



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



Appearances

For Government:
Andrew Henderson, Esquire, Department Counsel

For Applicant:
Carl Marrone, Esquire
National Security Law Firm

03/19/2025

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

On April 11, 2024, the Department of Defense (DOD) 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 (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) implemented by the DOD on June 8, 2017.

Applicant responded to the SOR in writing (Answer) on April 29, 2024, with attachments, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 29, 2024. The case was assigned to me on June 6, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 17, 2024. I convened the hearing as scheduled on September 5, 2024. The Government offered Government Exhibits 1 through 10, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through G. He asked that the record remain open for the receipt of additional information. He submitted Applicant Exhibit H in a timely fashion. Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 20, 2024.

Findings of Fact

Applicant is 37 years old and married with one child. He has a high school diploma. He served in the Air Force from May 2007 to July 2022. He has worked for a defense contractor since August 2022 as a general flight mechanic. He held a security clearance during his time in the Air Force and seeks to retain it in his current employment. (Government Exhibit 1 at Sections 12, 13A, 15, 17, and 18; Applicant Exhibit H; Tr. 51-52.)

Guideline H: Drug Involvement and Substance Misuse

The Defense Counterintelligence and Security Agency Central Adjudication Services (DCSA CAS) alleged that Applicant is not eligible for access because he has used illegal drugs. The incidents discussed below also involves possible adverse personal conduct on his part. He admitted the allegations under this paragraph with explanations.

1.a – 1.c. Applicant provided a urinalysis sample on December 16, 2021, while a member of the Air Force in the grade of staff sergeant (E-5). The sample tested positive for Delta-9-Tetrahydrocannabinol (THC9) at 49 ng/ml. The Air Force Drug Testing Laboratory, Brooks (DTL) reported the results to Applicant's then command on January 10, 2022. The DoD cutoff for THC9 is 15 ng/ml. At the time of his positive urinalysis Applicant had been determined eligible for a Top Secret clearance since 2007. (Government Exhibits 3 through 8; Tr. 62-64.)

Applicant received non-judicial punishment for his use of marijuana. He was reduced in rank to senior airman (E-4). He was subsequently discharged from the Air Force with an Honorable Discharge. (Applicant Exhibit H; Tr. 64-68, 92-93.)

Applicant has repeatedly stated that he has never used marijuana or any product containing THC9 in his life. He argues that the positive result must have been the result of accidental ingestion. Specifically, first he stated that it is the result of passive inhalation of marijuana smoke since his wife is a habitual marijuana smoker. Second, he argued that the positive result was the result of his ingesting his wife's breast milk during sexual relations. Finally, he stated that the positive result may have been the result of consuming food containing THC. Again, this is because his wife has THC edibles in their house. Other than his testimony there is no corroborating evidence of any of the three scenarios. (Tr. 55, 69-74, 85-92.)

An expert witness testified at the hearing. She is the Air Force Drug Testing Program Deputy Program Manager. Her curriculum vitae is found at Government Exhibit 10. Her testimony included how Applicant's sample was received, handled, and tested at the DTL, including the fact that there were no noted handling or testing errors. She confirmed that Applicant's sample tested positive for THC9 during the initial analysis and in the confirmation analysis. (Tr. 16-23.)

The witness was asked her opinion about the three scenarios posited by Applicant. With regard to passive inhalation, she stated that research has shown that THC9 levels raised by passive inhalation do not reach the DoD cutoff of 15ng/ml. (Tr. 23-25.)

The witness was also asked her opinion about the possibility Applicant had ingested a sufficient quantity of his wife's breast milk to test positive. She had done research on this point at the time Applicant was investigated by the Air Force for his positive urinalysis in 2021 and 2022. Based on her research she opined that it was not possible for Applicant to have a 49 ng/ml urinalysis for THC9 after ingesting breast milk. Her research showed that the THC9 quantities in breast milk were insufficient to show a positive result in an adult. There is limited research showing that it might show up in a baby's urine. (Government Exhibit 4; Applicant Exhibit G; Tr. 25-48.)

With regard to the accidental ingestion of THC in edibles, the witness did not have sufficient information to make an informed opinion. (Tr. 26-28.)

1.d. Applicant was arrested for simple possession of cannabis in 2006. He has repeatedly stated that the drugs actually belonged to a friend. The case was eventually dismissed. This incident is attenuated by time and has no current security significance. (Answer; Tr. 52-59, 82-84, 93-94.)

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. This allegation states that the information set forth under Paragraph 1, above, is cognizable under this paragraph. Applicant stated in his Answer, "I admit to testing positive, but deny that I used a controlled substance."

Applicant filled out his e-QIP on May 4, 2023. (Government Exhibit 1.) The following three allegations are in regard to that e-QIP.

2.b. Section 23 of the questionnaire concerns his illegal use of drugs or drug activity. One subsection asks whether, "In the last seven years, have you illegally used any drugs or controlled substance?" Applicant answered, "No." This was a false answer to a relevant question about his drug history.

In his Answer Applicant stated, "By my understanding of 'use' to be deliberate, I deny having illegally used a controlled substance. My response of 'No' was due to my not having intentionally used drugs." (See Tr. 74-75.)

2.c. A separate subsection asked Applicant, "Have you EVER illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed?" (Emphasis in original.) Applicant answered, "No." This was a false answer to a relevant question about his drug history.

Applicant stated in his Answer:

By my understanding of "use" to be deliberate, I deny having illegally used a controlled substance or been involved with "other than previously listed." I had not knowingly used any substance, as my ingestion was "unknown/accidental ingestion." I now understand that I should have gained more clarity on how to answer the question given the circumstances that led to my discharge from the Air Force. (See Tr. 76.)

2.d. Section 22 of the questionnaire concerns Applicant's police record. He was asked, "Other than those offenses already listed, have you EVER had the following happen to you? . . . Have you EVER been charged with an offense involving alcohol or drugs?" (All emphasis in original.) Applicant answered, "No." This was a false answer to a relevant question about his police record that included the 2006 drug offense discussed under subparagraph 1.d, above.

Applicant argues that this was an oversight on his part. He stated that this arrest had been listed on previous questionnaires, and he interpreted the question as including prior questionnaires. In addition, he had told his recruiter about the incident and was interviewed by a Government investigator concerning the incident, who prepared a Report of Investigation (ROI). The ROI is contained in the record as Government Exhibit 9. (Answer; Government Exhibit 9; Tr. 76-78, 80-81.)

Mitigation

Applicant submitted a signed statement of intent not to use marijuana or any other illegal drugs in the future. (Applicant Exhibit A.)

Applicant submitted letters of recommendation from members of the Air Force and his civilian pastor. They mainly concern his work in the Air Force and are laudatory. He received accolades for his service in the Air Force. (Applicant Exhibits B, C, D, E, and F.)

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

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

Applicant tested positive for the presence of THC9 while he was a member of the Air Force and had a security clearance. All three of the stated disqualifying conditions have application to this case.

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.

Applicant had a positive urinalysis test for THC9 in 2021. He argued that he had never knowingly used marijuana. He further argued that his positive drug test was due to accidental ingestion in one of several ways, with emphasis on ingestion of his wife's breast milk. To be successful Applicant must show that accidental ingestion of marijuana as he argued is possible, plausible, and probable.

This argument fails due to lack of corroborating evidence. There is some evidence that a person can test positive for THC9 through accidental ingestion. Even assuming that such a result is plausible, there is no evidence that it was probable or actually occurred to his sample. Applicant was unable to successfully rebut the expert witness's

testimony that accidental ingestion as he argued was not possible. The burden in these cases is on Applicant to show by a preponderance of the evidence that his version of the facts is correct and mitigates security concerns. His evidence as stated does not meet that standard. His refusal to acknowledge his drug involvement and substance misuse, while holding a security clearance, casts doubt on his current, reliability, trustworthiness, and judgment. As stated, subparagraph 1.d is found for Applicant due to the passage of time. The Drug Involvement and Substance Misuse guideline is found against 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 following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are possibly applicable 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; and

(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 or regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

Applicant tested positive for THC9, refused to admit his marijuana use, and falsified answers on his e-QIP regarding his drug abuse history. The disqualifying conditions apply and shift the burden to Applicant to mitigate them.

I have considered the following potentially mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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.

None of the mitigating conditions apply in this case, except in regard to subparagraph 2.d. Applicant's conduct in using marijuana, testing positive for such use, and falsifying answers regarding relevant facts on his questionnaire about his drug abuse was knowing and intentional.

Applicant argued that his negative answer about the 2006 arrest was not falsification in that it had been listed on previous questionnaires and he had been interviewed about it by the Government. His argument has some merit. With regard to subparagraph 2.d only, I find Applicant did not have the requisite intent to falsify his response. That subparagraph is found for Applicant. Otherwise, the Personal Conduct guideline is found against Applicant.

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 potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has not mitigated the security concerns of his illegal drug use and related personal conduct, except as stated. As set forth elsewhere in this decision, and supported by the evidence, Applicant has not acknowledged his drug use. Without such an acknowledgement, he cannot be eligible. His conduct has not earned him the privilege of being granted national security eligibility.

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.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	Against Applicant
Subparagraph 2.d:	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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge