



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



In the matter of:	)	
	)	
[Name redacted]	)	ISCR Case No. 15-08344
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Rhett Petcher, Esquire, Department Counsel  
For Applicant: *Pro se*

03/16/2017

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**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on May 20, 2015. On May 2, 2016, 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 September 1, 2006.

On July 26, 2016, Applicant answered the SOR and requested a hearing before an administrative judge. On September 12, 2016, Department Counsel amended the SOR to allege an allegation under Guideline E, Personal Conduct. Department Counsel was ready to proceed on September 15, 2016. I was assigned the case on October 28, 2016. On November 10, 2016, a Notice of Hearing was issued, scheduling the hearing for December 7, 2016. The hearing was held as scheduled. At the beginning of the hearing, Applicant acknowledged the Amendment to the SOR and admitted the allegation. The Government offered three exhibits which were admitted as Government (Gov) Exhibits 1 - 3. Gov 3 is the summary of Applicant's background investigation interview summarized by the investigator who interviewed her. It is unsworn. Applicant

did not object to Gov 3. Applicant testified, offered no exhibits, and called no witnesses. The transcript was received on December 15, 2016. The record was held open to allow Applicant to submit additional documents. She timely submitted a six-page document, which was admitted as Applicant Exhibit (AE) A, and one-page document which was admitted as AE B. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

### **Findings of Fact**

In her answer to the SOR, Applicant admits to all of the SOR allegations.

Applicant is a 32-year-old software engineer for a DOD contractor who seeks to maintain her security clearance. She has worked for her current employer since December 2014. She was previously employed by another DOD contractor from January 2009 to July 2014. She applied for a security clearance with this company in July 2011 and received a secret clearance. She has a bachelor's degree and has some graduate school credit. She is married and has a daughter who was eight months old at the time of the hearing. (Tr. 18-22, 28, 39; 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 and her family's privacy. The cited sources contain more specific information.)

### **Guideline H – Drug Involvement**

On her security clearance application, dated May 20, 2015, Applicant listed marijuana use from approximately January 2002, to February 2015 in response to Section 23, Illegal Use of Drugs or Controlled Substances, "In the last 7 years, have you illegally used any drugs or controlled substances?" Applicant noted in the comments section:

The first time I smoked was in high school over 10 years ago. I smoked maybe once a month for a year in high school (junior year – 2002) Most recently, it was a casual night with my younger sister. It wasn't used maliciously, we were watching tv and knitting at my house.

Applicant also mentioned:

I do not intend to smoke marijuana in the future because it's not worth the anxiety of losing my security clearance, job and ruining my future. It's very unhealthy and causes cancer.

(Gov 1, Section 23 at 41)

In an unsworn summary of Applicant's background investigation interview, conducted on August 25, 2015, Applicant confirmed she first started using marijuana in 2002 as a teenager. She smoked marijuana approximately once a month between 2002 to 2005. Her marijuana use decreased from two to three times a year between 2005 to 2010. From 2010 to February 2015, her marijuana use decreased to once a year. She

indicated that she has no intention of using marijuana in the future. She states it is unhealthy. Her main reason for stopping marijuana use is her security clearance. She used it so infrequently, it is not worth jeopardizing her job and her future. (Gov 3 at 3)

From 2011 to 2014, Applicant held a security clearance while working for her previous employer. She did not understand that she should not use marijuana while holding a security clearance because she rarely used marijuana. She estimates that she used marijuana on two to three occasions during the 2011 to 2014 timeframe while she held a security clearance. She did not realize that illegal drug use was prohibited while holding a security clearance until she completed the May 2015 security clearance application. She never used marijuana at work and did not show up for work under the influence of marijuana. (Gov 3 at 3)

Applicant used marijuana with friends or her former boyfriend in social settings at parties or at home. She never purchased it. It was provided to her. She never sold it. She never used any other illegal drugs. (Gov 3 at 3)

In her response to the SOR, Applicant admits that "I did smoke pot once and only once while I held a security clearance." She understands that her actions were illegal, but says that her trustworthiness as an American is unwavering and true. Applicant takes pride in her country, work, and self. She comes from a family who has served in the military. Both of her parents were Army veterans. She is proud of the work she does. She gives her "all to serve her country and to protect those who protect us. She says she is not the same person. She is a new mom with new responsibilities and would never jeopardize her job, family, or livelihood again. (Response to SOR)

During the hearing, Applicant testified that she began using marijuana in 2002 while she was in high school. She estimates that she used marijuana on average of once a month between 2002 to 2005. In 2003, she lived with a boyfriend who frequently used marijuana. She would smoke marijuana with him at home. They broke up in 2004-2005, and she stopped using marijuana. Between 2005 to 2010, Applicant's use decreased to once or twice a year. Her college work had become more demanding and her friends, to include her now husband, did not use marijuana. The few times she used occurred at a family party at her sister's house. Her aunt had some marijuana. One time she used with some college friends. (Tr. 23-25)

Applicant began working for her previous employer in January 2009. She recalls she was required to take a drug test and that she made sure that she abstained from marijuana because she did not want a positive drug test. During the hiring process, her previous employer advised her that they perform random drug testing. She later testified that she used marijuana on average of at least once a year between 2010 to February 2015. Applicant knew marijuana was illegal, but changes in the law relaxed the penalties for possession of marijuana, so Applicant did not think using marijuana was a serious offense. (Tr. 28-35)

Applicant did not become aware that using marijuana while holding a security clearance was considered serious until just before completing her May 2015 security clearance application with her current employer. She recalls using marijuana just once

after being granted a security clearance in 2011. She believes someone was passing a marijuana cigarette around and she took a puff. After having her memory refreshed, she recalls using marijuana with her younger sister in February 2015 while knitting. This was the last time she used marijuana. Her sister no longer uses marijuana. Her mother uses marijuana and struggles with addiction issues. Applicant does not have much contact with her mother aside from phone calls. She believes her aunt uses marijuana. Her aunt moved to another state so she does not have much contact with her. She has a 21-year-old nephew who is battling drug addiction. (Tr. 37-40; 45-48)

Applicant testified her last use of marijuana occurred several months before she submitted her security clearance application in May 2015. It also occurred before she received extensive security training with her current employer. Her current employer is more organized. They provided better training on their policies and standards. She claims her first employer was more “lax” about security training. (Tr. 40-41)

Applicant no longer intends to use marijuana. She says she has become a different person after giving birth to her daughter. She watches her nephew and her mother’s addiction problems and it is not a life that she wants to live. She has no desire for it. None of her current friends use illegal drugs. (Tr. 43) After the hearing, Applicant submitted a statement indicating her intent to abstain from all illegal drug use. She acknowledged that any future illegal drug use will result in the loss of her security clearance. (AE B)

## **Personal Conduct**

The personal conduct concern cross-alleged Applicant’s illegal drug use, which is alleged under Guideline H. The concern is more appropriately addressed under Guideline H. Alleging it under Guideline E is redundant. SOR ¶ 2.a is found for Applicant.

The amendment to the SOR, alleged:

You falsified material facts on an Electronic Questionnaire for Investigations Process(sic), executed by you on July 25, 2011, in response to “Section 23. **Illegal Use of Drugs or Drug Activity.**” You falsely answered that your drug use stopped in November 2007 when, in fact, your drug use continued after that date.

In her security clearance application, dated July 25, 2011, Applicant listed marijuana use from approximately August 2007 to approximately November 2007. She explained in the comments section of the security clearance application:

I used marijuana in college with some close friends. Frequency of use was close to nothing. Times used would be under 10 times in the past 7 years.

(Gov 2, Section 23 at 32)

While Applicant's direct answer to section 23 is incorrect, she tends to indicate marijuana use subsequent to that time in the comments section of the same section. There is nothing in the record evidence such as her background investigation interview related to the 2011 background investigation to conclude Applicant intended to minimize her illegal marijuana use.

Applicant's performance evaluation for the period from January 1, 2015, and December 31, 2015, was favorable. (AE A)

## **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 access to classified information will be resolved in favor of 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).

## **Guideline H, Drug Involvement**

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

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.

Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (E.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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 drug abuse;

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

AG ¶ 25(g) any illegal drug use after being granted a security clearance.

Applicant used marijuana with varying frequency from 2002 to February 2015. She illegally used marijuana after being granted a security clearance in 2011. AG¶ 25(a), AG ¶ 25(c), and AG ¶ 25(g) apply.

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) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(a) does not apply because of Applicant's long history of marijuana use. She continued to use marijuana after being granted a security clearance in 2011. Her most recent use occurred in February 2015. While she did not use marijuana on a regular basis, her use after being granted a security clearance is sufficient to raise concerns about her reliability, trustworthiness, and good judgment. While Applicant claims she did not appreciate that she should not use marijuana while possessing a security clearance until she was trained by her current employer in the Spring 2015, she should have known. When she was hired by her first company, she was required to take a drug test. She was also told that she might be subject to random urinalysis testing. She was asked about illegal drug use on her security clearance application. The fact that she did not understand illegal drug use would be a concern when she was initially granted a security clearance raises a concern that Applicant would be unable to appreciate and understand the procedures for protecting classified information.

Applicant is given credit for providing a signed statement of intent to refrain from marijuana use. However, I give this document little weight considering Applicant's illegal use of marijuana after being granted a security clearance. AG ¶ 26(b) does not apply.

Applicant did not meet her burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

## **Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in 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 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.

The following disqualifying condition potentially applies to Applicant's case:

AG ¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR alleges that Applicant deliberately omitted subsequent marijuana use after November 2007 in response to section 23 on her July 2011 security clearance application. She listed marijuana use from August 2007 to November 2007. While Applicant's direct response to section 23 is incorrect, she indicates marijuana use subsequent to November 2007 in the explanation portion of section 23. She states that she used marijuana in college with some close friends and the frequency of use was under 10 times in the past 7 years. I find SOR ¶ 2.b for Applicant because she indicated more recent use in the explanation section of the question. I cannot conclude that she deliberately falsified her answer to section 23.

I find for Applicant with respect to SOR ¶ 2.a because the conduct was more appropriately addressed under Guideline H. The personal conduct concern is found for Applicant.

### **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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's professional qualifications. I considered her honesty with regard to her illegal marijuana use on her May 2015 security clearance application. I considered that her last use of marijuana occurred in February 2015, after being granted a security clearance. Applicant has not used marijuana in over two years. The concern in this case is more about Applicant's



judgment. Her inability to recognize that illegally using marijuana would be a concern when she was first granted a security clearance and her decision to illegally use marijuana after being granted a security clearance indicates poor judgment and a disregard for laws, rules, and regulations. Concerns raised by Applicant's illegal marijuana use are not mitigated. Personal conduct concerns are mitigated because Applicant did not intentionally falsify her response regarding illegal drug use on her July 2011 security clearance application and the use itself was appropriately addressed under Drug Involvement.

At some point in the future, Applicant may demonstrate the requisite judgment required to be entrusted with a security clearance. She has not done so at this time. Clearance is denied.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR Applicant
Subparagraphs 2.a – 2.b:	For Applicant

### **Conclusion**

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

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ERIN C. HOGAN  
Administrative Judge