



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-03667
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esquire, Department Counsel  
For Applicant: *Pro se*

04/28/2015

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**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on January 22, 2014. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on October 17, 2014, detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Trustworthiness determination Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on November 5, 2014, and he submitted an undated answer. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 7, 2015, and I received the case assignment on February 23, 2015. DOHA issued a Notice of Hearing on March 3, 2015, and I convened the hearing as scheduled on March 25, 2015. The Government offered exhibits (GE) marked as GE 1 through GE 3, which were received and admitted into evidence without objection. Applicant testified. He submitted one exhibit (AE) marked as AE A, which was received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 31, 2015. I held the record open until April 6, 2015, for Applicant to submit additional matters. Applicant timely submitted AE B - AE M, which were received and admitted without objection. The record closed on April 6, 2015.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a. and 1.b of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 2.a - 2.c<sup>1</sup> of the SOR.<sup>2</sup> He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 33 years old, works as a senior information technology technician for a DOD contractor. He has worked for his current employer since 2002. Applicant's performance appraisals from 2011 through 2014 reflect that he either meets or exceeds his performance standards. In 2012, he assumed a new role in his job, and he has steadily improved his skills. Applicant submitted six letters of recommendations from co-workers, managers, or his facility security officer. All describe him as a hard-working individual whom they trust. All view him as a person of integrity and good character. No one indicates any knowledge of the issues in the SOR.<sup>3</sup>

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<sup>1</sup>In his answer to SOR allegation 2.b, Applicant admits that he provided certain specific information on his 2004 security application, but explains that he did not mention his additional use of marijuana because he believed he was using it legally. The second part of his answer is deemed a denial of an intent to falsify his answer.

<sup>2</sup>When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

<sup>3</sup>GE 3; AE B - AE K; Tr. 18.

Applicant graduated from high school, and he received an associate's degree in applied science in October 2005. Applicant and his wife married in August 2008. They have two children, a five-year-old son and a three-year-old daughter. His son suffers from spinal bifida and is in a wheel chair. His wife is a nurse.<sup>4</sup>

## **Drug Involvement**

As a high school student from 1996 until 2000, Applicant used marijuana regularly. It is unknown if he purchased marijuana during this time. Between 2000 and 2008, Applicant used or smoked marijuana from time to time, but not regularly. He never purchased marijuana between 2000 and 2008; rather, friends provided him with the marijuana. Since 2008, he has continued to use or smoke marijuana from time to time. He described his use of marijuana since high school as recreational and occurring approximately two to three times a year.<sup>5</sup>

Applicant experienced headaches, including migraine headaches, periodically for much of his life. In 2007, someone hit Applicant on the head with a bottle. He required 15 to 17 staples to close the injury to his head. Since this injury, Applicant's migraine headaches increased in intensity and frequency. Applicant stated that stress and eye strain from computer use trigger his migraine headaches. He sought medical treatment for his headaches, but prescription drugs did not eliminate or relieve his headaches.<sup>6</sup>

In 2009, Applicant discussed using marijuana as treatment for his headaches with his physicians. Applicant received a prescription for medical marijuana in late 2009. To obtain medical marijuana, he applied to the state public health department for listing on its medical marijuana registry. He provided the requisite documentation, and the state granted his request. Applicant has been listed on the medical marijuana registry since December 2009. He must renew his registration yearly. He renewed his registration in December 2014.<sup>7</sup>

Applicant described his use of medical marijuana as one to three times a week at the end of the day to help him sleep. He places a small amount in a bowl and takes one to two puffs (inhalation). This is enough to achieve the desired results. He never uses the marijuana before work or when he is in "on call" status for work. At home, he keeps the marijuana locked in a safe in his basement. His children know about the safe, but have no knowledge about what is in the safe. His children are in bed and asleep before he removes the marijuana from the safe for his use. He never provides his medical marijuana for others to use as such an act would violate the rules for access to medical marijuana in his state. Applicant provided a copy of his employer's general guidelines

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<sup>4</sup>GE 3; Tr. 17-18, 20.

<sup>5</sup>GE 1, GE 2; Tr. 21-22, 24-25, 40, 43, 47.

<sup>6</sup>Tr. 24-25, 28-29, 41-42.

<sup>7</sup>GE 3; AE A; AE L; Tr. 24-26, 28, 41-42, 44-45.

for its standards of conduct. The company policy prohibits use of illegal drugs in the workplace and while on duty. The company policy also prohibits working under the influence of alcohol or illegal drugs. The policy does not discuss the use of medical marijuana on the job or off-duty. Applicant called his legal department in 2009 to ask about company and state policy on the use of medical marijuana. He was told if it was medical marijuana, they did not want to know or need to know.<sup>8</sup>

Applicant testified that he did not believe that his use of marijuana, particularly for medical purposes, was a problem with DOD. He knew that the use of illegal drugs was not acceptable to his employer. He does not recall any specifically information about the use of illegal drugs in training.<sup>9</sup>

## **Personal Conduct**

Applicant completed his first security clearance application (SF-86) on May 5, 2004. He acknowledged use of marijuana between 1996 and 2000 in answer to Question 27, which asked about the use of illegal drugs in the last seven years. He denied purchasing, selling, manufacturing, trafficking, producing, transporting, shipping, or receiving any illegal drugs. He also denied illegal use of a controlled substance while employed in a sensitive position. His SF-86 did not ask about his future intent to use illegal drugs, and he did not acknowledge his occasional use of marijuana between 2000-2004. Applicant admitted that he did not acknowledge his occasional use at the hearing. Initially, Applicant testified that he met an investigator in 2004. He recalled telling the investigator that he used marijuana from time to time when it was available and he was present. Upon reflection, he later testified that he was not sure if he met with an investigator. A copy of any possible interview summary is not in the record.<sup>10</sup>

Applicant completed his second security clearance application (e-QIP) on May 28, 2008. Section 24 asks three questions about Applicant's current or past drug use. He acknowledged using marijuana between 1996 and 2000 while a high school student. He also indicated that he had used marijuana a few times on special occasions between 2000 and the date of his e-QIP. He indicated that he had been granted a security clearance. The e-QIP does not ask if he intended to use marijuana in the future. Applicant recalls meeting with an investigator in 2008. The investigator asked him when he last used marijuana. He advised the investigator that he had used marijuana the night before at his bachelor party. He did not recall a question from the investigator about his future intent to use marijuana. He testified that in 2008, he did not have an intent to use marijuana on a regular basis. A copy of this interview summary is not in the record.<sup>11</sup>

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<sup>8</sup> AE M; Tr. 24-27, 38-40, 45, 48.

<sup>9</sup>Tr. 26, 37-38.

<sup>10</sup>GE 1; Tr. 21.

<sup>11</sup>GE 2; Tr. 23-24, 34-37.

When Applicant completed his third security clearance application (e-QIP) on January 22, 2014, he again acknowledged his use of marijuana since 1996. He indicated that on occasions, he had used and still used marijuana. He stated that he occasionally used marijuana prescribed by a physician for headaches and nausea. He acknowledged use of marijuana while holding a security clearance and admitted his intent to use marijuana in the future.<sup>12</sup>

## **Policies**

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 used 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 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.

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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally

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<sup>12</sup>GE 3; Tr. 24, 26.

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**

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

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

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant regularly used marijuana from 1996 until 2000 as a high school student. He continued to use marijuana two to three times a year until December 2009, when he was given a prescription for marijuana to use for medical purposes. He uses

small amounts of marijuana to relieve headaches and to sleep one to three times most weeks and has since December 2009. He also uses marijuana for recreational purposes two to three times a year. To use marijuana, he must possess it. He has held a security clearance since approximately 2004 and while using marijuana. He intends to continue using marijuana in small amounts for medical purposes. A security concern has been established under AG ¶¶ 25(a), 25(c), 25(g) and 25(h).

The Drug Involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d). In light of Applicant's expressed intent to continue using marijuana for medical purposes, which is against federal law, I find that none of mitigating conditions apply.

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

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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;

(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.

The Government alleges falsification by Applicant when he completed his 2004 SF-86 by failing to acknowledge his occasional use of marijuana between 2000 and 2004 (SOR ¶ 2.b), and when he completed his 2008 e-QIP by failing to list his continued use of marijuana in 2008 (SOR ¶ 2.a). For AG ¶ 16(a) to apply, Applicant's omissions must be deliberate. The Government established that Applicant omitted material facts from his 2004 and 2008 security clearance applications when he failed to provide full

information about his marijuana use. This information is material to the evaluation of Applicant's trustworthiness and honesty. Applicant denied intentionally falsifying his answers on his security clearance applications.

When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.<sup>13</sup>

Neither the 2004 nor the 2008 security clearance applications specifically ask a question about an applicant's intent to use illegal drugs in the future. Because the question is not asked, as it was on the 2014 e-QIP, Applicant did not intentionally falsify his 2004 or 2008 e-QIP about his future intent to use marijuana. Applicant had no real explanation about his failure to list his occasional use of marijuana from 2000-2004. He did acknowledge his occasional use of marijuana on his 2008 e-QIP, as well as his previous use in high school. Throughout the security clearance process, Applicant has been open and honest about his marijuana use. His omission about occasional use in 2004 is not deemed intentional. Applicant did not falsify his 2004 and 2008 security clearance applications.

Applicant's decision to use marijuana, an illegal drug under federal law, even for medical purposes and while holding a security clearance reflects poor judgment and raises a security concern under AG ¶ 16(e).

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and concluded that none apply. Applicant has not mitigated the security concerns raised by his personal conduct.

### **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 an applicant's conduct and all relevant 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

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<sup>13</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is well respected at work for his work skills and his openness on work-related matters. Throughout the security clearance process, Applicant has acknowledged his use of marijuana in high school, for recreational purposes, and for medical purposes. He has not attempted to hide his marijuana use from the Government. He complies with state laws about the use of medical marijuana by not sharing his medical marijuana with others. He places his medical marijuana in a locked safe away from his young children. He is careful about when he uses his marijuana, making sure his children are in bed and he is not going to work. While he acts responsible about the marijuana in his house, his decision to use marijuana violates federal law. He used this illegal drug while holding a security clearance, which raises questions about his judgment. He intends to continue using marijuana, even though it is illegal under federal law, again raising questions about his judgment. Because of these decisions, Applicant has not mitigated the security concerns raised about his marijuana use.

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 failed to mitigate the trustworthiness concerns arising from his drug use and personal conduct under Guidelines H and E.

### **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

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Subparagraph 2.b:

For Applicant

Subparagraph 2.c:

For 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 a security clearance is denied.

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MARY E. HENRY  
Administrative Judge