



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



In the matter of:	)	
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	)	ISCR Case No. 21-02024
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government:  
Erin P. Thompson, Esquire, Department Counsel

For Applicant:  
Sean M. Bigley, Esq.  
Aileen X. Kozlowski, Esq.  
Bigley Ranish, LLP  
Applicant's Counsel

January 18, 2023

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**Decision**

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ROSS, Wilford H., Administrative Judge:

**Statement of the Case**

Applicant submitted his initial Electronic Questionnaires for Investigations Processing (e-QIP) on December 22, 2020. (Item 3.) On January 3, 2022, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). (The SOR was incorrectly dated January 3, 2021.) (Item 1.) 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 answered the SOR in writing (Answer) on January 26, 2022, with explanations and six enclosures identified as Applicant Exhibits A through F. He requested his case be decided on the written record in lieu of a hearing. (Item 2.) On March 15, 2022, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 to 4, was provided to Applicant, who received the file on March 30, 2022.

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information on April 15, 2022. The information consisted of a brief from counsel and one additional exhibit. Department Counsel had no objection to the admission of the additional exhibit, and it is admitted into evidence as Applicant Exhibit G. The case was assigned to me on June 16, 2022. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is granted.

### **Findings of Fact**

Applicant is a 27-year-old associate counsel with a defense contractor. He is single and has a fiancée. He has a *juris doctor* degree, and is seeking to obtain national security eligibility in connection with his work with DoD. This is Applicant's first application for a security clearance in connection with his first job out of law school. (Item 3 at Sections 12, 13A, 17, and 25.)

#### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted the single allegation under this paragraph with explanations.

1.a. Applicant admitted using marijuana from about September 2012 through August 2020. He used marijuana with varying frequencies during that time, at one point using marijuana two times a week (2012-2016). From 2016 to 2018 he used marijuana once a month. He then used marijuana three times in January 2019 and five times in August of 2020. Starting in 2016, he only used marijuana in states where its purchase and use was legal under state law. He has not used marijuana or any other illegal drug since August 2020. (Item 3 at Section 23 and Item 4.)

Applicant submitted a signed statement of intent dated January 26, 2022. He stated, "I have no future intent to use any illegal controlled substance or abuse prescription drugs, regardless of whether I am an applicant for or hold a security

clearance.” He also agreed to random drug testing and immediate revocation of his security clearance if he has a positive drug test. (Applicant Exhibit F.)

Applicant also agreed to the granting of a conditional clearance. His supervisor, the general counsel of the defense contractor, agreed in writing to monitor Applicant for one year and authorize quarterly, random drug tests. (Applicant Exhibit G.)

## **Mitigation**

Applicant submitted a letter from his supervisor, who is the general counsel of the defense contractor. She has worked daily with Applicant for five years, since he began as an intern. She stated, “I have personally found [Applicant] to be honest, trustworthy, reliable, dedicated and loyal.” The rest of the letter is also laudatory. She recommends Applicant for a position of trust, which is shown by the company’s decision to propose Applicant as the Facility Security Officer. (Applicant Exhibit D at 1-2.)

Applicant submitted his annual appraisal covering his first full year working for the defense contractor. His supervisor stated, “[Applicant’s] performance in 2020 was excellent.” (Applicant Exhibit C at 5-10.)

Applicant submitted letters from a long-time friend and from his fiancée. They each discuss Applicant’s stated and unequivocal intention not to use marijuana. (Applicant Exhibit D at 3-4.)

## **Policies**

When evaluating an applicant’s national security eligibility for a security clearance, 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 concern relating to Drug Involvement and Substance Misuse is set forth in AG ¶ 24:

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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any substance misuse (see above definition).

Applicant used marijuana on an occasional basis from 2012 to 2020. The stated disqualifying condition applies.

The following mitigating conditions under AG ¶ 26 have also been considered:

(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.

In my analysis, I have taken administrative notice of the Security Executive Agent (SecEA) "Clarifying Guidance Concerning Marijuana for Individuals Eligible to Access Classified Information or Eligible to Hold a Sensitive Position," dated December 21, 2021. (Applicant Exhibit E.) In her Guidance, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana and issued Applicant Exhibit E to "provide clarifying guidance." 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.

She further stated:

Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding security

clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Applicant used marijuana for about eight years, ending in August 2020, about four months before he submitted the e-QIP. Applicant has a good job, has abstained from marijuana use for over a year and a half as of the time the record closed, and evinced a credible intent not to use it in the future. Applicant has submitted a signed statement of intent and has discontinued association with other drug users. Viewed in the context of the whole person, Applicant has mitigated the security significance of his past drug use. Paragraph 1 is found for Applicant.

### **Whole-Person Concept**

Under the whole-person concept, the 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. 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. Applicant is a young man just beginning his career. His occasional use of marijuana is in the past and, as stated, he evinces a credible intent not to use marijuana in the future. The overwhelmingly positive statements of his supervisor, the corporate general counsel, are particularly worthwhile as being from someone with serious legal responsibilities and an obligation to provide appropriate legal advice to her superiors in corporate governance, including about employment. Applicant has mitigated his drug use. Overall, the record evidence does not create doubt 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

Subparagraph 1.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.

WILFORD H. ROSS  
Administrative Judge