



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



In the matter of:)	
)	
)	ISCR Case No. 22-01189
)	
)	
Applicant for Security Clearance)	

Appearances

For Government:
Bryan Olmos, Esquire, Department Counsel

For Applicant:
Kathryn D. Freiburger, Esquire

February 17, 2023

Decision

GLENDON, John Bayard, Administrative Judge:

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 10, 2020. (Item 4) On July 5, 2022, the Department of Defense Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). (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 *pro se* on July 20, 2022 (Answer), and requested his case be decided on the written record in lieu of a hearing. (Item 2.) In his Answer, Applicant admitted the three SOR allegations under Guideline H with explanations. On September 19, 2022, Department Counsel submitted the Department's written case. A complete copy of the File of Relevant Material (FORM), consisting of Items 1 to 6, was provided to Applicant, who received the file on September 29, 2022.

Applicant was given 30 days from receipt of the FORM to raise objections and submit material in refutation, extenuation, or mitigation. Applicant retained counsel, who submitted a written response to the Government's FORM on October 26, 2022 (Response). Department Counsel did not object to Applicant's submission. In the Response, Applicant asserted no objections to the Government's evidence (Items 1 to 6) attached to the FORM. Department Counsel's Items 1 through 6 are admitted into evidence. The case was assigned to me on November 29, 2022. Based upon a review of the pleadings and exhibits as well as the arguments of counsel set forth in the FORM and the Response, national security eligibility for access to classified information is granted.

Findings of Fact

Applicant is 45 years old, married, and has two minor children. He earned his Bachelor's degree in 2000 and a certification in 2009. Applicant has worked as an engineer since 2008 and has been with his sponsoring employer since October 2020. He was granted national security eligibility in May 2012 in connection with his employment with a Government contractor at that time. He seeks to retain his eligibility and security clearance in connection with his current employment. (Item 4 at Sections 2, 12, 13A, 17, 18, 25.)

Paragraph 1 - Guideline H, Drug Involvement and Substance Misuse

The Government alleged in the SOR that Applicant is ineligible for a security clearance because of his illegal use of a controlled substance, marijuana. The three SOR allegations are supported by Applicant's admissions in his Answer and in his Response. The allegations are also evidenced by Applicant's statements in his e-QIP and a prior security clearance application, dated March 8, 2012 (2012 SCA), and his comments made during interviews with investigators from the Office of Personnel Management held on December 31, 2020, and March 20, 2012. (Items 2, 3, 4, 5, and 6; Response.)

The details regarding the three SOR allegations and Applicant's admissions are as follows:

1.a. THC use from August 1995 to December 2018. In high school and college, Applicant frequently used marijuana. He continued using marijuana in the early 2000s after his graduation from college, but that use significantly decreased as his career progressed. After his marriage in 2007 and the birth of his first child in 2009, his use of

marijuana became “very rare.” During the period from 2013 to 2016, he used marijuana about one time per year on average, typically during camping trips with college friends in the rural state in which they all lived at that time and attended college together. His friends were using marijuana, and he wanted to feel involved. With the birth of his second child in 2014 and his relocation of his family to a state across the country late that year, he saw little of his camping friends with one exception. He used marijuana with that friend in 2015 and 2016. He used marijuana again one last time in December 2018. He has not used marijuana in more than four years because he is a “family man” and is dedicated to working hard to support his family. He also noted that he understands that using marijuana is inconsistent with holding a security clearance and he no longer enjoys it. (Item 3 at 41; Item 4 at 10, 32; Item 6 at 3.)

1.b. Use of marijuana after submitting his 2012 SCA. Applicant continued to use marijuana after he signed his 2012 e-QIP, as described above. He commented in his 2012 e-QIP that he does not plan on using marijuana again. (Item 3 at 41; Item 4 at 34; Item 5 at 3-4, 8.)

1.c. Use of marijuana in December 2018 while holding a security clearance. Applicant was granted national security eligibility and a security clearance in about May 2012. This allegation is focused solely on Applicant’s one-time use in December 2018 while holding a security clearance. The reason for this limitation is unclear. In his e-QIP, Applicant wrote that his use of marijuana was “very infrequent” and was “less than once a year at most” during the past seven years (2013 to 2020). He also wrote in his e-QIP and in his Answer that he does not intend to use marijuana in the future because of his family responsibilities and his “rewarding career.” In his Response, Applicant noted that he intends “to continue to abstain from all drug involvement and acknowledge[s] that any future involvement is grounds for revocation of national security eligibility.” He wrote that his one-time use in 2018 at a New Year’s Eve party in December of that year “was the last time I ever used THC. He also wrote that the use of marijuana was “not an enjoyable experience.” He expressed his regret for “his momentary lack of judgment” “late in the evening” in which another person possessed the illegal drug. He also noted that he has promised his wife that he will never again take any action that might jeopardize his ability to support her and their two children. Applicant noted that he takes this promise very seriously. (Item 2 at 1, 2; Item 3 at 41; Item 4 at 32; Item 6 at 4; Response at 4.)

Paragraph 2 – Guideline E, Personal Conduct

The Government cross-alleged the three allegations set forth in paragraph 1 of the SOR under the Personal Conduct guideline.

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.

The admitted facts in this case establish both disqualifying conditions and shift the burden to Applicant to provide mitigation of the Government's security concerns.

AG ¶ 26 includes two conditions in that could mitigate the security concerns arising from Applicant's 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 are 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.

The record evidence establishes both of the above mitigating conditions. Applicant's past use of marijuana while holding a security clearance occurred so long ago and was so infrequent that it is unlikely to recur. His limited number of uses in which he was offered puffs of marijuana by others last occurred more than four years ago. His past behavior does not cast doubt on his current reliability, trustworthiness, or good judgment. He has outgrown his prior errors in judgment, including his use of marijuana after committing to not use marijuana again in his 2012 e-QIP.

In addition, Applicant has acknowledged his past drug involvement with candor and openness. He has committed to abstain from using marijuana by promising his wife that he will never again do anything to jeopardize his ability to support his family. He has also promised himself that he will not jeopardize his career, which is important to him, by using marijuana again. When he and his wife had their second child, they relocated across the country to be near their families. Applicant is far away from his college environment and the college friends with whom he used to smoke marijuana on camping trips. He has candidly admitted that he remains in contact with one close friend from his past, but that there is no reason to believe that he cannot manage his relationship with that friend without using marijuana. Significantly, he has also signed his Response in which he formally committed to abstain from future drug involvement and acknowledged that and future involvement would be grounds for the revocation of his national security eligibility.

Applicant has established mitigation of the security concerns raised by his past use of marijuana before, and a few times after, being granted a security clearance. Paragraph 1 is found for 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 one 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's past use of marijuana after being granted a security clearance is certainly credible adverse information under the guideline for Drug Involvement and Substance Misuse. I have concluded that the record evidence does not support an adverse determination under that guideline. However, I also conclude that his actions do not support application of the above-quoted potentially disqualifying condition. As discussed below in my whole-person analysis, the record evidence does not support a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, or unwillingness to comply with rules and regulations. While Applicant's actions from 2012 to 2018, raise such concerns, his abstention from illegal drug use since December 2018 and his candor in admitting all of his drug history support a favorable whole-person assessment. AG ¶ 16(c) is not established. Paragraph 2 is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's potential 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 considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Further comments are warranted. Applicant's history of illegal drug use spans a number of years, but ceased after December 2018, more than four years ago. I have considered Applicant's age in the context of his use of marijuana while in college and for several years after that, including his infrequent (once-annual) use after committing in his 2012 e-QIP that he did not intend to use marijuana in the future. I have also taken into consideration Applicant's current status as a husband and father of two young children. In the past four years, he has shown by his abstention from illegal drugs, and by his complete candor during the security clearance application process, that he has matured and is a responsible professional with a solid career ahead of him. There is little likelihood of recurrence of his use of illegal drugs. He has mitigated the concerns raised by providing evidence of "permanent behavioral changes" with respect to his use of marijuana. Overall, the record evidence leaves me without questions or doubts as to Applicant's 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 Applicant national security eligibility for a security clearance. Eligibility for access to classified information is granted.

JOHN BAYARD GLENDON
Administrative Judge