



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



In the matter of:)
)
 ---) ISCR Case No. 18-02005
)
 Applicant for Security Clearance)

Appearances

For Government: Andrea M. Corrales, Esquire, Department Counsel
For Applicant: *Pro se*

04/23/2019

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse, criminal conduct, and personal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On September 9, 2016, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a set of interrogatories. On September 11, 2018, Applicant responded to those interrogatories. On October 15, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10,

2016) (AG) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guidelines H (Drug Involvement and Substance Misuse), J (Criminal Conduct), and E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on October 30, 2018. In a notarized statement, dated January 3, 2019, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by DOHA on March 1, 2019, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on March 7, 2019. His response was due on April 6, 2019. Applicant timely submitted one document in response to the FORM, and it was admitted without objection. The case was assigned to me on April 16, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted two of the factual allegations pertaining to drug involvement and substance misuse of the SOR (SOR ¶¶ 1.b. and 1.c.); and two of the factual allegations pertaining to criminal conduct (SOR ¶¶ 2.d. and 2.f.). He denied the remaining allegations as well as the principal allegation pertaining to personal conduct (SOR ¶ 3.b.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 37-year-old employee of a defense contractor. He has been serving as a mechanic with his current employer since February 2014. A 2000 high school graduate, Applicant attended a technical institute and received a heating, ventilation, and air conditioning (HVAC) certification in 2001. He has never served with the U.S. military. He was granted an interim security clearance at some unspecified point between September 2016 and February 2018.¹ Applicant has never been married, but he has six children, born in 2002, 2004, 2007, 2009, 2010, and 2016.

Drug Involvement and Substance Misuse

(SOR ¶ 1.a.): Applicant was a substance abuser whose primary substance of choice was marijuana. He started using and purchasing marijuana in 1997, when he was approximately 15 years old. He started smoking marijuana at least weekly, and that

¹ Item 4 (Enhanced Subject Interview, dated February 19, 2018), at 8.

frequency continued until approximately 2012 or 2013. Thereafter, until December 2017, he purportedly reduced his marijuana use to one or two times per year. During his interview with an investigator from the U.S. Office of Personnel Management (OPM) in February 19, 2018, Applicant admitted that his most recent use of marijuana occurred two weeks before he was interviewed.² However, he changed his story in his response to the interrogatories when he stated that his last and most recent use of marijuana occurred in December 2017.³ Regardless of the most recent date, Applicant's last use was well after he submitted his 2016 e-QIP. Applicant indicated that marijuana made him calm and enabled him to relax. While he did not consider himself to be dependent upon marijuana, as of his OPM interview, he was unable to quit altogether. Applicant never grew marijuana, and he generally purchased it "off the streets," as he does not have a supplier.

(SOR ¶ 1.b.): In November 2015, while in a foreign country, Applicant was arrested by the local police for suspected violations of the Cannabis Control Act and the nation's customs law. A female friend whom Applicant had met during a temporary assignment in the United States shipped him a package containing marijuana cookies. Applicant claimed that he was unaware that the package had been shipped to him, that he never expected it, and that he never received it. The package was intercepted by customs authorities. On November 23, 2015, pursuant to a search warrant, the police searched his hotel room and seized a glass pipe containing traces of marijuana. Applicant was arrested and taken to the local precinct where he was held for 21 days, after which the local prosecutor declined to prosecute Applicant. He was released.⁴

Applicant stated that he decided to stop using marijuana due to new religious beliefs; that he no longer associates with persons using illegal substances; and that he no longer frequents locations where drugs are being used. In his responses to the interrogatories, Applicant acknowledged that he had never participated in a drug or alcohol treatment rehabilitation program, or received any counseling. Instead, he practices self-control and prays. However, in his response to the FORM, he stated that he planned to attend his first Narcotics Anonymous meeting on April 1, 2019.⁵

In addition to marijuana, Applicant also had a relationship with cocaine, not by using it, but rather by selling it as a sideline activity to raise extra cash. He contended that he last did so about seven years before his 2018 OPM interview, which would make his most recent sale as taking place in approximately 2011.

(SOR ¶ 1.c.): On or about July 2, 2003, Applicant was arrested and charged with possession of a firearm while in possession of drugs, a felony; and manufacturing, sales, and possession of a controlled substance, also a felony. The controlled substance was

² Item 4 (Enhanced Subject Interview), *supra* note 1, at 8.

³ Item 4 (Response to Interrogatories, dated September 11, 2018), at 1.

⁴ Item 4 (Enhanced Subject Interview), *supra* note 1, at 7-8.

⁵ Item 4 (Response to Interrogatories), *supra* note 3, at 1; Response to the FORM, undated.

approximately one gram of cocaine. The charges were dismissed in September 2003.⁶ Applicant contended that the charges were dismissed because the search of his vehicle was “illegal.”⁷

Criminal Conduct

In addition to the criminal conduct associated with Applicant’s drug involvement and substance misuse, described above, Applicant has a history of arrests and charges for a variety of activities:

(SOR ¶ 2.b.): On May 24, 2010, he was charged with contempt of court for failure to appear, a misdemeanor. On December 9, 2011, he was found guilty of the charge, and he was ordered to pay restitution;⁸

(SOR ¶ 2.c.): On November 24, 2010, he was charged with contempt of court. No disposition was recorded;⁹

(SOR ¶ 2.d.): On October 28, 2011, after being in a bar fight protecting the mother of one of his children from an assault, he was arrested and charged with malicious wounding, a felony. He and the other individual involved remained in jail overnight. At the subsequent court hearing in February 2012, no witnesses appeared, and the charge was *nolle prossed*;¹⁰

(SOR ¶ 2.e.): On May 1, 2014, he was charged with contempt of court. In September 2014, the charge was dismissed;¹¹ and

(SOR ¶ 2.f.): On June 24, 2016, he was arrested and charged with assault and battery on a family member, a misdemeanor, after he slapped his daughter in the face, busting her lip. The child’s mother called the police. Applicant appeared in the juvenile and domestic relations court in July 2017, and the court ordered a two-year deferment (under advisement) with eventual and dismissal, providing Applicant completes a parenting class and an anger management course.¹² Thus, he remains in this status until July 2019. As of February 19, 2018, Applicant claimed that he had completed the

⁶ Item 5 (Federal Bureau of Investigation (FBI) Identification Record (IR), dated September 17, 2016), at 5; Item 4 (Enhanced Subject Interview), *supra* note 1, at 6.

⁷ Item 4 (Enhanced Subject Interview), *supra* note 1, at 6.

⁸ Item 5 (FBI IR), *supra* note 6, at 5.

⁹ Item 5 (FBI IR), *supra* note 6, at 5.

¹⁰ Item 5 (FBI IR), *supra* note 6, at 6; Item 4 (Enhanced Subject Interview), *supra* note 1, at 5.

¹¹ Item 5 (FBI IR), *supra* note 6, at 6.

¹² Item 6 (Case Details, dated September 25, 2018); Item 5 (FBI IR), *supra* note 6, at 6; Item 4 (Enhanced Subject Interview), *supra* note 1, at 5-6.

parenting class at a local church, one evening per week for six weeks, but he acknowledged that he had not yet taken the anger management course, and such a course was not yet scheduled.¹³ As of the closing of the record, Applicant had not submitted any evidence that he had completed the anger management course, that the charges had been dismissed, or that he remains “under advisement.”

Personal Conduct

(SOR ¶ 3.a.): This allegation cross-references the SOR allegations associated with Applicant’s drug involvement and substance misuse, and criminal conduct.

(SOR ¶ 3.b.): On September 9, 2016, when Applicant completed his e-QIP, he responded to certain questions pertaining to his illegal use of drugs or drug activity found in Section 23. The most significant question, and the one alleged in the SOR, was essentially as follows: In the last seven (7) years have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance. Two other questions, while not alleged in the SOR,¹⁴ were also asked: In the last seven (7) years have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?; and Have you ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed? Applicant answered “no” to the combined questions.¹⁵ He omitted the November 2015 violation of the foreign Cannabis Control Act and customs law for which he was in jail for 21 days; his admitted use of marijuana that continued until after the e-QIP was completed; his purchases of marijuana; and the fact that he held an interim security clearance at some unspecified point between September 2016 (when he was still using marijuana) and February 2018. He certified that his responses to those questions were “true, complete, and correct” to the best of his knowledge and belief, but, because of his omissions, the responses to those questions were, in fact, false.

Other than simply denying that he had deliberately falsified material facts in his e-QIP, Applicant has not offered any explanations for the omissions. He did not claim, for

¹³ Item 4 (Enhanced Subject Interview), *supra* note 1, at 6.

¹⁴ Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board. (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3.). See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant’s unlisted and unalleged drug activity will be considered only for the five purposes listed above.

¹⁵ Item 3 (e-QIP, dated September 9, 2016), at 31.

example, that he misinterpreted the questions, or that he forgot his drug involvement and substance misuse.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”¹⁶ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”¹⁷

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in 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 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”¹⁸ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.¹⁹

¹⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁷ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

¹⁸ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁹ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."²⁰

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."²¹ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse is set out 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

²⁰ *Egan*, 484 U.S. at 531.

²¹ See Exec. Or. 10865 § 7.

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The guideline notes several conditions under AG ¶ 25 that could raise security concerns 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;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admittedly purchased, possessed and used marijuana for approximately two decades; was arrested in a foreign country in 2015 for receiving marijuana, and possession of a glass pipe containing traces of marijuana; and was arrested in 2003 for manufacturing, sale, and possession of a controlled substance (cocaine). He also admittedly sold cocaine. Although Applicant claimed during his OPM interview, and thereafter in his responses to the SOR and the FORM that he would no longer use illegal substances, because he continued to use marijuana even after he completed his e-QIP, his recent conversion does not rise to the level of clearly and convincingly being committed to discontinuing such substance misuse. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

- (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.

AG ¶¶ 26(a) and 26(b) minimally apply. Applicant's two decades of drug involvement and substance misuse associated with marijuana was not infrequent, and it continued until at least December 2017 or February 2018, depending on which version of Applicant's story is to be believed. On the other hand, his involvement with the sale of cocaine apparently ceased with his arrest in July 2003, and there is no evidence that he has had any more recent involvement. Although Applicant denied any drug involvement on his e-QIP, upon being confronted by the OPM investigator, he finally acknowledged his history with drugs. However, because of his changing narrative regarding his most recent use of marijuana and the commencement of his supposed abstinence, there is some question regarding the accuracy of his current claim of abstinence and his claim that he has avoided drug-using individuals and locations where drugs are being used. Applicant claimed that one of the reasons for his new attitude regarding drugs is due to his new religious beliefs, but he failed to explain what those beliefs are with respect to drugs, and when he first started following those beliefs.

While Applicant's purported period of abstinence from illegal and authorized substances is to be encouraged, considering the lengthy period of his drug involvement and substance misuse, even accepting Applicant's stated period of such abstinence, the period of abstinence is simply too brief to establish confidence that a relapse will not occur. Under the circumstances, Applicant's actions continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes conditions under AG ¶ 31 that could raise security concerns:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;

(c) individual is currently on parole or probation; and

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

My discussion related to Applicant's drug involvement and substance misuse is adopted herein. Applicant has established a lengthy pattern of criminality involving felonies and misdemeanors, commencing with his 2003 arrest and continuing through his 2016 arrest. They include a variety of charges, police involvement, court involvement, and results. He was jailed from overnight to three weeks, and is currently under advisement. Some charges were dismissed or *nolle prossed*. Applicant's willingness to comply with laws, rules, and regulations is suspect, for he routinely ignored the law when he consistently purchased, possessed, and used marijuana; possessed and sold cocaine; was in contempt of court on several occasions; got into a bar fight; and assaulted a family member. The "under advisement" designation is akin to a probation. Moreover, while Applicant is to be under advisement until July 2019, and he has offered no evidence that he has completed one of the requirements set out by the court – completion of an anger management course – it appears that he has not, and may not, complete the court-mandated program. Based on the actions described above, AG ¶¶ 31(a), 31(b), 31(c), and 31(d) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from criminal conduct. They include:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

None of the mitigating conditions apply. While a substantial period may have elapsed since his 2003 arrest, Applicant's other more recent criminal behavior simply continued until at least December 2017 or February 2018. He is a recidivist, displaying a long pattern of drug involvement and substance misuse from 1997, with and without police or court involvement; contempt of court charges; and two incidents involving

physical assaults (malicious wounding in 2011, and assault and battery of a family member in 2016). Furthermore, he is still under advisement for his most recent charges. Applicant did not offer any evidence of a good employment record or constructive community involvement.

A person should not be held forever accountable for misconduct from the past, but in this instance, the most recent criminal conduct, in this case involving his continued drug involvement and substance misuse, was in December 2017 or February 2018. Given his cavalier attitude towards laws, rules, and regulations, Applicant's history of criminal conduct, under the circumstances, continues to cast doubt on his reliability, trustworthiness, or good judgment.

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 also includes examples of conditions that could raise security concerns under AG ¶ 16:

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

My discussions related to Applicant's drug involvement and substance misuse, and Applicant's criminal conduct, are adopted herein. At the time Applicant completed his e-QIP in September 2016, he concealed any references to his history of drug involvement and substance misuse, although at that time, he was still using marijuana. Applicant's comments provide sufficient evidence to examine if his submissions were deliberate falsifications, as alleged in the SOR, or merely inaccurate answers that were the result of oversight or misunderstanding of the true facts on his part. Proof of incorrect answers, standing alone, does not establish or prove an applicant's intent or state of mind when the falsification or omission occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the alleged falsifications or omissions occurred.

I have considered the entire record, including Applicant's denial of the SOR allegation, and have noticed his failure to address the allegation with any specific explanation.²² Applicant's simple denial, without any explanations for his e-QIP response, in my view, is simply not persuasive evidence of Applicant's actual intent. In addition, aside from his lack of candor with respect to the e-QIP, there is Applicant's lengthy history of drug involvement and substance misuse, his criminal conduct, and his personal conduct. As to the deliberate falsification on the e-QIP regarding his drug activity, AG ¶¶ 16(a) and 16(c) have been established. As to the combined drug involvement and substance misuse, criminal conduct, and Applicant's personal conduct allegations, AG ¶ 16(c) has been established.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

²² The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See also ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant's level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose [significant facts] on an application was deliberate).

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

(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.

Neither of the conditions apply. Applicant's lengthy history of drug involvement and substance misuse continued until at least December 2017 or February 2018; and his false response to the e-QIP inquiries occurred in September 2016, before he supposedly stopped using marijuana. Applicant was confronted with the true facts by an OPM investigator in February 2018, but before that interview, he made no efforts to correct the omissions, concealments, or falsifications. Far from being infrequent, Applicant's drug involvement and substance misuse was routine for decades, and his attitude towards laws, rules, and regulations also lasted for a lengthy period. Applicant's actions under the circumstances continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²³

There is some evidence mitigating Applicant's conduct. Applicant is a 37-year-old employee of a defense contractor. He has been serving as a mechanic with his current employer since February 2014. A 2000 high school graduate, Applicant received an

²³ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

HVAC certification in 2001. He has purportedly been abstinent from illegal substances since December 2017 or February 2018.

The disqualifying evidence under the whole-person concept is more substantial. Applicant admittedly purchased, possessed and used, marijuana; possessed and sold cocaine; violated a foreign country's Cannabis Control Act and customs law; was arrested and charged with a variety of criminal violations; and lied on his e-QIP when he denied drug involvement and substance misuse during the last seven years when, in fact, he was still using marijuana. Because of his assault and battery charge of a family member in 2016, he is still under advisement until July 2019, and he has not yet completed the court-mandated requirements. In addition, while the SOR did not allege it, Applicant held an interim security clearance at some unspecified point between September 2016 (when he was still using marijuana) and February 2018.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse; criminal conduct; and personal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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:	AGAINST APPLICANT
Subparagraphs 1.a. and 1.b.:	Against Applicant
Subparagraph 1.c.:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.f.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a. and 3.b.:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge