



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



In the matter of:)	
)	
)	ISCR Case No. 22-00315
)	
)	
Applicant for Security Clearance)	

Appearances

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

For Applicant:
Pro se

October 3, 2022

Decision

GLENDON, John Bayard, Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing on May 27, 2021 (2021 e-QIP). On April 15, 2022, the Department of Defense Consolidated Adjudications Facility (the 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 (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within DoD after June 8, 2017.

Applicant responded the SOR (Answer) on April 21, 2022, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May

31, 2022. The case was assigned to me on June 2, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on June 21, 2022, scheduling the case to be heard via video teleconference on July 12, 2022.

I convened the hearing as scheduled. Department Counsel presented Government Exhibits (GE) 1 through 4, which I admitted without objection. Applicant offered two exhibits marked as Applicant Exhibits (AE) A and B, which I also admitted without objection. Applicant and two witnesses testified on his behalf. DOHA received the transcript of the hearing (Tr.) on July 19, 2022. (Tr. at 13-19.)

Findings of Fact

Applicant is 48 years old, married and has two children (ages seven and ten) and two stepchildren (ages 25 and 28). He received his high school diploma in 1992 and has taken some college courses. In 2006 Applicant applied for a trustworthiness determination. DOHA granted him eligibility in March 2007. Applicant is now the co-owner and a senior management officer of a technology company (the Company), which he co-founded in 2011. He is also the Facility Security Officer (FSO) of the Company. The Company has about 12 employees. Applicant was granted eligibility for a Secret clearance in November 2018. The Company is now seeking facility clearance eligibility to work on Top Secret DoD contracts. As one of the Company's Key Management Personnel, Applicant is also seeking eligibility at the Top Secret level as a requirement for the upgrade of the Company's facility clearance. (Answer at 1-2; Tr. at 28, 43-51; GE 4 at 1; AE B at 1, 3, 4.)

Paragraph 1 - Guideline H, Drug Involvement and Substance Misuse

The Government alleged in this paragraph that Applicant is ineligible for clearance because of his recent drug involvement. Specifically, the SOR alleged that Applicant used marijuana with varying frequency from about August 2019 through March 2021 (SOR 1.a). The SOR also alleged that Applicant used marijuana after he had been granted a security clearance in November 2018 (SOR 1.b). In his Answer, Applicant admitted both allegations under this guideline. (Answer at 1.)

In 2019 Applicant started smoking marijuana at the request of his wife. They lived in State A where it was legal to purchase and possess marijuana. His wife was experiencing anxiety, and she wanted to use marijuana to ease her discomfort and help her sleep at night. When the Company was given the opportunity in 2021 to work on a DoD contract that required the Company to have a Top Secret facility clearance, Applicant knew that he would need to upgrade his clearance, and he stopped smoking marijuana. His wife continued to occasionally smoke marijuana alone in the family's garage before retiring to sleep. Applicant submitted his e-QIP for his upgraded clearance a couple of months later. He disclosed his marijuana use in his e-QIP and wrote that he used it about 40-50 times during the period August 2019 to March 2021. He wrote, "When it was noted

that existing contract work would require potential to upgrade to a TS I thought I probably should not use [marijuana].” At the hearing, he confirmed these dates, the estimated number of times he used marijuana, and his motivation for ceasing his marijuana use in about March 2021 before submitting his May 2021 e-QIP. (Tr. at 40-41, 45-47, 49; GE 1 at 35-36.)

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, an unwillingness to follow rules and regulations, lack of candor, and dishonesty. The SOR cross-alleged under this guideline the two Guideline H allegations described above (SOR 2.a). The SOR also alleged that Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI) on two occasions, once in August 2000 and again in November 2004 (SOR 2.b and 2.c). The SOR sets forth two additional allegations involving Applicant’s failure to disclose the November 2004 DUI arrest in his 2021 e-QIP and in a prior e-QIP, certified by Applicant on April 6, 2017 (2017 e-QIP). Applicant allegedly falsified his responses under Section 22 - Police Record (EVER) (SOR 2.d and 2.e) in both e-QIPs. The specific questions also use the unlimited timeframe of “EVER,” with the emphasis in the original e-QIP texts in both the section titles and in the questions.

In his Answer, Applicant admitted the allegations in subparagraphs 2.a through 2.c. He denied the falsification allegations in SOR 2.d and 2.e. He accompanied those denials with explanations. He wrote that the omission of his second DUI arrest in 2004 in his 2017 e-QIP and the omission of both arrests in his 2021 e-QIP was not intentional and was due to a misunderstanding. He wrote that he fully disclosed both DUIs during his background interviews in 2017 and 2021. (Answer at 1-2.)

Applicant discussed his DUIs in his 2021 background interview. He told the investigator that his failure to disclose his 2000 DUI in his 2021 e-QIP was due to an oversight. He disclosed it under questions dealing with alcohol counseling. He also reported that he did not disclose the 2004 DUI due to a misunderstanding. (GE 3 at 8-9.)

At the hearing, Applicant testified that his failure to completely disclose his DUI arrests in his two most recent e-QIPs was unintentional. Applicant noted that he disclosed his 2000 DUI in the 2021 e-QIP in response to questions in Section 24 titled “Use of Alcohol.” He omitted his 2004 DUI due to a “clerical mistake.” He did not believe he had to repeat in his 2021 e-QIP all of the details in his 2017 e-QIP and from his prior investigations. The record does not contain the summaries of his background interviews from his prior investigations. In his 2017 e-QIP he disclosed his 2000 arrest, but not his 2004 arrest. He said that omission was due to a misunderstanding. He also noted that he fully disclosed his recent use of marijuana and disclosed his DUI arrests in his background interviews. He also testified that he no longer drinks alcohol because he has developed an allergic reaction to alcohol. (Tr. at 37-42, 50-51; GE 2 at 37.)

Mitigation and Whole-Person Evidence

Applicant's business partner testified in support of Applicant. The witness has known Applicant since 2009 and has worked closely with him since then. They started their business together in 2011. The witness believes Applicant has "amazing integrity" and appreciates Applicant's honesty since they are partners. He and Applicant have discussed the differences between Federal law and the law in State A where they both live and work. (Tr. at 21-29.)

Applicant's wife also testified. She has known Applicant for 13 years. The first time he smoked marijuana was with her in the summer or fall of 2019. They last used marijuana together in the first quarter of 2021. She asked Applicant to smoke marijuana with her because she was nervous and suffering from anxiety. She was experiencing difficulty sleeping, and she thought that marijuana might help her condition. She did not want to use marijuana alone. She has seen Applicant use marijuana 30-40 times during the 2019-to-2021 period. She continues to use marijuana for her anxiety and has smoked marijuana as recently as a couple of months before the hearing. She does not use the drug in the presence of her husband. She smokes at before bedtime in their garage away from the couple's children. (Tr. at 29-36.)

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:
 - (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 of marijuana was recent, frequent, and casts doubt on his reliability, trustworthiness, and good judgment. He admits that he only stopped using marijuana because the Company's circumstances had changed and he needed to submit a new security clearance application to upgrade his clearance. AG ¶ 26(a) is not established.

Applicant acknowledged his drug involvement and has established a pattern of abstinence over a period in excess of one year. His wife confirmed that Applicant no longer smokes marijuana. He has not, however, satisfied the evidentiary requirements of AG ¶ 26(b)(1) - (3), in particular subsection 3. AG ¶ 26(b) is only partially established. Paragraph 1 of the SOR is found against 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 two conditions 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; and

(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 marijuana from about August 2019 to about March 2021. During that 19-month period, he was a co-owner and FSO of a defense contractor and held a security clearance. He was also twice arrested for and charged with DUI, once in August 2001 and again in December 2004. The prior arrests combined with the use of marijuana while holding a security clearance suggest questionable judgment and a pattern of unwillingness to comply with rules and regulations. AG ¶ 16(c) is established.

With respect to the two falsification allegations, the record evidence does not establish that Applicant intentionally provided false responses to questions in the 2017 e-QIP and the 2021 e-QIP regarding his DUI arrests that occurred many years earlier. He did disclose the information about his recent marijuana use in his 2021 e-QIP, which is more derogatory and of much greater security significance than two dated misdemeanor arrests. He may have been quite careless in responding to the questions in Section 22 of the two recent e-QIPs about his police record, but he did not intentionally provide false information. Applicant's candor in making the disclosure about his recent drug use supports his credible testimony that he did not deliberately omit the information about his

arrests in 2000 and 2004 in the e-QIPs. AG ¶ 16(a) is not established with respect to SOR 2.d and 2.e.

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

(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.

This mitigating condition is not established with respect to Applicant's recent use of marijuana while holding a security clearance. His actions cast doubt on his reliability, trustworthiness, and good judgment. This condition is established, however, with respect to Applicant's DUI arrests in 2000 and 2004. Those occurrences are too far removed from Applicant's present circumstances to be of any security significance at this time. In light of my conclusion regarding Applicant's marijuana use, however, paragraph 2 of the SOR is found against 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 not provided sufficient evidence to mitigate the security concerns raised by his use of marijuana while holding a security clearance.

Overall, the record evidence raises questions and 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b through 2.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not 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 denied.

JOHN BAYARD GLENDON
Administrative Judge