



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-06001
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Fahryn E. Hoffman, Esquire, Department Counsel  
For Applicant: *Pro Se*

May 12, 2008

**Decision**

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HEINY, Claude R., Administrative Judge:

Applicant failed to list his illegal drug history on his Security Clearance Application and failed to reveal his history during a subject interview. After a thorough review of the case file, pleadings, exhibits, and evidence, I conclude Applicant has not rebutted or mitigated the government’s security concerns under Guideline E, personal conduct or Guideline J, criminal conduct. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a

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<sup>1</sup> 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Statement of Reasons (SOR) on August 31, 2007, detailing security concerns under personal conduct and criminal conduct.

On November 12, 2007, Applicant answered the SOR, and requested a hearing before an administrative judge. On January 31, 2008, I was assigned the case. On February 11, 2008, DOHA issued a notice of hearing, scheduling the hearing which was held on February 19, 2008. The government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence. Applicant testified on his own behalf. The record was kept open to allow Applicant to submit additional matters, and on February 26, 2008, additional documents were received. Department Counsel did not object to the material and it was admitted into evidence as Ex. A. On March 4, 2008, the transcript (Tr.) was received.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, and 1.c (1) of the SOR. He denied the factual allegations in ¶ 1.c (2) of the SOR. Applicant neither admitted nor denied the allegations in SOR ¶ 2. which related to criminal aspect of the conduct set forth in SOR ¶ 1.a, an allegation he admitted.

Applicant is a 37-year-old data network security specialist (Tr. 29), who has worked for a defense contractor since May 2004 and is seeking to obtain a security clearance. Supervisors, co-workers, and friends state Applicant is a dedicated professional, a team player who leads by example, and who has outstanding character and integrity. Applicant is an open, honest, dependable, reliable, diligent, and trustworthy individual. (Ex. C) His trouble shooting skills are outstanding. (Ex. H) He is a top-rated analyst. (Ex. I) He has received an excellent award for his work performance. (Ex. J) Applicant takes great pride in his work. (Tr. 27)

Applicant first smoked marijuana at age 14, his sophomore year of high school. (Tr. 50-51) At one point in his life, Applicant used marijuana on a daily to weekly basis. (Tr. 52) He attended high school classes "high" a few times (Tr. 52) and went to his job at a restaurant "high." In 1989, at age 19, Applicant smoked marijuana with his ex-father-in-law. (Tr. 58) At age 19 Applicant changed his life style. He stopped drinking every night, quit smoking cigarettes, and lost 45 pounds when he started working out. (Tr. 49) From age 19 until 2003, Applicant used marijuana once every two or three years. (Tr. 53) In the summer or spring of 2001, Applicant smoked marijuana once by himself. Applicant has no desire to smoke marijuana. (Tr. 59, 60)

In June 2003, Applicant completed an online job application with the FBI at a job fair. (Tr. 66) Applicant was told he failed to meet the requirements to work for the FBI when he answered "yes" to the question concerning illegal drug use. (Ex. 3) The online application question asked if Applicant had used marijuana more than 15 times in his life.

In November or December 2003, five or six months after having had his applicant with the FBI turned down due to his marijuana use, Applicant again used marijuana. The use occurred in Applicant's home. The boyfriend of his wife's friend was a guest in his home. The friend had brought some marijuana and left it when he left the home. Applicant, his wife, and friend indulged. Applicant took two puffs of the marijuana. Other than his wife, Applicant no longer associates with the other two individuals. (Tr. 25)

In January 2005, a little over a year later, Applicant completed a Security Clearance Application, Standard Form (SF) 86. He answered "no" to question 27, which asked about his use of illegal drugs since the age of 16 or in the last seven years, whichever was shorter. This would have been use since January 1998 when Applicant was 27 years old. Applicant had used marijuana once in the spring or summer of 2001, again in November or December 2003, and may have used it one or two additional times during the period in questions because he was using it every two to three years. Applicant does not remember why he checked "no." (Tr. 20) Applicant asserts he had no intention of being deceptive or lying on the form. (Ex. B)

On December 12, 2006, Applicant was interviewed by an agent of the Office of Personnel Management (OPM) about a number of issues including his marijuana usage. Applicant revealed his use in his home in November or December 2003. Applicant stated he did not use marijuana prior to or since that incident. (Ex 2) Applicant was sent a copy of the report of investigation and made no corrections to it when he responded to interrogatories in July 2007.

Applicant stated he does not currently use or experiment with illegal drugs and did not intend to use illegal drugs in the future. Since 2003, he has been offered marijuana a couple of times and turned down the offers.

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). 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 ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Personal Conduct**

The Directive sets out various factors relevant to an applicant’s personal conduct that may be potentially disqualifying. Paragraph 15 of the Adjudicative Guidelines (AG) states a concern where there is 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.”

Under AG ¶ 16 (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” and ¶ 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”

Applicant’s false answer on his SF 86 and his response during his OPM interview concerning his history of marijuana use tends to show questionable judgment, unreliability, and a lack of trustworthiness. I find ¶¶ 16 (a) and 16 (b) apply.

Applicant deliberately failed to report his use of marijuana in response to question 27 on his security clearance application completed in January 2005. Applicant has offered no credible explanation for his failure to disclose his illegal drug usage on his SF 86. His assertion that he was not being deceptive is unpersuasive. Applicant had knowingly used an illegal drug on multiple occasions. That last use, occurring in November or December 2003, was slightly more than a year before completing the form. Applicant should have been especially attuned to this question because his online application to work for the FBI had been turned down when he indicated he had use marijuana more than 15 times. His application to work for the FBI was rejected approximately six months before he completed his SF 86. I find Applicant deliberately falsified his answer to question 27 of the security clearance application.

During his December 2006 OPM interview, Applicant revealed his 2003 use of marijuana. However, Applicant stated he had not used marijuana prior to the 2003 incident, which was a lie. Applicant was sent a copy of the report of investigation and made no corrections to it when he responded to interrogatories in July 2007. I find Applicant provided deliberate false information during his OPM interview.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. AG ¶17 provides conditions that could mitigate personal conduct security concerns, including AG ¶ 17(a): “if a person “provides the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” I find this mitigating factor does not apply. Applicant has not met his burden of proving that he made good-faith efforts to correct the omissions in his security clearance application and OPM interview, or that his efforts were prompt.

AG ¶ 17 (f) provides mitigation where “the information was unsubstantiated or from a source of questionable reliability.” Applicant’s wrongful use of marijuana is substantiated by his admissions. The information was pertinent to a determination of his judgment, trustworthiness, and reliability. I find this mitigating factor does not apply.

AG ¶ 17 (c) provides mitigation where “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.” The security clearance application in issue was executed in January 2005 and the OPM interview occurred in December 2006, both of which are recent. The available evidence shows Applicant gave one false answer on the security clearance application and gave false information almost two years later during his OPM interview. This was not a single, isolated incident. I conclude

this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

### **Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 (a) states it may be disqualifying where there “a single serious crime or multiple lesser offenses.” Similarly, AG ¶ 31 (c) provides “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted” may be disqualifying. Paragraph 2 of the SOR alleges Applicant violated 18 U.S.C. § 1001 by deliberately making a materially false statement on his security clearance application. For the reasons discussed above, I find Applicant deliberately made materially false statements on his SF 86 in violation of 18 U.S.C. § 1001.

Security concerns raised by criminal conduct may be mitigated under certain circumstances. AG ¶ 32 (a) provides conditions that could mitigate security concerns if “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” The false statements at issue were made on the security clearance application and during an OPM interview that are presently before us and are therefore recent. This mitigating condition does not apply.

Under AG ¶ 32 (d), criminal conduct may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” Applicant's evidence does not convince me that there is “clear evidence of successful rehabilitation. This potentially mitigating condition does not apply. The other potentially mitigating conditions were carefully considered and do not apply.

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an Appellant's eligibility for a security clearance by considering the totality of the Appellant's conduct and all the circumstances. An 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. Applicant is 37 years old and sufficiently mature to make prudent decisions when responding to questions about his illegal drug history. When he completed his SF 86, had Applicant been truthful about his drug usage during the seven years prior to his completing his SF 86, it is unlikely an SOR would ever have been issued. The government expects and demands truthful responses to questions even when those responses might be adverse or detrimental to the individual seeking to obtain a clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under the Applicant's current circumstances a clearance is not recommended, but should the Applicant be afforded an opportunity to reapply for a security clearance in the future he may well demonstrate persuasive evidence of his security worthiness. However, a clearance at this time is not warranted.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the financial considerations security concern. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT

Subparagraph 2.a:           Against Applicant

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.

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CLAUDE R. HEINY II  
Administrative Judge