



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



In the matter of:	)	
	)	
	)	ISCR Case No. 19-02396
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Moira Modzelewski, Esq., Department Counsel  
For Applicant: Alan Edmunds, Esq.

01/25/2021

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**Decision**

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Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the security concern generated by his use of marijuana. Clearance is denied.

**Statement of the Case**

On December 20, 2019, 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 and substance misuse. The DOD CAF took the action under Executive Order (EO) 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 the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on June 8, 2017.

On February 25, 2020, Applicant answered the SOR allegations, admitting all of the allegations, and requesting a hearing. The case was assigned to me on September 1, 2020. On November 3, 2020, the Defense Office of Hearings and Appeals issued a notice

of hearing, scheduling the case for November 6, 2020. Applicant waived his right to a 15-day notice of hearing.

The hearing was held as scheduled. I incorporated three government exhibits into the record, marked as Government Exhibits (GE) 1 through GE 3, and I incorporated 15 Applicant exhibits (AE), incorporated into the record as AE A through AE O. In addition, I received the testimony of Applicant and two character witnesses. The transcript (Tr.) was received on November 17, 2020.

### **Findings of Fact**

Applicant is a 49-year-old, married man. He has a six-year-old child from his marriage and an adult child from a prior relationship. He earned a bachelor's degree in 1995. Currently, he is a federal contractor who works in the information technology field. He has been working for the same company since 2005, and was promoted to his current position as a supervisor in 2010. He has held a top secret clearance since 2011. (Tr. 36)

Applicant is highly respected on the job. According to a coworker, Applicant is a "fair, unbiased, even-tempered, conscientious, and hardworking" employee who goes above and beyond in mentoring his subordinates. (AE D1 at 1) According to a former supervisor, Applicant "continuously demonstrated sound judgment at work." (AE D2 at 1)

Applicant began smoking marijuana in 1989 while in high school, using it once per week. In college, he used it a few times per week. (Tr. 32) In 1995, Applicant was charged with possession of marijuana, and was sentenced to six months of probation. (Tr. 32-33) He continued to use marijuana for three years after his arrest. In 1998, Applicant came to realize that his marijuana-smoking habit was not productive. (Tr. 34) Consequently, he quit using it.

In late 2014, Applicant was diagnosed with Stage 3 rectal cancer. (AE K) He had to undergo chemotherapy. The chemotherapy medications made him extremely nauseated and miserable. (Tr. 21) In response, his doctor prescribed anti-nausea medications, but they proved to be unsuccessful. (Answer at 3; Tr. 20, 36) Applicant was afraid that he was going to die. (Tr. 21) One of his friends suggested that he use marijuana to alleviate his nausea. (Tr. 21) Applicant then resumed his marijuana use. He used marijuana throughout his chemotherapy treatment, which lasted from December 2014 to March 2015. He was on short-term disability leave from work when he was using marijuana.

By March 2015, Applicant's cancer had gone into remission. He discontinued his marijuana use. Approximately three years later, in July 2018, Applicant used marijuana again on two occasions. (Tr. 21) He used it with his brother who was living with him at the time, and who had purchased it in a jurisdiction where it was legal. (Tr. 21) When Applicant used marijuana in 2018, he was not undergoing chemotherapy treatment, as his cancer was still in remission. (Tr. 22) Applicant recognizes that he made "a terrible mistake," and that regardless of whether it is legal in some state jurisdictions, it remains illegal under federal law, and is prohibited for people holding security clearances. (Tr. 22)

In February 2020, Applicant completed a drug and alcohol awareness class. (AE J) In October 2020, Applicant underwent a mental health and substance abuse assessment. (AE M) Part of the assessment included a Brief Addiction Monitor, “an evidence-based measurement used to establish a baseline of substance use and risk and protective factors.” Based on the assessment, Applicant did not meet any of the minimum criteria for substance use concerns. (AE M)

Applicant has not smoked marijuana since July 2018. His brother no longer smokes marijuana and no longer lives with him. (Tr. 24) Applicant does not intend to use marijuana in the future even if his cancer recurs. (Tr. 28) On February 11, 2020, Applicant executed an affidavit expressing his intent not to use marijuana again, and acknowledging that any future use is grounds for revocation of national security eligibility. (AE I) Applicant stated on a security clearance application completed in 2011 that he would not resume his marijuana use, and he reiterated his intent not to resume marijuana use on his security clearance application completed in January 2018. (GE 1 at 31)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense decision. 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 to obtain a favorable security decision.

## **Analysis**

## **Guideline H, Drug Involvement and Substance Abuse**

The security concerns about drug involvement and substance abuse are set forth in 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.

Applicant's intermittent use of marijuana between 1989 and 2018, including several occasions when he held a security clearance, triggers the application of AG ¶¶ 25(a), "any substance abuse," and 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position."

The following mitigating conditions are potentially applicable under AG ¶ 26:

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

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of action 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(b) warrants some consideration. Applicant voluntarily completed a drug awareness education class. The class counselor evaluated him and concluded he had no substance abuse concerns. Furthermore, Applicant's brother, the last person with whom he used marijuana, no longer lives with Applicant. Applicant signed an affidavit expressing his intent to abstain from future marijuana use.

Conversely, Applicant's marijuana use between 2014 and 2018 overlapped with the period he held a security clearance. When Applicant decided to resume his marijuana use in 2014, after a 16-year hiatus, he had recently been diagnosed with Stage 3 rectal cancer,

was suffering with uncontrolled nausea, was on extended sick leave, and thought he was going to die. Applicant's resumption of marijuana under these extraordinary circumstances – understanding that it could alleviate his suffering - would present little current security concern were it not for the recurrent use in 2018.

Applicant's 2018 usage, however, was after his cancer was in remission, and several months after he completed a security clearance application on which he promised never to use marijuana in the future. Under these circumstances, the application of AG ¶ 26(b) has limited probative value.

The nature and seriousness of Applicant's resumption of marijuana use after his cancer was in remission is compounded by the fact that he held a security clearance at the time, and had completed a security clearance application promising not to smoke marijuana in the future. Under these circumstances, the possibility of recurrence remains unacceptably high. I conclude AG ¶ 26(a) does not apply, and that Applicant has failed to mitigate the drug involvement security concern.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

I considered the whole-person factors when I analyzed the disqualifying and mitigating conditions under the drug involvement guideline, and they do not warrant a favorable conclusion.

### **Formal Findings**

Formal findings for 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Marc E. Curry  
Administrative Judge