



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



In the matter of: )  
)  
) ISCR Case No. 22-02371  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Kent, Esq., Department Counsel  
For Applicant: *Pro se*

09/26/2023

**Decision**

DORSEY, Benjamin R., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse and personal conduct security concerns. Eligibility for access to classified information is granted.

**Statement of the Case**

On January 31, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, and Guideline E, personal conduct. Applicant responded to the SOR on February 17, 2023 (Answer) and requested a decision based upon the administrative record. On March 6, 2023, Department Counsel timely requested a hearing in this matter. The case was assigned to me on June 20, 2023.

The hearing was convened as scheduled on September 14, 2023. I admitted Government Exhibits (GE) 1 through 6 in evidence without objection. I received a transcript (Tr.) of the hearing on September 21, 2022.

## Findings of Fact

Applicant is a 74-year-old employee of a government contractor for whom he has worked since 1999. He earned a bachelor's degree in 1972. He was married from 1975 until 1982. He remarried in 1985. He has two adult children. He served on active duty with the Navy for about three months between 1972 and 1973, when he received a general discharge because of a health issue. (Tr. 18-20; GE 1, 2)

At all times relevant to this proceeding, marijuana cultivation, sale, and possession has been illegal under federal law. Federal laws regarding marijuana supersede any state laws that are inconsistent with it. Applicant was granted access to classified information at all times relevant hereto. (Tr. 17; GE 1-4)

In about June 2019, after a change in state law regarding marijuana in State A where he resides, Applicant created a limited liability company (LLC) for the purpose of cultivating and selling medical marijuana for profit. He and his wife created the LLC because they thought it was legal and because they saw it as an opportunity to provide a job for their son, who lacked stable employment. Applicant felt he could also draw on his experience as a farmer when he was younger. They complied with State A's regulatory requirements and paid about \$25,000 of their own money to create and run the business. He left day to day operations of the business, including the marijuana cultivation, to his son, who lived about an hour-and-a-half away from Applicant. He visited the operating location of the LLC once. The LLC was never profitable, partially because their marijuana crop never met State A's testing requirements for quality. There is no evidence that the LLC ever sold any marijuana. (Tr. 17-18, 20-24; GE 2, 3, 6)

In June 2021, when it came time to renew the LLC's operating license with State A, Applicant did not renew it. He made this decision because the business was not profitable and because his son found other, stable employment. The LLC is no longer operational and its status with State A has been inactive since June 2021. The LLC still owns assets, such as pots, heat lamps, and a hoop house, but he plans to divest the LLC of those assets. His ability to do so was delayed and hampered by his colorectal cancer diagnosis in October 2022, for which he received radiation and chemotherapy treatment. He now believes he is cancer free, so he will take the steps necessary to wind down the LLC. The LLC does not currently own any marijuana or federally illegal paraphernalia. He has no intention to be involved with illegal, controlled substances ever again, and claimed that if he had known it was illegal under federal law, he would never have become involved. (Tr. 17-18, 20-30; GE 1-3, 6)

About every year-and-a-half since 2009, Applicant has received training from his employer regarding his responsibilities as a security clearance holder. This training informed Applicant that the use of illegal, controlled substances, among other things, could result in the loss of his security clearance. While he never notified his facility security officer about the LLC or the nature of its operations, there is no evidence that the training informed him that he had to inform his employer that he had registered an outside business or that he was *cultivating* an illegal controlled substance. He testified

that he believed there was no reporting requirement for registering a business or a duty to report that he started a business that was cultivating marijuana. He also testified that, because it was legal pursuant to state law, he did not know that cultivating marijuana was illegal pursuant to federal law or that it could affect his security clearance eligibility. In about March 2020, while the LLC was operational, one of the LLC's creditors, a credit-card company, canceled the LLC's credit card because of the nature of its transactions. While acknowledging the cancellation, he testified that he still thought the LLC operations were legal because it was properly licensed with State A and legal pursuant to the laws of State A. I observed him testify and found his testimony credible. (Tr. 17-18, 23, 25-28; 30-32; GE 2, 3, 5)

Under Guideline H in the SOR, the Government alleged Applicant's operation of the LLC while granted access to classified information or holding a sensitive position. Under Guideline E in the SOR, the Government alleged his failure to report his operation of the LLC to his facility security officer and cross-alleged the operation of the LLC. (SOR; Answer)

### **Policies**

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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."

Under Directive ¶ E3.1.14, the Government must 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.” The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 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. 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following is potentially applicable in this case:

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant created the LLC for the purpose of cultivating and selling marijuana, an illegal drug under federal law. At one time, the LLC possessed marijuana seeds and plants. The above listed disqualifying condition is applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following is 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;

It has been over two years since Applicant's LLC ceased cultivating marijuana. He created the LLC and maintained it not knowing that cultivating marijuana was illegal pursuant to federal law. A change in state law allowing marijuana cultivation reasonably contributed to his mistaken belief. He also was not aware that cultivating marijuana was incompatible with holding a security clearance, or that he was required to report the LLC or marijuana cultivation to his employer. There is no evidence that his employment training informed him of this information. He credibly testified that he will not have any involvement with illegal drugs, including marijuana, in the future. He is now fully aware of the precedence of federal law and that no distinction exists among marijuana use, cultivation, or possession. Given these considerations, in conjunction with the two-year passage of time, I find that the behavior happened so long ago and under such circumstances that it is unlikely to recur. Applicant's disqualifying conduct does not cast doubt on his current reliability, trustworthiness, and good judgment. Mitigating factor AG ¶ 26(a) fully applies and the Guideline H security concerns are mitigated.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following are potentially applicable in this case:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other government official; and

(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 standing;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

As Applicant did not know that he was required to report information regarding the LLC to his facility security officer, he did not deliberately conceal or omit that information. AG ¶ 16(b) does not apply. While he did not know that he was engaging in illegal conduct by operating the LLC, as growing marijuana was, in fact, illegal, this conduct created a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. AG ¶ 16(e) is applicable and shifts the burden to Applicant to provide evidence of mitigation.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's operation of the LLC ended over two years ago. It happened under the unique circumstances of a change in state law that contributed to his lack of understanding that operating the LLC was unlawful. He now knows that no involvement with marijuana is legal or compatible with holding a security clearance and credibly testified that he will have no involvement with illegal drugs. I find that this behavior is unlikely to recur and does not cast doubt on his reliability, trustworthiness, and good judgment. He has ceased operation of the LLC, which reduces his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(c) and AG ¶ 17(e) fully apply and the Guideline E conduct is mitigated.

### **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 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 incorporated my comments under Guidelines H and E in my whole-person analysis.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse and personal conduct security concerns.

### **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:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

### **Conclusion**

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Benjamin R. Dorsey  
Administrative Judge