



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



In the matter of:	)	
	)	
	)	ISCR Case No. 23-01867
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel O’Reilly, Esq., Department Counsel  
For Applicant: *Pro se*

11/09/2024

**Decision**

HYAMS, Ross D., 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**

Applicant submitted a security clearance application (SCA) on May 9, 2023. On September 29, 2023, 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) and Guideline E (personal conduct). Applicant answered the SOR on October 5, 2023, and requested a hearing before an administrative judge. The case was assigned to me on September 5, 2024.

The hearing convened on October 17, 2024. Department Counsel submitted Government Exhibits (GE) 1-3, which were admitted in evidence without objection. Applicant did not submit any documentation at the hearing. Afterwards, I held the record open for two weeks to give him the chance to provide documentation. He timely submitted Applicant’s Exhibits (AE) A-D, which were admitted in evidence without objection.

## Findings of Fact

Applicant admitted SOR allegations ¶¶ 1.a and 1.b. He denied SOR allegation ¶ 2.a. These admissions are incorporated into the findings of fact. Based on my review of the pleadings, evidence submitted, and testimony, I make the following findings of fact.

Applicant is 43 years old. He has worked as a technical lead for a government contractor since 2019. He was married in 2012 and divorced in 2016. He remarried in 2018. He has two stepchildren, one who is a minor. He earned associate degrees in 2012 and 2019. He served on active duty in the Navy from 2000-2010, and in the Navy Reserve from 2010-2024. During this time, he served on two combat deployments, and on the response to Hurricane Katrina. He retired from the Navy in 2024. (Tr. 11-18; GE 1)

Under Guideline H, the SOR alleges in ¶ 1.a that Applicant failed a Navy urinalysis in October 2019 and tested positive for THC. SOR ¶ 1.b alleges that Applicant used THC in October 2019 while employed in a sensitive position with the Navy. Under Guideline E, the SOR alleges in ¶ 2.a. that Applicant falsified his 2023 SCA by failing to report his positive urinalysis and THC use.

Applicant has never purposefully used illegal drugs. Starting in 2019, he and his Navy colleagues vaped together to relax during break times. He purchased vape liquid commercially in a variety of locations. The vape liquid came in different flavors, but beyond flavor designation the vape liquid did not have labeling or brand names. (Tr. 19-36)

In October 2019, Applicant tested positive for THC in a unit urinalysis. He stated the only explanation for this result is that he accidentally used a vape product that contained CBD or THC, but those contents were not marked on the liquid. He stated that he did not know when this occurred since he never experienced a high feeling after vaping. He reported that he is religious and does not use drugs or alcohol. He stopped vaping altogether after this incident. (Tr. 19-36; GE 3)

Applicant has never tested positive for THC or other drugs at any other time. He was tested monthly for a year and a half after the incident and all the tests were negative. (Tr. 19-36)

Since this incident occurred right before the start of the COVID-19 pandemic, he was able to reenlist in 2020. He was told by his command the amount of THC in his system was just over the limit, and it would have been much higher if he had used marijuana. (Tr. 19-36)

Applicant's defense counsel, Commander M, submitted a letter stating that the Navy declined to subject Applicant to non-judicial punishment or criminal charges for the incident. Because of the positive urinalysis, his 2020 reenlistment was reconsidered by an administrative separation board in November 2021. The board found no basis for separation, and he was retained. Applicant retired from the Navy in 2024. (AE A, B)

After the administrative separation case was resolved in his favor, Applicant was told that nothing would go on his record. He did not disclose marijuana use or use with a clearance on his SCA because of what they told him and because he did not purposefully use drugs. He did not intend to falsify his SCA. (Tr. 19-36; GE 1)

Applicant submitted two-character letters from work colleagues, which state that he is a good employee, committed to his work, reliable, trustworthy, and fit to hold a security clearance.

## **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**

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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 considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are applicable:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Controlled Substances Act makes it illegal under federal law to manufacture, possess, or distribute certain drugs (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844). All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§811, 812. Marijuana is classified as a Schedule I controlled substance, under §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment.

I have considered the mitigating conditions under AG ¶ 26. The following are 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; 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 is grounds for revocation of national security eligibility.

AG ¶¶ 26(a) and 26(b) apply. Five years ago, Applicant unknowingly used a vape product that contained THC. After testing positive on a urinalysis, he stopped vaping altogether. His command and an administrative separation board believed his story. He continued to serve in the Navy reserve until he retired in 2024. This occurred long ago under circumstances unlikely to recur, and it does not cast doubt on his current reliability, trustworthiness, and judgment. There is sufficient evidence to find he took action to overcome the problem and establish a pattern of abstinence by discontinuing further use of vaping and vaping products. The drug involvement and substance misuse security concerns are mitigated.

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

AG ¶ 15 details the personal conduct security concern:

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...

I have considered the disqualifying conditions under AG ¶ 16 and the following is potentially applicable.

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

I have considered the mitigating conditions under AG ¶ 17. The following is potentially applicable:

(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.

Applicant has refuted the Guideline E allegations since he credibly testified that he did not use marijuana and did not deliberately falsify his 2023 SCA. However, I note mitigating AG ¶ 17(c) would apply. The incident happened under unique circumstances that are unlikely to recur, and it does not cast doubt on his current reliability, trustworthiness, and judgment. The personal conduct security concerns are 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have considered his military service, his service to the government as a civilian contractor, and his character letters. I have incorporated my comments under Guidelines H and E in my whole-person analysis.

In the hearing, I had the chance to observe Applicant's demeanor and assess his credibility. He adequately explained the circumstances surrounding the SOR allegations. I found his testimony and explanations to be credible, and they are supported by evidence in the record.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility for a security clearance. He provided sufficient evidence to mitigate the security concerns under Guidelines H and E.

## **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
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

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

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Ross D. Hyams  
Administrative Judge