



**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. 16-03602

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

06/29/2018

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant mitigated the security concerns regarding her use of drugs. Eligibility for access to classified information is granted.

**History of Case**

On April 21, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for 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 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 DOD on September 1, 2006.

The 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Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the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). They 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 for the issuance of the SOR would not affect my decision in this case.

Applicant responded to the SOR on May 15, 2017, and requested a hearing. The case was assigned to me on February 8, 2018, and was scheduled for hearing on April 18, 2018. At hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on one witness (herself) and 11 exhibits. The transcript (Tr.) was received on May 1, 2018.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly (a) used marijuana products from approximately September 2015 to a least July 2016 and (b) continued to use and purchase marijuana or marijuana products, as set forth in paragraph 1.a, after being granted a security clearance in June 2015.

In her response to the SOR, Applicant admitted each of the allegations pertaining to her use of illegal drugs with explanations. She claimed that she misused marijuana after cancer treatment, chemotherapy, radiation, and nearly a year-long use of a study drug she believed caused persistent deep joint pains. She claimed she believed that using medicinal marijuana would be a good way to quickly ease her aches and pains without taking time off for personal therapy.

Applicant further claimed that after she learned that use of marijuana for medicinal purposes was against policy, she notified a company security person in December 2015 and January 2016; albeit, she was delayed in finding the right security person for several months. And, she claimed she is dedicated to her job and has no interest in abusing drugs in the future.

### **Findings of Fact**

Applicant is a 50-year-old mechanical engineer for a defense contractor who seeks to retain a 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 December 1998 and has two children from this marriage. (GE 1) She earned two engineering degrees from a respected university: one in May 1989 in mechanical engineering and another in May 1990 in electrical engineering. (GE 1) And she earned a master's degree in engineering in May 1998 from another respected university. (GE 1) Applicant reported no military service. Since November 2000, she has worked for her current employer and held a security clearance since 2003. (GEs 1-2 and AE K)

### **Applicant's medical history**

Medical records document that Applicant was treated for Stage III breast cancer following her diagnosis in October 2013. (AEs E and J) She underwent surgery in November 2013 and received chemotherapy between November 2013 and May 2014. (AE J) After completing radiation treatment in July 2014, she began anti-hormone treatment at the end of July and went on full-time medical leave. (AE J) After returning to a part-time work schedule in September 2014, she enrolled in a drug study trial (a blinded trial designed to ascertain the safety and effectiveness of a chemotherapy pill), which she completed in October 2015. (AEs E and J)

According to Applicant's certified oncology nurse (OCN), treatment for Stage III cancer is physically grueling and carries a higher risk of recurrence than Stage I or Stage II cancers. (AE E) Applicant was on medical disability between October 2013 and September 2014 and returned to work in September 2014 on a restricted basis (no more than 30 hours a week) (AEs E and J) Medical issues associated with her cancer study trial affected her ability to work the long hours she was accustomed to doing. When work restrictions were lifted in October 2014, she returned to her regular work schedule. The extra work hours soon increased her pain symptoms, enough to inhibit her ability to keep up with her regular therapy appointments. (AE E)

The oncology nurse's notes confirmed Applicant's September 2015 request to discuss the use of medicinal marijuana with her treating physician. (AE E) Applicant's treating nurse credited Applicant with taking her health responsibilities, her family (to include the death of her mother), and her work very seriously. (AE E) Addressing her medical issues has required considerable leave over the five years spanning April 2012 and February 2017. (AE G)

### **Applicant's drug history**

In 1992 (at the age of 25), Applicant tried marijuana three times on a summer trip abroad. (GE 2) She did not use the substance again until September 2015 (GE 2) Between September 2015 and July 2016, she used marijuana for medical purposes (after trying alternatives without success) in accordance with the prescription furnished her by her treating physician in September 2015. (GE 2 and AE H; Tr. 37-38) She continued to use medical marijuana while holding a security clearance in the belief it was not against either company or DOD.

In September 2015, Applicant read how marijuana relieves pain and obtained a medical marijuana prescription under her state's law that permits the dispensing of marijuana for certified medical purposes. (AE E; Tr. 38-39) With the prescription, she went to a marijuana dispensary and purchased \$25 worth of marijuana. (GE 2) Over the course of two weekends, she ate the marijuana product, but never smoked it. It helped her with her pain, but "knocked her out worse than any flu medication she ever took." (GE 2) After this experience, "she never ate the marijuana products again." (GE 2) When medical marijuana did not work for her, she turned to over-the-counter medications for pain relief. (GE 2)

In December 2015, Applicant received a refresher security briefing which included detailed explanations of both her employer's and DOD's policies in place banning the use of marijuana and other illegal drugs, even when prescribed for medicinal purposes. (AE J) It was during this briefing that she became aware of company and DoD policy against the use of medicinal marijuana products. (GEs 2-3; Tr. 39) Armed with this policy information, she self reported her past marijuana use to her company security personnel office in January 2016 and sought to obtain more guidance on the use of medical marijuana. (GEs 2-3 and AE J; Tr. 39-40)

Between 1992 and September 2015, and since July 2016, Applicant has not used marijuana altogether. (AE J) Except for her earlier use of marijuana for recreation purposes in 1992 and her past use of medicinal marijuana in 2015-2016, Applicant has never used marijuana and has never experimented with any other illegal drugs or misused prescription medications. (GEs 2; Tr. 40-41) She has never asked for or received drug counseling as a result of her misuse of prescribed marijuana products. (GE 2) And she assured she has no intention of ever using medicinal marijuana, or any other illegal drug, in the future. (GE 2; Tr. 41)

### **Endorsements and awards**

Applicant is well-regarded by her supervisors and colleagues who have interacted with her on a regular basis for many years and are aware of the serious health problems and medical treatment she has been receiving since 2014. (AEs D and I) They credit her with respect and a high level of trust for her ability to understand the issues, develop plans to resolve the issues, get program and customer concurrence with the plan, finding the root cause of the problem and implementing effective corrective actions. (AE D)

Applicant has received excellent performance evaluations with merit increases over the course of her employment. (AEs B and I) Between December 2003 and November 2017, she has received numerous monetary awards in recognition of her team and individual accomplishments and contributions. (AE A) Her awards include employee of the month leadership recognition and certificates of appreciation. (AE F) Of special note, Applicant was on her space executive leadership team, she was recognized as her team's space awards night recipient for 2018. (AE C) Her award recognized her excellent day and day performance and willingness to reach higher and farther in a way that sets her company apart in the defense industry. (AE C)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance 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. The AGs include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They 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 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. The following AG ¶ 2(a) factors are pertinent: (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 adjudication policy factors are pertinent herein:

### **Drug Involvement**

*The Concern:* 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 AG ¶ 24.

### **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**

Applicant experimented with marijuana in 1992 and used it more frequently between September 2015 and July 2016 for medicinal purposes to address her recurrent pain associated with her diagnosed Stage III cancer. She used prescribed marijuana on a frequent basis during this period in compliance with her state’s law authorizing marijuana use for prescribed medicinal purposes.

On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), “any substance misuse,” DC ¶ 25(c), “illegal possession, 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.” Judgment concerns exist over Applicant’s past drug use. She has some recurrent history of marijuana use on a limited scale to self-medicate her cancer-related pain with prescribed marijuana and less than two years of demonstrated abstinence.

Applicant claims she complied with state law in using prescribed marijuana for medicinal purposes. Once she learned from her employer’s refresher security briefings that marijuana use was against both company and DOD policy, she ceased using marijuana and found substitute medications to deal with her pain issues. But her use of marijuana for medicinal purposes not only violated company and DOD policies mandating drug-free federal work conditions, but federal law as well. Whether Applicant was ever made aware of federal law’s preemptive ban of marijuana use in states that authorize its limited use for medicinal purposes is unclear.

When the Federal Controlled Substances 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 state's Proposition 215, under §§ 11362.5 *et seq.* Proposition 215 (known as the Compassionate Use Act) 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 did affirm continued federal jurisdiction over drug violators covered by the federal 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 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 though Applicant complied with her state's permit to use marijuana for medicinal purposes, her state-approved medicinal permit would not foreclose the Federal Government from prosecuting illegal possession charges under the CSA. Applicant appears to understand the reach of the CSA in its preemption of her state's medical marijuana exception and how it affects the anti-drug policies placed in force by her employer and the DOD.

To her credit, Applicant committed to full compliance with her company's anti-drug policy and ceased using marijuana altogether in July 2016, once she fully understood the policy preempted her state's medicinal marijuana exception. She found other medications to treat her pain issues and has not returned to marijuana use in almost two years. Based on her limited use of marijuana in compliance with state law without any knowledge that her use of marijuana for medicinal purposes violated both federal law and her employer's anti-drug policy, she may claim the full benefit of several mitigating conditions of the drug involvement guideline: MCs §§ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," and 26(c), "abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended."

Applicant is credited with reliability, trustworthiness, and good judgment by her supervisors and colleagues who have known her and worked closely with her for a number of years. Her contributions to her employer and DOD are well-documented

through her impressive performance evaluations, awards, and letters of achievement. She has replaced her use of medical marijuana to treat her pain issues with other medications and is committed to complying with her employer's anti-drug policies that are at odds with her own state's medicinal marijuana exception. Safe predictable judgments, accordingly, can be made about her ability to avoid recurrent drug involvement.

### **Whole-person assessment**

From a whole-person perspective, Applicant has established independent probative evidence of her use of marijuana under exceptional circumstances to address her cancer-related pain issues. She has also established with strong probative evidence her understanding of company and DOD anti-drug policy and has made concerted efforts to find safe and effective substitutes to address her pain problems. Worth underscoring, too, are Applicant's important contributions to her employer and DOD. Her impressive performance evaluations, awards, and letters of achievement are well-documented and entitled to considerable weight in assessing her overall reliability, trustworthiness, and ability to abstain from self-medicating with drugs proscribed by federal law and the policies of her employer and DOD.

Taking into account all of the facts and circumstances surrounding Applicant's limited drug use for medicinal purposes in compliance with her state's medicinal marijuana exception without knowledge that her marijuana use violated federal law and the anti-drug policies of her employer and DOD, Applicant mitigates security concerns related to her drug use. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a and 1.b of 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):                      FOR APPLICANT

Sub-paras. 1.a-1.b:    FOR APPLICANT

### **Conclusions**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

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Roger C. Wesley  
Administrative Judge



