



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 14-05917
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah A. Minster, Esq., Department Counsel  
For Applicant: Geoffrey S. Burke, Esq.

11/15/2015

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the drug involvement and personal conduct security concerns. She deliberately falsified her initial security clearance application (SCA) by failing to disclose her past marijuana use. After being granted a security clearance, she again used marijuana. Applicant’s past marijuana use and lack of candor during the security clearance process continue to raise questions about her judgment, reliability, and trustworthiness. Clearance is denied.

**Statement of the Case**

On December 5, 2014, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that her conduct and circumstances raised security concerns under the drug involvement and personal conduct guidelines.<sup>1</sup> Applicant answered the SOR and requested a hearing to establish her eligibility for access to classified information (Answer).

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<sup>1</sup> This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

On March 19, 2015, Department Counsel notified the Hearing Office that the Government was ready to proceed. Applicant's hearing was scheduled, with the agreement of the parties, for May 28, 2015. The hearing was convened as scheduled.

At hearing, Department Counsel offered exhibits (Ex.) 1 – 3. Applicant testified, called several witnesses, and offered Ex. A – M. She requested additional time post-hearing to submit further documentary evidence. I granted her request and she timely submitted Ex. N – O. All exhibits were admitted into evidence without objection. Applicant's counsel's e-mail dated June 2, 2015, is included in the record as hearing exhibit (Hx.) V.<sup>2</sup> The transcript (Tr.) was received on June 5, 2015, and the record closed on June 12, 2015.

### **Findings of Fact**

Applicant, a 2010 college graduate, was working at a retail book store when she was hired by Employer A, a federal contractor, in 2011. She was hired by another federal contractor, Employer B, who is her current employer, in 2013. Applicant, who graduated with a degree in English, is currently employed as a technical writer. Her job performance has been good, and both her current and former supervisors testified about their favorable impression regarding her reliability and work ethic. Applicant's jobs with Employers A and B require that she attain and maintain a security clearance. In light of this requirement, Applicant filled out and submitted SCAs in 2011 and 2013. She has maintained a security clearance since 2011. She is now applying to upgrade her security clearance from Secret to Top Secret (TS).<sup>3</sup>

In March 2011, Applicant submitted her initial SCA. In response to questions asking whether she had used any illegal drugs, to include marijuana, in the preceding seven (7) years, she answered "no."<sup>4</sup> Applicant admits that her answer was false, as she used marijuana in 2008, while in college. She claims her failure to disclose her college drug use was inadvertent, as she was rushing to complete the SCA. She was hired by Employer A on either a Friday or Saturday, with a Monday start date. She was told by Employer A's facility security officer (FSO) that she needed to complete the SCA that weekend before starting on Monday. She filled out the entire application and submitted it the same day that she was contacted by the FSO.<sup>5</sup> She never contacted anyone at Employer A regarding any of the questions on the SCA, or about completing the SCA within the time allotted, or to request additional time to complete the SCA.<sup>6</sup> Applicant was subsequently granted a security clearance.<sup>7</sup>

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<sup>2</sup> Hx. I and II are the parties' index of exhibits. Hx. III is a March 2011 calendar that was accepted, without objection, for administrative notice. (Tr. at 47-48) Hx. IV is the scheduling order and prehearing correspondence.

<sup>3</sup> Tr. at 13-17, 61-90; Ex. 1 – 3; Ex. H; Ex. J at 34-44, *Forensic Psychological Evaluation*; Ex. L – Ex. M.

<sup>4</sup> Ex. 2 at 24.

<sup>5</sup> Tr. at 17-22, 43-60; Ex. 2; Ex. M – Ex. O; Hx. III; Hx. V. Applicant was initially hired as a subcontractor and within a few months was hired by Employer A as a direct employee. (Tr. at 61-67)

<sup>6</sup> Tr. at 43-44, 54-56.

In November 2013, Applicant filled out and submitted her recent SCA upon being hired by Employer B. Applicant testified that no time constraints were placed on her to complete the recent SCA and she took seven days to complete it. She disclosed her marijuana use in 2008. She also disclosed that she had used marijuana in 2012, after being granted a security clearance and while working as a federal contractor. A full background investigation was conducted by the Government after Applicant submitted her application for a TS security clearance. Applicant discussed her past drug use when she sat down for her security clearance interview. Applicant states that she has not used any other illegal drugs other than marijuana; she only used marijuana on two occasions in 2008 and 2012; and her use in 2012 occurred while she was drinking alcohol at a house warming party. Her 2012 use of marijuana was with three other partygoers, to include her good friend and former roommate, AC.<sup>8</sup>

Applicant claims to be unaware of Employer A or B's drug policy.<sup>9</sup> She submitted a signed statement promising not to use illegal drugs again upon condition that any violation of her written promise would result in automatic revocation of any clearance granted to her by the Government. After receiving the SOR, she started attending narcotics anonymous (NA), purportedly to demonstrate the seriousness with which she takes the Government's concerns. She no longer associates with any of the individuals with whom she previously used marijuana, except AC.<sup>10</sup>

Applicant submitted reference letters from family, friends, coworkers, and others stating their favorable opinions regarding her positive character traits.<sup>11</sup> One of the individuals who provided a letter was AC, who states that she has "been very close to [Applicant] over the years and would not hesitate to recommend her as an honest and responsible individual who regards illegal substance abuse as reprehensible and irresponsible." AC further states that she has "full knowledge of her [Applicant's] use of marijuana," and confirms she was aware of Applicant's marijuana use while they were going to college and witnessed Applicant use marijuana at the house warming party.<sup>12</sup> However, when AC was asked by a background investigator in February 2014 whether she was aware of whether Applicant had used drugs in the past AC stated that she was "unaware of [Applicant] using any illegal controlled substance to include marijuana."<sup>13</sup>

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<sup>7</sup> Tr. at 120-121; Ex. 3; Ex. M.

<sup>8</sup> Tr. at 22-25, 29-39, Ex. 1 at 30; Ex. F; Ex. M.

<sup>9</sup> Tr. at 44-45.

<sup>10</sup> Tr. at 31-33, 38-39; Ex. I.

<sup>11</sup> Ex. A – H.

<sup>12</sup> Ex. F.

<sup>13</sup> Ex. M at 81. *Contrast with*, Tr. at 32-33 (Applicant confirms AC was with her at the house warming party and was one of three people who used marijuana with her). AC's apparent falsification is only being considered in assessing the weight to be given her recommendation.

In February 2015, Applicant submitted to a psychological evaluation. The forensic psychologist prepared a report. The psychologist's testing suggested that Applicant has a "low probability of having a substance dependence disorder." He opined at hearing that he "would classify [Applicant] as a low risk to abuse substances, that's alcohol and elicit substances."<sup>14</sup>

During the evaluation, the psychologist discussed with Applicant the 2011 SCA. Applicant relayed to the expert essentially the same information she testified to at hearing. Specifically, that she rushed to complete the form before starting her new job and inadvertently failed to correctly answer the drug involvement question.<sup>15</sup> Applicant also told the expert of holding a discussion with a friend, RS, around the time she filled out and submitted her initial SCA in 2011. RS told her "that the government did not care if someone smoked marijuana in their past, *as long 'as you don't lie about it'.*"<sup>16</sup> Applicant testified that the topic of marijuana use came up in her conversation with RS sometime before she submitted her initial SCA in 2011.<sup>17</sup>

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865, § 2.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the paramount importance of protecting national security in all suitability determinations, the Supreme Court has held that "security clearance

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<sup>14</sup> Tr. at 102, 105.

<sup>15</sup> Tr. at 105.

<sup>16</sup> Tr. at 11, 123-124; Ex. J at 39, *Applicant's Account of the Information* (emphasis added).

<sup>17</sup> Tr. at 57-60.

determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

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. 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 an 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

## **Analysis**

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

The security concern regarding illegal drug involvement is set forth at 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.

Applicant’s past marijuana use, especially after being granted a security clearance, raises the drug involvement concern. The record evidence establishes the following disqualifying conditions:

AG ¶ 25(a): any drug abuse;<sup>18</sup> and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The guideline also sets forth a number of conditions that could mitigate the drug involvement concern. I have considered all the mitigating conditions and only the following are relevant in this case:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not

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<sup>18</sup> The Directive defines “drug abuse” as the “illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” See AG ¶ 24(b).

cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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's last use of marijuana occurred three years ago. Furthermore, she has promised not to use illegal drugs in the future on condition of automatic revocation of her clearance, attended NA, and received a favorable prognosis from a psychologist. However, she used marijuana after being granted a security clearance, which raises heightened concerns about her judgment, reliability, and willingness to comply with rules and regulations. Furthermore, I did not find credible Applicant's hearing testimony that she would not engage in similar conduct in the future. Her body language and tone of voice changed significantly when she testified that her drug use was a thing of the past. (Tr. at 41) Her change in demeanor cannot be ascribed to mere nervousness or other benign explanation.<sup>19</sup> In short, Applicant failed to meet her burden to establish that similar security-significant conduct will not recur.

Additionally, Applicant was only granted a clearance after deliberately falsifying her initial application by hiding her past marijuana use. She then used marijuana after obtaining a security clearance under false pretenses. Based on her discussion with RS, Applicant should have been fully aware that illegal drug involvement was incompatible with the requirements of those granted access to classified information. Instead of reforming her behavior after being hired as a federal contractor and granted a clearance, Applicant decided to once again use marijuana. Her NA attendance and the psychological evaluation that she submitted to were motivated by a desire to avoid an adverse clearance decision, not by a desire to truly reform and rehabilitate her past behavior. Under such circumstances, the mitigating value of the passage of time and the other favorable evidence in this case are outweighed by the serious security concerns raised by her illegal drug involvement after being granted a security clearance.<sup>20</sup> AG ¶¶ 26(a) and 26(b) do not apply. Applicant's past illegal drug involvement remains a security concern.

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<sup>19</sup> This is in contrast to Applicant's testimony regarding the timeline of when she received the job offer from Employer A and submitted her initial SCA. Her testimony on this issue was inconsistent with the rest of the record evidence and, at times, internally contradictory. See Hx. V (post-hearing submission by counsel retracting Applicant's testimony and providing alternate timeline). Questionable testimony of this nature has generally been found sufficient to sustain an adverse falsification finding. See, e.g., ISCR Case No. 14-04186 at 3 (App. Bd. Oct. 28, 2015) ("Moreover, the inconsistent statements cited by the Judge are sufficient to undermine the credibility of [applicant's] claim of an honest oversight" in failing to disclose information requested on a SCA). However, I find that Applicant's less than clear testimony on this issue was the result of faulty memory and the passage of time.

<sup>20</sup> ISCR Case No. 14-02203 (App. Bd. Mar. 30, 2015) (passage of five years does not mitigate security concerns raised by individual's drug use after being granted a security clearance); ISCR Case No. 14-01551 (App. Bd. Dec. 15, 2014) (sustaining adverse determination, where individual took a puff from a marijuana cigarette while holding a security clearance).

## Guideline E, Personal Conduct

The personal conduct security concern is set forth at AG ¶ 15:

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.

The SOR cross-alleges Applicant's use of marijuana after being granted a security clearance as a concern under Guideline E. As explained previously, such conduct calls into question Applicant's judgment and willingness to comply with rules and regulations. Her conduct also establishes disqualifying conditions AG ¶¶ 16(c)<sup>21</sup> and 16(e).<sup>22</sup> I have considered all the available mitigating conditions and for similar reasons explained under the drug involvement guideline find that none apply. ISCR Case No. 13-01281 (App. Bd. Aug. 4, 2014) (sustaining denial under Guideline E where applicant used marijuana after being granted a security clearance); ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008) (marijuana use after submitting SCA raises serious questions about an individual's judgment and fitness to hold a security clearance).

The SOR also alleges that Applicant's failure to list her past drug use on her 2011 SCA was deliberate and, therefore, disqualifying under Guideline E.<sup>23</sup> Individuals seeking a security clearance must be completely candid on their application and during the ensuing background investigation. However, the omission of material, adverse information standing alone is not enough to establish that an individual intentionally

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<sup>21</sup> Credible adverse information in several adjudicative issue areas that . . . 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 safeguard protected information.

<sup>22</sup> 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 . . . .

<sup>23</sup> See AG ¶ 16(a). Applicant denied SOR 2.b, which alleges she falsified her initial SCA submitted in 2011. Applicant's Answer was sworn to under oath and under penalty of perjury on December 23, 2014. With her Answer, Applicant submitted a single page from an SCA indicating that she answered "yes" to the drug question and disclosed her past drug use. Applicant did not provide the signature page or any other portions of the SCA, except for this single page. This single page does not indicate when the question was answered. After submitting her verified Answer, Applicant testified that she received a response to her freedom of information act request for her investigative file. She claims it is then she discovered that she had answered "no" to the illegal drug question on the 2011 SCA. (Tr. at 19-21) Applicant did not submit an amended Answer to dispel any confusion raised by her submission of this single page from a SCA. Apparently, the single page that was submitted with the Answer was from Applicant's 2013 SCA, not her 2011 SCA. Applicant did not explain why she submitted a portion from her 2013 SCA in responding to an allegation clearly stating she had deliberately falsified her 2011 SCA.

falsified their SCA. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an individual's true intent.<sup>24</sup>

Notwithstanding Applicant's less than clear testimony regarding the timeline leading up to her submission of the 2011 SCA, her story that she inadvertently failed to list her past drug use on this initial SCA due to time constraints appears plausible at first blush. However, Applicant provided a critical piece of evidence during her psychological evaluation that discredits her story. Namely, sometime before submitting the 2011 SCA, Applicant had a conversation with her friend, RF, who specifically advised her not to lie on her SCA regarding her past marijuana use. Applicant was, thus, at least aware and likely concerned that she would be asked on the SCA about her past drug use. She decided not to follow her friend's advice to disclose her past drug use. Instead, she falsified her response to the drug question to secure a well-paying job as a federal contractor – a job that required she obtain a security clearance.

An individual who deliberately falsifies their SCA commits an “offense that strikes at the heart of the security clearance process.” ISCR Case No. 09-01652 at 7 (App. Bd. Aug. 8, 2011). Moreover, an act of falsification has security significance independent of the underlying conduct. See SICR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). Accordingly, Applicant bears a heavy burden in mitigating the security concerns raised by her deliberate decision to falsify her initial SCA. Her subsequent disclosure on her 2013 SCA regarding her past drug use is not sufficient to mitigate the security concerns raised by her initial falsification.<sup>25</sup> This subsequent disclosure was not prompt, as it took place two years after Applicant was granted a clearance under false pretenses. Moreover, the disclosure was made in the course of Applicant's request for a TS clearance. Applicant's disclosure was thus motivated by her recognition that a much more in-depth investigation into her background would take place. Also, Applicant's refusal to acknowledge her past conduct undercuts the mitigating value of this subsequent disclosure and the passage of time since the falsification.<sup>26</sup>

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of all the relevant circumstances, to include the nine factors listed at AG ¶ 2(a). I hereby incorporate my comments under the illegal drug involvement and personal conduct guidelines. I gave due consideration to all the favorable and extenuating factors in this case, including Applicant's good work performance. However, the favorable evidence does not outweigh the security concerns raised by Applicant's past conduct. She obtained a

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<sup>24</sup> See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

<sup>25</sup> See AG ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” I have considered all the personal conduct mitigating conditions and find that none apply.

<sup>26</sup> ISCR Case No. 99-0228 at 6, 2001 DOHA LEXIS 58, \*17 (App. Bd. Mar. 12, 2001) (“Given Applicant's inability or unwillingness to recognize or acknowledge that his conduct was improper and wrong, there is nothing mitigating about the passage of time...”).

security clearance under false pretenses and, after securing the clearance, decided to use marijuana again. Based upon a full review of the record evidence and considering Applicant's demeanor, I am not convinced that similar security-significant conduct is unlikely to recur or, if it did, that she would report it.

A security clearance determination is not intended to punish an individual for past conduct. Instead, these decisions serve as predictive judgments regarding an individual's security suitability, where the individual's past conduct is the best indicator of future behavior.<sup>27</sup> Here, Applicant's past conduct continues to raise concerns about her judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with doubts about Applicant's eligibility for continued access to classified information.

### **Formal Findings**

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement)	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

### **Conclusion**

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge

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<sup>27</sup> ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013). See also, ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) ("Security clearance determinations are not an exact science, but rather predicative judgments about a person's security suitability in light of that person's past conduct and present circumstances.") (citing, *Egan*, 484 U.S. at 528-529).