



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 23-02213

**Appearances**

For Government:

Jeff Nagel, Esquire, Department Counsel

For Applicant:

*Pro se*

08/22/2024

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**Decision**

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ROSS, Wilford H., Administrative Judge:

**Statement of the Case**

Applicant submitted his initial Electronic Questionnaires for Investigations Processing (e-QIP) on March 15, 2023. (Government Exhibit 1.) On December 14, 2023, the Defense Counterintelligence and Security Agency Central Adjudication Services 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 the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on December 18, 2023, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 22, 2024. The case was assigned to me on February 6, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on February 13, 2024. I convened the hearing as scheduled on March 21, 2024. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through C. Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 29, 2024.

### **Findings of Fact**

Applicant is 32 years old. He has a bachelor's degree in engineering. He is pending employment with a defense contractor. That company has sponsored him for a security clearance. He has a fiancée and one child. This is his first application for a security clearance. (Government Exhibit 1 at Sections 12, 13A, and 17; Applicant Exhibit C; Tr. 5-6.)

#### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted the single allegation under this paragraph with explanations.

Applicant admitted that he used marijuana on approximately a weekly basis from July 2017 through December 2022 or January 2023. He abstained for several months and had a single use of marijuana in July 2023, which was unintentional and very minor. (Government Exhibit 3; Answer; Applicant Exhibit A; Tr. 23-24.)

Applicant testified that his use of marijuana was to help him sleep from the pain of a serious injury that occurred in the 2016-2017 time frame. He continued to use marijuana until he applied for a job with a defense contractor in early 2023 that would require him to obtain a security clearance. That is when he stopped regular use of marijuana. He has not used marijuana since that single accidental use in July 2023 and does not intend to use it in the future. (Tr. 21-25, 36-37.)

Applicant filled out an Electronic Questionnaires for Investigations Processing (e-QIP) on March 15, 2023. (Government Exhibit 1.) Section 23 asked about his illegal drug use. He admitted the use described above. The section also asked him, "Provide explanation of why you intend or do not intend to use this drug or controlled substance in the future?" He stated, "Don't think smoking is allowed while holding a security clearance so currently pursuing other more healthier alternative so ease my leg pain." (Tr. 27.)

Applicant submitted a negative drug-test result dated February 15, 2023. This drug test was done in relation to his application for a job with the defense contractor. (Applicant Exhibits A and B; Tr. 36.)

Applicant's child was born on July 3, 2023. (Applicant Exhibit C.) On July 15, 2023, he was at a party with several friends to celebrate the birth of his child. He stated in his Answer:

While celebrating we were smoking cigars and drinking when one of my friends decided to light a marijuana cigarette and gave it to me without telling me what it was. Under the influence of alcohol, I sucked in but immediately realized what it was and quickly blew out and told all the guys there that I do not smoke marijuana anymore because of my security clearance position. I have also started to distance myself from that group of friends since the incident because they would try to offer me marijuana knowing that I cannot use that controlled substance anymore. (See Tr. 27-30, 38-39.)

Applicant responded to interrogatories for the DCSA CAS on July 27, 2023. (Government Exhibit 3.) Question 2 of the form asked him to describe his current use. Applicant said it was weekly and that he last used on July 15, 2023. In reality, the July 15, 2023 use was a solitary incident after months of abstention. (Tr. 30-32, 40.)

Question 16 of the interrogatories asked Applicant, "Please provide any additional information, facts, or circumstances you believe could assist in [deciding] if it is clearly consistent with the national interest to grant or continue you for a position of national security." He stated, "I completely understand that Marijuana is illegal federally and am actively trying to stop smoking entirely."

Applicant stated the following in Applicant Exhibit A:

I have refrained from associating myself with friends whom I know are users as well as refrained myself from purchasing any marijuana at all since I was selected for employment with [a defense contractor]. I understand any deliberate future use is grounds for revocation and am also open to taking randomized drug tests during my employment to prove I will not be using marijuana in the future. (See Tr. 34-35.)

Based on the above evidence I specifically find that Applicant used marijuana on an approximately weekly basis from on or around July 2017 through December 2022-January 2023. He did not use marijuana again until a single, accidental use in July 2023. He has not used marijuana since that time.

## **Paragraph 2 (Guideline E – Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness, or unreliability.

2.a. The Government alleges in this subparagraph that Applicant's drug-use history, as set forth under Paragraph 1, above, is also cognizable under Guideline E. He denied the single allegation under this paragraph with explanations. My findings under Paragraph 1 are incorporated here by reference.

2.b. The Government alleges in this subparagraph that Applicant falsified facts about his drug use history during an interview with a DoD authorized investigator on May 3, 2023. (Government Exhibit 2 at 6-7.) During that interview Applicant correctly set forth his drug-use history until January 2023. (Tr. 31, 40-41.) Based on my specific findings of fact set forth under Guideline H, above, I find that he did not falsify any statement during this interview because it was the truth at the time. Accordingly, this allegation is found for Applicant.

2.c. The Government alleges in this subparagraph that Applicant falsified material facts in his answers to DoD interrogatories dated December 6, 2023, when he stated that his last use of marijuana was in January 2023. (Government Exhibit 2 at 2.) Applicant explained that this was a mistake on his part since he did not know how to state his single, accidental usage in July 2023. As stated, he had previously discussed that single usage in DoD interrogatories dated July 27, 2023, twelve days after the usage. Accordingly, the Government was put on notice of the actual date of last use. Based on the above facts, I find that there was no specific intent to deceive. Accordingly, this allegation is found for Applicant. (Answer; Applicant Exhibit A; Tr. 31-33, 46.)

## **Policies**

When evaluating an applicant's national security eligibility for a security clearance, 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 concern relating to Drug Involvement and Substance Misuse is set forth 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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any substance misuse (see above definition).

Applicant admitted that he used marijuana on approximately a weekly basis from July 2017 through December 2022 or January 2023. He abstained for several months and had a single use of marijuana in July 2023. This last use was accidental and in the context of “friends” playing a practical joke on him. The stated disqualifying condition applies.

The following mitigating conditions under AG ¶ 26 have also been considered:

(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 this 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 (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 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 “prior recreational marijuana use by an individual may be relevant to 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 marijuana use is in the past and has not been repeated. He explained at length that he thoroughly understands the consequences of any future drug use or exposure, and has taken several steps to avoid it. He credibly testified and submitted a written declaration of intent not to misuse drugs in the future. He also acknowledged that such misuse would be grounds for revocation of national security eligibility. He no longer associates with people involved in substance misuse. Viewing his marijuana use in the context of the whole person, Applicant has mitigated the security significance of his past drug involvement. Paragraph 1 is found for Applicant.

### **Paragraph 2 (Guideline E – Personal Conduct)**

The security concern relating to the guideline 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. One is potentially applicable in this case:

(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.

The following mitigating conditions under AG ¶ 17 are possibly applicable to Applicant's conduct:

(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

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the

stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

As stated under Paragraph 1, above, Applicant's drug use was in the past, and he evinces a credible intent not to use marijuana in the future. He has mitigated allegation 2.a under this guideline.

Furthermore, I find for Applicant on allegations 2.b and 2.c for the reasons stated under "Findings of Fact," above. He did not deliberately falsify material facts on either alleged occasion, and has been forthright about his previous drug involvement throughout the investigation and adjudication of his national security eligibility. Paragraph 2 is found for Applicant.

### **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 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. Applicant has mitigated his drug use. He did not falsify facts either during an interview or in his interrogatories. His forthright disclosures minimized or eliminated the potential for pressure, coercion, or duress. Continuation or recurrence of similar conduct is unlikely. Overall, the record evidence does not create any doubt 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 through 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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS  
Administrative Judge