



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



In the matter of:)
)
) ISCR Case No. 21-00925
)
)
Applicant for Security Clearance)

Appearances

For Government:
Adrienne M. Driskill, Esquire, Department Counsel

For Applicant:
Ray T. Blank, Jr., Esquire

July 22, 2022

Decision

GLENDON, John Bayard, Administrative Judge:

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 2, 2020. On June 25, 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 (AG) effective within the Department of Defense after June 8, 2017.

Applicant responded to the SOR (Answer) on January 7, 2021, and on July 23, 2021. He requested a hearing before an administrative judge. The case was assigned to me on February 28, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on April 21, 2022, scheduling the case to be heard via video teleconference on May 24, 2022.

I convened the hearing as scheduled. Department Counsel offered Government Exhibits (GE) 1 and 2, which were admitted without objection. Applicant offered seven exhibits, which I marked as Applicant Exhibits (AE) A through G, which were admitted without objection. Applicant also testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on June 6, 2022. (Tr. at 16-20.)

Findings of Fact

Applicant is 30 years old and unmarried. He earned a bachelor's degree in 2018. Applicant has been employed by a defense contractor as a financial analyst since December 2020. He is a first-time applicant seeking to obtain national security eligibility in connection with his employment. (Tr. at 21-22, 51.)

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 2010 through December 2020 (SOR 1.a). The SOR also alleged that Applicant purchased and used marijuana after completing his e-QIP and submitting it on December 2, 2020 (SOR 1.b). The Government alleged further in the SOR that Applicant intends to continue using marijuana in the future (SOR 1.c).

In his Answer, Applicant denied part of SOR 1.a and all of SOR 1.c. He wrote that he had not purchased marijuana prior to relocating to State 1 in 2017, where it was legal to do so under state law. He also wrote that he had only used marijuana a few times prior to 2017. He admitted the allegations in SOR 1.b and wrote that he was unaware of the significance of the difference between Federal and state law with respect to the use of marijuana in the context of Federal employment until he "went through the process of applying for my clearance." (Answer at 1.)

Applicant first smoked marijuana in 2010 with his college basketball teammates in State 2. This use occurred on a few occasions. He subsequently transferred colleges twice to continue his college basketball experience at larger universities. He did not smoke marijuana during those college years because he was no longer associating with the same teammates. In about 2013 or 2014 while a college student, Applicant's grandmother died. He was close to his grandmother, and he suffered a serious emotional loss. A therapist suggested that he try CBD to help him handle the stress and anxiety he

was experiencing. In about 2017, Applicant was treated by a doctor for a serious and painful medical condition. The doctor gave him a prescription for medical marijuana, which was legal at that time in State 1 where Applicant resided. A physical therapist who treated Applicant also recommended that he use medical marijuana for his condition. (Tr. at 29, 35-40.)

Applicant used marijuana medically and on occasion he used it with friends for recreational purposes, which was also legal in State 1 at that time. He purchased marijuana at a legal medical marijuana dispensary. He smoked the marijuana or ate it in edible form. (Tr. at 40-43.)

Applicant's December 2, 2020 e-QIP was followed later that month with his background interview. He initially advised the interviewer that he would like to continue using marijuana for medical purposes if that was allowed. In a follow-up phone call, he explicitly told the interviewer that he did not intend to use marijuana in the future for any purpose. He was concerned that the interviewer may have misunderstood his earlier comments on the subject of his intent to use marijuana in the future. He testified at the hearing that he has no intention of using marijuana in the future, and he provided a written statement memorializing his intention. He earnestly testified that he will keep that promise and has agreed in his written statement to the revocation of any security clearance granted to him should he violate his commitment in the future. He stopped using marijuana in or about December 2020 and now addresses his medical needs through daily meditation. He credibly testified that he does not recall whether he used marijuana during the three-week period after he submitted his e-QIP and the time of his background interview or whether he advised the interviewer that he had done so. (Tr. at 58-60, 65; AE G.)

In April 2022, however, he used a vape pen containing marijuana. The pen was offered to him by a friend after an evening of drinking alcohol at a bar. Initially, Applicant believed the pen was a simple e-cigarette, but after using it, he thought it contained marijuana. He asked his friend and the friend confirmed that it did. He then took one more "hit" from the pen. He gave the pen back to his friend and knew that he had just made a mistake and was upset with himself. He let his friends know that he will not ever again consume anything with marijuana so that a similar incident does not happen by mistake in the future. He now avoids smoking in general, whether it is an e-cigarette or a vape pen. He testified that "[I] knew that I had messed up [taking a second puff of marijuana from the vape pen]." (Tr. at 60-63.)

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 alleges that he falsified information in his e-QIP by denying any illegal purchase or use of drugs or controlled substances in the past seven years (SOR 2.a). Applicant denied this allegation in his Answer and asserted that he misunderstood

the e-QIP question. He explained that at the time he prepared his application, he understood that purchasing and using marijuana in State 1 was legal. (Answer at 1.)

Applicant's December 2, 2020 e-QIP was followed by his background interview on December 29, 2020. Applicant viewed the interview as an extension of his application giving him the opportunity to provide more detailed information than that which he had provided in his e-QIP. Applicant and the interviewer discussed his answers to each question in the e-QIP. The interviewer explained to Applicant how the law of State 1 and Federal law differed on the legality of marijuana purchases and use. When he learned the difference, he told the interviewer that he would like to change his answers to the questions in Section 23 regarding the possession and use of illegal drugs. He advised the interviewer that the correct answer to the e-QIP question was "Yes." He explained at the hearing that he answered the e-QIP question regarding illegal drug use in the negative because the purchase and use of marijuana was legal in his state. He had no intention to provide false information on his e-QIP. (Tr. at 43-49, 54-57, 63.)

Applicant noted at the hearing that his college drug use in 2010 and 2011 was outside the seven-year time frame of the question in the e-QIP. Accordingly, his only reportable drug use was after he relocated to State 1, where medical marijuana purchases and use were legal with a medical marijuana card. He explained that he had assumed incorrectly that the appropriate answer to the e-QIP questions was "No," since the question references illegal use of drugs and he did not believe his use of marijuana in State 1 in the past seven years was illegal. He testified that the interviewer never confronted him with information about Applicant's past use of marijuana prior to his disclosure about his purchases and use of marijuana in State 1 starting in 2017. (Tr. at 43-49, 54-57, 63; GE 2 at 8.)

Mitigation

Applicant provided six character letters. Two are from work supervisors, two are from retired military personnel who have long-term relationships with Applicant, and two are from Applicant's parents. All of the letters describe Applicant as a person with a high moral character and who is highly trustworthy. They strongly endorse Applicant's qualifications to hold a security clearance. (Tr. at 65-66; AE A-F.)

Applicant also submitted a letter stating his intent to refrain from using illegal drugs in the future. His letter, dated May 15, 2022, post-dates his one puff experience with a vape pen in April 2022. He included in his letter the statement required by AG ¶ 26(b)(3), which requires an acknowledgement by the Applicant that any breach of his commitment to abstain from illegal drug use in the future would be automatic grounds for the revocation of any security clearance granted to him. Applicant sincerely testified at the hearing that he made this promise in writing because "I meant it." (Tr. at 65; AE G.)

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 three conditions that could raise security concerns and may be disqualifying in this case:

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

Applicant's detailed testimony regarding his history of drug purchases and use establishes the disqualifying conditions AG ¶ 25(a) and (c). Applicant's credible testimony on the subject of his future intention with respect to using illegal drugs and his written statement of intent are more than sufficient to render AG ¶ 25(g) inapplicable. The record evidence regarding Applicant's purchases and use of marijuana after his relocation to State 1 in 2017 shifts the burden to Applicant to mitigate the security concerns raised by his past 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. With one limited exception, Applicant's last drug use occurred prior to December 2020 and was mostly under unusual circumstances. He had been advised by medical professionals to use marijuana and CBD products to help him address a serious medical condition. Now that he knows that his use of marijuana is inconsistent with Federal law, his behavior is unlikely to recur. Moreover, his past behavior does not cast doubt on his current reliability, trustworthiness, and good judgment. His one-time intentional puff of a vape pen containing marijuana was a mistake that Applicant does not intend to repeat.

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.)

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 past use of marijuana. Paragraph 1 of the SOR 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:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Appellant's credible testimony regarding his lack of intent to conceal information about his past purchases and use of marijuana renders the above potentially disqualifying condition inapplicable. Applicant was interviewed later in the same month as the date of his submission of his e-QIP. He was completely candid with the investigator who conducted his background interview about his past drug use. He self-reported to the investigator the information alleged in the SOR, which evidences that he had no intent to conceal his past drug use. His timely disclosure has sufficient security significance to be mitigating under AG ¶ 17(a) even if he had intentionally falsified his response on the e-QIP.

As a young man who spent most of his formative years playing college basketball at a very high level, Applicant lacked an understanding about the inconsistency between Federal and state law on the legality of marijuana and the significance of Federal law when answering the e-QIP question about past drug involvement. That inconsistency confused Applicant when he answered a question about having "illegally used any drugs or controlled substance" since he believed his activities with marijuana were legal under the laws of State 1. (GE 1 at 32.) I note that the instructions to Section 23 of the e-QIP address this issue and advise that Federal law is controlling, but that instruction was insufficient in this case to clarify the ambiguity.

I closely observed Applicant's demeanor as a witness and found him to be credible, honest, and forthright, which was consistent with the statements made about him in his character evidence. His admission of one puff on a vape pen in April 2022 when he knew it contained marijuana revealed his character, candor, and integrity. He made a mistake and he owned it. At the time he prepared the e-QIP, Applicant lacked any intent to deliberately conceal his past drug involvement in his e-QIP. 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 have incorporated my comments under the guidelines for Drug Involvement and Substance Misuse, and Personal Conduct in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but additional comment is warranted. Applicant is an impressive young man who purchased and used marijuana after moving to State 1 in 2017 where the purchase and use of marijuana was legal under the laws of that state. He had no appreciation for the implications that the prohibition of such activities under Federal law would later have on his employment with the Federal Government or what was required to be disclosed on his e-QIP. The investigator who conducted his background interview educated Applicant about Federal law and the disclosure requirements on a security clearance application and Applicant voluntarily disclosed his past reportable conduct. He also maturely made the decision to refrain from any future use of marijuana. I do not view his one puff on a vape pen that he learned contained THC to be of any security significance in light of Applicant's subsequent written commitment to refrain from using marijuana or any illegal drugs in the future.

Applicant has mitigated the security concerns raised by his past purchases and use of marijuana. Also, the record evidence does not support a conclusion that he deliberately falsified his e-QIP responses to Section 23. Overall, the record evidence leaves me without 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 through 1.c:	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