



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



In the matter of:	)	
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	)	ISCR Case No. 14-04740
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government:  
Jeff Nagel, Esquire, Department Counsel

For Applicant:  
Andrew H. Tran, Esquire  
Claery & Green LLP

February 29, 2016

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**DECISION**  
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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on October 31, 2013. (Government Exhibit 1.) On January 23, 2015, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), and E (Personal Conduct) concerning Applicant. The action was taken under Executive Order (EO) 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 within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on February 20, 2015 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 24, 2015. This case was assigned to me on April 30, 2015. The

Defense Office of Hearings and Appeals (DOHA) issued notices of hearing on May 11, June 10, June 30, July 1, and July 13, 2015. I convened the hearing as scheduled on July 22, 2015. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant submitted Applicant Exhibits A through H, which were admitted without objection, and testified on his own behalf. Applicant asked that the record remain open until August 28, 2015, for the receipt of additional documents, but no additional documents were received. DOHA received the transcript of the hearing (Tr.) on July 31, 2015. The record closed on August 28, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 53, and divorced with one child. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment. Applicant admitted allegations 1.a through 1.h of the SOR with explanations. He admitted allegations 2.a and 2.b with reservations. He denied, or I view his responses as denials, allegations 2.c through 2.g. Applicant's admissions are incorporated into the following findings of fact.

#### **Paragraph 1 (Guideline H, Drug Involvement)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used illegal drugs. Applicant has used marijuana with varying frequencies from 1980 through approximately 2014.

Applicant began using marijuana in the form of hashish in 1980 while in the US Army. He used marijuana on a regular basis while in the Army, which resulted in his receiving non-judicial punishment under Article 15 of the Uniform Code of Military Justice several times. He also attended the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) in 1980 and again in 1982. Due to his failure to stop using marijuana and alcohol, Applicant was deemed a drug abuse rehabilitation failure, and because of that he received a General Discharge Under Honorable Conditions in March 1984. (Government Exhibit 2 at 11; Tr. 23-26.)

Applicant was subsequently arrested in 1987 and charged with Possession of Paraphernalia, Marijuana Possession and Methamphetamine Possession. He was found guilty, fined and sentenced to ten days incarceration. (Government Exhibit 2 at 7; Tr. 33-34.)

Applicant continued to use marijuana on an occasional basis for many years. The evidence provided by Applicant is contradictory as to the true extent of this use. To start with, in his October 31, 2013, e-QIP (Government Exhibit 1) at Section 23 he denies that he has used illegal drugs, including marijuana, within seven years of that date, and also denies using drugs while holding a security clearance.

Subsequently, in an interview with an investigator from the Office of Personnel Management on December 18, 2013, Applicant stated that he “has not used illegal drugs for many years.”<sup>1</sup> (Government Exhibit 2 at 5.)

Applicant was interviewed a second time on February 13, 2014. The investigator states in the ROI:

Sometime in the subject’s [Applicant’s] 20’s to present he has reduced his use of mj [marijuana] to occasional social settings, in which he would take a couple of puffs of a mj joint that was supplied by random associates (names not known). Subject’s close friends that he is around do no [sic] utilize drugs. Subject continues to use mj sporadically, several times per year at social settings with random associates. (Government Exhibit 2 at 9.)<sup>2</sup>

Applicant was interviewed again on March 28, 2014. The investigator states in the ROI:

Subject [Applicant] uses marijuana (mj) approximately on a quarterly basis, in which he takes a couple of puffs from a joint. Subject partakes in the occasional mj use with [acquaintances] at social parties or gatherings. Subject does not purchase mj and he partakes in it for recreational purpose only. Subject is not dependant on mj use. (Government Exhibit 2 at 8.)<sup>3</sup>

In his February 2015 Answer Applicant states at page 1:

While I did indulge more when I was younger, there have been years of inactivity between these periods where I was completely abstinent. I do not know exactly how long it has been since I have abstained from use, but I do believe that it has been longer than a year, and that was sporadic and coincidental at best.

Applicant testified that he last used marijuana in approximately August 2013, not March 2014. He stated, “Basically, I took a hit off of a joint in a parking lot when I got done surfing one day about two years ago. I had run into an old acquaintance of mine.” (Tr. 31-32; 66-67.)

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<sup>1</sup>Applicant’s counsel offered no objection to my considering this exhibit, which consists of several Reports of Investigation (ROI). (Tr. 13-14.)

<sup>2</sup>See Tr. 27-28.

<sup>3</sup>See Tr. 29-30.

With regard to using marijuana while holding a clearance, Applicant stated in his Answer at page 1, "It was a very social setting, and nothing I had procured. I have just been in settings where it was being passed around. However, I have since stopped navigating in certain circles and chose to live a very quiet life with my family." Applicant testified that he did not think he had used marijuana within seven years of 2013, other than the one use described above. (Tr. 69-70.)

However, in his notarized Answer to the SOR at page 2, in his response to subparagraph 2.g, Applicant states, "As I told the interviewer, there were a couple of times in 2013-2014 I had used some marijuana in the parking lot after I finished surfing."

## **Paragraph 2 (Guideline E - Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has made false statements to the Department of Defense during the clearance screening process. Applicant admits that he had false answers on his questionnaire, but denied there was an intent to deceive the Government.

Applicant filled out a Government questionnaire on October 31, 2013. (Government Exhibit 1.) Section 23 of the questionnaire is entitled, "Illegal Use of Drugs or Drug Activity," and has several subparts. SOR Subparagraphs 2.a through 2.c concern different subparts.

2.a. Applicant responded, "No," to the part of the questionnaire, which asks whether he had illegally used controlled substances within seven years of the date of his signing the questionnaire. This was a false answer to a relevant question about his drug use since, by his own account, Applicant had used marijuana three months before, in August 2013.

In his Answer at page 1 Applicant admits this allegation with a condition, stating, "It is not with cowardice I answered this way. I believe I found so insignificant my use of marijuana that it warranted no response and when I think of illegal drugs I think of heroin, etc. . . . I clearly erred in my judgment on this." (See Tr. 62-63.)

In the February 13, 2014 interview discussed above, the investigator writes that Applicant stated, "Subject answered No, in the last seven years he has not illegally used any drugs or controlled substances (discrepant). Subject marked no because he doesn't view mj as an illegal substance because of blurred lines regarding the legalization of mj." (Government Exhibit 2 at 9.) Applicant attempted to minimize this statement in testimony at the hearing. (Tr. 74-78.) Based on all of the available information, I find this entry to be intentionally false.

2.b. Applicant answered, "No," to a second part of Section 23, which asks, "Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?" (Emphasis in original.) This was a false answer to a relevant question about his drug

use, since he had used marijuana in at least in August 2013, three months before the questionnaire was filled out, and at a time he held a security clearance. (Tr. 63.)

Applicant admitted this allegation in his Answer at page 1, with the exception of stating that he “did not seek to conceal information.” When asked at the hearing about this drug use and his holding of a security clearance Applicant stated, “I didn’t even recall the situation.” (Tr. 67.) Based on all of the available information, I find this entry to be intentionally false.

2.c. Applicant also answered, “No,” to a third part of Section 23, which asked him, “Have you **EVER** been ordered, advised, or asked to seek counseling or treatment as a result of your illegal use of drugs or controlled substances?” (Emphasis in original.) This was a false answer to a relevant question about Applicant’s drug history. As set forth above, he had attended the Army’s ADAPCP program in 1980 and 1982.

Applicant denied this allegation. He stated at page 1 of his Answer, “I realize there is evidence that states I was in a drug counseling program, but this was in the Army. I read nothing that required this information to be provided. Had I, I would likely have still answered the same way for I completely forgot about that. We are talking almost thirty years ago.” (See Tr. 63-64.)

Applicant’s argument that he had forgotten the treatment is undercut by his answer to Section 15 of the same questionnaire, concerning his military service. There, he admits to receiving a General Discharge Under Honorable Conditions for “disciplinary” reasons. Those disciplinary reasons were that he was a rehabilitation failure from his two ADAPCP programs. (Government Exhibit 2 at 10-11.) He may not have known the exact terms of his treatment, but it is reasonable to assume that he remembered the reasons why he left the Army the way he did. Based on all of the available information, I find this entry to be intentionally false.

2.d. Section 25 of the same questionnaire asked Applicant, “Have you **EVER** had a security clearance eligibility/access authorization denied, suspended, or revoked?” (Emphasis in original.) Applicant stated, “No.”

The SOR states that Applicant had a security clearance that was revoked or denied in 1983, while he was in the Army. Applicant denied this allegation, stating he had no knowledge until receiving the SOR that he had a clearance. (Answer at 2; Tr. 64-65.) No evidence was provided by the Government showing that Applicant had a clearance while in the Army, much less that it was revoked or denied. This allegation is found for Applicant.

2.e. This subparagraph of the SOR alleges that Applicant falsified Question 32 of a June 4, 2002 questionnaire, which asked Applicant, “To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment?” The SOR goes on to allege that Applicant answered, “No,” and repeats that he had a clearance denied in 1983.

Applicant denied this allegation, once again stating that he had no knowledge he had a clearance at that time. This questionnaire was not provided to me. Given Applicant's denial, and the lack of any documentary evidence, this allegation is also found for Applicant.

2.f. The Government alleges in this subparagraph that the allegations concerning Applicant's drug use, set forth under Paragraph 1, are cognizable under Guideline E as well.

2.g. The Government alleges in this subparagraph that as of March 2014 Applicant associated with individuals who use marijuana. Applicant denied this allegation, stating in his Answer at page 2:

As I told the interviewer, there were a couple of times in 2013-2014 I had used some marijuana in the parking lot after I finished surfing. I'm not condoning my actions, but use is a relative thing. My continued and naturally evolved abstinence of the controlled substance prolifically detailed in my denial for access to sensitive material should act as a testament of sorts to my resolve in furthering the success of my hard-earned career.

## **Mitigation**

Applicant is a highly respected and successful professional. He submitted letters from co-workers and superiors. He is described as a person who is trustworthy and capable of holding a security clearance. (Applicant Exhibits B, D, and E.)

Applicant also submitted his most recent performance appraisal, and laudatory communications from his employer. (Applicant Exhibits F, G, and H.) They show him to be a talented person.

It is worth noting that his ex-wife wrote a very laudatory letter on Applicant's behalf. She calls him "very good person." (Applicant Exhibit A.) In addition, a personal friend describes Applicant as "a responsible man." (Applicant Exhibit C.)

## **Policies**

Security clearance decisions are not made in a vacuum. 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 as appropriate 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 AG ¶ 2(a) describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

### Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

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

Applicant admits using marijuana over a period of 25 years. There is conflicting evidence, all provided by Applicant, as to when his drug use ended, and how much he was using, particularly during the last seven years. He does not deny using it at least once in 2013, though he stated in his Answer he used it at least twice in 2013-2014. He has had a current security clearance since 2003, and obviously had one at the time of his last use.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

- (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) a demonstrated intent not to abuse any 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.

Applicant offered insufficient evidence that would support mitigation under AG ¶¶ 26 (a), or (b). Two years of abstinence might arguably be enough. However, as stated, I remain uncertain as to the actual extent of Applicant's drug use due to his inconsistent description of it. Without that certainty, I cannot find that recurrence is unlikely, or that his conduct no longer casts doubt on his reliability, trustworthiness, or judgment. As for allegations 1.c through 1.h, it has been 30 or more years since the incidents occurred. Accordingly, they have no current security significance. With those exceptions, Paragraph 1 is found against Applicant.

## **Paragraph 2 (Guideline E - Personal Conduct)**

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(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 person may not properly safeguard protected information; and

(g) association with persons involved in criminal activity.

The following mitigating conditions under AG ¶ 17 may apply to the facts of this case:

(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; and

(g) association with persons involved in criminal activity 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.

Applicant was not truthful in his questionnaire. Concerning Applicant's drug use, as discussed above, I simply am unable to make a finding that his statements are true. He used marijuana for a long time, he knew he did it, and intentionally did not tell the Government about it. I have reviewed the mitigating conditions and find none of them apply to the facts of this case. In particular, I have examined the span of time, less than two years, since the falsifications. There is insufficient evidence that Applicant currently shows good judgment or is trustworthy and reliable.

As stated above, allegations 2.d and 2.e are found for Applicant. With those exceptions, Paragraph 2 is found against Applicant.

### **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 applicant's conduct and all the circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In a nutshell, the Government expects and requires applicants to be truthful and accurate in their communications with it, especially concerning their use of illegal substances. After reviewing all the evidence under the clearly consistent standard, I cannot find that Applicant has been truthful and accurate with the Government, or with me. Under AG ¶ 2(a)(3), Applicant's conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is an unacceptable likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug use and personal conduct.

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

### **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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, 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.

WILFORD H. ROSS  
Administrative Judge