



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



In the matter of:)
)
) ISCR Case No. 22-02533
)
)
Applicant for Security Clearance)

Appearances

For Government:
Aubrey M. De Angelis, Esquire, Department Counsel

For Applicant:
Christopher Snowden, Esq.

September 27, 2023

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant mitigated security concerns raised by his drug involvement between 2017 and 2022, including the use of marijuana after having been granted eligibility for a security clearance in January 2020. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on January 31, 2022 (2022 e-QIP). On December 28, 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). 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 January 24, 2023, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 22, 2023. The case was initially assigned to another administrative judge and then was reassigned to me on April 6, 2023. DOHA issued a Notice of Hearing on April 20, 2023, scheduling the case to be heard via TEAMS video teleconference on June 6, 2023.

I convened the hearing as scheduled. Department Counsel offered two documents marked as Government Exhibits (GE) 1 and 2, which I admitted without objection. Applicant testified on his own behalf and offered 16 exhibits, marked as Applicant Exhibits (AE) A through P. Applicant's exhibits were also admitted without objection. Applicant's counsel subsequently requested that the record be reopened so that he could submit one additional exhibit. Department Counsel raised no objection, and I granted Applicant's request. On June 20, 2023, Applicant's counsel timely submitted an exhibit marked as AE Q, which I admitted without objection. DOHA received the transcript of the hearing (Tr.) on June 13, 2023. (Tr. at 9-10.)

Findings of Fact

Applicant is 30 years old, has never married, and has no children. He earned a bachelor's degree in May 2019. He has worked for a DoD contractor as an engineer since July 2019. He submitted a security clearance application in July 2019 (2019 e-QIP) and was granted national security eligibility in January 2020 at the Secret level. He submitted the 2022 e-QIP to apply for eligibility for a Top Secret clearance in connection with his increased employment responsibilities. (Tr. at 10-12; GE 2 at 5, 12-13, 23-24 37-38.)

Guideline H, Drug Involvement and Substance Misuse

The Government alleged in this paragraph that Applicant is ineligible for a clearance because he has a history of drug involvement. Specifically, the SOR alleged that Applicant used Ecstasy in about August 2017 and marijuana from about March 2018 through at least January 2022 (SOR ¶¶ 1.a and 1.b). The SOR also alleged that Applicant used marijuana after having been granted eligibility for access to classified information in January 2020 (SOR ¶ 1.c). In his Answer, Applicant admitted each of the allegations "with clarifications."

I make the following findings of fact with respect to the SOR allegations:

SOR ¶ 1.a. Ecstasy Use. Applicant used Ecstasy on one occasion in August 2017 at a music festival he attended with some college friends. He was given the drug by a friend. Applicant views this as a one-time experience. He had never taken Ecstasy before

this music festival and has never taken it since. Applicant disclosed this illegal drug use in his 2019 e-QIP. (Answer at 1; Tr. at 21-24; GE 1 at 37-38.)

SOR ¶¶ 1.b and 1.c. Marijuana Use. Applicant wrote in the Answer that he smoked marijuana a few times with friends in 2018 while he was attending college. He smoked marijuana using a THC wax pen. He estimated that this occurred four or five times. The friends were in his study group during his senior year in college. He never possessed, bought, or sold the drug. He stopped using marijuana prior to starting work at his employer. His employer has a zero-tolerance policy for illegal drug use. Applicant disclosed his 2018 use of marijuana in his 2019 e-QIP. (Answer at 1; Tr. at 24-33, 38-42; GE 1 at 38.)

Applicant also admitted in his Answer that he used marijuana twice in 2021. He reported his use of marijuana in his 2022 e-QIP, and the two instances of illegal drug use are the subject of these SOR allegations. The first time he used marijuana in August 2021 was at a friend's wedding. Applicant joined with friends he knew from high school and took "a few puffs" on a THC wax pen. The wedding was the first occasion that he had seen these friends since the beginning of the Covid-19 pandemic. The second time in 2021 was at a New Year's Eve (2021-2022) party with friends from college. (Answer at 1; Tr. at 24-33; GE 2 at 34-36.)

Applicant wrote in his 2019 e-QIP that, "I sacrificed a lot to make sure that I graduated college and have no intention of jeopardizing my early career by using THC wax pens." At the hearing, he admitted that he used poor judgment on two occasions by smoking marijuana in 2021. He also described his judgment as a "careless lapse." In the future, he plans to be very diligent and "very, very conscious of my actions." He also attributed his lapses of judgment to the end of the COVID-19 restrictions on socializing. Now that the restrictions have been lifted for some time, he is comfortable that socializing with friends is not such a special occasion, and he can exercise better judgment in his actions. He has never been a habitual user of marijuana. He estimates that he has used marijuana about eight times in his life. He is unhappy with himself that he used such poor judgment that he put himself in the position of being scrutinized for his recent drug. He intends to make sure that he never puts his career in jeopardy again. He is now more conscious of his actions at his workplace, when he is away from work, and when he is around others. He is confident that his past poor judgment will not be repeated. (Answer at 2; Tr. at 38-42, 44-48, 49; GE 2 at 35.)

Mitigation and Whole-Person Evidence

In his 2022 e-QIP, Applicant disclosed his marijuana use in 2021 because he knew it was important to be completely transparent and honest. He feels that his work is important, and he takes his work seriously. He does not intend to ever use an illegal drug again. He feels strongly that the incidents in 2021 are in the past and will not be repeated. He has had subsequent experiences where others were using drugs in his presence, and he has refrained from participating. He understands now that his work is very important

to him, and he does not want to jeopardize his career in any way. Applicant submitted a written letter expressing his intent to abstain from illegal drugs in the future. (Tr. at 33-37; AE I.)

Applicant introduced three character-reference letters written by former supervisors. Each reference provided strong endorsements of Applicant's character and work ethic. (AE F; AE G; AE H.)

Applicant also presented a psychological evaluation from a board-certified psychologist. The psychologist concluded that Applicant "does not have any psychological conditions, behavioral patterns, or substance use problems that could impair his judgment, reliability, or trustworthiness related to properly safeguarding national security information or working in a secure setting." In support of this conclusion, the psychologist noted that Applicant has admitted to making poor choices in the past. The psychologist wrote further that Applicant "elected to disclose the information [about his past drug use] to the Government when it would have been easy to omit and conceal it. [Applicant] said, 'I just decided I would rather be honest and up front about it. That's who I want to be.'" (AE Q at 5-6.)

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

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 e-QIPs, Answer, and his testimony at the hearing regarding his past drug use establish AG ¶ 25(a). He also admitted using marijuana after being granted access to classified information, which establishes AG ¶ 25(f). This evidence shifts the burden to Applicant to mitigate the security concerns raised by his conduct.

Guideline H includes two conditions in AG ¶ 26 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:

(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. (Guidance.) In her Guidance, the SecEA noted the increased number of states that have legalized or decriminalized the use of marijuana and issued the Guidance to "provide clarifying guidance." She reaffirmed the previous 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 testimony and documentary evidence has established mitigation under AG ¶ 26(a). Applicant's drug use was infrequent. He has used Ecstasy once and marijuana about eight times in his 30 years. On two occasions, he exercised very poor judgment using marijuana after he had been granted national security eligibility. He presented significant and persuasive evidence that this behavior will not recur. After using marijuana twice in 2021, he acknowledged his error and disclosed his actions in the 2022 e-QIP. This acknowledgment and disclosure illustrated a significant change in character and values and represented an important break from his past as a college student and the two years following his graduation. He now appreciates the responsibilities he has as one entrusted to safeguard classified information. Under all of the circumstances

presented in this case, his behavior does not cast doubt on his reliability, trustworthiness, or judgment.

Applicant also presented a written statement of his intention not to use illegal drugs in the future. (AE I.) This statement establishes AG ¶ 26(b)(3). I recognize that he made a similar statement in his 2019 e-QIP and that his failure to abide by that prior statement raises questions about the evidentiary value of his current statement of intent. I am convinced by Applicant's sincere testimony and the fact that he reported his transgressions in his 2022 e-QIP that his undertaking set forth in AE I is sincere and that he will fully honor his commitment to the U.S. Government.

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 above whole-person factors and the potentially disqualifying and mitigating conditions in Guideline H, as well as the SecEA's Guidance, in light of all pertinent facts and circumstances surrounding this case. Applicant's poor judgment in using marijuana twice after being granted a security clearance in January 2020 has had a significant impact on his career, and he has come to realize that he is now an adult working in the adult world, not a college kid with few responsibilities other than completing his course work and graduating. His age, and more importantly, his stage in life were significant factors in his past mistakes. He has presented sufficient evidence to convince me that his past immaturity is behind him and that he is fully functioning in his adult life with significant responsibilities for U.S. national security. He now fully appreciates the importance of those responsibilities. The most important evidence is that he showed significant character and a change in attitude by disclosing his drug use in 2021 after he had been granted national security eligibility. Applicant mitigated his past drug use.

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
Subparagraphs 1.a through 1.c:	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