



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 16-03460
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie Mendez, Esquire, Department Counsel  
Brittany Muetzel, Esquire, Department Counsel  
For Applicant: Jesse Winograd, Esquire

01/25/2018

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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 March 18, 2015. On January 7, 2017, 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 Guideline E, Personal Conduct. The action was taken under Executive Order 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 June 8, 2017, new AG were implemented, which supercede the AG implemented on September 1, 2006. My decision would be the same under either guideline.

On March 2, 2017, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 23, 2017. I was assigned the case on October 10, 2017. On October 11, 2017, a Notice of Hearing was issued, scheduling the hearing for November 30, 2017. The hearing was held as scheduled. During the hearing, the Government offered one exhibit which is admitted as Government (Gov) Exhibit 1. Applicant testified, called two witnesses and offered one exhibit which is admitted as Applicant Exhibit (AE) A, without objection. An

additional document was offered after the hearing and was admitted as AE B without objection. The transcript was received on December 8, 2017. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

### **Findings of Fact**

In his answer to the SOR, Applicant admits to the allegations.

Applicant is a 40-year-old employee for a DOD contractor who seeks a security clearance. He has been employed with the DOD contractor since March 2015. This is his first time applying for a security clearance. He has a law degree. He is married and has two daughters, ages three and one. (Tr.12-13; Gov 1) (Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.)

On March 18, 2015, Applicant submitted an electronic questionnaire for investigations processing (e-QIP). This was his first time applying for a security clearance. In response to Section 23 – Illegal Use of Drugs or Drug Activity, Applicant listed that he used and purchased marijuana on a recreational basis from April 1994 to February 2015. He noted he used marijuana occasionally throughout his adult life. (Gov 1, section 23) Applicant stated this in regarding his intent to use marijuana in the future:

I do not intend to use marijuana in the future. I understand the importance of refraining from using marijuana with my new position, and I do not want to jeopardize my security clearance by continuing to use marijuana.

Applicant did not use marijuana from March 2015 to some time in the summer of 2015. He started using marijuana to relax after work. He would take one or two hits after getting home from work. He occasionally used marijuana with friends and relatives. (Tr. 43-45; Response to SOR)

In April 2016, Applicant was asked to complete a security questionnaire for a project. (Note: This appears to have been the DOD contractor's personal security eligibility evaluation form and not an e-QIP). One of the questions on the form asked about marijuana consumption within the past year. Applicant answered that he had used marijuana earlier that same month. The contractor security team asked for further explanation. Applicant responded in an e-mail that he has not purchased marijuana since July 2014. He used marijuana during the current month. He intended not to use marijuana after March 2015, but resumed usage in the summer 2015. He was not aware that he was prohibited from using marijuana while his security clearance application was being processed. He only used marijuana in the jurisdiction where he lives, which has very permissive marijuana laws. (Response to SOR)

Applicant admits his poor judgment in resuming marijuana use after submitting his security clearance application. Once he discovered his mistake, Applicant stopped using marijuana and has not used marijuana since April 2016. (Tr. 14, 31-34)

During the hearing, Applicant testified that he was not addicted to marijuana. His marijuana usage never created problems in his life. He testified that he was not aware that he was required to stop using marijuana after he submitted his security clearance application. Once he learned it was a problem, he stopped using marijuana. It was easy for him to stop using marijuana. Applicant's primary focus is his family, including his two young children. He does not intend to use marijuana again. Since he stopped using marijuana, he feels more clear-headed. He admits to making a mistake by not taking seriously the requirement to refrain from using marijuana after submitting his security clearance application. (Tr. 30-34)

Applicant began using marijuana at age 17. He describes his marijuana use in high school as experimental. During his college years, between 1995 to 1999, he used marijuana every other week. After college, he used marijuana several times a month. He worked for a few years and began law school in 2006. He occasionally had periods where he did not use marijuana, but sometimes he would use marijuana daily. He describes his daily use as taking two to three hits. After law school, he used marijuana on an occasional basis. He occasionally used marijuana with friends and family. He would use a little bit of marijuana to relax. He now avoids situations where there is a potential for marijuana use. (Tr. 36-41)

Applicant understood that marijuana use would be a problem if he held a security clearance. He understood that his marijuana use was illegal at the federal level. He never thought marijuana use was a serious crime. He never thought his marijuana use would have an impact on his career. He has never been arrested. (Tr. 47-50)

On March 2, 2017, Applicant submitted a statement indicating his intent to refrain from any future drug use. He accepts that his security clearance will be revoked if he violates this pledge. (AE A) Applicant intends to follow the standards applied by federal law. His activities and motivations are now different. He will do everything in his power to be a law-abiding citizen and take care of his family. (Tr. 52-53)

## **Whole-Person Factors**

Applicant's wife testified on his behalf. She met Applicant eleven years ago while they attended law school. They have been married seven years. She is a stay-at-home mother. She is aware of Applicant's marijuana use. She believes he stopped using marijuana two years ago. Applicant cares about their two children and is concerned about his job. In his leisure time, he plays drums with several of his classmates from law school. None of them use marijuana. She recalls Applicant used marijuana on a daily basis during his last year in law school. He started to smoke less marijuana when they began to have children. She used to use marijuana, but no longer uses it. (Tr. 12 – 20; AE B)

One of Applicant's team members testified on his behalf. He has worked with Applicant since March 2015. He describes Applicant as one of the better performers in the office. Clients request that Applicant be assigned to their cases. He is aware of the issues in the SOR and maintains that the quality of Applicant's work has remained

consistent. Applicant works with sensitive information involving high profile cases. He has had no security violations. (Tr. 21-29)

## **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.

## **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 over arching 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 Executive Order 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:

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; and

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

Applicant used marijuana with varying frequency from 1976 to the summer of 2016. He occasionally purchased marijuana for his personal use. AG ¶ 25(a) and AG ¶ 25(c) 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) 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) 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) does not apply because of Applicant's long history of marijuana use. His most recent usage occurred after he submitted his security clearance application in March 2015, which raised questions about his judgment. However, Applicant has not used marijuana for close to two years and he was completely honest about his marijuana use, which shows trustworthiness.

AG ¶ 26(b) applies. Applicant stopped using marijuana in April 2016, when he discovered that DOD was serious about illegal marijuana use. Admittedly, he should have been aware that marijuana use was not condoned when applying for a security clearance, but this was his first time applying for a security clearance, and he lives in a jurisdiction with permissive marijuana laws. In April 2017, he provided a signed statement of intent to refrain from marijuana use. Applicant was truthful about his marijuana use and demonstrated an appropriate pattern of abstinence. He is now more focused on supporting his family and raising his two daughters.

Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement. Applicant is warned that any future illegal marijuana use may result in the revocation of his security clearance.

## **Guideline E, 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security or adjudicative processes.

The following disqualifying conditions potentially apply to Applicant's case:

AG ¶ 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 individual may not properly safeguard classified or sensitive information.

AG ¶ 16(c) applies to Applicant's history of marijuana use as well as his decision to continue using marijuana after submitting a security clearance application in March 2015. On that same application, he stated that he did not intend to use marijuana. Applicant's past conduct raises issues about his judgment, reliability, and willingness to comply with rules and regulations. This raises doubts as to Applicant's ability to protect classified information.

Under Guideline E, the following mitigating conditions potentially apply in Applicant's case:

AG ¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Both mitigating conditions apply. While Applicant's resumption of marijuana use several months after submitting a security clearance application demonstrated poor judgment, Applicant was honest about his marijuana use and once he understood that his marijuana use was an issue, he stopped. He has not used marijuana for close to two years. Applicant is now a father to two young daughters. He realizes his focus should

be on raising them and he no longer uses marijuana. He demonstrated that he is reliable, trustworthy, and has good judgment.

### **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. Applicant is aware that he violated federal criminal statutes pertaining to the use and purchase of marijuana. His continued use of marijuana after submitting his March 2015 security clearance application and after expressing an intent to stop using marijuana on his security clearance application raises serious questions about Applicant's judgment, reliability and trustworthiness.

I find the mitigating reasons outweigh the disqualifying reasons in Applicant's case. His honesty in disclosing his marijuana use during the security clearance process supports that he is trustworthy. He is a first-time applicant for a security clearance and did not appear to appreciate the seriousness of using marijuana. Once he understood the significance of the incompatibility of marijuana use and holding a security clearance, he stopped using marijuana and has not used marijuana for close to two years. He signed a statement of intent to refrain from using marijuana in the future and acknowledged that he would lose his security clearance if he is discovered using marijuana in the future. Applicant has a wife and two young daughters to support. His outlook has changed. The favorable reviews of one of his project leads indicate that his job performance is excellent.

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. His expressed intent to refrain from illegal marijuana use is credible. Concerns raised by Applicant's illegal marijuana use are mitigated with the warning that any future illegal marijuana use may result in the revocation of Applicant's security clearance.



### **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
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.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 his security clearance.

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ERIN C. HOGAN  
Administrative Judge