



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



In the matter of:	)	
	)	ISCR Case No. 21-00326 <sup>1</sup>
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: Ronald Sykstus, Esq.

01/31/2023

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Eligibility for access to classified information is granted.

**Statement of the Case**

On June 24, 2021, the Defense of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse and Guideline E, personal conduct. The action was taken under Executive Order (EO) 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 (AG) effective on June 8, 2017.

Applicant answered the SOR on November 18, 2020, and requested a hearing before an administrative judge. The case was assigned to me on October 25, 2022. The

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<sup>1</sup> The SOR incorrectly stated the case number as 20-00326. This number was previously assigned to a different case. I have corrected the number on this decision.

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 4, 2022, scheduling the hearing for January 10, 2023, by Microsoft Teams. The hearing was held as scheduled. The Government offered exhibits (GE) 1 through 4. Applicant and three witnesses testified and offered Applicant Exhibits (AE) A through I. There were no objections and all exhibits were admitted into evidence. DOHA received the hearing transcript on January 25, 2023.

### **Findings of Fact**

Applicant admitted the allegations in the SOR ¶¶ 1.a through 1.c. He did not specifically admit or deny the same allegations that were cross-alleged in SOR ¶ 2.a. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 51 years old. He earned a bachelor's degree in 2000. He married in 2010 and has an adult stepson. He has been employed by his present employer, a federal contractor, since 2020 and has worked for different federal employers since 2006. (Transcript (Tr.) 20; GE 1)

In 1994, Applicant was arrested and charged with trafficking marijuana, a felony. He was attempting to sell about two pounds of marijuana when arrested. He had successfully sold about a pound of marijuana on one other occasion. His charge was later reduced to possession of marijuana, a misdemeanor. He was convicted of the lesser offense and sentenced to 12 months in jail. He served eight months and was released early. (Tr. 24, 39-45)

After Applicant's release from jail, he would purchase small amounts of marijuana from friends for personal use, and he used marijuana with varying frequency from 1994 to 2001. He stopped using marijuana when he applied for a job in 2001 that required a security clearance. He said he did not receive the clearance. He testified he also stopped using marijuana because he wanted to pursue a different path for his life. He became involved with his church and turned his life to God. In approximately 2006, he applied for another job that required a security clearance. He was denied the clearance after going through the adjudicative process, including a hearing with an administrative judge from DOHA. In 2009, Applicant reapplied for a security clearance and it was granted in 2010. All of his jobs since 2010 have required a security clearance. (Tr. 23-26, 45-52)

In about 2011, Applicant and his wife purchased undeveloped property in the country on which they spent years clearing brush and trees, erecting fences and renovating buildings. Six years later, after his stepson graduated from high school, he and his wife moved to their tiny house, planted gardens, fruit trees, berry orchards, and learned to care for livestock. Applicant was also in a position to invest more time into his hobby of cycling that he pursues three to four times a week for two to three hours at a time. Applicant also continued to work hard at his job. In 2019, after years of working every day and every weekend, he and his wife planned a vacation.

Applicant and his wife planned their vacation for months. They intended to fly to Colorado and rent a recreational vehicle and then drive to various locations where they could hike and bike and enjoy the mountains. They purchased one-way tickets, as when they completed their mountain trip, they intended to drive home. In order to leave their farm, they required someone who was experienced in caring for animals. Their farm is not for profit, but intended for a degree of self-sufficiency. They arranged for a person to care for the farm animals while they were gone. He was to come to the farm the day before they were to leave for vacation so they could do a last-minute walk through. The farm hand failed to show up the day before and could not be contacted. He had gotten the days wrong. (Tr. 26-30; Answer to the SOR)

The plane tickets were non-refundable, so Applicant's wife suggested that Applicant take the trip without her, rent a bike, and cycle through the Rockies. Applicant already had approved leave. He did not want to go on vacation without his wife, but at her insistence and to give him a much-needed vacation, he took the trip. (Tr. 26-30; Answer to the SOR)

Applicant arrived in Colorado and checked out bike shops. There were numerous cannabis shops. Use and possession of marijuana is legal in Colorado. He testified that he was curious because there were cannabis stores everywhere and since it was legal in the state, he went into one and on impulse purchased a small amount of marijuana. He went back to his hotel room and used a small amount. About ten minutes later, he realized his mistake and did not like the way the drug made him feel. He disposed of the marijuana, called his wife, told her what he did, and said he wanted to come home immediately. He did not want to vacation without his wife and felt guilty for his actions. He checked out of the hotel at 4:00 a.m. the next morning and drove home. (Tr. 30-33, 52-53, 55; Answer to the SOR)

Applicant credibly testified that this one-time use in 2019 was the only time since 2001 that he used marijuana or any illegal drug. His wife and his stepson are aware of his use. In July 2020, Applicant completed a security clearance application (SCA) as part of his reinvestigation for his security clearance. In the SCA, he disclosed his one-time use of marijuana in October 2019, while he held a security clearance. He indicated his intent never to use it again because it jeopardized all that he had worked for. Applicant provided a signed statement swearing that he does not intend to use marijuana again and understands revocation of his security clearance would be immediate if he did. Applicant credibly testified that he never considered lying on his SCA and not disclosing his marijuana use. He felt it was his duty and obligation to disclose the information. (Tr. 23, 34-36, 53, 58-59; GE 1; AE I)

In September 2020 Applicant was interviewed by a government investigator. He disclosed his purchase of marijuana in Colorado while on vacation and his one-time use before discarding the remaining marijuana. He told the investigator that he regretted his actions and the risk was not worth jeopardizing his livelihood. He made a full disclosure to the investigator. (GE 4)

Applicant testified and acknowledged his mistake. He said he was selfish. He is remorseful for his actions. He testified that he understands he was given a second chance when he was granted a security clearance in 2010. He did not like the way the marijuana made him feel, and he does not intend to ever use marijuana again. In 2021, he decided to abstain from alcohol to live a completely clean life. He eats healthy, rides his bike, and devotes any extra time he has to his church. He credibly testified that after he got married he gave his life to God. (Tr. 35-37, 56-57-58)

Applicant's wife testified on his behalf. She confirmed that she and Applicant had worked tirelessly on their farm, and they were looking forward to a second honeymoon because they were unable to take a first one. When their farm hand failed to show up, she had insisted Applicant go on the trip without her because he deserved a break. She said that Applicant called her from Colorado after he used marijuana and was upset with himself. She wanted him to put the incident behind him and enjoy the rest of the vacation, but he wanted to come home. She testified he was angry with himself and remorseful. She stated that he has a set of ethics that he lives by, and he is brutally honest. He is devoted to his faith and it is an integral and cornerstone part of his life. She believes she knows him better than anyone and acknowledges his past and that he has evolved. (Tr. 64-76)

Applicant's former supervisor testified on his behalf. She has known him since 2003 and supervised him for four to five years. He does excellent work and is honest to a fault. She is aware of his marijuana use in 2019. She was somewhat aware that he had issues in his background, but he had overcome them. She considers him trustworthy. She acknowledged he used bad judgment when he used marijuana, but he was honest when he disclosed it. She has no concerns about him holding a security clearance. (Tr. 76-83)

A coworker, who is retired from the military and has worked with Applicant since 2009, testified on his behalf. He noted that Applicant's work was detailed and excellent. He stated that Applicant is very honest, and he has integrity. He is aware of Applicant's 2019 marijuana use and he did not have concerns with him having a security clearance. (Tr. 84-89)

Applicant provided a copy of an award, letters of appreciation, certificates of excellence, letters of outstanding performance in support of a military program, certificate of excellence for exceptional service to the military, and a chronological list of accomplishments since August 2018. (AE A-H)

## **Policies**

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

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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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 that "[a]ny 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security 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 access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline H: Drug Involvement and Substance Misuse**

The security concern relating to the guideline for drug involvement and substance misuse is set out 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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacturing, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant purchased and used marijuana with varying frequency from 1994 to 2001. In 1994, he was arrested and charged with felony trafficking cannabis. He was convicted of the lesser included offense of possession of marijuana. In October 2019, Applicant purchased and used marijuana. AG ¶¶ 25(a) and 25(c) apply to these facts.

Applicant held a security clearance at the time he used marijuana in October 2019, but there is no evidence that he had access to classified information at the time. Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must not only have eligibility (i.e., a security clearance), but also must have signed a nondisclosure agreement and have a "need to know." See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022). I find that AG ¶ 25(f) does not apply.

The guideline also includes conditions that could mitigate security concerns. The following mitigating conditions under AG ¶ 26 are potentially applicable:

- (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 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 being 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 evidence supports that Applicant regularly used marijuana from 1994 to 2001. After his conviction for possession of marijuana in 1994, he continued to use marijuana. In 2001, he was denied a security clearance. At this point, he decided to change his life, and did. He married and found his faith. He and his wife work hard on their family farm. Applicant and his wife intended to take a vacation together and despite their best efforts of planning, the farm hand failed to show up. Applicant did not want to go alone, but at the insistence of his wife, he went to Colorado. While there he used marijuana one time.

Before 2001, Applicant had an extensive drug history. He readily acknowledged his transgressions. I found Applicant's testimony to be candid and remorseful. I do not have any concerns about Applicant using illegal drugs in the future. I believe his use in October 2019 was under unique circumstances, and is unlikely to recur, but it does not negate poor judgment in knowingly using marijuana.

Applicant was previously denied a security clearance, and had gone through the adjudication process, so he was aware and on notice of the ramifications drug use would have on his security clearance. He has acknowledged his transgressions and except for this one-time occurrence in 2019, he has been abstinent. He signed a letter of intent not to use illegal drugs in the future. I find both mitigating conditions apply.

### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concerns for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standards; . . . .

The SOR allegations under the drug involvement guideline were cross-alleged under the personal conduct guideline. Applicant used marijuana with varying frequency from 1994 to 2001. In 1994, he was convicted of possession of marijuana. In October 2019, he used marijuana. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or otherwise inappropriate behavior, and such behavior is unlikely to recur.

The same analysis under the drug involvement guideline applies under the personal conduct guideline. In addition, I conclude the offense was not minor because Applicant was aware of the prohibition of illegal drug use while working for a federal employer. However, it happened under unique circumstances, and I do not believe Applicant will use illegal drugs in the future. Applicant acknowledged his behavior and disclosed it on his SCA. Although he was required to disclose any illegal drug use, it is unlikely his October 2019 use would have otherwise been detected if he had not been honest. The above mitigating conditions apply.

### **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 the 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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

I do not believe Applicant will use illegal drugs in the future. The question is whether his most recent drug use in 2019 raises questions about his judgment, reliability and trustworthiness. Applicant clearly exercised poor judgment when he decided to use marijuana in 2019 while holding a security clearance, but not access to classified information. After 2001, he changed his life, married, found his faith, and he and his wife devoted their time to their farm. Applicant was obligated to disclose his 2019 marijuana use on his SCA. I have given considerable weight to the fact that although he was required to disclose this information, no one would have been aware of this use had he not been honest about it. The security clearance process is not meant to punish, but is to make a determination about whether there are legitimate security concerns about applicants. Although, Applicant has had issues in the past and succumbed to temptation in 2019, which is aggravated because he held a security clearance at the time, I do not believe this one time occurrence rises to the level of a current security concern. I have considered that he was given a second chance when he was granted a security clearance in 2010. I observed him and believe he is overwhelmed with guilt for his conduct and is remorseful. He was candid when he testified, and I found him credible. After considering the whole-person, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct.

### **Formal Findings**

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a-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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Carol G. Ricciardello  
Administrative Judge