



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



In the matter of: )  
)  
) ISCR Case No. 21-02459  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Karen Moreno-Sayles, Esq., Department Counsel  
For Applicant: *Pro se*

02/01/2023

**Decision**

Curry, Marc E., Administrative Judge:

Applicant’s failure of a drug test while in the U.S. Army, and his subsequent omission of the details of his drug use from his security clearance application generate security concerns that he failed to mitigate. Clearance is denied.

**Statement of the Case**

On January 10, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The DCSA CAF took the action 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 National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On February 10, 2022, Applicant answered the SOR, admitting all of the allegations except SOR ¶ 2.a, and requesting a decision on the written record instead of a hearing.

On May 17, 2022, Department Counsel submitted a file of relevant material (FORM), containing six attachments (Items 1 – 6) in support of the SOR allegations. Applicant received a copy of the FORM on June 10, 2022, and was given until July 10, 2022, to file a reply. Applicant did not file a reply, and on July 27, 2022, the case was assigned to me.

### **Preliminary Rulings**

1. In the FORM, Department Counsel moved to amend SOR subparagraph 2.a, striking it, as currently written, and replacing it with the following:

You falsified material facts on an Electronic Questionnaire for Investigations Processing (e-QIP) certified by you on January 21, 2021, in response to (1) Section 13A – Employment Activities 3. Active Military Duty Station – “For this employment, in the last seven (7) years, have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?”; and (2) Section 15 – Military History 1. Discipline – “In the last seven (7) years have you been subject to court martial or other disciplinary procedure under the Uniform Code of Military Justice (UCMJ) such as Article 15, Captain’s Mast, Article 135 Court of Inquiry, etc.? You answered “No” to both questions and deliberately failed to disclose that information set forth in subparagraph 1.c.

Applicant did not answer this amended subparagraph. Consequently, I will treat his non-answer as a denial.

2. The Government submitted a summary of a subject interview conducted by an investigator in support of its contention that Applicant falsified his security clearance application. (Item 4) The non-authenticated nature of the subject interview raises the issue of whether it is admissible under Directive ¶ E.3.20. In the FORM, Department Counsel informed Applicant of his right to object to the admissibility of the summary, as non-authenticated, or alternatively, of his opportunity to make any corrections, additions, deletions, or updates. Applicant did not do so. Consequently, I have incorporated the summary of the subject interview into the record for consideration.

### **Findings of Fact**

Applicant is a 32-year old married man. He is a U.S. Army veteran, serving from 2011 to 2019. He was honorably discharged. (Item 3 at 17) He has a high school diploma and has taken some college courses. (Item 3 at 12) Since December 2020, he has worked for a defense contractor as a warehouse technician, and he has held a Secret clearance since August 2017. (Item 3 at 13)

In or about March 2019, while in the Army, Applicant used marijuana. He held a security clearance at the time. His marijuana use led to the failure of a random urinalysis

test. Subsequently, he received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for the offense of wrongful use of marijuana – detected by urinalysis, and wrongful use of marijuana – not detected by urinalysis. (Item 1 at 3) During a follow-up interview, Applicant admitted using marijuana on several occasions. (Item 6 at 2) He stated that he learned his lesson and does not intend to use marijuana again. (Item 2 at 4)

Applicant failed to disclose his use of marijuana and his non-judicial punishment for failing a drug test, as required on his security clearance application of January 2021. In his interview with an investigative agent, he said that he failed to disclose the required information because he forgot to include it. (GE 2 at 4) In his answer, he stated that he “may have mistakenly selected the wrong button,” when completing the security clearance application.” (Item 1 at 2)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 1(d) requires that “[a]ny 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. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

## **Analysis**

### **Guideline E: Personal Conduct**

Under this concern, "conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information." (AG ¶ 15) Moreover, of "special concern is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes." (*Id.*) Applicant's omissions from his security clearance application raise the issue of whether 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," applies. Applicant's conflicting explanations for the omissions fatally undercut his credibility. Under these circumstances AG ¶ 16(a) applies without mitigation.

### **Guideline H: Drug Involvement**

Under this concern, "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." (AG ¶ 24) Applicant's use of marijuana and his subsequent failure of a drug test triggers the application of AG ¶ 25(a), "any substance misuse," and AG ¶ 25(b), "testing positive for an illegal drug."

Although Applicant used marijuana while holding a security clearance, there is no record evidence that he had been granted access to classified information when he used it. Consequently, AG ¶ 25(f), "any illegal drug use while granted access to classified

information or holding a sensitive position,” does not apply. (See ISCR Case No.20-03111 at 3 (App. Bd. Aug. 10, 2022) Nevertheless, such use is particularly egregious because applicants, having previously been granted clearances are fully cognizant of the security significance of holding a clearance. (ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007))

Given Applicant’s security clearance application falsifications, his assertion that he will not use marijuana in the future has minimal probative value. I conclude that none of the mitigating conditions applies, and that Applicant’s use of marijuana which led to the drug test failure continues to pose a security clearance concern.

### **Whole-Person Concept**

I have considered the whole-person factors in my analysis of the disqualifying and mitigating conditions, and conclude that they do not warrant a favorable conclusion.

### **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 – 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Marc E. Curry  
Administrative Judge