance-abuse course and had counselling, but he produced no evidence.

### **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. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has worked over five years for a federal contractor directly supporting DOD's mission and he is a key employee. He has completed a substance-abuse course and counseling. Most importantly, Applicant did not disclose the specific security violations alleged in the SOR on his 2009 SCA, and he has not unequivocally declared his intention to refrain from further use of illegal drugs. He has not met his burden of persuasion.

Applicant's drug involvement and substance misuse remain a security concern. These offenses were not minor or infrequent, and they were not committed under such unusual circumstances that they are unlikely to recur. There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement or taken steps to alleviate the stressors or circumstances that contributed his behavior to insure that it does not recur. He has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guidelines H and E.

### **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:

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|--------------------------------|-------------------|
| Paragraph 1, Guideline H:      | AGAINST APPLICANT |
| Subparagraphs 1.a through 1.i: | Against 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 interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Robert J. Kilmartin  
Administrative Judge