



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



In the matter of:)	
)	
)	ISCR Case No. 24-00128
)	
)	
Applicant for Security Clearance)	

Appearances

For Government:
Andrew Henderson, Esquire, Department Counsel

For Applicant:
Ryan C. Nerney, Esq.

07/17/2024

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant mitigated the security concerns raised by his past drug involvement and substance misuse. National security eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a Questionnaire for National Security Positions (SF86) on September 5, 2023. On February 15, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) 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 (AG) effective within DoD after June 8, 2017.

On April 10, 2024, Applicant, through counsel, responded to the SOR allegations (Answer) and attached 15 documents. Applicant also requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on May 10, 2024. The case was assigned to me on May 20, 2024. DOHA issued a Notice of Hearing on May 31, 2024, scheduling the case to be heard via Microsoft Teams video teleconference on June 24, 2024.

I convened the hearing as scheduled. Department Counsel offered three documents marked as Government Exhibits (GE) 1 through 3. Applicant and two character witnesses testified at the hearing. Applicant also proffered the 15 documents attached to the Answer and marked as Applicant Exhibits (AE) A through O. The exhibits of both parties were admitted without objection. I left the record open until July 1, 2024, to give Applicant the opportunity to supplement the record. Applicant's attorney timely submitted ten pages of additional exhibits, which were marked as AE P through R. Department Counsel raised no objection, and I admitted Applicant's post-hearing documents into the record. DOHA received the transcript of the hearing (Tr.) on July 1, 2024. (Tr. at 10, 29.)

Findings of Fact

Applicant is 52 years old. He was born in the Caribbean. He immigrated first to Canada and then entered the United States in 2001 at the age of 29. He became a U.S. citizen in August 2012. He received a bachelor's degree from a Canadian university in 1997 and a master's degree from a U.S. university in 2018. Applicant has worked for the same U.S. defense contractor since 2005. He received his initial security clearance in May 2016 and has held that clearance since then. He married in 2014, and they have three minor children. (Tr. at 29-32; GE 1 at 5-7, 12-15, 18-19, 51-52; GE 2 at 5; GE 3 at 1.)

The Government alleged in the SOR that Applicant is ineligible for a security clearance because he used marijuana at various times between the fall of 2020 and January 2023, all while holding a security clearance. The facts developed at the hearing and in the documentary record are as follows:

SOR ¶ 1.a. THC Use (Fall 2020-January 2023). Applicant disclosed in his security clearance background interview with a U.S. Government investigator on November 2, 2023, that he had used gummies containing THC (THC Gummies) "a few times" during the period 2020 to late 2022 or early 2023. At the hearing, he testified that he used THC Gummies on three occasions in 2022. His first use occurred in March 2022 at a music concert he attended with friends. The second time was in May or June 2022 at a neighborhood party. The third and last time he used THC Gummies was at another neighborhood event in the fall of 2022. His purchases of the THC Gummies were legal

under the laws of the State where Applicant resides. When he used THC Gummies in 2022, it never occurred to him that it was a violation of Federal law to use THC products. (Tr. at 28-43; GE 1 at 49-50; GE 2 at 8, 23.)

Applicant's employer provides security training annually to its employees. Applicant participated in training in about November 2022 and received instructions emphasizing that marijuana and related THC products were illegal under Federal law and could not be consumed by employees with security clearances. The training pointed out that state law in Applicant's home state differed from Federal law on the legality of marijuana and THC products. At the hearing Applicant testified that he deeply regrets his actions in 2022. He stated that he should have known better than to use THC Gummies in 2022. At his background interview in November 2023, he first disclosed his use of THC Gummies. (Tr. at 43-54.)

Applicant testified that he no longer associates with anyone who uses illegal drugs. He also avoids any environment where drugs are used. He pledged never to use drugs again. He stated that what is important to him is working hard to build "long, strong relationships, as well as contributing to society." He readily concedes that he has no excuse for his behavior and wants nothing to do with anything that "taints" his character. (Tr. at 47-54, 63-64.)

SOR ¶ 1.b. Use of THC while Holding a Sensitive Position. As noted above, Applicant was first granted a security clearance in 2016 and has held it continuously since then, including during the times he used THC Gummies. (GE 1 at 49-50; GE 2 at 10.)

Mitigation

Applicant provided a written statement, dated March 16, 2024, declaring his intent not to use illegal drugs in the future and acknowledging that any use of an illegal drug would be grounds for the revocation or denial of national security eligibility. In further support of his commitment to remain drug free in the future, he provided certificates of completion evidencing that he has attended three courses with the intent of educating himself on self-destructive behaviors with drugs and alcohol, as well as behavior modification. Applicant also provided a favorable substance abuse evaluation prepared by clinical psychologist. (AE K-N, AE R.)

There were some questions raised during cross-examination about inconsistencies between Applicant's testimony, his interrogatory responses, and his statements during his background interview. The inconsistencies do not raise any serious concerns over the number of times he used THC Gummies, *i.e.*, whether it was three or four times, or exactly when he first or last used THC Gummies. Applicant also made a mistake by not disclosing his use of THC Gummies in his SF86 and waiting for his background interview to disclose the drug use. The inconsistencies and his late disclosure address Applicant's credibility. His explanations for the inconsistencies were based on his use of incorrect time estimates and his failure to develop a clear chronology of events

before responding earlier in the investigative stage of his clearance processing. His knowing omission of his drug use on the SF86 was a serious mistake, but he voluntarily corrected it by disclosing the adverse information that was not otherwise discoverable by security officials. I note that the SOR contains no allegation of a falsification, and even if it did, AG ¶ 17(a) provides for mitigation under these circumstances because he made a prompt (less than two months after his certification of the SF86) good-faith effort to disclose his past use of THC Gummies. Appellant's testimony was candid and straightforward and lacked any signs of being evasive when confronted. Overall, I found Applicant's testimony to be both highly credible and strong evidence of his integrity. (Tr. at 54-72.)

Whole-Person Evidence

Two witnesses also testified at the hearing in support of Applicant's request to have his clearance reinstated. A neighbor testified about Applicant's character, stating that he is trustworthy, respectful, loyal, and smart. He believes Applicant is a person of strong moral character. A senior director at Applicant's employer also testified in support of his character. The second witness interacts with Applicant primarily outside of work. He has held high-level security clearances since the 1980s. He testified that Applicant is honest, trustworthy, and a person of strong moral character. He views Applicant's use of THC Gummies as a "misstep" that was "subsequently identified and disclosed and remedied." He noted that in this case, their employer's training process worked as it should because following training Applicant acknowledged and disclosed his mistake of using THC products. (Tr. at 10-18, 19-27.)

Applicant also submitted eight character-reference letters. Each of the character references praised Applicant's integrity, loyalty, and trustworthiness. (AE D, AE P.)

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 sets forth the following condition 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 response to SOR ¶ 1.a, and his testimony at the hearing established the disqualifying condition set forth in AG ¶ 25(a). He used THC Gummies on three occasions in 2022. THC is a federally controlled substance. The record evidence also established the allegation set forth in SOR ¶ 1.b regarding Applicant's use of a controlled substance while holding a sensitive position. Under the authority of ISCR Case No. 22-01661 at 3 (App. Bd. Sep. 21, 2023), Applicant held a sensitive position at the times he used THC because his position with his employer required that he be eligible for access to classified information, *i.e.*, eligible for a security clearance. Accordingly, the burden shifts to Applicant to mitigate the security concerns raised by his conduct.

AG ¶ 26 of this guideline provides conditions that could mitigate security concerns. I considered all the mitigating conditions under AG ¶ 26 and conclude that the following two conditions have possible application to the facts of this case:

- (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.

Both of the above mitigating conditions have been established. The behavior was infrequent and occurred in 2022. It occurred before he realized that applicable Federal and state marijuana laws differed, and completely ceased after he attended company training to that effect. He has acknowledged his past drug involvement and taken steps to address that behavior. He has also established a pattern of abstinence and provided a

statement of his intent to refrain from using illegal drugs in the future. He no longer associates with individuals who use drugs, and avoids environments where drugs are used.

Applicant's past use of THC Gummies represented a serious lapse in judgment. It is significant, however, that he voluntarily self-disclosed his three instances of drug use in 2022 after receiving training. He made the mature judgment that his past actions were mistakes, and he disclosed his errors during his November 2, 2023 background interview. In doing so, he accepted the risk that his national security eligibility may be terminated and his long-time successful career as a U.S. Defense contractor may be terminated. Applicant's past involvement with illegal drugs is unlikely to recur and does not cast doubt on Applicant's current reliability, trustworthiness, and judgment.

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 light of all pertinent facts and circumstances surrounding this case. I credit Applicant's honesty in self-reporting his past drug use knowing that it could affect his clearance eligibility and employment. I have considered his age and the circumstances under which he used recreational drugs in the past. At his age, he should have known better. On the other hand, I view his use of THC Gummies as an experimentation with a recreational drug that is legally sold and widely used in his state. In light of his self-disclosure of his use of an illegal drug, I conclude that the assessment of Applicant's character and trustworthiness presented by his two witnesses and his eight character-reference letter writers better represents Applicant's whole person than a few isolated uses of THC Gummies in the past. Overall, the record evidence leaves me

without 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 and 1.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 Applicant national security eligibility. Eligibility for access to classified information is granted.

JOHN BAYARD GLENDON
Administrative Judge