



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

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ISCR Case No. 18-00340

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: *Pro se*

09/17/2018

**Decision**

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns raised by his use of marijuana in 2017 while holding a security clearance. His request for continued eligibility for a security clearance is denied.

**Statement of the Case**

On June 3, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for access to classified information. After reviewing the completed background investigation, which included his responses to interrogatories<sup>1</sup> from the Defense Office of Hearings and Appeals (DOHA), Department of Defense (DOD) adjudicators could not determine that it is clearly

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<sup>1</sup> Authorized by Section E3.1.2.2, DOD Directive 5220.6 (Directive)

consistent with the interests of national security to continue Applicant's eligibility for access to classified information.<sup>2</sup>

On March 16, 2018, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement and Substance Misuse).<sup>3</sup> Applicant timely responded to the SOR and requested a decision without a hearing.

On May 24, 2018, DOHA Department Counsel issued a File of Relevant Material (FORM)<sup>4</sup> in support of the SOR. Applicant received the FORM on June 5, 2018, and was advised he had 30 days from the date of receipt to submit additional information in response to the FORM. Applicant responded to the FORM on June 6, 2018, and the record closed on June 13, 2018, when Department Counsel waived objection to Applicant's response. I received the case on July 27, 2018.

### **Findings of Fact**

Under Guideline H, the Government alleged that Applicant used marijuana from early 2017 until June 2017 (SOR 1.a), and that he purchased marijuana from early 2017 until July 2017 (SOR 1.b). Applicant admitted both allegations. (FORM, Items 1 and 2) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is a 49-year-old employee of a defense contractor, where he has worked since April 2001. He has been married and divorced twice between 1989 and 2013. He has two children, ages 14 and 27, and as of June 2016, had been cohabiting with his girlfriend since February 2014. Applicant has held a security clearance since at least November 2000. His eligibility for that clearance was last renewed in September 2011. Additionally, Applicant served in the United States Army between August 1986 and May 1988, and between November 1989 and July 1995. He then continued his service in the Army Reserve from December 1996 until October 1997. At the end of each period of service, he received an honorable discharge. (FORM, Items 3 – 5)

On August 23, 2017, Applicant completed a personal subject interview (PSI) with a government investigator. During that interview, Applicant disclosed that before 2015, Applicant began suffering pain from a herniated disk in his spine. In 2015 and 2016, he was treated with physical therapy and with oxycodone for pain. Applicant described the pain medication as too strong and that he often felt like a "space cadet" when he took the prescribed pills. As of the date of his PSI, Applicant had not sought other pain medications from his doctor. Applicant stated in the PSI that he started using marijuana

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<sup>2</sup> Required by Executive Order 10865, as amended, and by the Directive.

<sup>3</sup> See Directive, Enclosure 2.

<sup>4</sup> See Directive, Enclosure 3, Section E3.1.7. The FORM included five exhibits (Items 1 - 5) proffered in support of the Government's case.

in early 2017 to help with his back pain and to help him sleep. He bought marijuana from someone on the street and estimated his rate of use would project out to 12 times annually. Applicant last used marijuana in June 2017 because he had found “relief for back pain by other means.” He did not explain how he now manages his back pain. (FORM, Item 4)

Marijuana use for medicinal purposes is legal in the state where Applicant lives. In his response to interrogatories, he claimed he applied for a medical marijuana card in February 2017 and received it in June 2017. He did not document that claim, and he did not show that he purchased or used marijuana through any established medical marijuana program. Marijuana use is prohibited by his employer. Although the policy states that controlled substances may not be used on company premises or on company time, it also prohibits reporting to work “if testing would demonstrate that you have used or consumed an illegal drug.” The policy also contemplates an exception, wherein such substances, including marijuana, might be prescribed by a doctor. (FORM, Item 4)

I take administrative notice *sua sponte* of the fact that marijuana is a Schedule I controlled substance, the use and possession of which is a criminal violation of federal law. Guidance memoranda issued by the Office of the Assistant Secretary of Defense (OASD) in February 2013; by the Director of National Intelligence (DNI) in October 2014; and by the Office of Personnel Management (OPM) in May 2015 all make clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that federal law supercedes state laws on this issue.

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>5</sup> and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the adjudicative guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

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<sup>5</sup> Directive. 6.3.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>6</sup> for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOD based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.<sup>7</sup> If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.<sup>8</sup>

Because no one is entitled to a security clearance, applicants bear a heavy burden of persuasion to establish that it is clearly consistent with the national interest for them to have access to protected information.<sup>9</sup> A person who has access to such information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the nation's interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of the Government.<sup>10</sup>

## **Analysis**

### **Drug Involvement and Substance Misuse**

Applicant used and purchased marijuana with varying frequency for the first half of 2017. His last known use occurred in June 2017, and he has held a security clearance at all times while using marijuana. This information reasonably raises a security concern that is stated at AG ¶ 24 as follows:

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

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<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>7</sup> Directive, E3.1.14.

<sup>8</sup> Directive, E3.1.15.

<sup>9</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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.

More specifically, available information requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any drug abuse (see above definition);
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

I also have considered the following mitigating conditions under AG ¶ 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;
- (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.

Department Counsel presented sufficient evidence to support the SOR allegations and raise security concerns under this guideline. It thus fell to Applicant to present information that warrants application of any pertinent mitigating conditions. In response to the SOR and the FORM, Applicant did not present information that would support any of these mitigating conditions. His drug use was recent, in that, it occurred after he submitted his e-QIP. As to whether it occurred under unusual circumstances and is unlikely to recur, he did not support his claim that he has found a new pain management option, thus obviating his motivation to use marijuana in the future. Applicant did not present information about his circumstances since his last known use of marijuana, and

he did not provide any definitive statement regarding any future intent to abstain from using drugs.

Although potentially legal under state law where he lives as a medical option, Applicant's use of marijuana is still impermissible under his company's drug-free workplace policy, under federal controlled substances laws, and under DOD industrial security policy guidance consistent with those laws. On balance, Applicant did not mitigate the security concerns established by the Government's information.

In addition to my evaluation of the facts and my application of the appropriate adjudicative factors under Guideline H, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). I note that Applicant served in the Army for almost ten years, and that he has held a security clearance without incident since at least November 2000. Nonetheless, Applicant's recent use of marijuana, despite the clear and consistent company and government policies against such conduct, now raises doubts about his judgment, reliability, and willingness to follow rules and regulations regarding the protection of sensitive information. Because the protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

### **Formal Findings**

Formal findings 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
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Subparagraphs 1.a and 1.b:	Against Applicant
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### **Conclusion**

In light of all available information, it is not clearly consistent with the interest of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE  
Administrative Judge