



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



In the matter of: )  
)  
) ISCR Case No. 14-03154  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ross Hymans, Esq., Department Counsel  
For Applicant: Matt Hughes, Esq.

11/21/2015

**Decision**

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, Applicant mitigated drug involvement and personal conduct security concerns. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 29, 2008, to obtain a security clearance required for his duties in the U.S. Army. After an investigation conducted by the Office of Personnel Management (OPM), Applicant was granted access to classified information including Sensitive Compartmented Information (SCI). He submitted another e-QIP on June 18, 2013, to retain his access to classified information which is required for his employment with a defense contractor. After another investigation conducted by OPM, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On April 19, 2015, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline E). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of

Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant answered the SOR on June 23, 2015. He admitted the three allegations of personal conduct under Guideline E, and the two allegations of drug use under Guideline H. Department Counsel was prepared to proceed on August 10, 2015, and the case was assigned to me on September 17, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 30, 2015, scheduling a hearing for October 14, 2015. I convened the hearing as scheduled. The Government offered six exhibits, which I marked and admitted into the record without objection as Government Exhibits (GX) 1 through 6. Applicant testified, and offered two exhibits which I marked and admitted into the record without objection as Applicant Exhibits (AX) A and B. I kept the record open for Applicant to submit additional documents. Applicant timely submitted one additional document which I marked and admitted into the record without objection as AX C. (GX 7, e-mail, dated November 16, 2016) DOHA received the transcript of the hearing (Tr.) on October 22, 2015.

### **Findings of Fact**

Applicant's admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is a 28-year-old high school graduate. He attended one semester of college in 2005. He served on active duty in the Army from April 2008 until November 2011. He received an honorable discharge as a specialist (E-4). He served a tour in Iraq from July 15, 2009 until February 2011. He married in November 2010 and divorced in February 2011. He has no children. He has been employed in the same analyst position with different contractors since 2012. Applicant presented Certificates of Appreciation from the federal law enforcement office that he supports with his analysis work. (Tr. 17-22; Gov. Ex. 1, e-QIP, dated April 29, 2008; GX 2, e-QIP, dated June 18, 2013; AX B, Certificates of Appreciation, January and February 2015; AX C, DD 214)

The SOR alleges, and Applicant admits, that he used marijuana at various times from September 2005 until December 2011 (SOR 1.a), and after being granted access to classified information in July 2008 (SOR 1.b). All information concerning his marijuana use was provided by Applicant either in his e-QIP or in response to questions from a security investigator. Applicant also admits that he told a security investigator on May 14, 2008, that he does not intend to use illegal drugs again (SOR 2.a), and that he used marijuana for the first and only time in September 2005 (SOR 2.b). He did not tell the security investigator that he used marijuana in 2007 prior to entering the Army in April 2008. Applicant told a security investigator on September 24, 2013, that he had not used marijuana while in the U.S. Army and while having access to classified information (SOR 2.c). He admitted to using marijuana in November 2011 as he was leaving active duty.

On his first application for a security clearance submitted shortly after he entered active duty in the Army, Applicant admitted to one-time experimental use of marijuana in September 2005 while a college student. He purchased a small amount of marijuana and used it by himself in his home. (GX 1, e-QIP, dated April 29, 2008). Applicant was interviewed by a security investigator on May 14, 2008. He admitted his September 2005 use of marijuana. He told the investigator that he did not like the feeling he received from marijuana and did not continue to use marijuana. He stated he had no "future intent to smoke marijuana or use any other illegal substance" (Tr. 27-28, 33-34; GX 3, Personal Subject Interview, dated May 14, 2008).

Applicant submitted a second e-QIP to update his eligibility for access to classified information on June 18, 2013. It had been five years since his last application for a security clearance, and he was now employed as a civilian by a defense contractor. On this e-QIP, he noted that he used marijuana for experimental reasons with a friend in March 2007, as well as about five times after leaving active duty. He did not disclose his 2007 use of marijuana on his April 2008 e-QIP. He told his recruiter about his marijuana use in 2007. His recruiter told him that his limited use of marijuana in 2007 was not the type of marijuana use that concerned the Army. The recruiter did not tell him to lie about his marijuana use but indicated the use was not pertinent. Since he believed the experimental use of marijuana did not concern the Army, he did not include the 2007 use on his e-QIP. (Tr. 34-36)

Applicant was granted access to classified information while on Army active duty from April 2008 until November 2011. He did not use marijuana or any illegal substance for the over three years he was on active duty. He was tested for drug use numerous times while on active duty, and since starting work as a civilian analyst in 2012, with negative results. When Applicant was out processing from the Army in November 2011, he used marijuana four or five times during and shortly after his out processing from the Army. During the out processing, Applicant had left his barracks and was living with a friend off the military installation. He was "read out" of his access to classified information and SCI during his out processing, but he is unsure if he had been read out before he used marijuana in November 2011. He disclosed this use on his June 18, 2013 e-QIP, and admitted using marijuana while possessing a security clearance. He noted on the e-QIP that he had left the Army, was unemployed, and was thinking of returning to college. In response to another question on the e-QIP concerning any other use of an illegal substance while possessing a security clearance, Applicant answered "no". He admitted on the June 2013 e-QIP to using marijuana 12 to 15 times in his life.

In response to questions from the security investigator on September 24, 2013, Applicant said he had not used marijuana while holding a security clearance or while in the Army. Since he was no longer performing Army duties and was not living on the installation, he did not believe he was subject to the Army rule on drug use. About a month after leaving the Army, he realized he missed analyst work and started looking for an analyst position. He knew he could not use marijuana while in an analyst position, so he stopped using marijuana in December 2011. (Tr. 32-34; GX 4, Personal Subject Interview, dated September 24, 2013)

Applicant self-referred to an addiction service program for an evaluation in June 2015. He underwent a variety of substance abuse evaluation tests. The tests indicate no alcohol abuse, and a past history of low-level marijuana abuse. He was evaluated by a licensed clinical social worker and substance abuse counselor who is the program director for the addiction services. The counselor's report noted Applicant's early marijuana use and that he relapsed to marijuana use in November 2011 in response to multiple social stressors. The report noted that Applicant realizes that marijuana is not a positive stress management tool. The report also noted that Applicant has not used any illegal substance since late 2011. His marijuana use was diagnosed as in sustained full remission. Based on his test results and evaluation, the counselor did not recommend any substance abuse or mental health treatment. (AX A, Report, dated June 22, 2015)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 access to classified information will be resolved in favor of 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel. . ." The applicant has the burden of persuasion 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 the applicant may deliberately or inadvertently fail to protect or 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.

## **Analysis**

### **Guideline H, Drug Involvement**

The use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Drugs are defined as mood and behavior altering substances, including drugs material and other chemical compounds identified and listed in the Controlled Substances Act of 1970. Marijuana or cannabis is included in the Schedule 1 list. (AG ¶ 24)

Applicant used marijuana at various times from September 2005 until December 2011. He admitted using marijuana after being granted a security clearance. While it may be unclear whether Applicant was still holding a security clearance when he used marijuana in November 2011, the disqualifying condition as noted below raises use of marijuana after being granted a security clearance. Applicant's use of marijuana in 2011 was after being granted a security clearance in 2008. Applicant's use of marijuana raises the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

- (a) any drug use; and
- (g) any illegal drug use after being granted a security clearance.

I considered the following Drug Involvement Mitigating Conditions under AG ¶ 26:

- (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;
- (b) a demonstrated intent not to abuse drugs in the future, such as; (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation); and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirement,

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

These mitigating conditions apply. Applicant admits to intermittent limited use of marijuana as a student before entering the Army and as he was leaving the Army. He was at a low point in his life at the time he left the Army. He used marijuana a total of 12 to 15 times in his life. He has not used illegal drugs since late 2011. Applicant realizes that he is an adult and a security analyst and as such he cannot use illegal substances. He stated a clear intent not to use illegal drugs in the future. His last use of marijuana was over four years ago, his use was infrequent, and the use happened under circumstances that are now unlikely to recur. Applicant's environment is now one of maturity and a professional life that prohibits illegal drug use. While Applicant was not enrolled and did not complete a substance abuse program, he did receive a favorable evaluation and prognosis from a duly qualified medical professional. There has been an appropriate period of abstinence, and a change in lifestyle and circumstance. Applicant mitigated security concerns for drug involvement.

## **Personal Conduct**

Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified and sensitive information. Of special interest is any failure to provide truthful and candid answers during the process to determine eligibility for access to classified information or any other failure to cooperate with this process (AG ¶ 15). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified or sensitive information. Authorization for a security clearance depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified or sensitive information is in the best interest of the United States Government.

While there is a security concern for a deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive.

The SOR alleges that Applicant did not provide full, complete, and accurate information concerning his drug use in responses to questions from security investigators. There is evidence to indicate that Applicant may not have provided full, complete, and accurate information to the security investigators. Applicant's failures potentially raise the following security concerns under Personal Conduct Disqualifying Condition AG ¶ 16(b) deliberately providing false and misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant denied that he intentionally did not provide full, complete, and accurate information to security investigators. Applicant told the security investigator in May 2008 that he never intended to use illegal drugs in the future. At the time of the interview, it was Applicant's intent not to use drugs in the future. He did not use illegal drugs for almost four years while in the Army indicating his intent in 2008 was not to again use illegal drugs. His limited use of marijuana as he left active duty in November 2011 does not establish that he lied to the investigator about never intending to use illegal drugs again.

Applicant used marijuana on a limited basis with a friend in 2007 prior to entering the Army. He did not disclose this use on his May 2008 e-QIP because he did not believe his limited marijuana use under the circumstances was pertinent and an Army concern. This belief was based on comments and guidance from his recruiter. His failure to list the use was not deliberate but the result of a wrong understanding of the Army's concern for use of illegal substances. Applicant noted his 2007 use of marijuana on his June 2013 e-QIP. By that time, he had been in the Army for almost four years, had been eligible for access to classified information both as a soldier and a civilian for over five years. He was honest and truthful because he knew what conduct and actions to list on the e-QIP.

Applicant admits using marijuana in November 2011 after being granted a security clearance in 2008. While the language of the disqualifying condition is using illegal drugs after being granted a security clearance, the investigator's notes indicate that Applicant's statement was that he did not use illegal drugs while holding a security clearance. Applicant was in the final days of his out processing from the Army when he used marijuana in November 2011. He may have been "read out" of his security clearance at the time. Applicant believed he was no longer in the Army, did not have a security clearance, and was not bound by the non-use of illegal drug rules. His failure to inform the security investigator that he used marijuana while holding a security clearance is reasonable under the circumstances. I find Applicant did not deliberately fail to provide correct and accurate information on drug use security investigators. I conclude that Applicant mitigated the personal conduct security concern.

### **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(a):

- (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 considered that Applicant is a good worker who has been commended by the law enforcement agency he supports for his employer. I considered that he has been granted access to classified information for the past seven years without any allegations of security violations.

Applicant admitted using marijuana with varying frequency while a student and before entering active duty, and on a limited basis after leaving Army active duty. His last use of marijuana was over four years ago. He received a good prognosis concerning his drug use from a medical professional. Applicant established that he did not deliberately provide false information concerning his drug use to security investigators. These facts leave me without questions and doubts about Applicant's eligibility and suitability for access to classified information. For all these reasons, I conclude that Applicant has mitigated drug involvement and personal conduct security concerns. Eligibility for access to classified information is granted.

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

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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THOMAS M. CREAN  
Administrative Judge