



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-00888
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Karen Moreno-Sayles, Esq., Department Counsel,  
For Applicant: *Pro se*

03/27/2024

**Decision**

GARCIA, Candace Le'i, Administrative Judge:

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

**Statement of the Case**

On November 18, 2022, 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 J (criminal conduct). The action was taken under Executive Order (Exec. Or.) 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) implemented by DoD on June 8, 2017.

Applicant responded to the SOR on January 19, 2023 (Answer) and requested a hearing before an administrative judge. The case was assigned to me on November 7, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 17, 2023, scheduling the matter for a video conference hearing on December 19, 2023. I convened the hearing as scheduled. At the hearing, I admitted

Government Exhibits (GE) 1 through 4 into evidence without objection. Applicant testified and did not submit any documentation or call any witnesses. I kept the record open until January 5, 2024, to allow the parties the opportunity to provide documentation. Department Counsel submitted a document I marked as GE 5 and Applicant submitted documents that I collectively marked as Applicant Exhibit (AE) A. I admitted GE 5 and AE A into evidence without objection. DOHA received the hearing transcript (Tr.) on January 4, 2024.

### **Findings of Fact**

At the hearing, Department Counsel withdrew SOR ¶ 1.b. (Tr. 98) Applicant admitted SOR ¶ 1.c and 2.c, and he denied SOR ¶¶ 1.a, 2.a, and 2.b. He is 29 years old, married, and he has two sons, ages eight and four. He has owned his home since May 2020. (Tr. 6-7, 28-29, 37-38, 76, 89, 95; GE 1)

Applicant graduated from high school in 2013. He has attended college since 2022 and anticipates receiving an associate degree in the summer of 2024. He has served in the U.S. Army Reserve since 2013, and he was promoted to sergeant in 2020. He worked at a food processing company from approximately 2018 to 2019. He then worked for a defense contractor until November 2021. Since then, he has worked for another defense contractor. He was granted a security clearance in approximately 2013. (Tr. 5, 7-10, 29-39, 53, 67, 82-83; GE 1; AE A)

Applicant was drug tested when he first joined the Reserve in 2013. He has since been subject to random drug testing through the Reserve. He tested positive for tetrahydrocannabinol (THC) on a drug test administered by his Reserve unit in February 2019 (SOR ¶ 1.c), as further discussed below. He testified that he was also randomly drug tested in December 2018, March 2019, and June 2019. He understands that illegal drug use is not permitted while holding a security clearance. At the time of his positive drug test, he was a private first-class mechanic, and he also worked at the food processing company. He held a clearance, but he did not have access to classified information, as his duties did not require it. He began working with sensitive information when he was promoted to sergeant in 2020, and when he began working for his current employer in 2021. (Tr. 38-41, 56-57, 82-85, 91-94; GE 4)

Applicant denied knowingly using THC monthly in 2019. (SOR ¶¶ 1.a, 2.a) He mistakenly listed this information when he completed his response to interrogatories in December 2023. He meant to report that he unknowingly used THC, for only one month in 2019, when he purchased and used a “vape pen” that he did not know contained THC. He started vaping when he worked at the food processing company in December 2018. It was a hectic environment and vaping relieved his stress. From December 2018 to March 2019, he purchased and used between six to seven vapes from a smoke shop. The vapes were about the size of a key fob and lasted him about three weeks. After purchasing it, he would charge the vape and use it on his lunch breaks. He lost some of the vapes and a few stopped working after losing their charge. (Tr. 16-17, 39, 41-52, 55-57, 81-87, 93-94; GE 1, 2, 4)

In February 2019, Applicant purchased and used a “vape pen” from a convenience store just outside of the food processing company. It was different than the previous vapes he had purchased because it was more expensive, it looked like a pen, and it had a cartridge, a push button, and liquid in it. The store clerk told him that it was a new vape, it held its charge longer than the vapes that looked like key fobs, and it was better for him. He decided to try it because it was more convenient. He did not feel anything different from using this vape pen than he felt from the previous vapes. He was administered a drug test by his Reserve unit on February 10, 2019. He continued to use the vape pen into March 2019. In March 2019, he purchased and used one more of the less expensive vape, and then he stopped vaping because he realized it was affecting his lung capacity when he went to the gym. (Tr. 16-17, 39, 41-52, 55-57, 81-87, 93-94; GE 1, 2, 4)

In May 2019, Applicant was informed by his commander that he tested positive for THC. (SOR ¶ 1.c) He was shocked and confused. He eventually determined that his positive drug test resulted from the new vape pen he purchased and used because, in the timeframe of the February 6, 2019 drug test, it was the only thing different during the period he was vaping. He maintained that he did not know the vape pen contained THC and he unknowingly used THC through the vape pen. This is the only time he has ever tested positive for THC or any other illegal drugs. He never used THC either before, or since, he inadvertently smoked from the vape pen without realizing it contained THC. He has no intentions of using THC or any other illegal drugs in the future, and he does not socialize with individuals who use THC or any other illegal drugs. (Tr. 16-17, 39, 41-52, 55-57, 81-87, 93-94; GE 1, 2, 4)

As a result of Applicant’s positive drug test, his commander informed him that the process of medically discharging him from the Reserve had commenced. He testified that a judge advocate appeared on his behalf “against the charges of smoking [THC].” He was told that he could remain in the Reserve if he maintained good behavior. In 2020, he was promoted to sergeant and put in charge of other soldiers. He described the experience of “almost getting kicked out” of the Reserve as “the worst feeling in my life, because at this point, the Army is the best thing I’ve ever done.” He stated that he learned his lesson, understands that, as a security clearance holder, he is responsible for knowing and understanding anything that he ingests. In that regard, he intends to exercise diligence in the future. (Tr. 49, 52-55, 87-89, 95; AE A)

In around April 2013, at age 18 and prior to leaving for Reserve boot camp, Applicant worked at Walmart. He unlawfully took a gaming system from his workplace for which he had not paid. In December 2013, he was charged with misdemeanor embezzlement, less than \$200. In January 2014, at age 19, he pled guilty and he was sentenced to twelve months in jail, suspended, placed on two years of unsupervised probation, and ordered to pay restitution. He stated that his misguided actions cost him approximately \$10,000, including \$1,200 for restitution and his lawyer’s fees. He has not been convicted for any other criminal offense. (SOR ¶ 2.c) (Tr. 16-17, 58-61, 90-91; GE 1, 3; AE A)

Applicant moved multiple times before he bought his home in May 2020. As a result, he was either not informed about certain court dates or he was served at addresses

in which he no longer lived. He lived with his mother from 2013 to 2014, from 2017 to 2018, and for a few months in 2019; with his grandmother from 2014 to 2015; in his own apartment from 2015 to 2017 and from 2019 to May 2020; and with a friend for seven to eight months in 2018, when he worked for the food processing company. (Tr. 17, 32-38; GE 1-2)

In October 2016, an order to show cause was issued and Applicant was summoned to appear in court for failure to obey an order regarding visitation for one of his children. He believed he appeared in court. The order was dismissed in November 2016. (Tr. 61-63; GE 1)

In 2020, the mother of Applicant's eldest son petitioned the court for a protective order (PO) against Applicant and his mother. His eldest son, who was around four years old at the time, had fallen, injured his face, and required medical care. The child's mother attempted to reach Applicant through his mother. When Applicant arrived at the hospital, he saw that his mother and his eldest son's mother were "going back and forth," and he tried to separate them. The police interjected. Applicant and his mother declined to press charges but his eldest son's mother pursued the PO. When Applicant and his mother appeared in court, the judge dismissed the petition. (Tr. 63-65; GE 1)

In November 2020, an arrest warrant was issued for Applicant to show cause why he failed to appear at his civil case involving the petition for child support that his youngest son's mother had filed against him. The order was subsequently dismissed because Applicant had not received notice of the initial hearing, as he was served at a bad address. Applicant did not learn about the foregoing arrest warrant until he attempted to get his DoD common access card for his current job in December 2020, at which time, he was arrested, notified of an outstanding warrant, and jailed. This was the only time he has been arrested. When he contacted this youngest son's mother following his arrest, she informed him about the child support petition for the first time. After the arrest warrant was dismissed, he was summoned to appear for a new hearing on the child support petition. In January 2022, Appellant was ordered to show cause why he failed to appear for DNA testing. The show cause was subsequently dismissed because the notice to appear for DNA testing had been sent to a wrong address. Once he was properly notified, he completed the DNA testing. He remains current with his child support obligations for both children, with whom he also has visitation rights. (Tr. 65-70, 72-74, 78-81; GE 1-2)

In around 2021, an arrest warrant was issued for Applicant to show cause why he failed to appear at a court hearing regarding a child neglect charge. (SOR ¶ 2.b) The mother of one of his sons accused him of child neglect after he brought the child to her home with a wet diaper. He believed she did so because she saw his girlfriend in the car with him. He did not appear in court because he never received a summons, as it was sent to a bad address. He denied that he was arrested in connection with this issue. Another summons to appear was issued to his correct address, for a new court hearing in November 2021 for his child neglect charge, at which time the arrest warrant and the child neglect charge were dismissed. (Tr. 70-74; GE 1-2)

In February 2022, a summons was issued for Applicant to show cause why he failed to obey an October 2019 court order regarding his visitation with one of his children. The matter was subsequently dismissed because the visitation order had been served to a bad address. This was the last time Applicant has been involved in an event involving his failure to appear or failure to obey. (Tr. 73-78, 83; GE 2)

The 2016 order to show cause, 2020 protective order, 2020 civil support case and related proceedings, and 2022 summons were not alleged in the SOR. Thus, they may not serve an independent basis for revoking Applicant's clearance. However, they may be considered to evaluate Applicant's credibility; to evaluate his evidence of extenuation, mitigation, or changed circumstances; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for the whole-person analysis. I have considered these unalleged events for these limited purposes.

Applicant provided a December 2023 letter of support from a senior mechanic non-commissioned officer who has known him since May 2021. This individual vouched for his reliability, trustworthiness, and judgment. Applicant was awarded an Army Achievement Medal in September 2017 for exceptional service and an Army Reserve Component Achievement Medal in June 2019. He received a favorable evaluation report for the period October 2022 to September 2023, when he served as a squad leader. (AE A)

### **Policies**

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(a), 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 Exec. Or. 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* Exec. Or. 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 the following applicable conditions that could raise security concerns under AG ¶ 25:

- (a) any substance misuse . . . ;
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Although Applicant tested positive for THC on a drug test administered by his Reserve unit in February 2019, he did so because he unknowingly used THC for a month in 2019, when he purchased and used a vape pen that he did not know contained THC. He was candid and credible at the hearing about the circumstances surrounding his use of a vape pen that he did not know contained THC. His unknowing use of THC does not

raise questions about his reliability, trustworthiness, judgment, or willingness to comply with laws and regulations and does not establish disqualifying conditions under Guideline H. See ISCR Case No. 22-01176 (App. Bd. Oct. 24, 2023), in which the Appeal Board held that the innocent use of an illegal drug does not raise security concerns under Guideline H and that if an applicant successfully refutes the pertinent SOR allegations, those allegations should be resolved in favor of the applicant and the Judge does not need to conduct a mitigation analysis regarding them. I find SOR ¶¶ 1.a and 1.c in Applicant's favor.

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct as: “[c]riminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant: “(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.”

Applicant was convicted in 2014 of misdemeanor embezzlement. While he did not use marijuana monthly in 2019, he used marijuana for about a month in 2019. In 2021, he was charged with child neglect and a warrant was issued for his arrest for failure to appear in court. AG ¶ 31(b) is established.

AG ¶ 32 provides the following relevant mitigating conditions:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense;  
and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

As I previously stated under my Guideline H analysis, Applicant unknowingly used THC for about a month in 2019. AG ¶ 32(c) is established for SOR ¶ 2.a. Applicant’s misdemeanor embezzlement conviction in 2014 occurred when he was 19 years old. This was the only time he was convicted of a criminal offense. The 2021 child neglect charge and related warrant were dismissed. The unalleged conduct between 2016 and 2022 was

dismissed because he was served at a bad address. Once he was properly notified, he appeared for the child support proceedings. Since then, he has timely paid the required child support payments for both of his children. He was candid and credible at the hearing. I find that enough time has elapsed since his criminal behavior and without recurrence of criminal activity, and the record evidence does not cast doubt on his reliability, trustworthiness, and judgment. AG ¶¶ 32(a) and 32(d) are established for SOR ¶¶ 2.b and 2.c

### **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 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 J in my whole-person analysis. I had the opportunity to observe Applicant's demeanor during his hearing and found that he was credible, candid, and remorseful. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the criminal conduct and drug involvement and substance misuse 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
Subparagraph 1.b:	Withdrawn
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a - 2.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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Candace Le'i Garcia  
Administrative Judge