



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-03207
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: Eric A. Eisen, Esq.

06/16/2015

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**Decision**

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RIVERA, Juan J., Administrative Judge:

Applicant’s history of drug-related criminal conduct, in particular, his use of marijuana after he started working for his employer and after he was granted a secret clearance, continues to raise security concerns. Moreover, he intentionally falsified his 2008 security clearance application (SCA). His lack of honesty, judgment, and unwillingness to comply with the law raises questions about his reliability, trustworthiness, and ability to protect classified information. Clearance denied.

**Statement of the Case**

Applicant submitted SCAs on January 1, 2008, and March 27, 2012. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct) on September 12, 2014.<sup>1</sup> Applicant answered the SOR on October 11, 2014, and requested a hearing before an administrative judge. The case was assigned to me on January 27, 2015. The Defense

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<sup>1</sup> The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 30, 2015, scheduling a hearing for March 6, 2015.

At the hearing, the Government offered five exhibits (GE 1 - 5). Applicant testified and submitted four exhibits (AE A – D). GE 5 (the Government's discovery letter) and AE D (a document to be considered for administrative notice purposes) were marked and made part of the record, but not admitted as evidence. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on March 12, 2015.

### **Findings of Fact**

Applicant admitted the SOR factual allegations, with explanations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 55-year-old translator or linguist employed with a defense contractor. He was born in a North African nation, married an American woman while studying in France, and immigrated to the United States with his spouse in 1985. He divorced his wife after 25 years of marriage, and they have three adult daughters. Applicant became a naturalized U.S. citizen in 2006.

Applicant received a bachelor's degree in middle eastern studies and language in 2007. He applied for a position with a government contractor, and submitted his first SCA in January 2008. Section 24 (Your Use of Illegal Drugs and Drug Activity) of the 2008 SCA asked Applicant to disclose whether in the last seven years he had used any illegal drugs, including marijuana. Applicant answered "No," and failed to disclose that he had illegally used marijuana between August 2005 and January 2008.

Following his 2008 SCA falsification, Applicant was granted access to classified information at the secret level. Thereafter, he has worked for several government contractors and retained his access to classified information until the present.

Applicant submitted another SCA in March 2012, in which he requested an upgrade of his secret clearance to a top secret clearance. In his 2012 SCA, Applicant disclosed that in 1996, he was arrested and charged with solicitation of prostitution and possession of an undisclosed amount of marijuana. He was issued tickets and paid fines for both offenses.

In response to Section 23 (Your Use of Illegal Drugs and Drug Activity) of the 2012 SCA (asking whether in the last seven years he had used any illegal drugs, including marijuana), Applicant stated: "I have used marijuana on 4 or 5 occasions in the last 7 years (between August 2005 and January 2009) during social gatherings and each time I never exceeded 2 to 3 puffs from a marijuana cigarette."

Applicant used marijuana in January 2009, while possessing a secret security clearance. He used the marijuana “during a social gathering organized by a friend of [his] brother. One of the guests produced a marijuana cigarette and invited me to share . . . I took no more than two or three puffs.” (GE 1) Applicant stated that he had not used any illegal drugs since January 2009, and that he did not intend to use any illegal substances in the future, or engage in any illegal activity that could jeopardize his career and most importantly his security clearance.

During a 2012 background interview with a government investigator (affirmed in April 2014 (GE 2)), Applicant confirmed his illegal use of marijuana from August 2005 to January 2009, “at residences or parties for social reasons with his brother.” (GE 2)

At his hearing, Applicant testified that he started using marijuana while in high school, but claimed that he used it only a handful of times. He claimed that when he was issued a ticket for possession of marijuana in 1996, he only had enough marijuana in his possession for one marijuana cigarette. He testified that he illegally used marijuana in 2005 while at a neighbor’s cookout. He claimed someone started passing a marijuana cigarette and he took one puff. (Tr. 25)

Concerning his 2009 use of marijuana, Applicant explained that he was in between jobs visiting his brother in a foreign country when he took one puff of a marijuana cigarette that was being passed around. He explained that he smoked the marijuana in a passing moment and did not think about his security clearance eligibility. Since 2009, Applicant has been in environments in which illegal drugs were being used, but not often. (Tr. 48)

Applicant claimed that he disclosed his past marijuana use in his 2012 SCA because he felt guilty about having falsified his 2008 SCA, and he felt the need to come clean. He denied disclosing his marijuana use because he was expecting to have to participate in a polygraph-assisted interview as a result of his request for an upgrade of his clearance. (Tr. 33)

Applicant knew that his use of marijuana was illegal. He admitted that he deliberately made a false statement when he failed to disclose his past use of marijuana in his 2008 SCA. He explained that he was desperate for a job, and he was concerned that the disclosure of his illegal use of marijuana would hurt his chances of getting the job.

Applicant submitted a statement of intent with automatic revocation of his clearance for any future use of illegal drugs. Applicant averred that he would never use marijuana or any illegal drug ever again. He believes that he is now older, has matured, and he loves his job. He presented no evidence of substance abuse counseling or rehabilitation.

Applicant repeatedly denied at his hearing that he used marijuana more than twice between 2005 and 2009, and claimed he only took one puff on each occasion.

When confronted with his statements in the 2012 SCA, and to an investigator in August 2012 (indicating he “used marijuana on 4 or 5 occasions in the last 7 years . . . and each time I never exceeded 2 to 3 puffs”), Applicant stated that it was possible that he had used marijuana more than twice, but he only recalled using marijuana twice.

Applicant asked me to take administrative notice about some states decriminalizing the use of marijuana. Regardless, the possession and use of marijuana continues to be a felony offense under Federal law and contrary to Executive Order 12564, and the U.S. Office of Personnel Management and the Director of National Intelligence policies. Involvement with marijuana (criminal conduct) may be the basis for an unfavorable suitability determination. However, the security concerns alleged in this case are under the personal conduct guideline, and not under the criminal conduct or drug involvement guidelines.

### **Policies**

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.

"[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

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

AG ¶ 15 articulates the security concern for personal conduct:

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.

Applicant deliberately falsified his 2008 SCA when he failed to disclose his history of marijuana use between August 2005 and January 2008. He illegally used marijuana in January 2009, after he was granted a security clearance in 2008.

Applicant's 2008 false statement and his illegal use of marijuana trigger the applicability the following disqualifying conditions under AG ¶ 16:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct security concerns:

(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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the above mitigating conditions fully apply. AG ¶ 17(a) does not apply because Applicant did not make a prompt, good-faith effort to correct the falsification. It was not until 2012, that he disclosed he used marijuana between August 2005 and January 2009.

Applicant's drug-related behavior also constituted criminal behavior. His marijuana use, although apparently infrequent, extended from his high school days until at least January 2009. Applicant's evidence failed to establish that his illegal drug use occurred under unique circumstances and is unlikely to recur. On the contrary, it appears that it regularly occurred as part of Applicant's lifestyle. Moreover, Applicant's evidence failed to establish his disassociation from his illegal drug-using associates. He presented no evidence of drug counseling or rehabilitation. Applicant's false statement and his illegal drug use while possessing a security clearance cast doubt on his current reliability, trustworthiness, and good judgment.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is a 55-year-old employee of a government contractor. His deliberate falsification of his 2008 SCA and his history of drug-related criminal conduct, in

particular his use of marijuana after he was hired by his employer and after he was granted access to classified information, continues to raise security concerns. Moreover, at his hearing Applicant continued to minimize his drug-related criminal conduct. Considering the evidence as a whole, Applicant's lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information.

### **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 E:	Against APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance denied.

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JUAN J. RIVERA  
Administrative Judge