



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



In the matter of:)	
)	
)	ISCR Case No. 20-03572
)	
)	
Applicant for Security Clearance)	

Appearances

For Government:
Adrienne Driskill, Esquire, Department Counsel

For Applicant:
Pro se

May 2, 2022

Decision

GLENDON, John Bayard, Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on August 19, 2020. On January 4, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant responded the SOR (Answer) on January 22, 2021, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 20, 2021. The case was initially assigned to another administrative judge and was reassigned to me on October 25, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on March 1, 2022, scheduling the case to be heard via video teleconference on March 16, 2022.

I convened the hearing as scheduled. Department Counsel offered Government Exhibits (GE) 1 and 2, which I admitted without objection. Applicant offered four exhibits, which I marked as Applicant Exhibits (AE) A through D. His exhibits were admitted without objection. Applicant also testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on March 28, 2022. (Tr. at 13-19.)

Findings of Fact

Applicant is 38 years old and unmarried. He lives with a longtime partner. They have no children. He earned a bachelor's degree in 2007. Applicant has been employed by a defense contractor as an engineer since 2007, and seeks to retain national security eligibility and a security clearance in connection with his employment. He lives a healthy active lifestyle, which includes alpine mountain climbing and camping. (Tr. at 21-24; GE 1 at 7, 14-15, 17.)

Paragraph 1 (Guideline H, Drug Involvement and Substance Involvement)

The Government alleged in this paragraph that Applicant is ineligible for clearance because he has a history of drug involvement. Specifically, the SOR alleged that Applicant purchased and used marijuana with varying frequency from about July 2004 through at least September 2019. The SOR also alleged that Applicant purchased and used marijuana after he had been granted a security clearance in September 2010. In his Answer, Applicant admitted the two SOR allegations under this guideline and wrote that his last use of marijuana was in September 2019. He explained further that his uses of marijuana were isolated events and occurred in December 2017 and September 2019. He concluded his Answer with the comment that he has "no intent to abuse any drugs in the future."

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that involves questionable judgment, lack of candor, and dishonesty. The SOR cross-alleges under this guideline the two Guideline H allegations described above. Applicant admitted both allegations again in his Answer.

Applicant's Illegal Drug Use

On three occasions while climbing backcountry mountains, Applicant ingested an "edible" containing CBD with THC (Edibles). The dates of his use of Edibles are December 2017, June 2018, and August 2019. His last use of an Edible or any illegal drug was August 2019. He used the Edibles as a sleep aid on three occasions after "high-exertion" days and evenings of mountain-climbing activity so that he could sleep on a mat on the ground. He has never purchased an Edible or any other illegal drugs. (GE 1 at 54; Tr. at 26-31, 36-38.)

Prior to 2017, Applicant experimented with marijuana one or two times when he was in college (2004-2007). He has not used any illegal drugs at any other times. (Tr. at 28-33.)

He reported in his e-QIP his use of THC during the preceding seven years. He also reported his college use of marijuana in his original security clearance application when he started working for his employer in 2007. (GE 1 at 53-55; Tr. at 29-33.)

Applicant testified that even though he had received extensive training about the use of illegal drugs during the course of his employment from 2007 to 2019, he was uncertain about the rules regarding the use of Edibles while holding a security clearance. He described it as a gray area at the time, though he acknowledged that he had never inquired about the use of a substance containing CBD with THC. Through the process of the adjudication of his clearance application, he now has a clear understanding of security clearance rules. He wrote in his Answer and testified that he has no future intent to use illegal drugs. (Tr. at 31-33.)

Mitigation

Applicant provided a statement of his personal history that emphasized his charitable work and athletic activities while in high school and college. His statement also expressed his pride in working for an important defense contractor for the past 15 years. He wrote that he has been rated as a "high performer" in each of those years. (AE A.)

In a separate statement, Applicant noted that he has not used any illegal drugs since August 2019 and that his use was limited to three occasions and occurred under unusual circumstances when his use was solely for the purpose to permit him to sleep under unusual circumstances. He wrote that he intends to continue to abstain from any future use of illegal drugs, and he acknowledged that any future illegal drug involvement or substance misuse would be grounds for the revocation of his national security eligibility. (AE B.)

Applicant submitted two character letters. One letter is from a neighbor and friend who wrote that Applicant is "of good character and a model citizen." The other letter is

from Applicant's former roommate. He also praised Applicant in glowing terms. (AE C; AE D.)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires, "Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

See also Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H, Drug Involvement and Substance Misuse)

The security concerns relating to the guideline for drug involvement and substance misuse are set out in AG ¶ 24, which reads 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.

AG ¶ 25 describes two conditions that could raise security concerns and may be disqualifying in this case:

- (a) any substance misuse (see above definition); 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 detailed testimony regarding his history of drug use, establish both of the above disqualifying conditions and shift the burden to Applicant to mitigate the security concerns raised by his conduct.

The guideline includes two conditions in AG ¶ 26 that could mitigate the security concerns arising from Applicant's alleged drug involvement and substance misuse:

- (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 the problem, and has established a pattern of abstinence, including, but not limited to:

(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.

Both of the above mitigating conditions fully apply. Applicant's last drug use occurred more than two years ago and was under unusual circumstances. Also, his drug use was very infrequent. Now that he knows that his use of Edibles is inconsistent with the requirements for holding a security clearance, his behavior is unlikely to recur. Moreover, his past behavior does not cast doubt on his current reliability, trustworthiness, and good judgment.

In my mitigation analysis, I have also taken administrative notice of the Security Executive Agent "Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position," dated December 21, 2021 (Guidance). In her Guidance, the Security Executive Agent (SecEA) noted the increased number of states that have legalized or decriminalized the use of marijuana. She reaffirmed SecEA's 2014 memorandum regarding the importance of compliance with Federal law on the illegality of the use of marijuana by holders of security clearances. She provided further clarification of Federal marijuana policy writing that this policy remains relevant to security clearance adjudications "but [is] not determinative." She noted that the adjudicative guidelines provided various opportunities for a clearance applicant to mitigate security concerns raised by his or her past use of marijuana. (Guidance at 1.)

SecEA also addressed in her Guidance the issue of the use of CBD products by holders of security clearances. She commented that the use of CBD products may also be relevant to eligibility adjudications. SecEA explained, however, that only CBD products containing more than "0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy." She noted the risks involved in the use of CBD products under the adjudicative guidelines because the advertised THC percentages of CBD products are not necessarily reliable and the use of CBD products may result in a positive drug test for marijuana. (Guidance at 2.)

Following careful consideration of the disqualifying and mitigating evidence, as well as SecEA's recent clarifying guidance regarding Federal policy concerning marijuana, I conclude that Applicant has mitigated the security concerns raised by his use of CBD products. Paragraph 1 is found in favor of Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

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.

AG ¶ 16 describes a condition that could raise security concerns and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 or sensitive information.

Applicant used Edibles containing THC three times during the years 2017 to 2019. During that time, he was employed by a defense contractor and held a security clearance. The above disqualifying condition has application to this case.

The guideline includes a condition in AG ¶ 17 that could mitigate the security concerns arising from Applicant's use of CBD products and his use of marijuana while holding a security clearance:

(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.

Applicant provided credible testimony that he was uncertain about any restrictions on the use of CBD products while holding a security clearance. Once he learned that such use was restricted, he ceased using Edibles with THC, including when he engaged in mountain climbing. There is no evidence of further drug use since August 2019. Applicant evinced a credible intent not to use marijuana/THC or any other illegal drugs in the future and provided a written statement to that effect. Applicant has successfully mitigated the security concerns raised by his personal conduct. Accordingly, paragraph 2 of the SOR is found in favor of Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for national security eligibility by considering the totality of the applicant's conduct and all relevant 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 national security 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 pertinent facts and circumstances surrounding this case, including the whole-person factors quoted above. Applicant has mitigated the security concerns raised by his past use of CBD containing THC. Overall, the record evidence does not create any questions or doubts as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For 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 clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

JOHN BAYARD GLENDON
Administrative Judge