



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



In the matter of:

Applicant for Security Clearance

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) ISCR Case No. 18-00655
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Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel

For Applicant: *Pro se*

03/01/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant mitigated personal conduct concerns regarding falsification allegations, but failed to mitigate the security concerns regarding his drug involvement and substance misuse. Eligibility for access to classified information is denied.

Statement of Case

On June 15, 2018, Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons 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); and Security Executive Agent, Directive 4, National Adjudicative Guidelines (SEAD 4), effective June 8, 2017.

Applicant responded to the SOR on July 2, 2018, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on August 30, 2018, interposed no objections to the materials in the FORM, and did not supplement the FORM. The case was assigned to me on January 2, 2019.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana, with varying frequency, from about 1975 to at least May 2017. Allegedly, he stated in his response to DOHA interrogatories that he may continue its use on a very rare basis.

Under Guideline E, the SOR (a) cross-alleges Applicant's marijuana involvement covered by Guideline H and (b) alleges that Applicant falsified his electronic questionnaires for investigations processing (e-QIP) of August 2016 by deliberately omitting his past marijuana use. Allegedly, he failed to disclose his marijuana use from about 1975 to at least May 2017.

In his response to the SOR, Applicant admitted the allegations covered by Guideline H with explanations. He claimed that as a private citizen he is free to live his life within the laws of his state and country and found difficulty in seeing marijuana as an illegal substance as a resident of a state where recreational marijuana is legal. He claimed that he could not say with 100% certainty that he will never use marijuana again. Applicant also claimed that he may use marijuana on a rare basis, but will never use it during any activity associated with work or job assignments.

Addressing the allegations covered by SOR ¶ 2.b, Applicant admitted the incorporated allegations of drug involvement and the allegation of omission, but did not consider marijuana a controlled substance at the time he completed the e-QIP. He claimed he now knows that marijuana is covered by 21 U.S.C. § 862 and considers marijuana to be a controlled substance.

Findings of Fact

Applicant is a 61-year-old senior project manager for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in February 1980 and divorced in June 1987. (Item 3) He remarried in June 1995 and separated from his wife in August 2009. (Items 2-3) He has no children from either marriage. (Items 2-3) Applicant earned a bachelor's degree in June 1991. (Items 2-3) He enlisted in the Air Force in August 1976 and served three years of active duty. He was honorably discharged in February 1979.

Since April 2010, Applicant has worked for his current employer. Previously, he worked for other employers as a software engineer. (Items 2-4). He held a security clearance while in the Air Force, but not since his discharge in 1979. (Items 2- 3)

Applicant's drug use

Applicant was introduced to marijuana at the age of 17 and used it on and off once or twice a year between 1975 and May 2017. (Item 4) He last used marijuana in May 2017 with a sailing crew partner, but has used it before with a female friend. Both the sailing partner and friend freely supplied marijuana for his use. (Item 4) He used the drug to relax, taking two to three puffs at a time. (Item 4)

In an interview with an agent of the Office of Personnel Management (OPM) in June 2017, Applicant told the agent that he will use marijuana in the future whenever he feels like it and has no intention of stopping his marijuana use. (Item 4) Asked by the interviewing agent whether he feels he has a drug problem, he answered in the negative. He assured the agent that he has never needed drug counseling or treatment. (Item 4) And he acknowledged using marijuana while previously possessing a security clearance during his Air Force enlistment. Applicant posited that his infrequent marijuana use never affected his judgment, reliability, or ability to hold the confidence of others he interacts with.

E-QIP omissions

Asked to complete an e-QIP in August 2016, Applicant omitted his past use of marijuana when replying to the information requested about his past drug use in section 23 of the e-QIP. He denied making intentional omissions and attributed his e-QIP omissions to his belief that marijuana use was not illegal in his state of residence. (Item 4) Acceptance of Applicant's explanation requires a credibility check. To his credit, he acknowledged using marijuana between January 2004 and January 2011 in the e-QIP he completed in January 2011. (Item 2) And when asked about any prior marijuana use in an interview with an OPM agent in June 2017, he voluntarily acknowledged his past marijuana use without being confronted by the interviewing agent about his previous e-QIP omissions.

Applicant has continued to deny any deliberate omissions of his past marijuana use in the e-QIP he completed in 2016. (Item 4) His explanations implicitly reflect misunderstandings about the disparate rules governing marijuana use in his state of residence and the federal rules covering marijuana use and drug activity in the United States. His mistaken understandings, while not fully developed, are plausible enough to warrant acceptance. To his credit also, he was up-front about his marijuana use when initially asked about his drug use in his earlier 2011 e-QIP, and when subsequently asked about his marijuana use in his June 2017 OPM interview.

On balance, Applicant's omissions of his past marijuana use in his August 2016 do not reflect knowing and wilful omissions of past marijuana use. Allegations of falsification of his August 2016 e-QIP are not substantiated.

Policies

The SEAD 4, App. A lists guidelines to be used by administrative judges in the decision-making process covering security clearance 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 a 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 App. A. 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 App. A, AG ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair 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. The following App A, AG ¶ 2(d) factors are pertinent: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Drug Involvement

The Concern: 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
AG ¶ 24.

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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. . . 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. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

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).

Analysis

Applicant presents as a senior project manager for a defense contractor who seeks a security clearance. Principal security issues in this case center on Applicant's recurrent use of marijuana (a controlled substance whose use is banned by federal law and DoD's anti-drug policy) Additional security concerns are raised over Applicant's omissions of his marijuana use in the e-QIP he completed in August 2016.

Drug involvement and substance misuse concerns

Over a number of years spanning 1975 and May 2017, Applicant used marijuana recurrently. On the strength of the evidence presented, two disqualifying conditions of the AGs for drug involvement and substance abuse are applicable: DC ¶ 25(a), "any substance misuse," and DC ¶ 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Applicant claims he complied with state law in using marijuana and cites to no contradictions with federal law or DoD policy. But his use of marijuana in compliance with his state's law not only violated DoD policies mandating drug-free federal work conditions, but federal law as well. Whether Applicant was ever made aware of federal law's preemptive ban of marijuana use in states that authorize its use is unclear.

DNI Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use* (Oct. 25, 2014) addresses changes to state laws and the laws of the District of Columbia that legalize the use of marijuana. DNI Memorandum ES cautions that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. Instructive, too, on the reach of federal laws and policies to federal employees, and implicitly to federal contractor personnel, who require security clearances, is Executive Order (Exec. Ord) 12564, *Drug-Free Federal Workplace* (Sept. 15 1986) Noted concerns stress that "the use of illegal drugs, on or off duty, reflect less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law." (*Id.*)

When the Federal Controlled Substances Act (CSA) has been challenged on federalism grounds, the courts have consistently extended federal preemption authority over competing state laws that legalize marijuana use. In *Oakland Cannabis Buyers*, 532 U.S. 483 (2001), the Supreme Court did not attempt to invalidate the enabling legislation adopted by the particular state in issue. This legislation was designed to implement the key enabling provisions of the state's Proposition 215, under ¶¶ 11362.5 *et seq.* Proposition 215 (known as the Compassionate Use Act) was passed by this state's voters in 1996 to validate the right of residents of the state to possess and use marijuana for medical purposes, when they have a recommendation from a licensed

physician. Proposition 215 gives the patient's primary caregiver the right to cultivate and possess marijuana for the patient. But the Supreme Court in *Oakland Cannabis Buyers* did affirm continued federal jurisdiction over drug violators covered by the federal law without regard to the state's marijuana exception.

More recently, the Supreme Court seized the opportunity to refine and clarify the reach of its holding in *Oakland Cannabis Buyers, supra*. In *Raich v. Gonzales*, 545 U.S. 1, 8-14 (2005), the Court addressed the claims of two state residents who suffered from a variety of serious medical conditions and sought to avail themselves of medical marijuana pursuant to the terms of the state's Compassionate Use Act. Notwithstanding that county investigating officials had found that one respondent's medical use of marijuana was entirely lawful, federal agents seized and destroyed all six of her cannabis plants. In *Raich v. Gonzales, supra*, the Supreme Court held that the regulation of marijuana under the CSA was fully within Congress' commerce power (U.S. Const., art. I, Sec. 8), because marijuana production intended for home production could have a substantial effect on supply and demand in the national market. The *Raich* Court reasoned that federal failure to regulate the intrastate manufacturing and possession of marijuana would leave a considerable gap in the CSA. In turn, the Court vacated the Ninth Circuit's judgment.

So, even though Applicant was legally within his rights to use marijuana in his state of residence, his recurrent use would not foreclose the Federal Government from prosecuting marijuana possession charges under the CSA. It is still unclear whether Applicant understands the reach of the CSA in its preemption of his state's marijuana legalization legislation and how it affects the anti-drug policies placed in force by the DoD.

While Applicant's recurrent abuse of marijuana has never been resumed since his admitted last use in May 2017, his hedging on his potential use of the drug in the makes the likelihood of recurrent use too great to facilitate safe predictions of continued abstinence. Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid marijuana use in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's recurrent use of marijuana over a 44-year period, he does not mitigate security concerns with respect to the allegations covered by Guideline H.

Personal conduct concerns

Allegations of illegal drug use covered by Guideline H are incorporated as well under Guideline E. Because Applicant's marijuana use is adequately covered by Guideline H, it does not require separate consideration under the disqualifying conditions potentially applicable under Guideline E. For the same reasons assigned to holding that Applicant failed to mitigate drug involvement concerns, conclusions are warranted that Applicant does not mitigate raised personal conduct concerns about his illegal use of federally controlled illegal drugs.

Security concerns are raised as well over Applicant's omission of his past marijuana use in the e-QIP he completed in August 2016. Based on the evidence produced in the record, the falsification allegation covered by Guideline E is unsubstantiated.

Whole-person assessment

From a whole-person perspective, Applicant has established insufficient probative evidence of his overall trustworthiness, and understanding of DoD policy constraints on the use of illegal substances to merit eligibility to hold a security clearance or sensitive position. His contributions to the defense industry are worthy of respect and appreciation and are taken into account in making an overall evaluation of his clearance eligibility.

At this time, though, Applicant is at continued risk of recurrence. Evaluating all of the facts and circumstances developed in the record, Applicant fails to mitigate security concerns associated with the allegations covered by Guidelines H and E pertaining to his illegal use and possession of marijuana. Favorable conclusions are warranted with respect to the allegation pertaining to falsification of Applicant's 2016 e-QIP.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For 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 or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

