



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



In the matter of: )  
)  
) ISCR Case No. 14-05395<sup>1</sup>  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: Eric A. Eisen, Esq.

03/25/2016

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana between 2003 and 2009. He used marijuana after he was granted a security clearance in 2008. He falsified his 2008 security clearance application (SCA) to cover his drug-related criminal behavior. He disclosed his marijuana use and his falsification in his 2010 and 2013 SCAs, and during three government interviews. There is no evidence of any further illegal drug use after 2009. Under the circumstances of this case, Applicant's use of marijuana and 2008 falsification do not raise questions about his current reliability, trustworthiness, judgment, ability to comply with the law, and to protect classified information. He mitigated the Guidelines H and E security concerns. Clearance is granted.

**Statement of the Case**

Applicant submitted his most recent SCA on February 4, 2013. 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 eligibility for a clearance. On November 26, 2014, DOD issued him a Statement of Reasons

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<sup>1</sup> The initial ISCR Case Number in the SOR (14-03643) was incorrect. The correct ISCR Case Number for this case is 14-05395.

(SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct).<sup>2</sup> Applicant answered the SOR on December 23, 2014, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to other administrative judges on April 23, 2015 and July 20, 2015. It was assigned to me on October 28, 2015. The DOHA issued a notice of hearing on November 6, 2015, scheduling a hearing for November 18, 2015. At the hearing, the Government offered six exhibits (GE 1 through 6). Applicant testified and submitted three exhibits (AE A through C). I note that Applicant also submitted documents as attachments to his Answer to the SOR (Enclosures A through G), and a statement of intent to abstain from any illegal drug use with automatic revocation for any violation. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on December 3, 2015.

### **Procedural Issue**

The hearing was held less than 15 days after issuance of the notice of hearing. Applicant stated that he had sufficient time to prepare, was ready to proceed, and affirmatively waived his right to 15 days' advance notice.

### **Findings of Fact**

Applicant admitted all the SOR factual allegations with explanations. His admissions to the SOR and at his hearings 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 30-year-old employee of a federal contractor. He graduated from high school in 2003; earned his bachelor's degree in December 2007; and was awarded a master's degree in June 2011. Applicant has never been married, and he has no children.

Applicant started working for federal contractors as a summer intern in 2006. He then worked numerous jobs as a research analyst, administrative assistant, intern, and volunteer for some organizations. Between June 2011 and April 2012, he worked as a research and editorial consultant for a federal contractor, and from August 2011 to April 2012, he worked as associate director of business development for another federal contractor. He was hired by his current employer, a federal contractor, in April 2012.

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<sup>2</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.

Applicant submitted his first SCA in March 2008. In response to Section 24 (Your Use of Illegal Drugs and Drug Activity), asking whether in the last seven years he had illegally possessed, or used any controlled substances (including marijuana), or used them while possessing a security clearance, Applicant answered “no.” He deliberately failed to disclose his prior illegal marijuana use from 2003 to 2008. Applicant was granted a secret level security clearance in May 2008.

Applicant submitted his second SCA in March 2010. In response to Section 23 (Illegal Use of Drugs or Drug Activity), asking whether in the last seven years he had illegally possessed, or used any controlled substances (including marijuana), or used them while holding a security clearance, Applicant answered “yes,” and disclosed that he illegally used marijuana, approximately three times, from May 2009 to July 2009. He also disclosed that he used marijuana once in November 2008, and approximately six times between September 2003 and December 2007. Applicant explained that in college he experimented with marijuana, but that he was not addicted to marijuana. He averred that marijuana use was no longer part of his life, expressed regret for his criminal behavior, and accepted full responsibility for his criminal behavior.

In April 2010, Applicant was interviewed by a government investigator concerning his prior use of marijuana. During the interview, Applicant confirmed that he illegally used marijuana about twelve times between September 2003 and July 2009. He attributed his marijuana use to his experimentation and peer pressure at college. He claimed he did not intend to use any illegal drugs in the future.

During a subsequent government interview in June 2010, Applicant admitted that he used marijuana three times while holding a security clearance between May 2008 and July 2009. Applicant told the investigator that he realized that he was wrong to use marijuana, and that he understood the policy prohibiting illegal drug use. Applicant promised that he would never use illegal drugs again under any circumstances.

Applicant submitted his most recent SCA in February 2013. In his response to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant reiterated his prior disclosures about his illegal marijuana use, including his use of marijuana while possessing a security clearance between November 2008 and July 2009.

When asked why he falsified his 2008 SCA, Applicant testified that he was young and immature, and he did not appreciate the level of concern the Government would have about his falsification. In his 2010 SCA, Applicant wanted to correct the biggest mistake he had made in his life – falsifying his 2008 SCA. He wanted to disclose and bring to the open his illegal drug use and to correct his prior falsification.

Applicant testified that he has never been addicted to marijuana. He claimed he no longer associates with his marijuana-using friends or frequents places where the illegal use of drugs is likely. I note, however, that he continues his association with his cousin, who provided Applicant marijuana, and with whom Applicant smoked marijuana

most of the time. Applicant never participated in substance abuse counseling and has never received an illegal drug-related diagnosis.

Applicant highlighted that when he submitted his 2010 SCA, he made the decision to be honest about his prior illegal marijuana use and his 2008 SCA falsification. He now understands that he has to be honest and forthcoming with the Government to be eligible for a clearance. To show his commitment to never use illegal drugs again, Applicant submitted a written statement of intent with automatic revocation of clearance for any violation. Applicant's last marijuana use was in July 2009, when he was 24 years old. Applicant acknowledged that his illegal drug use and falsification of his 2008 SCA demonstrated bad judgment; however, he noted that his admissions also demonstrate his honesty, reliability, and trustworthiness.

Applicant submitted numerous favorable reference statements lauding his honesty, reliability, trustworthiness, professional qualifications, expertise, and his writing and research abilities.

### **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 2003 and 2009. He used marijuana at least four times between 2008 and 2009, after he was granted a security clearance in 2008.

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

- (a) any drug abuse;
- (c) illegal drug possession . . . . ; 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 raised by the facts and circumstances in this case and mitigate the drug involvement security concerns. Applicant disclosed his illegal use of marijuana in his 2010 SCA, during two interviews with government investigators in 2010, in his 2013 SCA, and during a subsequent government interview in 2013. 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 disclosures in his 2010 and 2013 SCAs and his three interviews with government investigators.

It has been close to seven years since Applicant's most recent use of marijuana. There is no evidence of any further drug abuse after July 2009. Applicant promised to never use any illegal drugs ever again. To reinforce his commitment, Applicant signed a statement of intent with automatic revocation of clearance for any violation. I have given this statement less weight, and reviewed Applicant's evidence cautiously, in light of his illegal marijuana use after he submitted his 2008 SCA and after he was granted a security clearance.

#### **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 Guideline E allegation cross-alleged the same facts and circumstances alleged under Guideline H, which are incorporated herein by reference. Moreover, Applicant falsified his 2008 SCA to cover his illegal history of marijuana use. Applicant's illegal drug use and falsification trigger the applicability of the following disqualifying condition 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 his illegal use of marijuana in both his 2010 and 2013 SCAs, and discussed his criminal behavior during three interviews with government investigators in 2010 and 2013. 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(a) fully applies. 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 30-year-old employee of a federal contractor. His past illegal drug use is not recent. There is no evidence of any further marijuana use after 2009, or of any other illegal drug use. He has established a reasonable period of abstinence and a change of lifestyle. Applicant was honest and forthcoming in both his 2010 and 2013 SCAs and during interviews with government investigators wherein he disclosed his prior illegal drug use.

I carefully considered that Applicant used marijuana after he was granted a security clearance in May 2008. His illegal marijuana use after he was granted a security clearance in 2008 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.

On balance, Applicant's period of abstinence, his disclosures in both of his SCAs, during three interviews, and his statement of intent under penalty of clearance revocation for any violation, give substance to his promise to never use drugs again. He clearly understands the possible adverse consequences he will face if he is ever involved in the use of illegal drugs. He specifically understands that 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 and his references' statements show Applicant's current maturity, judgment, and his desire to be truthful, reliable, and honest. After weighing all the facts and circumstances, in the context of the whole person, I conclude that Applicant has mitigated 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 and 1.b:	For Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraphs 2.a and 2.b:

For Applicant

**Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is granted.

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JUAN J. RIVERA  
Administrative Judge