



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



In the matter of: )  
)  
) ISCR Case No. 18-02712  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Eric C. Price, Esquire, Department Counsel  
Tovah A. Minster, Deputy Chief Department Counsel  
For Applicant: Leon J. Schachter, Esquire.

06/09/2020

**Decision**

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case.<sup>1</sup> I grant Applicant's clearance.

On 9 January 2019, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) raising security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct.<sup>2</sup> Applicant timely answered the SOR, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 10 April 2019, and I convened a hearing 8 May 2019. DOHA received the transcript 22 May 2019, and the record closed.

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<sup>1</sup>Consisting of the transcript (Tr.), Government exhibits (GE ) 1-2, and Applicant exhibits (AE) A-C.

<sup>2</sup>DoD acted 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* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, effective on 8 June 2017.

## **Findings of Fact**

Applicant admitted the marijuana use allegations (SOR 1.a-1.b and 2.a), but denied the falsification allegations (SOR 2.b-2.c). He is a 46-year-old software engineering manager employed by a defense contractor since August 2003; he has been employed in related positions since 1996. He married in August 1995, and he and his wife have a son, born June 2010; they have since separated. Applicant seeks to retain the clearance he was first issued in May 1996.

In July 2012, after completing a marathon, Applicant used marijuana with a friend he had met at their running club. At the time, he held a clearance and was aware that any illegal drug use was inconsistent with holding a clearance. He later used marijuana with his wife's family members after a brewery tour around Thanksgiving 2015. He reported these two instances of marijuana use on his March 2017 clearance application (GE 2). However, he placed his first use of marijuana in July 2008, a date he later confirmed during a May 2018 interview with a Government investigator (GE 3). Based on this evidence, the Government alleged that Applicant falsified his March 2012 clearance application (GE 1).

Nevertheless, Applicant testified (Tr. 27-29; 37-40) that he had used marijuana after the marathon in July 2012, not in July 2008, when he did not run that marathon. The friend with whom he used the marijuana provided the particulars of that use, including the fact that it occurred in July 2012, not July 2008 (AE B). She was the only witness to Applicant's marijuana use on that occasion. She reports having been interviewed as part of Applicant's 2018 background investigation.

Applicant's Answer to the SOR acknowledges the poor judgment demonstrated by his past illegal marijuana use but provides substantial documentation that this illegal drug use was an aberration in his life. He has an excellent work history (Answer, Exhibit B, C), and has received significant financial recognition from his employer (Answer, Exhibit A). His coworkers consider him honest and trustworthy and recommend him for his clearance. They are aware of the SOR allegations (Answer, Exhibit D). Another long-time friend from his running club similarly recommends him for his clearance (AE A). He has executed a statement providing for immediate revocation of his clearance for future drug use, as contemplated by the Directive (Answer, Exhibit E; AE C). In February 2019, he had a favorable drug screening by a certified substance abuse counselor, albeit by live video feed (Answer, Exhibit F). He is a fitness devotee (Answer, Exhibit G).

Applicant acknowledged that his poor decisions reflect adversely on his judgment, but attributes them to spur-of-the-moment decisions made in one instance after a strenuous physical accomplishment, and in the other after a family outing involving alcohol. He notes that continued drug use is inconsistent with his fitness lifestyle, and he will have little contact with his soon-to-be-ex-wife's family.

## **Policies**

The AG list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(d). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline H (Drug Involvement), and Guideline E (Personal Conduct).

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 applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.<sup>3</sup>

### **Analysis**

The Government established a case for disqualification under Guideline H, by demonstrating Applicant's illegal marijuana abuse in July 2012 and November 2015, but Applicant mitigated the security concerns.<sup>4</sup> Applicant used marijuana twice after having been given access to classified information. However, there is no indication of a substance abuse problem, and he has been abstinent from any illegal drug use for over three years.

Drug involvement mitigating conditions give significant support to Applicant. His illegal drug abuse was not recent, clearly infrequent, and under circumstances unlikely to recur.<sup>5</sup> He has not used marijuana in over three years. Moreover, he has executed the

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<sup>3</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup>¶25(a) any substance misuse; (f) any illegal drug use while granted access to classified information or holding a sensitive position;

<sup>5</sup>¶26(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 [Emphasis supplied];

statement of intent regarding future illegal drug use as contemplated by the Directive.<sup>6</sup> Under the circumstances, I conclude Applicant is unlikely to abuse illegal drugs in the future. Accordingly, I resolve Guideline H for Applicant.

The Government failed to establish a case for disqualification under Guideline E. The conduct complained of—marijuana use on two occasions while having access to classified information—is fully cognizable as drug abuse under Guideline H. The disqualifying condition cited by the Government, ¶16 (d), is not satisfied.<sup>7</sup> The Government did not establish that Applicant falsified his March 2012 clearance application because the actual date of the marijuana use was July 2012, and consequently after he executed the clearance application. Accordingly, I resolve Guideline E for Applicant.

### Formal Findings

Paragraph 1. Guideline H:	For Applicant
Subparagraphs a-b:	For Applicant
Paragraph 2. Guideline E:	For Applicant
Subparagraphs a-c:	For Applicant

### Conclusion

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

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<sup>6</sup>¶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) 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;

<sup>7</sup>¶16 (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This included but is not limited to consideration of: . . . (3) a pattern of . . . rule violations.

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JOHN GRATTAN METZ, JR  
Administrative Judge