



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 17-03191

**Appearances**

For Government: David Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

12/17/2018

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**Decision**

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WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement or criminal conduct concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On November 6, 2017, the Department of Defense (DoD) Consolidated Adjudications facility (CAF) issued a Statement of Reasons (SOR) detailing reasons under the drug involvement, criminal conduct, and personal conduct guidelines why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under executive Order (Exec. Or.) 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); by Directive 4 of the Security Executive Agent, *National Security Adjudicative Guidelines* (SEAD 4).

Applicant responded to the SOR on December 27, 2017, and requested a hearing. The case was assigned to another judge on March 20, 2018, reassigned to me on May 30, 2018, and scheduled for hearing on June 5, 2018. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on one witness (himself) and 11 exhibits (AEs A-K). The Government's exhibits and Applicant's exhibits were admitted without objection. The transcript was received on June 13, 2018.

### **Procedural Issues**

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with documentation of expunged charges regarding two state drug charges and proof of probation compliance in connection with a September 2016 marijuana possession conviction satisfaction. Within the time permitted, Applicant supplemented the record with a cover sheet and order of dismissal of unidentified charges in another state and proof of probation compliance in connection with his 2016 drug-related conviction. Applicant's submissions were admitted without objection as AEs L-N.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly used marijuana with varying frequency from approximately 1974 until September 2016; (b) sold and purchased marijuana from approximately 1981 until 1985; (c) used marijuana at least three times in 2016 while holding a security clearance; (d) and was diagnosed with a condition described as marijuana use in February 2017 by a licensed clinical psychologist.

Under Guideline J, Applicant allegedly was charged with the following: (a) possession of marijuana and possession of drug paraphernalia in September 2016; (b) engaging in construction trade without a license and proof of insurance in July 1999; (c) felony forgery and engaging in construction trade without a license in February 1998; (d) possession of marijuana and drug paraphernalia in November 1997; (e) violation of a protective order in March 1996; (f) fighting in a public place in August 1987; (g) felony possession and distribution of marijuana in October 1985 for which he served nine months in jail; (h) burglary, possession of marijuana, and receiving stolen property in March 1980; (i) threatening a witness, battery on a person, and misdemeanor vandalism in May 1979; (j) burglary in March 1979; and (k) information set forth in ¶ 1.a-1.c of Guideline H.

Under Guideline E, (a) each of the allegations covered in Guidelines H and J are incorporated and (b) the allegations covered by ¶¶ 3.b-3.c covering allegations of receipt of unsatisfactory evaluation in 2016 for violating company policy for using marijuana and placement on his company's performance action plan due to his arrest for marijuana possession.

In his response to the SOR, Applicant admitted all of the allegations covering his drug activities, arrests and charges with explanations. He claimed his drug-related activities happened so long ago and under such conditions that they will not likely recur. Addressing his non-drug-related charges, he denied the allegations with explanations. He claimed they were either dropped, duplicated, did not involve charges or felonies, or happened many years ago and under such conditions that recurrences are unlikely. Responding to the allegations covered by Guideline E, Applicant denied receiving an unsatisfactory evaluation from his employer in September 2016 for violating company policy for using marijuana. He admitted being placed on a performance action plan by his employer.

### **Findings of Fact**

Applicant is a 59-year-old software engineer who seeks a security clearance for a defense contractor. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant has never married and has no children. (GEs 1-2) He earned a high school diploma in June 1977 and a music teaching certification in June 1985. In August 2000, Applicant earned a programming certification from a local state community college in his state of residence. Between May 2005 and May 2006, he attended a state university in his state of residence and earned a bachelor's degree in computer science. (GE 1) Applicant reported no military service.

Since November 2012, Applicant has been employed by his current employer. (GEs 1-2) He worked for another defense contractor between October 2009 and November 2012. (GE 1) Between December 2000 and November 2012, he worked for numerous non-defense contractors in various jobs. He reported intermittent periods of unemployment between September 2006 and October 2009. (GEs 1-2) Records document that he has held a security clearance since 2010. (GE 1)

### **Applicant's drug history**

Applicant was introduced to marijuana at the age of 14. (GE 2). Typically, he would smoke marijuana a few times a month when he or his friends could get the substance. (GE 2) Between 1974 and 1985, he continued using marijuana with varying frequency of use until he reached the age of 21. (GE 2) Beginning in 1981, he began to buy and sell marijuana for his personal use as well as smoke the substance weekly on a regular basis to relieve anxiety. (GE 2) He continued this practice until 1985 when he was arrested for selling marijuana. (GE 2)

In November 1997, Applicant was arrested and charged with possession of marijuana and possession of drug paraphernalia. (GEs 2-3) In court, he pled guilty to possession of drug paraphernalia, and the marijuana possession charge was dropped. (GE 2 and AE N)

In March 1980, Applicant was arrested on felony charges for burglary, possession of marijuana, and receiving stolen property, Applicant entered a guilty plea. Applicant later filed a motion with the court to vacate his guilty plea. (AE K) This motion was granted, and Applicant's felony guilty plea was dismissed and expunged. (AE K; Tr. 59)

In October 1985, Applicant was arrested for felony possession and distribution of marijuana. (GEs 1-3) At the time, Applicant was buying and selling marijuana at the rate of two to three pounds a week and selling it to other unidentified individuals in approximately one-half or one pound quantities. (GE 2) In that month, police raided his home and found approximately one pound of marijuana. (GE 2) Applicant was then arrested and taken to jail. In court, he pleaded guilty to the possession charges and was sentenced to nine months in jail. (GEs 1-3; Tr. 60-61) Applicant is credited with completing his court sentence. (GE 2) Upon Applicant's subsequent motion in 2009 to set aside his guilty plea, the charges were dismissed, and his felony guilty plea was expunged. (AE K)

Between 1981 and 1985, Applicant continued to use marijuana and purchased and sold marijuana to support his personal needs for the substance. (GEs 1-3) Following his arrest for selling marijuana in 1985, Applicant ceased using the substance until early 2016. (GE 2; Tr. 62)

Records document that he was arrested and charged with possession of marijuana and possession of drug paraphernalia in December 1997. (GEs 1-3) In court, he pled guilty to possession of marijuana paraphernalia, and the marijuana possession charge was dropped. (AE N) The record contains no probative evidence of Applicant's using or possessing marijuana prior to his arrest.

Sometime in early 2016, Applicant began dating a woman who typically smoked marijuana in a homemade bong made from a soda can. (GE 2) Feeling peer pressure from his girlfriend to use the marijuana she offered him, he used marijuana on approximately three occasions in 2016, with the last occurring in September 2016. All of his marijuana use and possession in 2016 occurred while he held a security clearance. (GEs 1-22 and AE F; Tr. 70) While he likes the feeling he gets from marijuana use, he knows his use violated DoD policy, as well as Federal and state law. (GE 2 and AE F)

In September 2016, Applicant was arrested and charged with possession of marijuana and possession of drug paraphernalia. Applicant had been home at the time when police arrived in response to a complaint by his tenant. After disclosing to police that he had a small amount of marijuana in his unit, and rented the other unit, police arrested him and charged him with marijuana possession. (GE 1-3) Applicant disclosed his arrest the following day to his employer. (GEs 2-3; Tr. 65-66)

Once in court to answer to the 2016 marijuana possession and marijuana paraphernalia charges against him, Applicant pled guilty to marijuana and marijuana paraphernalia charges, was directed to see a substance abuse evaluator, and was placed on probation. Probation conditions set by the court for his September 2016 offense included counseling and six months of supervised probation. (GEs 1-3 and AE L;

Tr. 69-70) Applicant, in turn, self-referred himself to a substance abuse clinic in fulfillment of the conditions set by both the sentencing court and his employer.

Due to his September 2016 arrest for possession of illegal drugs and drug paraphernalia, In February 2017, Applicant was placed on a performance action plan and required to complete an improvement plan. (GE 2 and AE A) To complete his action plan, Applicant was required to seek counseling on substance abuse through an employee assistance program and complete counseling sessions recommended by the provider; maintain a lifestyle consistent and compliant for someone that holds a security clearance; and receive negative test results from any directed random drug tests. (GE 2)

In his follow-up counseling sessions (three in all) with a licensed clinical psychiatrist, who diagnosed him with a condition described as marijuana use under the *Diagnostic and Statistical Manual-5* (Am. Psych. Assoc. 2013) (*DSM-5*). (GEs 1-2) Before entering a diagnosis, his mental health evaluator administered an SASSI-3 test and cleared him of any substance abuse or dependence problems. (AE F; Tr. 63-64)

Applicant submitted to two randomly administered urinalyses directed by his employer in 2016 and 2017, respectively. (AEs D-E) Both tests produced negative results. (AEs D-E) Applicant was credited with satisfying his probation conditions in May 2017, and he has not used marijuana since September 2016. (AEs C and L; Tr. 64) And to reinforce his assurances that he has disassociated from persons who use illegal drugs (including his former tenant), Applicant sued his tenant to vacate the premises leased from the former. (AE B; Tr. 55-58) Disposition of the lawsuit remains pending.

### **Non-drug-related arrest history**

Other criminal charges waged against Applicant include engaging in construction trade without a license or proof of insurance in July 1999 and felony forgery and engaging in construction trade without a license in February 1998. While the 1999 charges were dismissed in July 1999, Applicant pled guilty to the 1998 charges and was convicted of a misdemeanor offense. (AE N)

Besides the forgery and construction trade charges, Applicant was charged with other non-marijuana offenses between 1979 and 1996. In March 1996, he was charged with violating a protective order. Applicant denies the charges, and the case summary does not indicate any disposition. (AEs J, N) Records confirm that Applicant was charged in March 1979 with burglary and in May 1979 with threatening a witness, battery on person, and misdemeanor vandalism. Dispositions of these charges are not available.

### **Work-related adverse performance evaluations**

As the result of his September 2016 drug-related arrest, Applicant received an unsatisfactory evaluation for violating company policy for using marijuana. (GEs 1-2) He was placed on an action plan by his employer due to his arrest for possession of marijuana. His performance review of November 2016 included no evaluations on a

number of performance elements and an overall unsatisfactory rating. (AEs A and I) Still, Applicant has kept his employment with his employer. (Tr. 67-68).

### **Endorsements**

Applicant is well-regarded by his supervisors and co-workers. His supervisor characterized him as a strong worker who can be trusted to perform his work thoroughly and efficiently. (AE H) He credited him with strong professional commitments in all areas he is responsible for as a member of his intelligence team. (AE H) A former general manager familiar with Applicant's work described Applicant as a thoughtful, trustworthy employee on the company's development team who is always considerate of his colleagues and never gave reason to doubt his job performance. (GE I) A project lead of Applicant's software team credited Applicant with helping to modernize a military project to keep pace with the newest technologies and protocols. (AE G) And a good friend who worked with Applicant for four years, and is aware of his 2016 drug-related charges, credited Applicant with good software work skills, dependability, and a strong work ethic. (Tr. 82-83) In his opinion, Applicant gained valuable lessons from his 2016 drug-related incident. (Tr. 85)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise as security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole-person in accordance with AG, ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial into account the pertinent considerations for assessing extenuation and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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 chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. [s]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

#### **Drug Involvement**

*The Concern:* The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that causes physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations . . . AG ¶ 24.

#### **Criminal Conduct**

*The Concern:* Criminal activity creates doubts 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 ¶ 30

#### **Personal Conduct**

*The Concern:* 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during

national security investigative or adjudicative processes. . . .  
AG ¶ 15

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And, because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

### **Analysis**

Applicant is a well-regarded software engineer who presents with a considerable history of drug involvement that includes drug-related arrests and an unsatisfactory personnel evaluation of Applicant as the result of his violating company policy in 2016 for using marijuana. Principal security issues in this case center on Applicant's lengthy history of drug involvement that includes a still very recent 2016 marijuana arrest and conviction.

#### **Drug concerns**

Over a considerable period of drug activity stretching from 1974 to 1985, and more recently in 2016, Applicant used, possessed, sold, and purchased marijuana. His most recent involvement with marijuana (both use and possession) occurred while



holding a security clearance. Applicant's admissions to using and possessing illegal drugs while holding a security clearance raises concerns about risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions of the AGs for drug abuse are applicable: DC ¶¶ 25(a), "any substance misuse," 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

In Applicant's case, his significant involvement with marijuana over a number of years, capped by his recurrent use and possession of marijuana in 2016 while holding a security clearance following over 20 years of self-imposed abstinence, raises serious questions over the strength of his most recent abstinence commitments. To his credit, he sought substance abuse counseling in compliance with the directions he received from the sentencing court and his employer and has since satisfied the court's probation conditions. For these initiatives, he warrants some application of MC ¶ 26(d), "satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence or abuse, and a favorable prognosis by a duly qualified medical professional," and received a favorable prognosis from his substance abuse evaluator.

But while Applicant's material use and possession of illegal drugs in 2016 has never been repeated since his acknowledged last use in September 2016 in any proven way, his recurrent use and possession of marijuana products after a lengthy period of sustained abstinence is still too recent to enable safe predictions of continued avoidance of illegal drugs. It is too soon to fully apply any of the potentially mitigating conditions to Applicant's situation. While Applicant's assurances that his drug involvement is a thing of the past are encouraging, more time is needed to draw safe inferences that he is not a recurrence risk.

Considering the record as a whole, there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid drugs and drug purchases in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's past marijuana use in 2016 while holding a security clearance, he does not mitigate security concerns with respect to the allegations covered by subparagraphs ¶¶ 1.a-1.c of the SOR. Based on the favorable prognosis he received from his substance abuse evaluator, subparagraph 1.d is resolved favorable to Applicant.

### **Criminal conduct concerns**

Additional security concerns are raised over Applicant's considerable history of arrests, both drug-related and non-drug related. Most of his pre-2016 drug-related arrests (i.e., those of 1997, 1980, and 1985) are aged, but still relevant and material to a pattern assessment of Applicant's recurrent involvement with illegal drugs and drug paraphernalia. Applicable to Applicant's situation is DC ¶¶ 31(a), "a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security

eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness," and 31(b), "evidence (including, but not limited to, a credible allegation, an admission, and matters of official record ) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted," of the criminal conduct guideline.

Due to the age of most of Applicant's drug-related and non-drug-related criminal offenses, partial mitigation is available to him. MCs ¶¶ 32(a), "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," and 31(d) "there is evidence of successful rehabilitation: including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement," apply.

Overall, Applicant's recurrent drug-related offenses covering his 1980, 1985, 1997 and 2016 charges and convictions form a part of a continuing pattern of illegal drug involvement that are inner-related with his drug-related activities over an extended period time spanning 1980-2016. Because his older drug-related arrests cannot be reasonably separated from his drug-related activities covered by Guideline H, they cannot be independently mitigated. So, while Applicant's non-drug-related arrests are mitigated by the passage of time and subsequent dismissal and expungement in some cases, his drug-related offenses cannot be separated from the Government's continuing drug-related concerns covered by Guideline H.

### **Personal conduct concerns**

The Government's drug-related concerns are also raised under the personal conduct guideline. Most of the allegations are adequately covered by the drug and criminal conduct guidelines and need not be addressed anew under the personal conduct guideline. Separately covered are Applicant's unsatisfactory evaluation for 2016 that is keyed to his self-reported violation of his company's policy for avoiding marijuana use. As the result of his drug-related arrest of September 2016, his company placed him on a performance action plan. With the support of his supervisors and managers, Applicant is widely credited with being in compliance with his plan.

By all reported accounts from his supervisors and managers, Applicant continues to function and prosper with his employer and has successfully gained the confidence of his company that he is not at risk to relapse to recurrent drug usage. Personal conduct concerns of his employer resulting from his 2016 arrest are resolved and mitigated in Applicant's favor.

### **Whole-person assessment**

In making a whole-person assessment of Applicant's trustworthiness, reliability, and good judgment, consideration is given to not only the drug, criminal conduct, and personal conduct issues raised in the SOR, but the contributions he has and continues to

make to his employer and the defense industry in general. Overall, though, Applicant has established insufficient probative evidence of his overall trustworthiness and understanding of DoD policy constraints on the use of illegal substances to facilitate safe predictions that he is at no risk of recurrence of illegal drug usage. Criteria for meeting security clearance requirements under the drug and criminal conduct guidelines have not been met by Applicant. Favorable conclusions are warranted with respect to the allegations covered by the personal conduct guideline.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparas. 1.a-1.c	Against Applicant
Subparas. 1.d:	For Applicant
GUIDELINE J (CRIMINAL CONDUCT)	AGAINST APPLICANT
Subparas. 2a, 2.d, 2.g, and 2.h,	Against Applicant
::                  and 2.k	
Subparas. 2.b-2.c, 2.e-2.f, and 2.1-2.j:	For Applicant
GUIDELINE E (PERSONAL CONDUCT)	FOR APPLICANT
Subparas 3.a-3.c:	For Applicant

### **Conclusions**

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

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Roger C. Wesley  
Administrative Judge

