



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



In the matter of: )  
)  
) ISCR Case No. 17-02975  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Adrienne Driskill, Esq., Department Counsel  
For Applicant: *Pro se*  
04/20/2018

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**Decision**

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LYNCH, Noreen A., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse), but the concern under Guideline E (personal conduct) is duplicative conduct. Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

On October 26, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. Applicant timely answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's file of relevant material (FORM) on January 2, 2018. Applicant received the FORM on January 29, 2018, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence, but he provided a response to the FORM. The Government's evidence, identified as Items 1 through 3, is admitted without objection. Applicant's response is also admitted. The case was assigned to me on April 13, 2018.

## Findings of Fact<sup>1</sup>

Applicant is 48 years old. He obtained his undergraduate degree in 1991 and received his master's degree in 1998. He served in the U.S. Army on active duty from 1991 to 2000, receiving an honorable discharge. He has been employed as a senior systems engineer by his current federal contractor since 2016. He married in 1996 and has four children. Applicant has held a previous security clearance since August 2003.

On March 8, 2016, Applicant completed a Security Clearance Application (SCA),<sup>2</sup> and disclosed that he experimented with marijuana twice in September 2015. (Item 2). He noted that only medicinal marijuana use is legal in his state. He described the marijuana as cannabis oil (CBD). In his Answer to the SOR dated November 14, 2017, Applicant admitted to the allegations in SOR ¶¶ 1. a-c. However, he provided a different explanation. He wrote that he used "cannibidiol (CBD) for the sole purpose of pain relief. He has chronic back pain and stated that CBD is the non-psychoactive component of marijuana. (Item 1) He elaborated that it upset his stomach and since he does not want to use opiates, he now goes to physical therapy. He also admitted that his use occurred during the time he held a clearance but at the same time said he did not have access to any classified information. He also admitted to the allegation that he intended to continue use in the future. In his Answer, he modified his response by indicating that that he had not ruled out the use of CBD if it would prove efficacious to his pain if prescribed. He then stated that he has not used marijuana since September 2015 and prefers physical therapy. (Item 1)

Applicant also admitted the allegation under Guideline E (personal conduct) in SOR ¶ 2.a. with explanations. He stated that he "was not read onto any classified program and did not have access to any classified information." He again stated that he has not used marijuana since 2015.

In his interview, dated 2017, Applicant reiterated that he used marijuana offered by a friend to treat his pain. It made him sick and did not help, so he decided not to use marijuana again. He had researched CBD and found that he would try that if prescribed by a physician and legal in his state. He did not report it to his FSO. (Item 3)

In his response to the FORM, Applicant acknowledged that marijuana is a controlled substance but he was not aware that CBD was included in that definition. He stated he was using it for therapeutic reasons. He stated that he had a clearance but at the time did not have access to classified information. He further explained that he did

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<sup>1</sup> Unless stated otherwise, the source of the information in this section is Applicant's March 8, 2016 Security Clearance Application (SCA) (Item 2) and his summary of clearance interview by a background investigator dated 2017 (Item 3).

<sup>2</sup> Item 2.

not mean to imply he would use marijuana in the future, but that he would consider CBD if it was declassified from a Schedule 1 drug. (Response to FORM)

In addition, Applicant argued that the whole-person concept was not considered in his case. He elaborated that he was cooperative with the investigators and has held multiple levels of security clearances. He stated that he never had a security incident. He included a JPAS investigations summary with his response to the FORM. The purpose of the adjudicative summary is to show that he has a favorable adjudicative history.

## **Policies**

DOD took action in this case 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 adjudicative guidelines (AGs) implemented by DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017.<sup>3</sup> Accordingly, I have applied the June 8, 2017 AGs in this decision.

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, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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

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<sup>3</sup> Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either AG.

contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an applicant may deliberately or inadvertently fail to 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).

## **Analysis**

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

¶ 24: The security concern for drug involvement and substance misuse is set out in AG

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. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

¶ 25: The guideline notes several conditions that could raise security concerns under AG

(a) any substance misuse (see above definition);

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

(f) any illegal drug use while granted access to classified information or holding a sensitive position; and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana while holding a security clearance. The latest incident was in September 2015. He stated that he may use CBD in the future if it was not a Schedule 1 drug. He stated that he had a security clearance but at the time had no access to classified information. He claimed it was for therapeutic use, but he provided no evidence of such. He stated that he now goes to physical therapy for his back pain. All of the above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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.

Applicant admits he used marijuana in September 2015 on two occasions. He stated that he did not know that a derivative CBD was illegal. It is not clear what he meant by that statement. He had no information providing a medical therapeutic reason or a prescription. And even if he did, federal law does not permit the use of marijuana. He stated that it made him sick and thus, he did not use it anymore, but chose physical therapy. He had a security clearance but said he did not have access to classified information at the time. He fully disclosed the incidents during his investigative interview. He said he might use again, but also said that he will pledge to abstain from ever using it again. He has not provided evidence that would allow mitigation under any of the

mitigating conditions at this time. His marijuana use is too recent, and he seemed uncertain as to future use. Applicant knew that he held a security clearance and the impact that use of an illegal drug would have on such a clearance. He did not provide any letter of intent to abstain in the future. It is insufficient to mitigate the illegal drug use, particularly while possessing a security clearance. To accept Applicant's assertion that he was unaware marijuana use was illegal stretches credibility. Although some states have decided to legalize marijuana use for medical use, it is still illegal under Federal law in all circumstances. (Internal Reform and Terror Protection Act (IRTPA) as amended, 50 U.S.C. 3343 (2008)). Applicant's security clearance falls under federal authority. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(b) is partially applicable.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

The Concern. 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 national security investigative or adjudicative processes. The following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 information. This includes but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; . . . .

(e) personal conduct, or concealment of information about one's conduct,

that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;
- (2) while in another country, engaging in any activity that is illegal in that country; and
- (3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

Applicant admitted the use of marijuana in 2015, but parsed his language as to CBD and a difference between that and marijuana. His response to the FORM showed no acknowledgement that he did anything to jeopardize his security clearance. He stated that at the time he had no access to classified information. During his interview, he spoke about the use of the marijuana and disclosed an "experimentation" on his SCA. However, I have doubts as to his judgment and reliability and do not find that he has mitigated the personal conduct concerns with his varying responses. He was cooperative but evasive in his varying answers and response to FORM. The allegations under personal conduct are the same as the ones alleged under drug or substance abuse. AGs 16 d (3) and 16 e (1) apply.

Under AG ¶ 17, conditions that could potentially mitigate security concerns include:

- (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 it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

My analysis above under adjudicative guideline H is the same under this adjudicative guideline E, and is herein incorporated by reference. Applicant admitted to his use of marijuana while holding a security clearance. He has not mitigated the drug usage while holding a security clearance under Guideline H. SOR ¶ 2.a cross-alleges under the personal conduct guideline the same conduct alleged under the drug

involvement guideline. All of Applicant's conduct causing a security concern in SOR ¶ 2.a is explicitly covered under Guideline H, and that conduct is sufficient to warrant revocation of his security clearance under Guideline H. Applicant's involvement with marijuana affects his professional and community standing. However, this conduct does not create a vulnerability to exploitation, manipulation, or duress because security officials are aware of it. Guidelines H and E address identical issues involving judgment, trustworthiness, and reliability. Guideline E concerns in SOR 2.a constitute a duplication of the concerns under Guideline H.

## **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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has worked for a federal contractor directly supporting DOD's mission and he held a security clearance for a number of years. He served in the U.S. Army on active duty and received an honorable discharge. He never acknowledged poor judgment for the use of marijuana in 2015, while holding a security clearance. He believed that his whole-person was not considered given his many years of holding a security clearance and no security incidents. However, his answer and response to FORM are not credible despite the fact that he stated he used it for therapeutic reasons and that his previous history of holding a security clearance should mitigate any concerns.

There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement while holding a security clearance. He has not met his burden of persuasion under Guideline H. The record evidence leaves me with serious



questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline H. Guideline E conduct is duplicated.

### **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.c:	Against 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 not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Noreen A. Lynch  
Administrative Judge