



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



In the matter of: )  
)  
) ISCR Case No. 17-03490  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

06/25/2018  
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**Decision**  
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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline H, drug involvement. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On November 8, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted 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 (AG) implemented by the DOD on June 8, 2017.

On November 26, 2017, Applicant answered the SOR and requested a hearing. The case was assigned to me on January 19, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 5, 2018, and the hearing was

held on March 21, 2018. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through H, which were admitted into evidence without objection. The record remained open and Applicant timely submitted AE I and J, which were admitted without objection. DOHA received the hearing transcript (Tr.) on March 28, 2018.

### **Findings of Fact**

In Applicant's answer, she admitted SOR allegation ¶ 1.a, but denied ¶ 1.b. I adopt her admission as a finding of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 32 years old. She is married and has no children. She has worked for her current employer, a defense contractor, since December 2016. Before working as a contractor employee, she was a teacher for approximately seven years. She has a master's degree.<sup>1</sup>

The SOR alleges Applicant used marijuana, with varying frequency, from May 2013 to July 2017. It also alleges that during her background interview in July 2017, she told an investigator that she intended to continue using marijuana.

Applicant lives in a state where personal marijuana use is legal under state law. She claims that she began using marijuana only after it became legal in her state in 2012. She described her use as merely social and that she does not need to use it. However, she also indicated that use of marijuana helped her sleep. She used marijuana because it helped her relax. She used it with her friends and her spouse while camping or during other social activities. She described her frequency of use in her January 2017 security clearance application (SCA) as follows: 2013—"a few times"; October 2015 to April 2016—"a few times a week socially"; September 2016—"I smoked three times socially."<sup>2</sup>

As stated above, Applicant was hired by her current employer in December 2016. She completed her SCA in January 2017. She was aware that her company had a policy prohibiting the use of marijuana. She was required to take a drug-urinalysis test as a condition of employment. She passed the test, but she did not reveal her past drug use to her employer. Applicant continued to use marijuana after her hiring by the company and after completing her SCA. She estimated her number of uses from January to July 2017 (when she claimed she stopped using marijuana) as 10. Her use was knowing and conscious and she knew it was in contravention of her employer's drug policy. She used marijuana in her home or while camping with her spouse and friends. She stopped using in July 2017 before her background interview with a defense

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<sup>1</sup> Tr. at 6, 20, 48; GE 1.

<sup>2</sup> Tr. at 21, 25, 28-29, 44; GE 1-2; AE A.

investigator. She stated she stopped because she felt guilty about her recent use. She realizes that her use after completing her SCA was a “bad decision.”<sup>3</sup>

Applicant’s spouse, with whom she lives, continues to use marijuana. She also was growing marijuana plants in their home. She provided a post-hearing statement claiming that she no longer grows marijuana in their living environment. Applicant described that their home is set up so that her spouse can smoke marijuana away from where Applicant is located. Applicant has also asked her friends to refrain from smoking marijuana around her when they go camping and at other social gatherings. Applicant submitted a statement of future intention not to use marijuana. She also clarified the statement she made to the investigator about her future use. She did not mean to insinuate that she intended to continue using marijuana. She provided a urinalysis test result dated March 20, 2018, showing that she tested negative for marijuana and methamphetamines. No testing data or quantification results were provided with the test.<sup>4</sup>

Applicant provided numerous character references from her teaching days through her present employer. Universally, Applicant is viewed as a talented and dedicated employee who was an excellent teacher and is performing well in her new career field. Her current coworkers recommend her for a clearance. She also provided several teaching evaluations and one from her current employer, along with awards from both career fields.<sup>5</sup>

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, 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 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.

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<sup>3</sup> Tr. at 23, 30-31, 33, 37-38, 41, 44, 48-49, 52; GE 2.

<sup>4</sup> Tr. at 23, 26, 44, 46-47; AE A-B, I.

<sup>5</sup> AE C-H, J.

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, 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 to obtain 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 about 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 Abuse**

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws

prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

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

Applicant used marijuana on numerous occasions from May 2103 to July 2017. I find both disqualifying conditions apply to SOR ¶ 1.a. Her July 2017 statement to a defense investigator did not express her future intent to continue using marijuana. Neither disqualifying condition is applicable to SOR ¶ 1.b.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

- (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
- (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's use and of marijuana was frequent and as recent as July 2017, after she was aware of her company's drug policy and after she completed her SCA. Given his recent pattern of use, her claimed abstinence beginning in July 2017, is not sufficiently attenuated to be considered remote. Although she provided a signed statement of intent to abstain from all future illegal drug use, she continues to associate with people who use marijuana. Her spouse, who continues to use marijuana in their home, and her friends, with whom she socializes, also continue to use marijuana. Applicant's claimed abstention is insufficient to convince me that recurrence is unlikely. The frequency and recency of her past use and her association with active marijuana users casts doubt upon her current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) do not apply.

### **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 guideline 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 that Applicant voluntarily disclosed her marijuana history, her character references, her work performance, her recent negative drug-test result, and her stated intention of no future use. However, I also considered that she used marijuana on numerous occasions after knowing it violated her company's drug policy, after she filled out her SCA, and her continued association with marijuana users.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement.

## **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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

## **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge