



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



In the matter of:

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ISCR Case No. 19-01842

Applicant for Security Clearance

**Appearances**

For Government: Jeff Kent, Esq., Department Counsel

For Applicant: Leon J. Schachter, Esq.

05/12/2020

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant mitigated Guideline H (drug involvement and substance misuse) security concerns because his most recent marijuana use was in 2014, and his marijuana use is not recent; however, he did not mitigate Guideline E (personal conduct) security concerns relating to his false statements in 2018 about his history of marijuana use. Eligibility for access to classified information is denied.

**Statement of the Case**

On December 13, 2012, and April 23, 2018, Applicant completed and signed Questionnaires for National Security Positions or security clearance applications (SCA). (Government Exhibit (GE) 1; GE 2) On August 9, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to

determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines H and E. (HE 2) On September 25, 2019, Applicant responded to the SOR and requested a hearing. (HE 3) On October 30, 2019, Department Counsel was ready to proceed.

On November 26, 2019, the case was assigned to me. On December 20, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 16, 2020. (HE 1C) On January 13, 2020, the hearing was cancelled, and on January 13, 2020, DOHA issued a hearing notice setting the hearing for February 13, 2020. (HE 1A; HE 1B) The hearing was held as scheduled.

During the hearing, Department Counsel offered 3 exhibits; Applicant offered 11 documents including the exhibits previously provided with the SOR as well as 3 additional exhibits; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 11-12, 20-24, 35-40; GE 1-3; AE A-K) On February 15, 2020, Applicant provided an additional exhibit; there was no objection; and the document was admitted into the record. (AE L) On February 18, 2020, the record closed. (Tr. 42-43) On February 24, 2020, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript. ISCR and ADP decisions and the Directive are available at <https://ogc.osd.mil/doha/isp.html>.

### **Procedural Issue**

Applicant moved to dismiss SOR ¶¶ 1.a and 1.b because he had previously received a favorable adjudication concerning his marijuana use in 2014, and he urged application of the concept of double jeopardy. (Tr. 12-14) He believed it was "unfair, inefficient, unnecessary, and ought not to be allowed" for the government to raise his marijuana involvement because of the absence of evidence of a pattern of marijuana involvement, and there was no evidence of marijuana involvement after 2014. (Tr. 14-15) Department Counsel opposed the motion. (Tr. 16-17)

The Double Jeopardy Clause in the Fifth Amendment to the U.S. Constitution prohibits prosecution twice for substantially the same crime by the same sovereign. The relevant part of the Fifth Amendment states, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Applicant admitted SOR ¶¶ 1.a and 1.b, and he did not contend there was a previous security-related finding that his marijuana use in 2014 was unsubstantiated. (Tr. 14) A security clearance proceeding or determination is not a criminal prosecution, and the Fifth Amendment does not limit reconsideration of SOR ¶¶ 1.a and 1.b in administrative proceedings. In ISCR Case No. 16-03047 at 4 (App. Bd. May 29, 2018), the Appeal Board said:

It is well established, however, that there is no right to a security clearance, and a past decision to grant or continue a security clearance does not give rise to any right or vested interest in a security clearance. See, e.g., ISCR

Case No. 03-24144 at 6 (Dec. 6, 2005). Furthermore, a favorable security clearance decision does not preclude the Federal Government from reassessing a person's security eligibility in light of current circumstances. *Id.*

Applicant's marijuana use in 2014 provides the basis for assessment of the alleged falsification under Guideline E. The allegations under Guideline H are dated or stale but still relevant, and Applicant's motion was denied. (Tr. 17) My denial of the motion did not restrict Applicant's right to present mitigation evidence relating to his history of marijuana use.

### **Findings of Fact**

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a and 1.b. (HE 3) He denied the other SOR allegations. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 29-year-old senior technical consultant in information technology or senior network administrator. (Tr. 25, 27; HE 3 at 1; GE 1; AE A) In 2009, he received a high school diploma. (GE 1) In 2016, he received an associate's degree. (Tr. 26; GE 1) He needs one credit to receive a bachelor's degree. (Tr. 26-27) He is scheduled to receive a bachelor's degree in early 2020 in network and cyber security. (Tr. 27; AE A; AE D) He completed numerous information technology certification courses and endeavored to enhance his technical expertise and value to his employers. (HE 3; AE B; AE C) He served in the Army National Guard from 2012 through 2018. (HE 3 at 2) When he was honorably discharged, he was a specialist (E-4). (AE E) He is not married, and he does not have any children. (Tr. 26; GE 1) He has been dating his fiancée for about two years. (Tr. 26) She and her family are very supportive of Applicant. (Tr. 47) His current employment is in jeopardy if his security clearance is not reinstated or continued. (Tr. 28)

### **Drug Involvement and Substance Misuse**

SOR ¶ 1.a alleges that Applicant used marijuana with varying degrees of frequency in the spring and early summer of 2014. SOR ¶ 1.b alleges Applicant tested positive for the presence of the marijuana metabolite in his urine in approximately June 2014. Applicant admitted the SOR allegations. (HE 3)

In Applicant's December 13, 2012 SCA, he disclosed marijuana use in 2006. (Tr. 49) He said he did not intend to use marijuana in the future. (Tr. 49)

On October 25, 2014, Applicant submitted a request for a suspended general discharge from the Army National Guard. (GE 3) He said he used marijuana to help him cope with diagnosed depression. (GE 3) He used marijuana in lieu of prescription drugs he was authorized to take. (GE 3) He did not reveal how many times he used marijuana or how long he used marijuana before it was detected through a urinalysis test. He successfully completed the Army National Guard probation period. (Tr. 33-34) In June 2017, Applicant responded to an SOR based on a positive urinalysis test showing use of marijuana in July 2014. (Tr. 35; AE J; AE K; AE L) On June 30, 2017, his security manager

advised Applicant “your Secret clearance was adjudicated on 28 June 17[, and] the SOR was sent out in error.” (Tr. 40; AE L)

In his response to DOHA interrogatories, Applicant said he used marijuana from June 1, 2014, to August 10, 2014, on a weekly basis. (GE 3 at 4) A close friend of Applicant’s said Applicant told him that he used marijuana on a weekly basis for about five months until he was caught on the urinalysis test in 2014. (Tr. 76) In 2014, Applicant’s friend advised Applicant to stop using marijuana; however, Applicant continued to use marijuana. (Tr. 77) Applicant said he stopped using marijuana because of “fear of losing my military career and all civilian side consequences.” (GE 3 at 6) He received substance abuse counseling in June 2016. (GE 3 at 8)

At his hearing, Applicant said he used marijuana once in 2007 when he was about 16 years old, and then resumed his marijuana use in 2014. (Tr. 29) He used marijuana on a weekly basis in 2014, and he purchased the marijuana from a friend he knew in college. (Tr. 31) In 2014, he used marijuana because of stress in his relationship with his parents. (Tr. 30) His mother was ill. (Tr. 30) His father was an alcoholic, and his father was “combative and aggressive.” (Tr. 30; HE 3 at 2-3) He does not associate with the person who provided marijuana to him or anyone else involved in marijuana distribution. (Tr. 32, 48)

Applicant suffered from depression in 2014. He sought and received treatment for his depression, and he moved out of his home. (HE 3 at 2) His mother remarried, and Applicant is close to his mother. (Tr. 46; HE 3 at 2)

Applicant changed after the positive urinalysis test in 2014 showing marijuana use, and he stopped using marijuana. (Tr. 32) He exercises and has healthy eating habits. (HE 3 at 4) He stays away from drug users, and he strives to spend time with his family. (HE 3 at 4) He did not test positive for use of any illegal drugs after 2014. (HE 3 at 5) He expressed his remorse for his illegal drug use. (HE 3 at 5)

Applicant promised not to use illegal drugs in the future. (HE 3 at 5) He provided “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.” (HE 3 at 5 (citing AE H); see AG ¶ 26(b)(3))

Possession of small amounts of marijuana has been increasingly decriminalized in various states and the District of Columbia. (AE I) No evidence was presented of repeal of the federal statute prohibiting possession of marijuana or revocation of the policy prohibition against use of marijuana by security clearance holders.

## **Personal Conduct**

SOR ¶ 2.a alleges that Applicant responded, “No,” to a question in Section 23 of his April 23, 2018 SCA about whether he used any controlled substance in the previous seven years. (Tr. 43-44) At the time he completed his April 23, 2018 SCA, he was serving

in the Army National Guard. As indicated in the previous section, Applicant used marijuana for several months in 2014 while serving in the Army National Guard.

At his hearing, Applicant said the reason he answered, “No,” about his marijuana use in the previous seven years was because he believed the question sought information not previously disclosed. (Tr. 44) He did not intend to conceal his marijuana use. (Tr. 44-45) The Army National Guard already had the information about his positive urinalysis test for marijuana, and DOD CAF had the information as indicated in his SOR response. (Tr. 45) In his SCA, he indicated his security worthiness had previously been investigated. (Tr. 45)

Applicant responded, “No,” to two additional questions in Section 23 of his April 23, 2018 SCA that asked about whether he was ordered, asked, or advised to seek counseling or treatment as a result of his use of illegal drugs and whether he ever voluntarily sought counseling or treatment as a result of his use of a controlled substance. (Tr. 54; GE 1) Applicant was supposed to attend an Army Alcohol Substance Abuse Program (ASAP); however, he did not actually attend ASAP. (Tr. 62; OPM ROI at 21) In June 2016, he attended 16 hours in a substance abuse education seminar provided by a civilian entity. (GE 3) He successfully completed the course. (GE 3) Applicant said he answered, “No,” because he thought the SCA was seeking new information about drug abuse counseling. (Tr. 54)

Applicant responded, “No,” to a question in Section 21 of his April 23, 2018 SCA that asked about whether he had “EVER been diagnosed by a physician or other health professional . . . with [a] psychotic disorder, . . . [or] bipolar mood disorder . . . ?” (GE 1) In response to DOHA interrogatories, Applicant said he was met with a psychiatrist in 2015 and 2017, and he received Lexapro, Lamictal and Zoloft. (GE 3 at 4, 7) Lexapro or “Escitalopram is used to treat depression and anxiety.” ([www.webmd.com](http://www.webmd.com)) “Lamictal is also used to delay mood episodes in adults with bipolar disorder (manic depression).” [www.drugs.com](http://www.drugs.com). “Zoloft (sertraline) is used to treat depression, obsessive-compulsive disorder and panic and anxiety disorders.” (*Id.*) In response to a DOHA interrogatory, he wrote that the reason the medication was prescribed was “bipolar depression” and he provided the name of the physician that prescribed the prescription drugs. (GE 3 at 4) Applicant admitted he received treatment for depression while he was in the Army National Guard. (Tr. 60) He did not disclose his treatment for depression on his SCA because he “viewed it as a stigma.” He “didn’t want people to know he had it.” (Tr. 61) He did reveal the treatment to his team leader, but he was worried about the “stigma” and being “portrayed as weak.” (Tr. 65)

Applicant responded, “No,” to a question in Section 13A of his April 23, 2018 SCA that asked Applicant whether in the previous seven years he “received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy.” (Tr. 50-51; GE 1) He did not disclose any adverse actions he received from the Army National Guard for using marijuana. Applicant received a written warning and reprimand for using marijuana in the Army National Guard after his 2014 positive urinalysis test. (Tr. 51-52) Applicant said he should have indicated, “Yes,” in response to the question. (Tr. 52) He explained that he answered, “No,” because he

did not receive any adverse action under the Uniform Code of Military Justice and he was not discharged from the Army National Guard for marijuana use. (Tr. 52)

SOR ¶ 2.b alleges that Applicant stated during an August 2, 2018 Office of Personnel Management (OPM) personal subject interview (PSI) that he has not used any drugs in the previous seven years. (Tr. 55)

The August 2, 2018 OPM PSI is a summary non-verbatim description of what Applicant told an OPM investigator. His OPM PSI states that Applicant “confirmed that he has not used any drugs in the last seven years.” (OPM Report of Investigation (ROI) at 11) Applicant “was given every opportunity to provide clarification or additional information in regards to any disciplinary actions taken against him during his time in the military, but [he] did not provide anything and had to be confronted.” (OPM ROI at 12) Applicant was then confronted with documentation from the Army National Guard showing he was given a suspended discharge in 2014 because of his use of marijuana discovered through the positive urinalysis discussed previously. (*Id.*) He was on probation for 12 months. (*Id.* at 13) Applicant said he did not remember how many times he used marijuana. (*Id.*) Applicant said he used marijuana to help him cope with his depression. (*Id.* at 12-13) The Army suggested that Applicant receive treatment for his depression and drug use. (*Id.* at 13)

Applicant’s August 2, 2018 OPM PSI states that Applicant did not provide information about his marijuana use because “the issue was never filed under UCMJ and there were no punishments that affect [Applicant’s] job.” (OPM ROI at 13) Applicant’s October 30, 2018 OPM PSI states that Applicant did not provide information about his marijuana use in 2014 for the following reason:

[T]his was only an issue within his unit. It was kept between his team leader, himself, and the captain who wrote the memorandum [about his suspended discharge]. This was not common knowledge within the unit. Because of that and the fact that it did not fall under the UCMJ, [Applicant] did not believe that the information has to be listed. (Tr. 62-63; OPM ROI at 17)

In response to a request for an explanation for why he gave a different answer to the OPM investigator about his rationale for not disclosing his history of marijuana use in 2014 than at his hearing, Applicant said he suspected he did not disclose his marijuana use on his SCA due to being “ashamed.” (Tr. 63) He also thought, “hey, it’s already been noted. It’s already in the records. You can let it slide essentially.” (Tr. 64) He acknowledged that he “lied,” and there was a strong probability that the government would discover the truth. (Tr. 66)

In his SOR response, Applicant said he did not intentionally lie to security officials because he believed security officials would examine his record and discover his previous positive urinalysis test showing his marijuana use. (HE 3 at 6) He assumed the previous security-related adjudication of his marijuana use in 2017 would be part of the record. (HE 3 at 6) He said, “[h]e had no new information to report-no recent use-and as such, did not

report anything. He regrets now that he did not re-report his previously reported 2014 issues, and he will not make this mistake again.” (Tr. 55; HE 3 at 7)

Applicant promised to be honest in future security matters. (Tr. 65-66) He faced adversity and acknowledged his mistakes. (Tr. 67, 78-79) He promised to strive to improve. (Tr. 67) He intends to establish his integrity and trustworthiness. (Tr. 67)

## **Character Evidence**

Nine supervisors, coworkers, colleagues, or friends or both as well as his fiancée provided character statements supporting reinstatement or continuation of Applicant’s access to classified information. (Tr. 70-91; AE B; AE F) The general sense of their statements is that Applicant is exceptionally diligent, knowledgeable, intelligent, meticulous, professional, generous, honest, reliable, and trustworthy. His hard work and professionalism made substantial contributions to mission accomplishment. He learns from his mistakes and does not repeat them. None of his character statements described any use of illegal drugs after 2014. He completed several military courses, and he achieved good to outstanding course evaluations. (AE E) In one course, he was selected as the distinguished honor graduate. (AE E) There is no evidence of adverse employment actions, security violations, improper disclosure of classified information, or that Applicant otherwise compromised national security. (Tr. 28)

## **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.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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

about potential, rather than actual, risk of compromise of classified information. 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.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted). “The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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 provides conditions that could raise a security concern and may be disqualifying in this case including: “(a) any substance misuse (see above definition); “(b) testing positive for an illegal drug”; and “(c) illegal possession of a controlled substance.” Applicant admitted marijuana possession and use in 2014. His marijuana use was detected through an Army National Guard administered urinalysis test in 2014.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). AG ¶¶ 25(a), 25(b), and 25(c) are established.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government

presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2, [App. A] ¶ 2(b).

Applicant completed a 16-hour substance abuse-related class. He does not associate with marijuana users. He promised not to use illegal drugs in the future. He provided “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.” See AG ¶ 26(b)(3). Applicant most recent possession and use of marijuana occurred more than five years ago when he was self-medicating because of depression or bipolar depression or both and due to stress because of his relationship with his father. He received treatment for his mental-health issues. He has a close supportive relationship with his fiancée. His marijuana possession and use happened so long ago or happened under such circumstances that it is unlikely to recur and does not cast doubt on Applicant’s current reliability, trustworthiness, or good judgment. See AG ¶ 26(a). Guideline H security concerns are mitigated.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

AG ¶ 16 lists “conditions that could raise a security concern and may be disqualifying includ[ing]”:

(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;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant did not disclose his marijuana use in 2014 on his April 23, 2018 SCA, and he did not disclose it until confronted during his August 2, 2018 OPM PSI. He was in the Army National Guard when he used marijuana and when he made these two statements. Applicant said at his hearing and in his SOR response that he did not intend to mislead or lie about his history of marijuana use. He asserted that the government was already well aware of his marijuana use in 2014 because: (1) he tested positive for use of marijuana during an Army National Guard urinalysis test; (2) he was processed for discharge by the Army National Guard, and he received a suspended discharge; and (3) he was issued an SOR by DOD based on his marijuana use in 2014. 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)).

Applicant's August 2, 2018 OPM PSI states that Applicant did not provide information about his marijuana use because "the issue was never filed under UCMJ and there were no punishments that affect the Subject's job." (*Id.*) Applicant's October 30,

2018 OPM PSI states that Applicant did not provide information about his marijuana use in 2014 for the following reason:

[T]his was only an issue within his unit. It was kept between his team leader, himself, and the captain who wrote the memorandum [about his suspended discharge]. This was not common knowledge within the unit. Because of that and the fact that it did not fall under the UCMJ, [Applicant] did not believe that the information ha[d] to be listed. (OPM ROI at 17)

Applicant's explanations during his August 2, 2018 and October 30, 2018 OPM PSIs were not consistent with his explanation at his hearing and SOR response, that is, he did not need to disclose his history of illegal drug use because it was already well known by officials. He said that he lied because he was probably ashamed. Applicant's claims in his SOR response and at his hearing that he did not intend to mislead security officials are not credible.

Applicant's intentional lies in 2018 about his marijuana possession and use in 2014 show questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules. Such conduct adversely affects his professional and community standing. AG ¶¶ 16(a), 16(b), and 16(e) are established.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's SOR does not allege that he lied on his April 23, 2018 SCA when he failed to disclose: (1) suggestions from Army National Guard members that he receive some drug-related counseling; (2) receipt of drug-related counseling; (3) being counseled or reprimanded by his unit leadership about not using marijuana or being placed in a conditional discharge status in the Army National Guard or both because of the positive urinalysis test for marijuana; and (4) mental-health treatment for his depression or bipolar depression or both. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(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 Section 6.3.

*Id.* (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)). The non-SOR allegations will not be considered except for the five purposes listed above.

None of the mitigating conditions fully apply to Applicant's false statements. Applicant's lack of candor about his marijuana use on his April 23, 2018 SCA and before being confronted with evidence during his August 2, 2018 OPM PSI show a lack of rehabilitation. Future inappropriate behavior is likely to occur. His behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the 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), “[t]he 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. My comments under Guidelines H and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 29-year-old senior technical consultant in information technology or senior network administrator. In 2016, he received an associate's degree, and he was scheduled to receive a bachelor's degree in the fall of 2019 in network and cyber security. He completed numerous information technology certification courses and endeavored to enhance his technical expertise and value to his employers. He served in the Army National Guard from 2012 through 2018. When he was honorably discharged, he was a specialist. He is not married, and he does not have any children.

Nine supervisors, coworkers, colleagues, or friends or both as well as his fiancée provided character statements supporting reinstatement or continuation of Applicant's access to classified information. The general sense of their statements is that Applicant is exceptionally diligent, knowledgeable, intelligent, meticulous, professional, generous, honest, and trustworthy. His hard work and professionalism resulted in substantial contributions to mission accomplishment. None of his character statements described any use of illegal drugs after 2014. He completed several military courses, and he achieved good to outstanding course evaluations. There is no evidence of security violations, improper disclosure of classified information, or that Applicant otherwise compromised national security. See ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (noting admissibility of “good security record,” and commenting that security concerns may nevertheless not be mitigated).

The evidence against reinstatement of his access to classified information is persuasive. Applicant failed to fully and frankly disclose his marijuana use in 2014 in his April 23, 2018 SCA and his August 2, 2018 OPM PSI before being confronted by the evidence of marijuana use. He maintained in his SOR response and at his hearing that he did not disclose this negative information on his April 23, 2018 SCA and his August 2, 2018 OPM PSI before being confronted because the government was already aware of his marijuana involvement. His statement during his OPM PSI that he did not disclose the information because knowledge of his marijuana use was limited to a small number of Army National Guard personnel is more credible and somewhat inconsistent with his more recent explanations of why he failed to disclose his 2014 marijuana possession and use in 2018.

Applicant's state of mind when he completed his April 23, 2018 SCA is also shown by his failure to disclose on that SCA: (1) suggestions from Army National Guard members that he receive some drug-related counseling; (2) receipt of drug-related counseling; (3) being counseled or reprimanded by his unit leadership about not using marijuana or being placed in a conditional discharge status in the Army National Guard or both because of the positive urinalysis test for marijuana; and (4) mental-health treatment for his depression or bipolar depression or both. If Applicant had disclosed his marijuana-related counseling and treatment or adverse command action for marijuana use, it would have led to questions about his marijuana use in 2014.

The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant's career. AG ¶ 15 emphasizes the importance to security of Applicants providing accurate security-related information. Applicant cannot be trusted to disclose potentially derogatory security-related information about himself. He did not establish his reliability, trustworthiness, and ability to protect classified information.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)). I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated drug involvement and substance misuse security concerns; however, he failed to mitigate personal conduct security concerns.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.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 or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge