



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



Appearances

For Government:
Andrew Henderson, Esquire, Department Counsel

For Applicant:
Melissa L. Watkins, Esq.

02/11/2025

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate the security concerns raised by his past drug involvement. National security eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a Questionnaire for National Security Positions on July 18, 2023 (2023 Questionnaire). On March 8, 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) and Guideline 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 (AG) effective within DoD after June 8, 2017.

On May 27, 2024, Applicant responded, through counsel, to the SOR allegations (Answer) and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on June 21, 2024. The case was assigned to me on July 2, 2024. DOHA issued a Notice of Hearing on July 23, 2024, scheduling the case to be heard via Microsoft Teams video teleconference on August 29, 2024.

I convened the hearing as scheduled. Department Counsel offered five documents marked as Government Exhibits (GE) 1 through 5, which I admitted without objection. Applicant's counsel offered ten exhibits marked as Applicant Exhibits (AE) A through J. Applicant and three witnesses testified at the hearing. I left the record open until September 13, 2024, to give Applicant the opportunity to supplement the record. Applicant timely submitted two exhibits, which I marked as AE K and L. Department Counsel objected to the relevance of Applicant's supplemental exhibits. My ruling on his objection is set forth below. All other Applicant Exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 6, 2024. (Tr. at 13-16, 91-92; post-hearing correspondence regarding Applicant's supplemental exhibits marked as Hearing Exhibit I.)

Evidentiary Ruling

Department Counsel's objection to Applicant's supplemental exhibits (AE K and AE L) is overruled. AE K is a negative drug test scheduled and taken after the hearing. A negative drug test in the context of the SOR allegations and Applicant's mitigation response has some relevance. AE L is a summary of a visit with a doctor on August 27, 2024, confirming that Applicant had previously been diagnosed with Attention Deficit Disorder (ADD) and was prescribed 10 mg of a medication to treat his condition. The doctor's notes also state, "monitor for insomnia." The notes are relevant to Applicant's mitigation case, specifically Applicant's testimony regarding his past drug use and current abstinence, his treatment for ADD, and his experience with insomnia. I will give AE K and AE L the weight they deserve in the context of the other evidence in the record.

Findings of Fact

Applicant is 31 years old. He has never married and has no children. He earned a bachelor's degree in May 2015 and a master's degree in business administration in December 2021. Applicant has worked for a U.S. defense contractor, first as an intern in the summer of 2014 and then as a full-time employee starting in June 2015. He maintained a Secret security clearance since February 2019. (Tr. at 17-21, 60; GE 2 at 7, 12-15, 20-21; GE 5 at 1; AE A at 1.)

The Government alleged in the SOR that Applicant is ineligible for a security clearance because he used marijuana at various times, including a period when he held a sensitive position, *i.e.*, one in which he held a security clearance. The SOR also alleges that Applicant deliberately provided false information in his initial security clearance questionnaire, submitted on November 13, 2017 (2017 Questionnaire) about when he began using marijuana again after a period of abstinence. The facts developed at the hearing and detailed in the documentary record are as follows:

Paragraph 1, Guideline H (Drug Involvement and Substance Abuse)

SOR ¶¶ 1.a and 1.b. Purchase and Use of Marijuana (June 2011 to December 2022).

In his Answer, Applicant admitted “he used marijuana with varying frequency from June 2011 to December 2022” and that “he purchased marijuana with varying frequency over the period outlined herein.” Applicant disputes that he purchased and used during part of the alleged period. (Answer at 6-7.)

In his 2023 Questionnaire, Applicant disclosed that he purchased and used marijuana during the period alleged (2011 to 2022). He graduated from high school in June 2011, which is the month and year he first used marijuana. In his 2017 Questionnaire, he wrote that he used marijuana socially about once every two-to-three months during the period June 2011 to December 2014 (Period 1). He noted that he did not intend to use marijuana in the future with the comment that “I have no need to use it going forward and stopped enjoying the feeling it gave when I used it.” (GE 1 at 12, 38-39; GE 2 at 10, 32.)

Applicant advised a government investigator in a September 2018 background interview that he purchased and used marijuana during his college years and that his last use was in December 2014, prior to his graduation the following Spring. He told the investigator that he stopped using the drug to focus on his grades and future career. He again commented that he has no intention to use marijuana in the future. As noted, he was granted a Secret clearance in February 2019, a few months after this interview. (GE 3 at 2.)

In his 2023 Questionnaire, Applicant again disclosed that he had purchased and used marijuana. He wrote that he used marijuana “[f]rom June 2016 to December 2022,” bought marijuana “once every three months,” and “engaged in smoking marijuana as a means to assist sleep quality.” He also advised that he used marijuana while possessing a security clearance. Applicant claimed that he has since “found alternate ways to enhance my sleep quality without using marijuana” and did not intend to use marijuana in the future. He listed his last use of marijuana as occurring in December 2022, seven months prior to his submission of his second questionnaire. (GE 2 at 32, 33.)

In a September 2023 background interview in connection with his current application, Applicant advised the investigator that he used the drug to help improve his sleep during periods of insomnia. He purchased the drug from his roommates. He stopped using marijuana when he became more focused on his health and had no need to continue using it. He acknowledged that his employer's policy does not permit drug use. Applicant affirmed that he has no intention to use marijuana or other drugs in the future. (GE 4 at 7.)

Applicant testified that he used marijuana socially until he was a university senior and was preparing to commence full-time work with his current employer following his graduation. He knew that he had to pass a drug test to begin his post-graduation job. He also understood at that time that using marijuana was illegal under the laws of the state in which he attended university and was inconsistent with his future employer's drug policy. (Tr. at 45-46, 59-60, 67.)

In discussing his post-university use of marijuana, Applicant explained that he was diagnosed with ADD in 2017. He began taking a prescription medication for his condition that caused insomnia. He claimed that his doctor declined to prescribe a medication for insomnia. After experimenting with other possible solutions for insomnia, which he claimed were not helpful, Applicant turned to marijuana in December 2018 to improve his sleep and used the drug occasionally until December 2022 (Period 2). (Tr. at 47, 56, 65, 71; GE 2 at 33.)

Applicant further testified that in December 2022, he made "significant lifestyle changes." He began working out consistently and changed his diet. His doctor also decreased the dosage of his ADD medication. These steps, taken together, addressed his insomnia, and he had no need to continue using marijuana. He testified that he does not intend to use marijuana in the future, and he submitted a signed, sworn statement in support of his testimony. (Tr. at 48-49, 54; GE G.)

SOR ¶¶ 1.c and 1.d. Purchase and Use of Marijuana while Holding a Sensitive Position (December 2017 through December 2022).

As noted, Applicant resumed using marijuana in December 2018 and continued using the drug throughout Period 2. He admitted that shortly thereafter, he was granted a Secret security clearance. (Tr. at 62-63.)

Applicant justified his illegal drug use on his belief that it was not objectionable because he was not working on a classified project and had no access to classified information during Period 2. He testified, "I didn't think I had access to classified material," because I was never briefed or read onto a program and was strictly supporting unclassified contracts." Based upon this belief, he did not regard using the drug in his bedroom to sleep better was "a super big deal." Applicant also explained that he knew some of his co-workers used marijuana and thought he could do the same. He never sought to confirm his belief with his supervisors or company's security officials. He knew

that drug use by clearance holders was against the company's drug policy. (Tr. at 49-50, 53.)

In the summer of 2023, Applicant was read onto a classified "program." He had been offered a promotion and was approved for access to the program material. His manager requested that he apply to upgrade his clearance to Top Secret. At that point, he prepared the July 2023 Questionnaire. After the issuance of the SOR, Applicant was transferred to an unclassified project. (Tr. at 40-42, 49-51, 53; AE A at 1.)

Paragraph 2, Guideline E (Personal Conduct)

SOR ¶ 2.a. Falsification in 2017 Questionnaire regarding the full extent of drug use during the period from June 2011 to November 2017.

This allegation is based upon Applicant's disclosure in his 2023 Questionnaire in which he wrote that he started to use marijuana again in June 2016. In the 2017 Questionnaire, Applicant did not disclose any marijuana use after December 2014. In his Answer, Applicant "adamantly denies" providing any false material information in his 2017 Questionnaire. He testified that the June 2016 date was not the actual date when he started using marijuana again. He claimed that after his use of marijuana in December 2014, his next use was in December 2018. He asserted that the June 2016 date provided in the 2023 Questionnaire was merely a reference to the seven-year time frame of the question to which he responded. (Answer at 5; Tr. at 62-63; GE 3 at 32-33.)

Mitigation

Applicant presented the testimony of three witnesses and several documents in support of his case for mitigation of the Government's security concerns. The three witnesses were a former supervisor (W1), his second-tier supervisor (W2), and his father (W3). The witnesses also submitted letters in which they provided additional support for Applicant.

W1 was Applicant's supervisor during the period from September 2023 to May 2024. Applicant was assigned to work on a classified project during that period. W1 described Applicant as "reliable and helpful." Applicant has given W1 no reason to believe that he would be unable to protect classified information. W1 admitted that he has not seen Applicant's responses on his questionnaires. W1 wrote in his letter that Applicant "has demonstrated strong work ethic, ability to be proactive in team building, and a strong support of the program mission he supports," and has shown "good judgment and integrity." (Tr. at 18-22; AE C.)

W2 has known Applicant since 2018 and has worked with him on and off since that time. She believes that he is trustworthy and has no history of failing to follow the company's rules. She confirmed that the company does not permit the use of marijuana by a clearance holder. In her letter, she wrote that Applicant "embodies [the employer's]

leadership characteristics and is a valuable asset and leader within the organization." (Tr. at 26-29; AE D.)

W3 has seen the SOR and understands the Government's concerns. He believes Applicant has been very honest with him. The family dynamic is very open and "does not encourage secrets." He understands that his son's use of marijuana was to help him sleep when he experienced insomnia. . W3 believes Applicant has resolved his insomnia and "is able to put [his use of marijuana] behind him and to follow rules and regulations of the Department, as well as that of his employer." W3 also prepared a letter in which he spoke highly of his son's character. He argued in his letter that Applicant "believe[s] in the United States and ha[s] a high patriotic belief." (Tr. at 32-39; AE J.)

Applicant also presented his 2023 and 2022 year-end reviews. He was rated a "Successful Performer" in both reviews. He also submitted portions of his 2021, 2020, and 2019 year-end reviews. Each review rated Applicant as an "Excellent Performer." (AE B at 1, 3, 4, 6, 7, 8.)

On April 19, 2024, Applicant voluntarily took a drug test after receiving the March 8, 2024 SOR. He tested negative for marijuana. On September 3, 2024, after the hearing, he took a second drug test outside of the context of his employment. That test was also negative for marijuana. Applicant also submitted a Certificate of Completion certifying that he took a four-hour drug and alcohol awareness class on April 6, 2024. (AE I; AE K, AE L.)

Two days before the hearing, Applicant had an appointment with his doctor. After the hearing, Applicant submitted his doctor's notes that briefly summarize the appointment. In item 3 of the summary, the doctor referred to Applicant's ADD diagnosis and wrote: "ADD: continue 10 mg a day and monitor for insomnia or tachycardia [excessively high heart rate]; follow-up in 6 months-1 year for heart rate above 90 for more than an hour." (AE L.)

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

Paragraph 1 - 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);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted purchasing and using marijuana in Period 1, while in college, and in Period 2, while working at his current employer and after being granted a security clearance. Marijuana is a controlled substance under federal law. These admissions and the other record evidence establish the disqualifying conditions set forth in AG ¶ 25(a) and 25(c).

Under the authority of ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023), Applicant held a sensitive position at the times he used marijuana because his position with his employer required that he have national security eligibility for access to classified information, *i.e.*, eligibility for a security clearance. In its decision, the Appeal Board ruled that the Directive defines “sensitive position” broadly and including positions that require “eligibility for access to classified information (*i.e.*, a security clearance).” The Board also noted that the Directive’s definition of a sensitive position does not require that “the occupant of the position has access to classified information.” (missing open quote mark)

The holding in this Appeal Board decision is inconsistent with the conclusion in the Hearing Office decision cited by Applicant’s attorney in the Answer and in her closing argument at the hearing, *i.e.*, ISCR Case No. 23-01139 (Hear. Off. Feb. 1, 2024). The cited decision is inapposite, as well as non-binding, because the Administrative Judge did not address in her decision the possible application of AG ¶ 25(f) and whether the applicant held a sensitive position in light of his holding a security clearance. Also, the decision does not even discuss the applicability of the Appeal Board’s prior decision in ISCR Case No. 22-01661, *supra*.

Applicant’s admissions as corroborated by the record evidence established that Applicant used an illegal drug while holding a sensitive position. Accordingly, AG ¶ 25(f) applies.

The evidence establishing AG ¶¶ 25(a), 25(b), and 25(f) shifts the burden to Applicant to mitigate the security concerns raised by his conduct. AG ¶ 26 of this guideline provides conditions that could mitigate security concerns. I have 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.

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 the previous 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 this policy remains relevant to security clearance 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.

In applying AG ¶ 26(a) to the facts of this case, I conclude that Applicant's illegal drug use was not so long ago, was not so infrequent, and did not occur under such circumstances that it is unlikely to recur. Moreover, this recent illegal drug use while holding a sensitive position casts significant doubt on his current reliability, trustworthiness, and judgment. His last use of an illegal drug while holding a sensitive position was just seven months before he submitted the 2023 Questionnaire seeking to upgrade his security clearance from Secret to Top Secret, and less than three years prior to the close of the record.

Based upon his admissions, Applicant used marijuana for three and one-half years during Period 1. Four and one-half years later, in December 2018, he began using marijuana again. He was fully aware that his actions were against company policy. In fact, he stopped using marijuana in his senior year as an undergraduate because he was aware of the employer's drug policy from having worked there in the summer of 2013. He tried to justify, to himself and at the hearing, that his use was medically necessary to counter a side effect of a prescribed drug he took for ADD. He believed his occasional use for insomnia was not "a super big deal." He also justified his behavior on his belief that some co-workers also used marijuana.

Applicant admitted, however, that he never checked with a supervisor or security official to determine whether using marijuana while he held a Secret security clearance was a violation of company policy if he was not assigned to a classified program. His decision to violate the company's drug policy over a four-year period is, in fact, a big deal, and shows a lack of maturity and questionable judgment. The circumstances that caused him to resort to illegal drugs for his sleep concerns were not unusual. Under the circumstances, I cannot conclude at this time that use of an illegal drug is unlikely to recur.

One of Applicant's justifications for using an illegal drug and violating his duty as a person occupying a sensitive position and holding a security clearance was that he was not the only one acting contrary to the Government's requirements. This excuse raises the issue whether Applicant is sufficiently reliable and trustworthy to be compliant with other Government rules regarding classified information in the event he sees others violating such rules. His behavior also raises serious questions about his independence from the influence of others, his judgment, and his maturity. Overall, Applicant failed to establish mitigation under AG ¶ 26(a).

Applicant has also not provided sufficient evidence under AG ¶ 26(b) to fully mitigate the security concerns raised by his recent illegal drug use. He provided a written statement of intent under AG ¶ 26(b)(3) to abstain from illegal drug use in the future, and he testified that he does not intend to use illegal drugs again. He stopped using marijuana because he no longer needed it for insomnia. Applicant's primary motivation for changing his past illegal drug behavior was not that he now appreciates that using drugs violates federal law and that compliance with the law is important in the context of the safeguarding national security. Under the circumstances of this case, Applicant's evidence is inadequate to establish mitigation under AG ¶ 26(b).

Paragraph 2 – Guideline E, Personal Contact

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

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.

AG ¶ 16 describes the following condition that may raise security concerns and potentially be disqualifying in this case.

(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.

The record evidence is insufficient to prove that Applicant used marijuana during the period June 2014 to December 2018. Accordingly, the government has not met its burden of proof with respect to its allegation that Applicant deliberately falsified his 2017 Questionnaire about drug use prior to December 2018. AG ¶ 16(a) is not established. In reaching this conclusion, I find that Applicant's testimony about the timing of his drug use was credible and persuades me that the evidence suggesting that he use of marijuana began in June 2017 was merely a poorly worded response to the questions in the 2023 Questionnaire. This conclusion obviates the need to consider the mitigating conditions of AG ¶ 17.

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. However, his drug use during Period 2 was a blatant violation of federal law, federal security clearance rules and regulations, and his company's drug policy. While his extensive mitigation evidence speaks well of his character, his use an illegal drug over a four-year period while holding a sensitive position seriously undercuts the mitigation value of that character evidence. Applicant's lack of compliance with his repeated statements to the government over several years that he then intended to abstain from using marijuana in the future raises questions about the sincerity of his current stated intentions, as well as his maturity and judgment. Applicant has not, at this time, mitigated security concerns raised by his behavior. Overall, the record evidence leaves me with questions and 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: AGAINST APPLICANT

Subparagraphs 1.a through 1.d: Against Applicant

Paragraph 2, Guideline E: **FOR APPLICANT**

Subparagraph 2.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant national security eligibility. Eligibility for access to classified information is denied.

JOHN BAYARD GLENDON
Administrative Judge