



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



In the matter of: )  
)  
) ISCR Case No. 14-05126  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: *Pro se*

03/28/2016

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant failed to present sufficient evidence to mitigate the Guideline E (personal conduct) security concerns. Clearance is denied.

**Statement of the Case**

Applicant submitted his most recent security clearance application (SCA) on February 26, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant’s eligibility for a clearance. On December 16, 2014, DOD issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H and Guideline E.<sup>1</sup> Applicant answered the SOR on October 5, 2015, and requested a hearing before an administrative judge.

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<sup>1</sup> 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 Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The case was assigned to me on December 2, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 11, 2015, scheduling a hearing for January 28, 2016. At the hearing, the Government offered seven exhibits (GE 1 through 7). Applicant testified and submitted no exhibits. I note, however, that Applicant submitted as an attachment to his Answer to the SOR his nomination and award of the Navy Superior Civilian Medal for Valor for his heroic actions. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on February 8, 2016.

### **Findings of Fact**

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

Applicant is a 28-year-old employee of a federal contractor. He graduated from high school in 2006, and earned his bachelor's degree in 2010. He received his master's degree in business administration (MBA) in 2015. Applicant has never been married, and he has no children. He worked as an intern for federal contractors while he was attending college in 2008, 2009, and 2010. After graduating from college, he worked for a federal contractor between January 2011 and June 2012. He was hired by his current employer, a federal contractor, in June 2012.

Applicant submitted his first security clearance application in June 2009. He disclosed in Section 22 (Police Record) that he was arrested and charged with possession of marijuana in April 2008. In Section 23 (Illegal Use of Drugs or Drug Activity) Applicant disclosed that he illegally possessed and used a controlled substance (marijuana) between May 2007 and April 2008. He stated that [he] fell into a poor crowd [and he] was smoking marijuana for a brief period of time during [his] sophomore year of college. Applicant regretted illegally smoking marijuana, but averred he learned from his mistake. He noted he was drug free and successfully passed a drug test before he was hired by his current employer. He now associates with a positive group of friends. (GE 4) Applicant was granted eligibility for a secret clearance in November 2009. (GE 2)

Applicant submitted his most recent security clearance application in February 2014. In his response to Section 22 (Police Record), Applicant reaffirmed his prior marijuana-related disclosures made in his 2009 SCA. Additionally, he corrected some omissions from his June 2009 SCA. Applicant disclosed that he was arrested and charged with possession of marijuana with intent to distribute, a felony, in 2008. He pleaded guilty to the lesser offense of possession of marijuana in September 2008. He was sentenced to serve 15 days in jail, was placed on unsupervised probation, performed 100 hours of community service, paid a \$500 fine, and his driver's license was revoked for six months.

Applicant also disclosed that he was arrested and charged with drunk in public, a misdemeanor offense, in November 2010. The charge was dismissed after Applicant performed 25 hours of community service.

In his response to Section 23 (Illegal Use of Drugs or Drug Activity) of his 2014 SCA, Applicant reaffirmed the drug-related behavior he disclosed in his 2009 SCA. Additionally, he disclosed that he estimated he illegally used marijuana approximately 50 times between July 2006 and April 2010. He used marijuana when he felt stressed out or needed help relaxing. He smoked marijuana in social settings with friends. Applicant credibly stated that after his arrest in 2008, he smoked marijuana only a couple of times. He stated that he no longer enjoyed the effects of it. It made him feel paranoid thinking about the illegality of smoking marijuana and the consequences of it. He was beginning to prepare for his life after college and decided that his use of marijuana was not worth the risks to his personal life and potential jobs.

Applicant also disclosed that he illegally used cocaine approximately 10 times between October 2007 and April 2010. He used it a few times with a friend from high school. When his friend started to have trouble and dropped out of college, Applicant began to understand the impact that the illegal use of drugs could have on a person's life. Additionally, cocaine was too expensive, and he did not want to waste his money. Applicant believes that he stopped using illegal drugs because he matured and his priorities changed. He no longer wanted to take the risk of ruining his life or any potential new jobs. He started to think about his future and made the decision not to use any illegal drugs in the future. He has not used any illegal drugs since 2010.

At his hearing, Applicant candidly reiterated his prior admissions. He clarified that he never used illegal drugs before college. He used marijuana and cocaine with a friend from high school that was with him in college. Applicant admitted to using marijuana and cocaine after he was granted a secret level security clearance in November 2009, but only once or twice. He considered his use of illegal drugs as not a very smart decision. He was not really thinking about his future when he used illegal drugs.

Applicant believes that he was too young and immature when he started college. He did not know where he belonged and was trying to fit in and find friends. He got involved with the wrong crowd. Concerning his failure to disclose in his 2009 SCA his felony charge for possession of marijuana with intent to distribute, Applicant credibly testified that after he pled guilty to the lesser offense of possession of marijuana, his attorney instructed Applicant to answer to anyone that asked him that he was charged with a misdemeanor.

After submitting his 2009 SCA, Applicant was interviewed by a government investigator. Applicant testified that when he completed the 2009 SCA, he did not understand the importance of being truthful in the application. The investigator made him aware of the importance of the SCA, and the serious consequences he could face for making a false statement. Applicant was candid and forthcoming with the

investigator and told him that he had used cocaine between 2007 and November 2009, and did not disclose it in the SCA because he was scared.

Applicant testified that he has been dealing with the consequences of his illegal use of drugs for a number of years. He believes it has prevented him from getting a couple of jobs, and it has taken a toll on his life. Applicant no longer associates with any illegal drug users. He tries to make up by being involved with his church and has participated on mission trips. He has gone overseas to build churches and to provide assistance building homes after natural disasters. Applicant believes that his current work performance, his receipt of the Navy Superior Civilian Medal for Valor, and a 2011 certificate of appreciation from a high-ranking government official show that he has matured, that he is a different person now, and that he has been rehabilitated.

After presenting his testimony, Applicant refused to answer Department Counsel's questions during cross-examination. He was very polite and apologetic for his refusal to answer questions. He explained that he wanted to come to the hearing to apologize for his past behavior and to provide some explanations. He explained that the proceedings were making him very anxious, uncomfortable, and were taking him to a dark time in his life where he did not want to dwell. He stated that his well-being was more important than his receipt of eligibility for a security clearance.

Applicant was warned repeatedly that his failure to participate in the security clearance hearing, and his refusal to answer the Government's questions would be construed as a refusal to cooperate in the security clearance process. I explained to Applicant that if he failed to cooperate in the security clearance process, I would deny his eligibility for a clearance, or recommend to the DOHA Director to terminate any further processing of Applicant's request for a clearance and to revoke his current clearance. Applicant indicated that he understood my warnings and the consequences of his refusal to cooperate in the security clearance process. He elected not to answer any further questions, and I adjourned the hearing. (Tr. 28-35)

## **Policies**

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

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense

consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

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

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

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

AG ¶ 24 articulates the security concern for 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.

Applicant illegally used marijuana with varying frequency between 2006 and April 2010. He used cocaine infrequently between 2007 and April 2010. He used marijuana and cocaine after he was granted a secret-level security clearance in November 2009. In 2008, Applicant was arrested and charged with possession of marijuana with intent to distribute, a felony. He pleaded guilty to possession of marijuana, a misdemeanor.

AG ¶ 25 describes two conditions related to drug involvement that could raise a security concern and are disqualifying in this case:

(a) any drug abuse; and

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

AG ¶ 26 provides two potentially applicable drug involvement mitigating conditions:

(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.

Both Guideline H mitigating conditions are partially raised by the facts and circumstances in this case; however, they do not fully mitigate the drug involvement security concerns. Applicant disclosed his illegal use of marijuana in both his 2009 and 2014 SCAs. Additionally, he disclosed his use of marijuana and cocaine to a government investigator during an October 2009 interview. There is no evidence that the Government had any independent knowledge about his use of marijuana prior to his disclosures. The SOR allegations were based on his candid disclosures in both his 2009 and 2014 SCAs.

It has been close to six years since Applicant's most recent use of illegal drugs. There is no evidence of any further illegal drug abuse after April 2010. Applicant credibly promised to never use any illegal drugs ever again.

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

AG ¶ 15 articulates the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The first part of the Guideline E allegation cross-alleged the same facts and circumstances alleged under Guideline H, which are incorporated herein by reference. The second part alleged that Applicant falsified his 2009 SCA when he deliberately failed to disclose the full extent of his illegal drug use. Specifically, that Applicant failed

to disclose his use of marijuana up to at least May 2009, and his use of cocaine during the preceding seven-year period.

Applicant admitted the SOR allegations concerning his illegal drug use and his falsification. His behavior triggers the applicability of the following disqualifying conditions 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
- (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.

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

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant disclosed part of his illegal drug use in his 2009 SCA. He then disclosed the full extent of his drug-related behavior to a government investigator in

October 2009 and in his 2014 SCA. The Government had no independent knowledge of Applicant's use of illegal drugs until his disclosures. Applicant's disclosures demonstrate an acknowledgment of his mistakes. It also shows his intent to comply with the law, rules, and regulations. By disclosing the information, Applicant reduced his vulnerability to exploitation, manipulation, and duress. Moreover, it shows Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest.

For the above reasons, and those discussed under Guideline H, incorporated herein, I find that AG ¶¶ 17(c), (d), and (e) partially apply.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 28-year-old employee of a defense contractor. His past illegal drug use is not recent. Most of his illegal drug use occurred when Applicant was young and immature and could be attributed to youthful immaturity and experimentation. He only used illegal drugs once or twice in 2010. There is no evidence of any illegal drug use after April 2010. He has established a reasonable period of abstinence, and has changed his lifestyle to avoid illegal drugs.

I carefully considered that Applicant illegally used drugs after he was granted a security clearance in November 2009. His illegal drug use after holding a clearance raises serious concerns. Applicant violated the trust placed on him by the Government. His criminal behavior underlines his possible inability or unwillingness to comply with the law, rules, and regulations.

I also considered that Applicant failed to disclose the full extent of his illegal drug use in his June 2009 SCA. However, he was forthright and candid during an October 2009 interview with a government investigator, and disclosed the full extent of his drug-related behavior in his 2014 SCA.

Applicant's period of abstinence, his disclosures in both of his SCAs, his performance, his receipt of the Navy Superior Civilian Medal for Valor, and a 2011 certificate of appreciation from a high-ranking government official show that he has matured, that he is a different person now, and that he has been rehabilitated. It also gives substance to his promise to never use drugs again. He seems to understand the possible adverse consequences he will face if he is ever involved in the use of illegal drugs. He specifically understands that he could be fired from his job, and his eligibility for a security clearance may be revoked. Applicant acknowledged his mistakes and demonstrated his intent to comply with the law, rules, and regulations in the future. His

disclosures show Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest.

Notwithstanding, Applicant failed to submit sufficient evidence to mitigate personal conduct security concerns. He refused to answer Department Counsel's questions during his cross-examination. His refusal to cooperate in the security clearance process raises questions about his judgment, candor, and willingness to comply with rules and regulations, and ultimately, in his reliability, trustworthiness, and ability to protect classified information. I note that Applicant was very polite and apologetic about his refusal to answer questions. He explained that the proceedings were making him very anxious, uncomfortable, and were taking him to a dark time in his life."

Applicant's refusal to cooperate in the security clearance process was not alleged in the SOR. I considered his questionable behavior solely for the purpose of assessing Applicant's credibility and his evidence in mitigation, extenuation, mistake, inadvertent behavior, or lack of intent to mislead the Government.

After weighing all the facts and circumstances, in the context of the whole person, I conclude that Applicant failed to submit sufficient evidence to mitigate the drug involvement and personal conduct security concerns.

### **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:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

## **Conclusion**

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

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JUAN J. RIVERA  
Administrative Judge