



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



In the matter of: )  
)  
) ISCR Case No. 17-04019  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Michelle P. Tilford, Esq., Department Counsel  
For Applicant: Ronald C. Sykstus, Esq.

11/05/2018

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

**Statement of the Case**

On January 3, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and H. Applicant responded to the SOR on January 18, 2018, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on July 13, 2018, and reassigned to me on July 26, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 13, 2018, scheduling the hearing for August 18, 2018. An amended notice was issued on August 7, 2018, changing the courtroom location, while keeping the date and time. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Memorandums from U.S. Government officials about marijuana were marked as

Hearing Exhibit (HE) I and accepted for administrative notice. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through EEEEE, which were admitted without objection.

### **Findings of Fact**

Applicant is a 51-year-old employee of a defense contractor. He has worked for his current employer since November 2015. He seeks to retain a security clearance, which he has held with some breaks since 2008. He has bachelor's degrees, which were awarded in 1994 and 2014, and a master's degree, which was awarded in 2010. He is married with an adult child.<sup>1</sup>

Applicant was diagnosed with glaucoma when he was 16 years old. He also suffers from diabetes. He smoked marijuana from the 1990s to at least May 2015 to assist him in relieving his glaucoma symptoms, including while holding a security clearance. Marijuana is recognized as an effective treatment for glaucoma. He was not prescribed medical marijuana, and he does not live in a state that permits medical marijuana.<sup>2</sup>

In May 2015, Applicant tested positive in a pre-employment drug test, indicating the use of tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana. There is some evidence to the contrary (see below), but he testified that he has not used marijuana since the May 2015 drug test, and he does not intend to use it again. He has other medication that he uses to treat his glaucoma. He signed a statement of intent not to use any illegal drugs in the future, with an acknowledgement that any future illegal drug use would be grounds to revoke his national security eligibility.<sup>3</sup>

Applicant was prescribed dronabinol in 2015. Dronabinol, sold under the brand name Marinol, is a man-made form of THC. It is a Schedule II controlled substance, which means it can be prescribed by a doctor. Marijuana is a Schedule I controlled substance. Under federal law, it cannot legally be prescribed by a doctor even in those states that have legalized medical marijuana. Dronabinol is used to treat nausea and vomiting caused by cancer chemotherapy. It is also used to treat loss of appetite and weight loss in patients with HIV infection.<sup>4</sup>

Applicant testified that he was first prescribed dronabinol in 2014. He submitted a July 2015 prescription for seven medications, including dronabinol. The prescription called for 30 capsules with two refills. The other medications included eye medication for his glaucoma. Applicant testified the dronabinol was not for his glaucoma; it was to treat his nausea, eating disorder, and diabetes. He stated that his doctor was concerned

---

<sup>1</sup> Tr. at 15-20, 36, 55; GE 1; AE SSSS, TTTT, XXXX.

<sup>2</sup> Tr. at 21-25, 32-33, 36, 55; Applicant's response to SOR; GE 4; AE B, C.

<sup>3</sup> Tr. at 23-27, 33-34, 42-45, 60; Applicant's response to SOR; GE 4, 5; AE A, CCCCC, DDDDD.

<sup>4</sup> Tr. at 39, 45-46 GE 4; AE DDDDD.

that Applicant had lost too much weight. He prescribed the drug so that Applicant could increase his appetite and gain weight. Applicant listed his height and weight as 5'11" and 210 pounds on Questionnaires for National Security Positions (SF 86) submitted in 2007, 2015, and 2016. He testified that he weighed 192.<sup>5</sup> He was examined by the physician who treats his glaucoma in March 2018. This was not the doctor that prescribed the dronabinol. The doctor noted in the medical records:

Patient advised that they have background diabetic retinopathy which is stable and does NOT require laser intervention. Recommend patient work carefully with PMD and/or diabetic specialist to maintain optimal blood sugar, blood pressure, and cholesterol to minimize the risk of development or progression of diabetic complications. Additionally, the importance of healthy nutrition, frequent exercise, weight management, and avoiding smoking was emphasized.<sup>6</sup>

Applicant submitted an SF 86 in November 2007. He intentionally provided false information when he denied using any illegal drugs in the previous seven years.<sup>7</sup>

Applicant submitted another SF 86 in December 2015. Under the drug questions, he answered that he used "THC (such as marijuana, weed pot hashish, etc.)" and specifically "[w]eed," with the first and most recent use both in May 2015. He wrote that it was "[m]edical use to treat nausea and vomiting. Once. Once." ("Once" repeated in original) He wrote that he did not intend to use marijuana again because his doctor prescribed Marinol as a substitute for his marijuana use. He did not list his additional marijuana use, nor did he mention his glaucoma.<sup>8</sup>

Applicant admitted that he intentionally provided false information on the December 2015 SF 86 when he failed to list the extent of his marijuana use. He stated that he reported his marijuana use in May 2015 because of the positive drug test. He stated that if not for the positive drug test, he would not have listed any illegal drug use. He stated that he had to remain consistent with the previous SF 86, even if it was a consistent lie.<sup>9</sup>

Applicant submitted a third SF 86 in August 2016. Under the drug question he answered that he used "THC (such as marijuana, weed pot hashish, etc.)" and specifically "Dronabinol 2.5 MG." He estimated that the first use was in January 1999 and the last use was in August 2016. He wrote that it was "[m]edical use to treat

---

<sup>5</sup> Tr. at 39-42, 47, 53; AE DDDDD.

<sup>6</sup> AE CCCCC.

<sup>7</sup> Tr. at 28-29, 35, 50; GE 3.

<sup>8</sup> GE 2.

<sup>9</sup> Tr. at 29-31, 38-39, 43, 47, 50.

nausea, vomiting and to treat loss of appetite and weight loss.” He did not report any marijuana use.<sup>10</sup>

Applicant initially denied intentionally providing false information on the August 2016 SF 86 when he failed to list his marijuana use. He stated that he was confused. He later appeared to admit that he lied on the SF 86.<sup>11</sup>

Applicant was interviewed for his background investigation in July 2017. He told the investigator that he had been smoking marijuana for about 20 years to treat his glaucoma. He stated that he still used marijuana, as needed, for his glaucoma. He later stated that he was not currently using marijuana, and he was willing and able to discontinue his marijuana usage if required, but it would be difficult for him to do so. When he responded to DOHA interrogatories in December 2017, he wrote that his last marijuana use was in May 2015, and that he did not intend to use marijuana again.<sup>12</sup>

Applicant admitted the Guideline H allegations in his response to the SOR, including that he “used marijuana with varying frequency from about the mid-1990s to about 2017.” He wrote that “the use of marijuana in my past starting about mid 1990s to about 2017 is for medical use to treat my diagnosed disease of glaucoma naturally.” He also admitted the SOR allegation that he “intend[s] to continue to use marijuana.” He stated that he did not believe his marijuana use to treat glaucoma naturally should cause him to lose his security clearance. He wrote about the falsification allegations in the SOR:

I was choosing the best answer to the questions. I did not intend to hold back information. I do not believe that this should cause me to lose my security clearance.

Applicant submitted an extensive amount of documents and letters attesting to his excellent job performance and strong moral character. He is praised for his dedication, dependability, professionalism, initiative, intelligence, diligence, work ethic, responsibility, and integrity.<sup>13</sup>

## **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.

---

<sup>10</sup> GE 1.

<sup>11</sup> Tr. at 39-42, 47-51.

<sup>12</sup> GE 4.

<sup>13</sup> AE D-RRRR.

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

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);
- (b) testing positive for an illegal drug;
- (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 possessed and used marijuana from the 1990s until at least May 2015. He has held a security clearance since 2008. He tested positive for THC after a pre-employment drug test in May 2015. AG ¶¶ 25(a), 25(b), 25(c), and 25(f) are applicable.

SOR ¶¶ 1.d and 2.b (SOR ¶ 2.b cross-alleges the SOR ¶ 1.d allegation under personal conduct) allege that Applicant intends to continue to use marijuana. There is insufficient evidence to support those allegations. AG ¶ 25(g) is not applicable. SOR ¶¶ 1.d and 2.b are concluded for Applicant.

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; 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 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.

Marijuana helps to relieve Applicant's glaucoma symptoms. I understand why he smoked marijuana, but I cannot condone its use. He claims that he has not used marijuana since May 2015. He signed a statement of intent not to use any illegal drugs in the future, with an acknowledgement that any future illegal drug use would be grounds to revoke his national security eligibility. His testimony about when he ended his marijuana use may be true, but he has lied so many times that his testimony is not credible. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. His well-established pattern of illegal drug use is not mitigated.

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

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

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.

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;

(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 individual may not properly safeguard classified or sensitive information;

(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.

Applicant intentionally provided false information about the extent of his marijuana use on three SF 86s, which were submitted in 2007, 2015, and 2016. AG ¶ 16(a) is applicable.

Applicant's marijuana use while holding a security clearance is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;



(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.

Applicant lied on his 2007 SF 86 and received a security clearance. He continued to use marijuana while holding a security clearance and lied on two subsequent SF 86s. He admitted that the only reason he reported his marijuana use in May 2015 was because of the positive drug test. He lied in his response to the SOR when he wrote that he did not intend to hold back information on the SF 86s. He provided inconsistent and contradictory testimony at his hearing. There was very little in Applicant's testimony that I can accept at face value. Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

### **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 E and H in my whole-person analysis. I also considered Applicant's strong character evidence and that his marijuana use was motivated by his glaucoma.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guidelines E and H.

### **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.c:    | Against Applicant |
| Subparagraph 1.d:         | For Applicant     |
| Paragraph 2, Guideline E: | Against Applicant |
| Subparagraph 2.a:         | Against Applicant |
| Subparagraph 2.b:         | For Applicant     |
| Subparagraphs 2.c-2.g:    | Against Applicant |

### **Conclusion**

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.

---

Edward W. Loughran  
Administrative Judge