



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02679

**Appearances**

For Government: Erin P. Thompson, Esq., Department Counsel  
For Applicant: *Pro se*

07/02/2018

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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) and Guideline E (personal conduct). Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on March 17, 2016. On August 30, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, and E. The DOD CAF 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 (AGs) implemented by DOD on June 8, 2017.

Applicant answered the SOR on September 21, 2017, admitting all of the SOR allegations with explanations. With respect to the falsification allegations in SOR ¶¶ 2.c, 2.d, 2.e, and 2.f, he explained that he miscalculated the dates concerning the seven-year period leading up to his completion of the SCA. Therefore, I will consider these responses to be denials, since he suggests he did not intend to falsify his SCA. He also requested a

hearing before an administrative judge. The case was assigned to me on May 14, 2018. On May 24, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 12, 2018. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 3 were admitted into evidence without objection. At the hearing, Applicant was represented by his sister who, served as his personal representative. (Tr. 10) Applicant testified and presented favorable testimony from two witnesses, who both attested to his work ethic, honesty, and trustworthiness. Department Counsel's motion to withdraw the falsification allegations at SOR ¶¶ 2.c and 2.d was granted. (Tr. 58) DOHA received the transcript (Tr.) on June 20, 2018.

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

Applicant is 53 years old. He graduated from high school in 1983 and he had some college courses. Applicant was married in 1989 and divorced in 2008. He has been married again since 2016, and he has two adult children and a 14-year old daughter. The youngest child lives with her mother, and Applicant pays \$680 a month in child support. (Tr. 65) His adult son has special needs and is not independent. Applicant has been employed by federal contractors at a military installation since 2000. Applicant is presently employed as an HVAC mechanic. He suffered head trauma and extensive injuries when he was driving a vehicle that was hit by a train, and his passenger killed in 1985. (Tr. 30)

On May 30, 2007, Applicant completed a Security Clearance Application (SCA),<sup>2</sup> and in section 24 (use of illegal drugs) he responded "no" to the question about any illegal drug use since age 15, or in the last 7 years. This was contradicted by later disclosures in his personal subject interview (PSI) and his Answer to the allegation at SOR ¶ 1.b where he admitted purchasing and using marijuana (MJ) with varying frequency from 1979 to 2002. Thus, he was alleged to have falsified his response on the 2007 SCA. In August 2017, Applicant was sent interrogatories asking him to verify the accuracy of the information in the PSI and to make any necessary changes.<sup>3</sup> He made one change concerning the city where he attended high school, but left intact the statement that he used MJ up to 2002. (Tr. 59) Again, in his September 2017 Answer to SOR allegations at ¶¶ 1.b and 2.e, Applicant reiterated his MJ use up to 2002.

Applicant testified that he realized he had made a mistake after he enlisted the aid of his sister (personal representative) to prepare for the hearing. His putative "mistake"

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<sup>1</sup> Unless stated otherwise, the sources of the information in this section are Applicant's March 17, 2016 Security Clearance Application (SCA) (GE 1); his earlier May 30, 2007 SCA (GE 2); and his summary of a June 29, 2017 personal subject interview (PSI) that was adopted in his answers to interrogatories signed on August 17, 2017 (GE 3).

<sup>2</sup> GE 2.

<sup>3</sup> GE 3.

was made in stating he used MJ up to 2002 vice 2000.<sup>4</sup> (Tr. 60-61) He testified that he had been nervous and confused when he spoke to the clearance interviewer, and he forgot about his job at the military installation at Morale Welfare and Recreation (MWR), which lasted from 2000 to 2002. (Tr. 61-62) After his sister got involved in preparing his case, Applicant recalled that he was subject to drug testing in that MWR job and he passed an entry urinalysis test. (Tr. 69) He testified that this was a life-changing opportunity at MWR and he wanted to clean up his act. (Tr. 33) He stopped associating with friends who used MJ and stopped smoking MJ in late 1999 in preparation for his MWR job. (Tr. 33) Applicant provided no evidence of negative urinalyses exams from 2000 to 2002, or witnesses from that period, to corroborate his testimony that he was drug free. He did submit urinalysis results from 2015. (AE C)

In SOR ¶¶ 1.a through 2.b, Applicant admitted getting arrested in September 2015 and charged with possession of MJ, speeding, and driving under the influence (DUI). (AE B) Applicant testified that on September 11, 2015, he had a few drinks at a local restaurant while he was waiting for a girlfriend to get off work. (Tr. 40) He noticed that she was cut and bruised due to seizures she had endured, and she told Applicant that MJ helped mitigate her seizures. (Tr. 40) Applicant then asked other patrons for MJ and he “can’t remember if he bought a small amount” or if it was given to him. Applicant told the clearance interviewer that he purchased a small amount of MJ. (Tr. 51) Anyway, he procured less than one cigarette’s worth of MJ on behalf of the girl, whom he only remembered by her first name. He got on his motorcycle and drove away with the woman following in her car. (Tr. 42) Applicant hasn’t seen the woman since that night. (Tr. 52) Applicant had a security clearance at the time, and he disclosed this 2015 arrest on his March 2016 SCA. (Tr. 57)

Applicant testified credibly that he had difficulties with anxiety and stress and that is why he used MJ earlier in his life. It is a challenge for him to remember details. He was nervous and stressed when he provided the clearance interview. (Tr. 45) He never sold MJ and he has never been reprimanded on the job. (Tr. 39) With his sister’s devoted assistance, Applicant prepared and provided a letter of intent to abstain from any all illegal drug use going forward conditioned upon the automatic revocation of his clearance, if he re-offends. (Tr. 50, AE D) He also provided four favorable character reference letters (AE A) and two impressive live witnesses at the hearing. They both testified to Applicant’s honesty, trustworthiness and reliability and stated they had no issues with him having a security clearance. (Tr. 73-79)

## **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, 1992), as amended (Directive); and the adjudicative guidelines (AGs) implemented by DOD on June 8, 2017.

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<sup>4</sup> If true, his marijuana use would have been more than seven years before his 2007 SCA, and thus, not reportable.

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. 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

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

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.

¶ 25: The guideline notes several conditions that could raise security concerns under AG. 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; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted purchasing and using MJ with varying frequency from 1979 to 2002. More recently, he purchased a small amount of MJ in September 2015 while he possessed a security clearance and was granted access to classified information. 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's use of MJ from 1979 to 2002 has been mitigated by the passage of time. He last used MJ over 16 years ago. Applicant's situation and circumstances have changed and he has provided evidence of his disassociation from persons who use illegal drugs. Applicant also provided a statement of his intent to abstain in the future. However, his arrest for possession of MJ and DUI in 2015 displays a disappointing lack of judgment and trustworthiness. Applicant had stopped using MJ for about 13 years at that point, and he possessed a security clearance when he was arrested. He betrayed his fiduciary responsibility to the Government, and the trust placed in him by dint of his clearance. I am not confident that his drug use is not likely to recur under stressful circumstances, and it continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) and AG ¶ 26(b) are only 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 national security 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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 individual may not properly safeguard classified information. This includes but is not limited to, considerations of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior; and

(3) a pattern of dishonesty or rule violations.

Applicant has admitted to purchasing and using MJ between 1979 and 2002. Despite eleventh-hour efforts at the hearing to modify the dates for use to end in 2000, I must accept Applicant's three consistent earlier statements that he used MJ up to 2002 as credible. He told the clearance interviewer that in June 2017, reiterated it in notarized answers to interrogatories, and again in his Answer to the SOR. Applicant also admitted to getting arrested for possession of MJ, speeding, and DUI, while he possessed a security clearance. AG ¶¶ 16 (b), (b) and (d)(3) apply and the focus shifts to a determination of which, if any of the mitigating conditions apply.

Under AG ¶ 17, 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

(g) association with persons involved in criminal activities was unwitting, 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.

My analyses above under adjudicative Guideline H is the same under this this adjudicative Guideline E, and are herein incorporated by reference. Applicant has changed his environment and stopped associating with drug users. However, he re-offended less than three years ago by purchasing MJ. He failed to answer the questions in section 24 of his 2007 SCA honestly. The Government has to rely on forthright cooperation and complete candor by Applicants seeking the privilege of a security clearance. While AG ¶¶ 17(c),(d), and (e) may have some applicability, they are not enough to overcome Applicant's well-established violations of the law and ignoring rules, such as when he purchased MJ while possessing a security clearance.

### **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 provided almost 20 years of dedicated support to the defense industry and he is suffering the lingering effects of a tragic automobile accident. He has a fiercely loyal, protective, and remarkably devoted sister and a strong family support network. Most importantly, however, Applicant did not resolve all of the specific violations alleged in the SOR and he had multiple opportunities to correct any putative mistakes during the SCA process.

Applicant's purchase and use of MJ and inability to follow rules and instructions remain security concerns. His transgressions 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 taken sufficient steps to alleviate the stressors or circumstances that contributed to his drug use, to insure that such behavior 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:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b and 1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Subparagraphs 2.c – 2.d:	Withdrawn
Subparagraphs 2.e – 2.f:	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