



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



In the matter of:)	
)	
)	ISCR Case No. 22-02170
)	
)	
Applicant for Security Clearance)	

Appearances

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

For Applicant:
Pro se

May 10, 2023

Decision

GLENDON, John Bayard, Administrative Judge:

While granted access to classified information, Applicant used marijuana two or three times in 2022 to help him sleep following the sudden death of his wife. He also failed to disclose information on his 2014 security clearance application about his experimental use of marijuana on one or two occasions after graduating from college in 2012. Applicant mitigated the security concerns raised by his actions. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing on June 29, 2022 (2022 e-QIP). On December 9, 2022, the Department of Defense Consolidated Adjudications Facility (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 to the SOR (Answer) on December 20, 2022 and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 7, 2023, and the case was assigned to me on the same day. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Microsoft Teams Video Conference Hearing on March 24, 2023, scheduling the case on April 12, 2023.

I convened the hearing as scheduled. Department Counsel presented Government Exhibits (GE) 1 through 4, which I admitted without objection. Applicant testified on his behalf. I kept the record open until April 19, 2023, to give him the opportunity to supplement the record. He timely submitted 15 documents, which I marked as Applicant Exhibits (AE) A through O. His exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on April 19, 2023. (Tr. at 12-14.)

Findings of Fact

Applicant is 33 years old. He married in March 2020. His wife passed away unexpectedly in March 2022, leaving him a widower with an 18-month-old child. Applicant earned a bachelor's degree in 2012 and a master's degree in 2017. He has worked for a federal contractor since 2014 and is now a manager. He applied for a security clearance in November 2014 (2014 e-QIP), and the CAF granted him national security eligibility in January 2015. He seeks to retain his eligibility in connection with his employment. (Tr. at 17-20; GE 1 at 5, 10-12, 17, 20-21, 35-37; GE 3; GE 4.)

Paragraph 1 - Guideline H, Drug Involvement and Substance Misuse

The Government alleged in this paragraph that Applicant is ineligible for a clearance because of his recent drug involvement. Specifically, the SOR alleged that Applicant used marijuana with varying frequency from about June 2012 through March 2022 (SOR ¶ 1.a). The CAF also alleged in subparagraph 1.a that Applicant used marijuana after he had been granted a security clearance. In his Answer, Applicant admitted the allegation under this guideline. (Answer at 1.)

In his 2022 e-QIP, Applicant disclosed that he used marijuana "very sparingly" in the past seven years. He wrote that he used marijuana during that period about five times. He disclosed further that his most recent use (two or three of about five times) was in March 2022 after his wife died suddenly on March 1, 2022. He used the marijuana to help him sleep at a time of extreme stress. (GE 1 at 33-34.)

Applicant testified that he had first experimented with marijuana one or two times during the period after college and before he began working for his current employer

(2012 to 2014). He smoked marijuana with friends who shared their marijuana with him. He also smoked marijuana during the period 2015 to early 2022, while he held a security clearance. He does not recall the specifics of these occasions because it was a number of years ago when he was younger, but he is certain that his use of marijuana was very limited during that period before his wife died. His best estimate is that he used marijuana one or two times during that period. (Tr. at 21-23, 25-27.)

Applicant explained that the cause of his wife's death was the result of taking a medication that she thought was a prescription medication. He experienced significant trauma from this loss and the new reality that he was the widowed father of a young child and responsible for both his child and a demanding full-time job. He had difficulty sleeping. He tried non-prescription sleep aids, but they did not help him, and they had side effects that were difficult for him to handle. On two or three occasions he smoked marijuana before trying to sleep. He purchased the marijuana legally under the laws of his state of residence (State A). The marijuana gave him some needed rest. (Tr. at 24-30.)

Applicant quickly decided, however, that he did not want to continue to use marijuana for this purpose because he knew that its use was inconsistent with his responsibilities as someone with access to classified information. He concluded that using marijuana was a mistake. He did not want to have his use of marijuana "spiral" into constant use to self-medicate his stress and grief. Because of the circumstances of his wife's death, he had no interest in taking any prescription medication to help with his sleep. He forced himself to find non-drug remedies for his stress in the form of meditation, therapy, breathing exercises, physical exercise, eating better, and time with his child. He used these techniques to calm his mind so he could function during the day and sleep at night. He described his path towards emotional recovery as an effort to better himself. He testified that he has no intention to use marijuana or any illegal drug in the future because he wants to strive to better himself and to set a proper example for his child. (Tr. at 28-32.)

Applicant has not used any marijuana or other illegal form of drugs since his brief experience immediately after his wife's death. After the hearing, he provided a written statement in which he wrote that he has no intention to use illegal drugs in the future and acknowledged that that usage of illegal drugs would constitute a basis for the automatic revocation of his security clearance. He no longer associates with anyone who uses illegal drugs. (Tr. at 31-32; AE A.)

Paragraph 2 - Guideline E, Personal Conduct

The Government alleged in this paragraph of the SOR 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 CAF alleged that Applicant falsified his answers to the question in Section 23 of the 2014 e-QIP about prior illegal drug use. (SOR ¶ 2.a.) The SOR also cross-alleged under this guideline the Guideline H allegations described above. (SOR ¶ 2.b.)

In his Answer, Applicant admitted the allegations in subparagraph 2.b and did not respond to the falsification allegation in SOR ¶ 2.a. Accordingly, I regard his lack of response to the allegation in SOR ¶ 2.a as a denial of the allegation. (Answer at 2.)

At the hearing, Applicant admitted that he deliberately provided a false answer to the question in Section 23 of the 2014 e-QIP. He testified that he was scared at the time to admit his prior limited use of marijuana because it could make him ineligible to work for the Government contractor that had offered him his first serious job after his completion of college. He was 24 years old. (Tr. at 23-24.)

Applicant explained that when he prepared his 2022 e-QIP, he knew that he had made a serious mistake in failing to disclose his drug use prior to November 2014 in his 2014 e-QIP. He decided that he should fully disclose his past use of marijuana, including his post-college drug use and his recent use of marijuana after the death of his wife about three months earlier. He reasoned that he had matured since 2014 when he was very young and that working at a DoD contractor had taught him the importance of personal integrity. He also believes that being fully candid with the Government was an important step in his healing process following the loss of his wife. He is determined “to better himself” so that he is the best person he can be. He decided he needed to accept the consequences of his past mistakes using marijuana and not disclosing his prior use in his 2014 e-QIP. (Tr. at 32-33, 36, 41.)

Applicant understands that the purpose of his 2022 e-QIP is to seek eligibility for a Top Secret clearance. He fully appreciates the responsibilities that such eligibility carries with it and the level of personal integrity that accompanies such a clearance. He intends to live a healthy and honest lifestyle going forward. He is proud of his hard work throughout his college years and post-graduate education. He has been successful working at his employer since 2014 and has been rewarded with several promotions. He hopes to continue his stellar career working for a DoD contractor. (Tr. at 32-33, 36, 41.)

Mitigation and Whole-Person Evidence

After the hearing, Applicant submitted his performance evaluations since 2017. He has been rated in each year as a “excellent performer” or a “successful performer. He has earned promotions since his first year at the company in 2014 with increasing levels of responsibility. (AE B – AE H, AE N.) Applicant also submitted four character reference letters from work colleagues, including a former supervisor, and a neighbor. They all praise Applicant’s dedication to his work and his reliable and trustworthy character. (AE I through AE L.)

In a written statement submitted after the hearing, Applicant wrote that he does not intend to use marijuana in the future and acknowledges that any such use would be grounds for the revocation of his national security eligibility. He also wrote that he has volunteered to receive random drug testing by his employer. He noted that his illegal drug

use, both before he worked for this contractor and held a clearance, and after, occurred when he was quite young and was very infrequent. His usage of marijuana after the death of his wife was also quite limited and occurred during a brief period when the crisis of his wife's sudden death dramatically changed his life. He was traumatized. He has since worked hard to rebuild his life and commit himself to living a healthy, drug-free lifestyle. He believes that his therapy, his stress-reducing exercises, and time with his young child have all dramatically improved his life since the low point he experienced in March 2022. (AE O.)

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 the following two conditions that raise security concerns and may potentially 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

- (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 substance misuse establish the above potentially disqualifying conditions. This evidence shifts 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.

In my analysis, I have taken administrative notice of the Security Executive Agent's (SecEA) "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 SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana (including State A) and issued the Guidance 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.

Applicant's use of marijuana in or prior to 2014 was long ago when he was quite young, was experimental, and was very infrequent. His more recent use after 2015 and prior to March 2022 was also infrequent and is primarily a security concern because he had been granted a security clearance in January 2015 before that use occurred. All of his drug use was self-reported in his 2022 e-QIP. His use of marijuana immediately after the death of his wife was limited to two or three nights. He used marijuana to help calm his stress and permit him to sleep under extraordinary and tragic circumstances. Applicant credibly testified that after two or three nights of using marijuana for this purpose, he changed his mind, and committed to himself that he would never use marijuana or any other illegal drug again because he knew it was wrong to do so. He further committed to himself that he would face this extreme adversity with maturity. He resolved to be a better person. He refused to let his tragedy be an excuse for his life to

“spiral” down. He knew he could not afford to do that because he had a young child to raise by himself.

Applicant has acknowledged his mistakes and has taken steps to overcome the stress in his life in a responsible manner. He has established a year of abstinence and has signed a statement of his intent to never use illegal drugs again with an acknowledgment that any future involvement or misuse of illegal drugs would be grounds for the revocation of his security clearance eligibility. In addition, he no longer associates with drug users. Under all of the above circumstances, Applicant’s past behavior does not cast doubt on his current reliability, trustworthiness, or good judgment. Both of the above mitigating conditions are fully established. Paragraph 1 of the SOR 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 the following two conditions that raise security concerns and may potentially 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 admitted that he deliberately provided a false answer in his 2014 e-QIP regarding his past illegal drug use. AG ¶ 16(a) is established and shifts the burden to Applicant to mitigate the security concerns raised by his conduct. Applicant also admitted using marijuana while holding a security clearance, which raises concerns about his

judgment, trustworthiness, reliability, and willingness to comply with rules and regulations under AG ¶ 16(c). However, the record evidence as a whole does not support an adverse whole-person assessment for the reason set for the below in the analysis of the whole-person concept. Accordingly, the security concerns arising under AG ¶ 16(c) are not fully established.

The guideline includes two conditions in AG ¶ 17 that could mitigate the security concerns arising from Applicant's falsification in the 2014 e-QIP and his use of marijuana while holding a security clearance:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, of falsification before being confronted with the facts; and

- (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.

Applicant's falsification in the 2014 e-QIP is mitigated because so much time has passed, and the behavior was so infrequent. Moreover, he has learned from his past mistakes and self-disclosed in the 2022 e-QIP the facts underlying his falsification in 2014, *i.e.*, that he had experimented with marijuana on one or two occasions in the first year or two after he graduated from college. While the explicit terms of AG ¶ 17(a) do not apply to the facts of this case, the mitigating concept of voluntary self-disclosure has some application here. With his complete candor in his 2022 e-QIP and his credible testimony at the hearing, Applicant has established that his past behavior is unlikely to recur and does not cast doubt on his reliability, trustworthiness, or good judgment. AG ¶ 17(c) has been fully established in mitigation with respect to Applicant's falsification in his 2014 e-QIP.

Applicant has also established mitigation under AG ¶ 17(c) with respect to the security concerns raised by his use of marijuana while holding a security clearance. His illegal drug use after he was granted a security clearance and prior to his wife's death was limited to one or two occasions. While any illegal drug use with a security clearance is concerning, the infrequent nature of this behavior reduces that concern, as does the unique circumstances of his use after his wife's sudden death. Also, the record evidence supports that conclusion that the limited times Applicant used marijuana after being granted a security clearance in 2015 occurred a number of years ago, with the exception of the substance misuse immediately after the death of Applicant's wife. The circumstances of that recent use of marijuana are so highly unusually and extraordinarily sympathetic, that I cannot conclude that his actions in any way represent the person he is today. His limited use of marijuana for what can best be described as "medicinal purposes" after his wife's death does not cast doubt on Applicant's reliability, trustworthiness, or judgment. Paragraph 2 of the SOR is found for 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 and the whole-person factors quoted above. I have also weighed the recent guidance of the SecEA with respect to the importance of mitigating evidence in a Guideline H case, such as this. Applicant has provided sufficient evidence to mitigate the security concerns under Guidelines H and E raised by his use of marijuana while holding a security clearance, and by the Guideline E concerns regarding falsification. Overall, the record evidence does not raise 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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	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