



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



In the matter of: )  
)  
) ISCR Case No. 20-01050  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tara Karoian, Esq., Department Counsel  
For Applicant: *Pro se*

May 10, 2021

**Decision**

GLENDON, John Bayard, Administrative Judge:

Applicant mitigated security concerns regarding drug involvement and criminal conduct. Based upon a review of the pleadings, the documentary evidence, and Applicant’s testimony, national security eligibility for access to classified information is granted.

**Statement of the Case**

On April 29, 2018, Applicant submitted a security clearance application (SCA). The Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant on October 2, 2020, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended (Exec. Or.); Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4,

*National Security Adjudicative Guidelines* (Dec. 10, 2016), effective within the DoD on June 8, 2017.

In an undated answer, Applicant responded to the SOR (Answer). He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On March 4, 2021, the case was assigned to me. DOHA issued a notice of hearing on March 10, 2021, scheduling the hearing for April 8, 2021.

I convened the hearing as scheduled. Department Counsel presented five proposed exhibits, marked as Government Exhibits (GE) 1 through 5, which were admitted without objection. I marked Department Counsel's exhibit list as Hearing Exhibit I.

Prior to the hearing, Applicant submitted via three emails six proposed exhibits, which I marked as Applicant's Exhibits (AE) A through F. I marked his emails and Department Counsel's responses as Hearing Exhibits II through IV. I kept the record open until April 15, 2021, to provide Applicant with the opportunity to submit supplemental exhibits. He forwarded via email six exhibits on April 9, 2021, which I have marked as AE G through L. I have also marked his email, dated April 9, 2021, and Department Counsel's email response as Hearing Exhibit V. All Applicant exhibits presented at the hearing were admitted into the record without objection. I have also admitted Applicant's six post-hearing exhibits in the absence of an objection from Department Counsel. (Tr. at 11-12, 14-19; Hearing Exhibit V.)

At the conclusion of the testimony, Department Counsel moved to amend SOR ¶ 1.a to conform to the evidence by modifying the date "June 2006" to "June 2004." The supporting evidence for this motion was: (i) Applicant's disclosure in his SCA that he first used marijuana in June 2004, not June 2006 as alleged in the SOR; and (ii) his testimony confirming that date. Applicant had no objection to the amendment and I granted the motion. The record closed on April 15, 2021. DOHA received the hearing transcript (Tr.) on April 14, 2021. (Tr. at 55-56; GE 1 at 42.)

### **Findings of Fact**

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 30 years old and was recently married. He has no children. He received his high school diploma in 2009. Shortly after receiving his bachelor's degree in engineering in May 2018, he began working for a DoD contractor. He works in a position that requires a top secret security clearance. He submitted his SCA in April 2018 in anticipation of commencing his new job three months after his graduation. (Tr. at 20-22.)

When Applicant was a young teen, he spent his free time with the “wrong crowd” and became involved in smoking marijuana in 2004. His drug use was typically limited to summers and holidays when he visited an older cousin and the cousin’s friends in a distant state. Despite that, he earned the honor of being admitted to the U.S. Air Force Academy Preparatory School (Prep School). The Prep School prepares athletes such as Applicant and others to succeed at the Air Force Academy. Students at the Prep School are treated as enlistees. He did not use any marijuana after he was accepted at the Prep School in April 2009, when he was a high school senior. His father died that summer before Applicant commenced his studies at the Prep School, which made his transition away from home difficult. Nevertheless, he performed very well at the Prep School in both his studies and his athletic activities. He believed he had a promising opportunity and future at the Air Force Academy and as a future Air Force Officer. As a member of the Air Force, he was granted a security clearance. (Tr. at 23-27, 31, 39-40; 55; AE I; AE J.)

One day before leaving the Prep School for the Christmas 2009 holiday break, he smoked marijuana with his roommate. His roommate was caught and informed the school officials of Applicant’s use of marijuana with him. After initially denying any drug use, Applicant admitted his use and tested positive for marijuana. He was 18 years old. He was expelled from the Prep School and discharged from the Air Force the next day. His DD 214 reflects that he received an “Uncharacterized” “Entry Level Separation.” It is not a punitive discharge. In his SCA, he mistakenly wrote that he received an Other Than Honorable (OTH) discharge. Applicant was “very devastated” by the adverse impact his poor judgment had on his future with the Air Force. (Tr. at 23-27, 50-51, 58-59; GE 1 at 27; AE G.)

Following his arrival at home in disgrace, Applicant tried to repent for his mistake by working in his church community and performing services helping others. He attended community college in the spring of 2010. He transferred to a four-year university in 2011 and waited on tables to pay for his living expenses. He transferred to a second university closer to home in 2012. He also enlisted in the U.S. Army Reserve in October 2012 to fulfill his desire to serve in the military. He required a security clearance and was unaware that his 2009 eligibility had not been revoked. He mistakenly understood that he was granted a security clearance in connection with his Army Reserve duty. He accessed classified information for the first and only time in the military when he received his advanced individual training during the period February to April 2013. After his basic training and advanced training were completed, he returned home. (Tr. at 27-34, 40-42, 51-52, 58; AE H.)

Upon his return, Applicant used marijuana again with another cousin who was attending college in Applicant’s home area. In July 2013, Applicant was arrested for possession of marijuana while sitting in a car in front of his home. He was 22 years old. He testified that this use of marijuana was one of the rare occasions he smoked marijuana at that time in his life. He received deferred adjudication and was put on probation for six months. He was also required to attend drug-education classes. He did not smoke marijuana while on probation. (Tr. at 32-36, 45-47; GE 5 at 2.)

Applicant's next use of marijuana was in the spring of 2015 when he was living on campus after returning to his first university and living with roommates who used marijuana. He used marijuana occasionally until summer 2017. He would contribute to the cost of marijuana when it was being used. (Tr. at 32-36, 45-47.)

Applicant's eligibility for a clearance had not changed since 2009. He only accessed classified information during a three-month training period in 2013 and never functioned in a classified work environment with the Army Reserve. He did not understand his responsibilities as someone eligible for a clearance with respect to drug use. In fact, he did not even understand at the hearing that he remained eligible to hold a clearance after he was discharged from the Air Force in 2009. In mid-2017, he made a decision to stop using marijuana completely for reasons unrelated to his clearance status. He became focused on finding an internship and planning his career after graduating the following year. At around the same time, he met his future wife, who disapproved of his use of marijuana. He shifted his friendships to other engineers who were not users of marijuana. In the fall of 2017, he received a job offer from his current employer for a position to begin after he graduated. He was discharged from the Army Reserve in October 2018 with the rank of Sergeant (E-5) after starting his current position with the defense contractor. (Tr. at 32-36, 45-47; AE F.)

## **SOR Allegations**

Paragraph 1 of the SOR sets forth four allegations under Guideline H. Subparagraph 1.a, as amended, alleges that Applicant used marijuana "with varying frequency" from about June 2004 to about July 2017. The other allegations are that he purchased marijuana with varying frequency from June 2006 to July 2017 (¶ 1.b); that he used marijuana during the period of November 2009 to July 2017 while holding a security clearance (¶ 1.c); and that he tested positive for marijuana usage in 2009 (¶ 1.d). Paragraph 2 of the SOR sets forth two allegations under Guideline J. Subparagraph 2.a alleges that Applicant received an OTH discharge from the U.S. Air Force in 2009. The second allegation states that Applicant was arrested in approximately 2013 for possession of marijuana and received deferred adjudication (¶ 2.b).

In his Answer, Applicant admitted each of the allegations and provided detailed background information. As discussed below, he incorrectly believed that his discharge from the Air Force was characterized as under other than honorable conditions, and he therefore admitted the allegations in SOR ¶ 2.a. As noted, he received an Entry Level Separation.

## **Whole-Person Evidence**

Applicant provided substantial evidence regarding his character and his current views on using illegal drugs. One exhibit in the record is a Clinical Marijuana Assessment prepared by a licensed social worker (LSW). The LSW concluded his assessment with the statement that Applicant "appears poised to continue abstaining from cannabis without any apparent difficulty." The LSW also wrote that no treatment recommendations

were necessary. Exhibits from his employer, supervisor/mentor, co-workers, and family members all praise Applicant's skills, work ethic, trustworthiness, integrity, and maturity. His supervisor wrote that he hired Applicant on the spot at a college job fair because he was so impressed with Applicant. His family members praised him for his seriousness and committed religious beliefs. He has also submitted a signed statement of intent affirming his intention to abstain from ever using marijuana in the future with an acknowledgement that any future involvement or misuse of illegal drugs would be grounds for the revocation of his national security eligibility. (AE A-L.)

## **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v.*

*Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

## **Analysis**

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

The security concern under this guideline is set out in 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 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 at AG ¶ 25 contains seven disqualifying conditions that could raise security concerns. Four of the conditions potentially apply:

- (a): any substance misuse (see above definition);
- (b): testing positive for an illegal drug;
- (c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f): any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant's admissions in his Answer and his testimony and the documentary evidence in the record establish each of the four allegations under H allegations in the SOR. The burden now shifts to Applicant to provide mitigation.

The guideline in AG ¶ 26 contains four conditions that could mitigate security concerns arising from illegal drug use. Two of the conditions have possible applicability to the facts of 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 evidence established both of the above mitigating conditions. He was an infrequent user of marijuana who started using the illegal drug as a young teen. He was influenced by older cousins and others. He was involved with the wrong crowd at a time when he was also a high achiever, having been selected to attend the Prep School in preparation for him becoming a student at the Air Force Academy and a future Air Force officer. He entered the Prep School while grieving over the death of his father. He made poor choices in his attempts to manage his grief, and he paid dearly for his mistake at the Prep School. On and off over the subsequent years, Applicant continued to make poor choices. In the summer of 2017, almost four years ago, he decided to abstain from using marijuana ever again. Since then he graduated from college, married his college girlfriend, and obtained employment at an important defense contractor. Applicant's commitment to continue this important change in his life makes it unlikely that he will ever use marijuana again. His wife strongly supports his abstention.

During much of his past use of marijuana, Applicant held a security clearance. His understanding of the responsibilities that accompany eligibility for a clearance when he was not in a classified work environment was vague. He was also unaware that he held eligibility after his discharge from the Air Force and before his enlistment in the Army Reserve. Under the circumstances, he has mitigated the security concerns raised by his past mistakes. He has acknowledged his past drug use and taken steps to overcome this

problem. He has disassociated himself from drug-using friends and has signed a statement of intent to abstain from illegal drug use in the future. Moreover, he has established a substantial period of abstinence. In light of all of the record evidence, Applicant's past drug use does not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant has mitigated security concerns under Guideline H.

### **Guideline J, Criminal Conduct**

The security concern under this guideline is set out in AG ¶ 30 as follows:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise security concerns. Three of the conditions potentially apply:

(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

The record evidence does not establish allegation 2.a of the SOR, which asserts that Applicant received an OTH discharge in 2009. Applicant's admission of his arrest for possessing marijuana in 2013 partially establishes the disqualifying condition in AG ¶ 31(a). The single SOR allegation of an arrest in 2013 does not constitute a "pattern of minor offenses." Applicant did, however, commit unalleged offenses of possessing marijuana on multiple occasions, which were indirectly the subjects of allegations in SOR ¶¶ 1.a and 1.c regarding Applicant's use of marijuana.

The guideline in AG ¶ 32 contains four conditions that could mitigate security concerns arising from criminal conduct. Two of the conditions have possible applicability to the facts of this case:

(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and



(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's evidence established mitigation under both of the above-quoted mitigating conditions. The SOR allegation in 2.b is specifically limited to Applicant's 2013 arrest, which was a long time ago. Also, Applicant's abstention from illegally possessing and using marijuana for nearly four years evidences that his criminal conduct is unlikely to recur. The 2013 arrest does not cast doubt on his reliability, trustworthiness, or good judgment. Applicant's evidence of rehabilitation is impressive. He finished his probation and earned his bachelor's degree. He has an excellent employment record and is involved in his community. Applicant has mitigated security concerns under Guideline J.

### **Whole-Person Analysis**

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d), specifically:

(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.

I have incorporated my comments under Guidelines H and J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under these guidelines, but some warrant additional comment. Applicant is an impressive young man, who experienced the loss of his father at a significant point in Applicant's life. He dealt with his grief immaturely as he was quite young. In 2017 at the age of 26, he made a commitment to himself to never again use marijuana. With the help of his girlfriend who he married in 2020, he has made an important shift towards being more mature and responsible. He has shown his commitment to living a highly functional adult life through his accomplishments in his employment. He is now fulfilling his potential that he temporarily lost when he was expelled from the Prep School and discharged from the Air Force at the age of 18. After weighing the applicable disqualifying and mitigating conditions and evaluating all of the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement and criminal conduct.

### **Formal Findings**

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant
Paragraph 2, Criminal Conduct:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national interests of the United States to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is granted.

John Bayard Glendon  
Administrative Judge