



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



In the matter of: )  
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[NAME REDACTED] ) ISCR Case No. 18-01483  
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Applicant for Security Clearance )

**Appearances**

For Government: Aubrey DeAngelis, Esq., Department Counsel  
For Applicant: *Pro se*

03/22/2019

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**Decision**

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MALONE, Matthew E., Administrative Judge:

Applicant demonstrated exceedingly poor judgment by using marijuana while holding a security clearance; however, he is unlikely to repeat his past misconduct. Additionally, the information he presented about his current judgment, reliability, and trustworthiness was sufficient to mitigate the security concerns about his personal conduct. His request for a security clearance is granted.

**Statement of the Case**

On April 25, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not

determine that it is clearly consistent with the interests of national security for Applicant to have a security clearance.<sup>1</sup>

On June 15, 2018, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guidelines for drug involvement and substance misuse (Guideline H) and personal conduct (Guideline E).<sup>2</sup> Applicant timely responded to the SOR (Answer) and requested a hearing.

I received the case on September 19, 2018, and convened the requested hearing on December 12, 2018. The parties appeared as scheduled. Department Counsel proffered Government Exhibits (GX) 1 – 3. Applicant testified and proffered Applicant Exhibit (AX) A. All exhibits were admitted without objection. I received a transcript of the hearing (Tr.) on January 2, 2019.

### **Findings of Fact**

Under Guideline H, the Government alleged Applicant used marijuana between August 2009 and August 2016, while holding a security clearance he received in April 2009. (SOR 1.a). The same conduct was cross-alleged under Guideline E (SOR 2.a). In response, Applicant admitted both allegations and provided extensive explanatory remarks, as well as numerous documents attesting to his character, reliability, lifestyle and accomplishments. (Answer) In addition to the facts established by Applicant's admissions, I make the following additional findings of fact.

Applicant is 33 years old and works as an engineer for a defense contractor. After graduating from college with a degree in electrical engineering in 2008, he was hired in February 2009 by a large defense contractor. He worked there until February 2017, when that company lost the contract on which he was working. Applicant then was hired by the company that took over the contract, working there until February 2018, when he was hired for the position he now occupies. (Answer; GX 1 – 3; Tr. 38)

After Applicant was hired for his first defense contractor job, he submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on February 12, 2009. In April 2009, he was granted a security clearance, which he has held ever since. Applicant first tried marijuana in August 2009 and continued to use marijuana sporadically until August 2016. He disclosed his drug use when he submitted his most recent e-QIP for purposes of obtaining eligibility for top secret access with eligibility for access to sensitive compartmented information. He also discussed his drug use with a government investigator in August 2017. Applicant has never failed a workplace urinalysis or other drug screening test. There have been no breaks in the employment for which he requires

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<sup>1</sup> Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

<sup>2</sup> The adjudicative guidelines were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

to have access to classified information. Applicant never bought, sold, or possessed marijuana. Rather, he used it when it was offered to him in social settings, such as camping trips, concerts, and house parties. In 2014 and 2015, Applicant had a girlfriend who frequently used marijuana for pain management, and Applicant used it a few times with her. Applicant is an avid outdoorsman and engages in a variety of sports and endurance events each year. He averred that he stopped using marijuana in 2016 for health reasons, particularly because he was diagnosed with asthma. He was given that diagnosis in 2012, but smoked marijuana on occasion thereafter. (Answer; GX 1 – 3; Tr. 29 – 36, 40 – 42)

Applicant also claimed that he was not aware of any specific proscription against using marijuana as part of his employers' drug policies; however, before he was hired for his jobs in 2009 and 2018, he had to pass a pre-employment drug screening. He also was aware that he could be fired if he tested positive for marijuana through workplace screening. Applicant never used marijuana at work or with any coworkers; nor did he ever use marijuana while traveling for work assignments. While he acknowledged that he did not consider the work or security ramifications of his marijuana use when it was offered to him, he has accepted full responsibility for his actions and has been candid and forthcoming to the best of his abilities about his misconduct. (Tr. 23 – 28, 37)

Applicant has an outstanding reputation among his current and past co-workers and supervisors, and others with whom he associates away from work. He submitted over 20 letters of recommendation. Most of his character references were informed that he had used marijuana, yet still vouched for his character and reliability. Applicant no longer associates with anyone who uses illegal drugs, and he has a new girlfriend with whom he is in a committed relationship. She does not use drugs nor condone such conduct. Finally, Applicant has submitted a notarized statement of intent to abstain from illegal drug use in the future. (Answer; AX A)

## **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>3</sup> and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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;

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<sup>3</sup> See Directive. 6.3.

(8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>4</sup> for an applicant to either receive or continue to have access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.<sup>5</sup> A person who has access to classified information enters 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 one who will protect the national interests as his or her 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.<sup>6</sup>

## Analysis

### Drug Involvement and Substance Misuse

Applicant illegally used marijuana with varying frequency between 2009 and 2016, at all times while he held a security clearance. This information reasonably raises a security concern about illegal drug use that is stated at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause 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. *Controlled substance* means any "controlled substance" as

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<sup>4</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>5</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>6</sup> See *Egan*; AG ¶ 2(b).

defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

More specifically, the Government's information requires application of the following AG ¶ 25 disqualifying conditions:

(a) any substance misuse (see above definition); and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record also supports application of the mitigating condition at AG ¶ 26(b):

the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

On balance, I conclude Applicant is unlikely to engage in such conduct in the future. His drug use was sporadic, at most, and his circumstances have changed so as to make it increasingly unlikely he will use marijuana in the future. The security concerns under this guideline are mitigated.

### **Personal Conduct**

Applicant's repeated willingness to engage in illegal drug use while holding a security clearance reasonably raises a security concern about his willingness or ability to adhere to rules and regulations while safeguarding sensitive information. That security concern is expressed, in relevant part, at AG ¶ 15:

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.

More specifically, the record evidence as a whole requires application of the disqualifying condition at AG ¶ 16(c):

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

By contrast, of the mitigating conditions listed under this guideline, only AG ¶ 17(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*) is pertinent here.

Applicant's use of marijuana while holding a security clearance raises broader doubts about his judgment. My assessment of all of the information probative of Applicant's decision making in that regard leads me to conclude that either he knew he was not supposed to engage in such conduct and did so anyway, or at the very least, that he was willfully ignorant of his employer's drug policies and his own responsibilities under those policies. If nothing else, Applicant knew or should have known that his conduct was a violation of federal law. Such conduct undermines confidence in Applicant's willingness or ability to follow rules and regulations attendant to his duties as the government's fiduciary in safeguarding sensitive information. Applicant either decided to engage in illegal drug use, or he did not consider that he bore responsibilities that his friends, who offered him marijuana, did not.

Nonetheless, I am mindful of the overwhelmingly positive information produced about Applicant's current judgment, reliability, and trustworthiness from persons who know about his drug use and have observed him in a variety of personal and professional circumstances, including classified work environments. Despite the adverse information about Applicant, each of his character references recommended him for a position of trust. That information, along with Applicant's credible testimony that he takes full responsibility for his actions and understands the full scope of the government's concerns, persuades me that Applicant's use of marijuana is not indicative of his current judgment and reliability. Applicant no longer associates with anyone who uses illegal drugs, and he is in a committed relationship with a girlfriend who does not condone such conduct. I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d).

Based on the foregoing, I conclude that AG ¶ 17(c) is applicable here, and that a fair and commonsense assessment of the record evidence as a whole shows that the security concerns raised by Applicant's use of marijuana while holding a security clearance are mitigated.

### **Formal Findings**

Formal findings 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
Subparagraph 1.a:	For Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE  
Administrative Judge