



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 18-00488

**Appearances**

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

07/31/2018

**Decision**

KILMARTIN, Robert J., Administrative Judge:

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

**Statement of the Case**

On March 2, 2018, 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 in lieu of a hearing.

Department Counsel submitted the Government's file of relevant material (FORM) on April 10, 2018. Applicant received the FORM on April 16, 2018, 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 no response to the FORM. The Government's evidence, identified as Items 1 through 3, is admitted without objection. Department Counsel withdrew the allegation of falsification in SOR ¶ 2.b. The case was assigned to me on July 24, 2018.

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

Applicant is 27 years old. He graduated from high school in 2010 and obtained his bachelor's degree in 2014. He has been employed as an operations officer analyst at a federal contractor since March 2016. Previously, Applicant was employed as a trading analyst for a large bank from May 2014 to August 2015 when he left by mutual agreement because he was an employee at will. Applicant claims that he was forced out due to racial profiling by managers at the bank, which was located in a southern state. He was then unemployed for seven months. Applicant reports no military service, and he has never married. Applicant has not previously held a security clearance.

On May 23, 2016, Applicant completed a Security Clearance Application (SCA), and in section 23 (illegal use of drugs or drug activity) he responded "no" to questions about illegal drug use and/or misuse of prescription drugs within the last seven years. Yet, in his Answer to the SOR (Answer), and Personal subject interview (PSI) he admitted to using marijuana (MJ) from approximately 2006 to October 2017, while he was in high school and college. In his PSI, Applicant stated that he used MJ only 2-4 times during high school, and he has no intent to use it in the future. In his Answer and PSI, Applicant also admitted to using prescription oxycodone that was not prescribed to him, on one occasion after he completed his SCA. He took three pills out of curiosity. It was his roommate's prescription, and Applicant retrieved it out of the trash can after she discarded it, unbeknownst to the roommate. It caused itching and it was not a positive experience. (Answer) His peers told Applicant that the oxycodone pills (3) would help with anxiety, but it did not have that effect on him. He stated no intent to ever use it again in the future. (Answer)

Applicant claims that he forgot about his MJ use when he completed his SCA, and he did not intend to deliberately falsify his May 2016 e-QIP. He subsequently used MJ in September 2017 with a friend in New York, and again in October 2017, when he succumbed to peer pressure. (PSI) He self-reported this MJ use to his facility security officer (FSO). SOR ¶¶ 2.a and 2.b allege falsifications when Applicant completed his SCA. In his Answer, Applicant credibly states that "I did not label marijuana as a drug because it is legal in some states. I told the investigator very willingly because I wanted clarification on the use of marijuana. I did not intentionally deceive the investigator or withhold information."

In his PSI in October 2017, Applicant was asked about his future intentions with respect to drug use. "When asked if subject had any intentions of future use of illegal drugs, subject stated that he would be open to the idea of using marijuana again if he didn't have a job that required him not to use."<sup>2</sup>

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<sup>1</sup> Unless stated otherwise, the source of the information in this section is Applicant's May 23, 2016 Security Clearance Application (SCA) (Item 2) and his summary of clearance interview by background investigators dated October 19, 2017 (item 3).

<sup>2</sup> Item 3, PSI at p. 5.

## 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.

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**

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; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used MJ during high school and college, and twice in late 2017 after he submitted an SCA. He also admits to using oxycodone one time out of curiosity. His statements to the OPM investigator did not unequivocally reject the prospect of future use of MJ, if Applicant was not encumbered by a job that prohibited use of illegal drugs. 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; 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.

Applicant did not provide any evidence that he has disassociated from friends who use illegal drugs, or any letter of intent to abstain in the future. He continued his sporadic use of MJ as recently as October 2017. While his high school and college use of MJ has been mitigated by the passage of time, his 2017 MJ use was less than one year ago, and it was after Applicant submitted his SCA. Applicant can not reasonably assert that he was unaware that his MJ use conflicted with federal law, after completing the SCA. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is only partially applicable, and AG ¶ 26(b) does not apply.

### **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.

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; and

(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.

I find that Applicant did not have the intent to deliberately falsify the SF-86 form as alleged. He lived in a state where MJ use is legal, and he seems culturally accustomed to cavalier use of MJ in social settings. His use of MJ as a student was unremarkable. It is understandable that he would have confusion about the illegality of MJ, and forget about it when completing his SCA. His use of MJ after submitting the SCA is more egregious. Applicant self-disclosed this 2017 MJ use to his FSO. This undermines any suggestion of intent to falsify the SCA or deceive the government. The falsification allegation is not substantiated. AG ¶¶ 16(a) and 16(b) do not apply

### **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. Most importantly, Applicant did not resolve the specific violations alleged in the SOR, and he has not unequivocally declared his intention to refrain from further use of illegal drugs.

Applicant's drug involvement remains 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 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 Guideline 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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	For APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Withdrawn

### **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