



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 16-02218

**Appearances**

For Government: Philip J. Katauskas, Esq., Department Counsel  
For Applicant: *Pro se*

12/11/2017

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate security concerns regarding her use of illegal drugs. Eligibility for access to classified information is denied.

**History of the Case**

On November 4, 2016, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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 Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.

Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs). The new AGs apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect as of the issuance of the SOR would not affect my decision in this case.

Applicant responded to the SOR on November 26, 2016, and elected to have her case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on February 1, 2017, and did not respond to the FORM. The case was assigned to me on October 1, 2017.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly (a) used marijuana with varying frequency from approximately August 1973 to April 2016 and (b) continued to use marijuana after being granted a security clearance in January 2001. Allegations made under Guideline H raise questions about the user's reliability and trustworthiness.

In her response to the SOR, Applicant admitted the allegations in the SOR with explanations. She claimed she abstained from public activism, lobbying, and protesting for the legalization of marijuana. She further claimed she would abstain from social or personal use of marijuana while working for her employer. And she claimed she attended a few celebrations where she used marijuana with groups of friends since being granted a security clearance. Applicant claimed honest regret for losing the DOD's trust. She claimed she was diagnosed 12 years ago with Fibromyalgia and currently takes medication to help her sleep and reduce her chronic pain. And she claimed she has chosen to educate and advocate for medical marijuana to be used as a medicine.

### **Findings of Fact**

Applicant is a 63-year-old electrical engineer assistant for a defense contractor who seeks the restoration of her security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant married in November 1974 and divorced in January 2001. (Item 5) She has one adult child from this marriage. (Item 4) She currently co-habitates with another adult.

Applicant earned a high school diploma in June 1972. She reported no post-high school education credits or military service. (Item 5) Applicant has worked for her current employer since May 1995 and has held a security clearance with her employer since January 2001. (Item 5)

### **Drug use history**

Applicant was introduced to marijuana after high school and used the drug with varying frequency between August 1973 and April 2016. (Items 5-6) Since April 2016, she has abstained from marijuana use out of concern for her security clearance and employment. She has not participated in any recognized alcohol or drug rehabilitation programs or sought counseling or drug-related treatment programs.

Addressing her lifestyle changes in her SOR response, Applicant described herself as a long-time activist for the legalization of marijuana. In her SOR response, she posited that she resigned from the board of directors of a lobbying organization committed to the reform of marijuana laws. (Item 2) She assured in her response that she had ceased her lobbying activities and attending public rallies that focused on changing her state's marijuana laws. (Item 2) She committed, too, to refraining from social and personal use of marijuana and avoiding activities where marijuana might be present or used by attendees. (Item 2)

In an interview in April 2016 conducted by an agent from the Office of Personnel Management (OPM), Applicant discussed her marijuana use. (Item 6) Asked by the interviewing OPM agent about her use of marijuana, Applicant confirmed her inclusive dates of usage and frequency. She told the OPM agent she is an outspoken activist for the legalization of marijuana and will continue to use the substance. (Item 6) She acknowledged in her interview and answers to DOHA interrogatories that she has never participated in any drug rehabilitation or counseling program. (Item 6) Only after her OPM interview in April 2016 did she reconsider her expressed intentions to continue using marijuana and cease using the substance.

Reconciling Appellant's past statements in her OPM interview about her intentions to continue using marijuana with the assurances she provided in her SOR response that she would cease using marijuana is difficult without more clarifying explanations from Applicant. The best inferences that can be drawn from her reconsidered statements about her future use of marijuana is that her prospects for returning to marijuana use in the future are at best uncertain. *Compare* Items 2 and 6.

Applicant provided no character references or performance evaluations as attachments to her response. Nor did she provide evidence of counseling or rehabilitation initiatives.

### **Federal laws covering the enforcement of marijuana use**

In a memorandum of October 2014, the Director of National Intelligence (DNI) issued guidance that made it clear that no state can authorize violations of federal law.

*See Adherence to Federal Laws Prohibiting Marijuana Use* (October 2014). Under federal law, marijuana is identified as a Schedule 1 controlled drug. Noted, too, in the DNI's memorandum, Executive Order 12564 mandates a drug-free workplace and drug-free federal workforce. (Id.)

Guidance to federal prosecutors regarding marijuana enforcement in the states was issued in August 2013 by the Deputy Attorney General (DAG) and reaffirmed the Justice Department's enforcement priorities in addressing state laws that legalize marijuana for cultivation and distribution for medicinal use. *See Guidance Regarding Marijuana Enforcement*, United States Department of Justice at 3 (August 2013). Under current Justice Department (DOJ) guidance, prosecutors are counseled to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the marijuana operation is demonstrably in compliance with a strong and effective state regulatory system. (Id.)

Most importantly, neither the DOJ guidance nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the Controlled Substance Act (CSA). The guidance stresses that even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action.

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns. The AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guideline is pertinent in this case:

### **Drug Involvement**

*The Concern:* 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 defined in 21 U.S.C. 802. . . .

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of

establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### Analysis

Security concerns are raised about Applicant’s recurrent use of marijuana (a controlled substance) over the course of many years between September 1983 and April 2016. Her admissions to using marijuana with varying frequency create security concerns over risks of recurrence, as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions (DC) of the AGs for drug involvement are applicable: DC ¶ 25(a), “any drug abuse,” DC ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” and DC ¶ 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

Heightened judgment concerns exist over Applicant’s active drug involvement after she was granted a security clearance in January 2001. Not only did her marijuana use violate her own state’s laws banning the use of marijuana and other illegal substances, but it violated both federal law and DOD’s mandated drug-free workplace and drug-free federal workforce policies in place for both DOD employees and DOD contractors. See *Adherence to Federal Laws Prohibiting Marijuana Use*, *supra*, and *Guidance Regarding Marijuana Enforcement*, *supra*.

When the federally legislated Controlled Substance Act (CSA) has been challenged on federalism grounds, the courts have consistently extended federal preemption authority over competing state laws that legalize marijuana use. In *Oakland Cannabis Buyers*, 532 U.S. 483 (2001), the Supreme Court did not attempt to invalidate the enabling legislation adopted by the particular state in issue. This legislation was designed to implement the key enabling provisions of the approving state’s Proposition 215, under ¶¶ 11362.5 *et seq.* Proposition 215 (known as the Compassionate Use Act under the laws of the state in issue in *Oakland Cannabis Buyers*, *supra*) was passed by this state’s voters in 1996 to validate the right of residents of the state to possess and use marijuana for medical purposes, when they have a recommendation from a licensed physician. Proposition 215 gives the patient’s primary care giver the right to cultivate and possess marijuana for the patient. But the *Oakland Cannabis Buyers* Court affirmed continued federal jurisdiction over drug violators covered by the law without regard to the state’s marijuana exception.

More recently, the Supreme Court seized the opportunity to refine and clarify the reach of its holding in *Oakland Cannabis Buyers*, *supra*. In *Raich v. Gonzales*, 545 U.S. 1, 8-14 (2005), the Court addressed the claims of two state residents who suffered from a variety of serious medical conditions and has sought to avail

themselves of medical marijuana pursuant to the terms of the state's Compassionate Use Act. Notwithstanding that county investigating officials had found that one respondent's medical use of marijuana was entirely lawful, federal agents seized and destroyed all six of her cannabis plants.

In *Raich v. Gonzales*, *supra*, the Supreme Court held that the regulation of marijuana under the CSA was fully within Congress' commerce power (U.S. Const., art. I, ¶ 8), because marijuana production intended for home production could have a substantial effect on supply and demand in the national market. The *Raich* Court reasoned that federal failure to regulate the intrastate manufacturing and possession of marijuana would leave a considerable gap in the CSA. In turn, the Court vacated the Ninth Circuit's judgment. So, even if Applicant's current state of residence were at some time in the future to approve the use of marijuana for medicinal purposes, a state-approved medicinal permit would not foreclose the Federal Government from prosecuting illegal possession charges under the CSA. And state-approval of medicinal use of marijuana is still very hypothetical, for Applicant's current state of residence does not authorize marijuana use for any purposes.

To Applicant's credit, she has made some noticeable gains in her efforts to mitigate her past involvement with illegal substances (*viz.*, marijuana use) Her cessation of marijuana involvement was more recent (*i.e.*, less than two years following recurrent use over more than 42 years), though, and still leaves questions about her exposure to risks of returning to marijuana use.

With almost two years of accepted abstinence from illegal drug use and disassociation from friends who shared her marijuana use, Applicant merits some consideration of two of the mitigating conditions of Guideline H. MC ¶ 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: (b)(1), 'disassociation from drug-using associates and contacts, and (b)(2), 'changing or avoiding the environment where drugs were used," partially apply to Applicant's situation. Both of these mitigating conditions have very limited application, however, without more input from Applicant on her continued progress.

In fairness to Applicant, she has exhibited open candor about her past marijuana use and her associations with persons who have used marijuana. Her commitments to breaking all ties and connections with friends and associates who use or are in any way involved with marijuana use are encouraging. Still, Applicant has provided little corroborating evidence of her progress in breaking with her past friends and contacts and claims a relatively short period of abstinence in her answer and summary of interview with an agent of the OPM. Even if she were to prospectively obtain a state-approved exception for marijuana use for medicinal purposes, such an exception would not absolve her from potential exposure to federal enforcement actions. For any medicinal use of marijuana that might be legal under the laws of Applicant's state, or other state, is not immune to federal prosecution for violation of the CSA under the federal government's concurrent jurisdiction over manufacturing,

distributing, and possessing illegal drug. So, while Applicant's most recent assurances that she has no intention of ever resuming her involvement with marijuana while she works for her current employer with a security clearance are entitled to some weight, they cannot be totally separated from the recurrence risks that face Applicant in the foreseeable future based on her past history of extended marijuana use.

Because of the recency of Applicant's discontinued involvement with marijuana (less than two years), and the uncertainty about her permanent breaks from her past friends with whom she shared marijuana, it is still too soon to conclude that Applicant's illegal use of marijuana and judgment lapses associated therewith are fully mitigated. More time is necessary before safe predictive judgments can be made that Applicant will not resume her involvement with marijuana.

From a whole-person perspective, Applicant has established some understanding of DOD policy constraints on the use of illegal substances. Because motivation is never easy to objectively establish, the placement of reasonable time lines on clearance applicants to test and absolve them of recurrence risks makes safe and practical sense when balancing the interests of protecting national security with the interests of those who seek access to the nation's secrets.

Considering the record on a whole, at this time there is too little documented evidence of Applicant's mitigation efforts to avert foreseeable risks of recurrent involvement with illegal drugs (marijuana in this case). While she is to be commended on her decision to discontinue her marijuana usage, it is still too early to make safe predictions about her ability to sustain her abstinence. Unfavorable conclusions warrant with respect to the allegations covered by Guideline H.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H (DRUG INVOLVEMENT):                      AGAINST APPLICANT

Subparas. 1.a-1.b:    Against Applicant

### **Conclusions**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge



