



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
[Name redacted] ) ISCR Case No. 20-03438  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Benjamin Dorsey, Esquire, Department Counsel  
For Applicant: Alan V. Edmunds, Esquire

11/29/2021

**Decision**

HOGAN, Erin C., Administrative Judge:

On June 16, 2021, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense on June 8, 2017.

On July 21, 2021, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 25, 2021. I was assigned the case on August 27, 2021. The case was originally scheduled for September 21, 2021, but was amended to September 30, 2021. The hearing was held as scheduled. During the hearing, the Government offered three exhibits which were admitted as Government (Gov) Exhibits 1 - 3. Applicant testified, and offered 25 exhibits which were admitted as Applicant Exhibits (AE) A – Y, without objection. The transcript was received on October 7, 2021. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

## Findings of Fact

Applicant is a 37-year-old employee for a DOD contractor who seeks to maintain a security clearance. She has been employed with the DOD contractor for 15 ½ years. The first time she held a security clearance was approximately 2006-2007. In February 2015, she was transferred to a commercial subsidiary of the DOD contractor. She remained there until November 2017 when she transferred back to the main DOD contractor for a career opportunity. During her time at the subsidiary, she did not handle classified information. She did not know whether her security clearance was active during her employment at the subsidiary. She learned her security clearance remained active when she transferred back to the main DOD contractor and was notified that it was time for her periodic reinvestigation. Her work with the main DOD contractor involves handling classified information. Her highest level of education is a Master's in Business Administration. She is married and has two children ages five and three. (Tr.11-17 check; Gov 1; Gov 2) (Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant's and her family's privacy. The cited sources contain more specific information.)

Under the drug involvement concern, the SOR alleged Applicant used marijuana with varying frequency from September 2001 to September 2006 and from January 2011 to August 2017. The SOR also alleges Applicant used marijuana after being granted access to classified information in approximately January 2011. In her response to the SOR, Applicant admits the allegation with clarifications. She first states the term "with varying frequency" is vague and misleading. She has never been a consistent or habitual user of marijuana. Her marijuana use was sporadic and she has not used marijuana since August 2017. The first period, from 2011 to 2006, refers to occasional use during social situations while in college. Applicant states she recalls using marijuana on three occasions in early 2017. She describes the use as a small amount with friends. (Response to SOR, dated July 21, 2021)

Applicant voluntarily disclosed her marijuana use to the Government during her security clearance background investigations. On October 4, 2010, Applicant indicated that she used marijuana in response to Section 23 – Illegal Use of Drugs or Drug Activity, on her security clearance application. She estimated that she used marijuana from September 2001 to September 2005, on ten occasions.

During a subsequent background investigation interview in October 2010, Applicant provided the same information. She indicated she used marijuana approximately ten times while in college from September 2001 to September 2005. Her use occurred while at parties or in social situations. She would take one or two puffs off a joint that was being passed around. She never purchased, distributed, or grew marijuana. Her marijuana use was sporadic. She told the investigator during her October 2010 background investigation interview that her last use of marijuana was in the Spring 2006. (Gov 3 at 16)

On February 6, 2018, Applicant submitted another security clearance application as part of a periodic background reinvestigation. In response to Section 23, Applicant indicated that she used marijuana infrequently over the past several years. She

indicated the estimated month and year of first use was January 2011. The estimate and year of her most recent use was August 2017 (estimated). She indicated “Infrequent use over the last several years in social settings while living in [redacted] – mainly January 2017 to August 2017.” She also indicated that she had used marijuana while possessing a security clearance. (Gov 1, Section 23, at 67)

During a background investigation interview on October 13, 2018 Applicant indicated she used marijuana infrequently from January 2011 to August 2017. Her last use of marijuana was August 2017. She indicated that she never abused marijuana and that her use of marijuana cannot subject her to blackmail. (Gov 3 at 8-9)

The Defense Office of Hearings and Appeals sent Applicant interrogatories regarding her past use. The first set asked Applicant to list her past illegal drug use. She listed “THC” (i.e. marijuana) and indicated the date of her first use was 2001 and the date of her last use was 2017. She listed the frequency of use as “once every three months.” She acknowledged the information provided was true and correct to the best of her knowledge and belief. She signed the document before a notary public. No date was provided with her signature.

The second set of interrogatories provided the unsworn summaries of Applicant’s background investigation interviews from October 2018 and October 2010. Applicant was instructed to read the interviews carefully. She was then instructed to provide any information that was not accurate in the interview summary. Applicant made corrections to both unsworn summaries. After making corrections to the unsworn summaries of interview, she acknowledged before a notary on March 19, 2021, that she amended the report and it is now accurate. (Gov 3 at 4-18).

During the hearing, Applicant admitted her answer to the interrogatories indicated she used marijuana “once every three months” between 2001 to 2017. She indicated that this was not accurate and that she intended the answer to mean that she used marijuana once every three months in 2017. It was an omission on her part, and she was not careful when reviewing the interrogatories. She intended her answer to be in a broad fashion because she was concerned about omitting any of her illegal marijuana use. (Tr. 32-36)

Applicant has not used marijuana since August 2017. She used marijuana between January 2017 and August 2017 in social settings. The amount of her use was taking a puff or two on a marijuana joint while it was being passed around. She no longer associates with the people with whom she used marijuana. She moved out of the area and has built a new social network. (Tr. 22, 30-38, 42-44)

On July 12, 2021, Applicant signed a Statement of Intent declaring that she will never misuse substances in the future, including use or possession of any illegal drug, or use of a legal prescription drug without a valid prescription or in a manner inconsistent with their intended purpose. She acknowledged that a violation of this Statement of Intent could result in the revocation of her security clearance. (AE A).

On July 18, 2021, Applicant obtained a substance abuse evaluation with K.B., an LCSW, CSAC, MAC and SAP. K.B. found Applicant to be forthright, open and honest. Applicant was fully cooperative with no indication of guarded or withdrawn demeanor. The results of the standardized testing revealed Applicant to have no probability of a substance abuse disorder. No treatment was warranted. (AE C). Applicant was tested and had negative drug screens on July 7, 2021 (AE B) and September 8, 2021. (AE K; AE L)

### **Whole-Person Factors**

Applicant is a highly regarded employee as indicated by her performance appraisals and awards. (AE E; AE N; AE O) She is also involved in her church and coaches her son's soccer team. (AE Q; AE R) She is a dedicated wife and mother. (AE I) Several friends who know Applicant personally provided letters attesting to her character, trustworthiness, and integrity. (AE F; AE J; AE M).

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

### **DOD and Federal Government Policy on Marijuana Use**

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use” addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

### **Guideline H, Drug Involvement**

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription drug 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 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.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

AG ¶ 25(a) any substance misuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The SOR alleges and Applicant admits she used marijuana on various occasions between 2001 and 2017. Primarily, she used marijuana on numerous occasions during high school and college. There were periods of years where she did not use marijuana. She used marijuana on three occasions in 2017 in social situations. AG ¶ 25(a) applies. Applicant did not cultivate, purchase, or distribute marijuana. She did possess marijuana when she used the marijuana. Based on this reason, AG ¶ 25(c) applies. Her use in 2017 occurred while she held a security clearance, although she was in a position that did not require access to classified information. Applicant worked for a subsidiary of the DOD contractor and admits her use of marijuana in 2017 was illegal. AG ¶ 25(f) applies.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b) the individual acknowledges 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.

AG ¶ 26(a) applies because Applicant's last use of marijuana occurred over four years ago. Applicant disclosed marijuana use on several security clearance applications in October 2010 and February 2018. Although Applicant's answers about her use of marijuana varied in responses on her SF 86 and DOHA interrogatories, I find the various discrepancies to be minimal. Applicant was honest and forthright about her illegal marijuana use. She made no excuses for her marijuana use and admits her marijuana use was illegal. While her marijuana use showed extremely poor judgment, she has not used marijuana in over four years. Since that time, Applicant has built a successful career and is an involved mother to her two young children. It is unlikely she will use marijuana in the future.

AG ¶ 26(b) applies. Applicant stopped using marijuana in August 2017. She no longer associates with the people she used marijuana with in social situations. Applicant provided a signed statement of intent to refrain from all drug involvement and substance misuse. Applicant was truthful about her marijuana use and demonstrated an appropriate pattern of abstinence. She was never a habitual marijuana user, only taking a puff or two while a joint was being passed around and parties. K.B.'s substance abuse evaluation indicates Applicant does not have addiction issues.

Applicant met her burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There are reasons that support not granting a security clearance to Applicant. Questions are raised about Applicant's judgment because of her admitted illegal use of

marijuana, while as an employee with a DOD contractor and while possessing a security clearance.

I find the mitigating reasons outweigh the disqualifying reasons in Applicant's case. She disclosed her marijuana use during the security clearance process which supports that she is trustworthy. She stopped using marijuana in August 2017 and has not used marijuana for over four years. She signed a statement of intent to refrain from all drug involvement and substance misuse and acknowledged that any future substance misuse could result in the revocation of her security clearance. Applicant has built a successful career and is highly regarded among her peers. Her free time is devoted to raising her two young sons with her husband.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has learned a significant lesson. While her marijuana use showed poor judgment, she disclosed her marijuana use during the security clearance process. She learned from her mistake in judgment and took steps to demonstrate her intent to refrain from illegal marijuana use. Concerns raised by Applicant's illegal marijuana use are mitigated.

### **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
Subparagraph 1.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted. Applicant is warned that any future use of illegal substances may result in the revocation of her security clearance.

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ERIN C. HOGAN  
Administrative Judge