



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-00174
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Erin Thompson, Esq., Department Counsel  
 For Applicant: *Pro se*  
 01/27/2023

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**Decision**

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BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on February 8, 2019. On February 11, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline E. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR and requested a hearing before an administrative judge. (Answer) The case was assigned to me on August 19, 2022. The Defense Office

of Hearings and Appeals (DOHA) issued a notice of hearing on October 28, 2022, setting the hearing for November 15, 2022. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2; Applicant testified, but did not offer any documents. I admitted all proffered exhibits into evidence without objection. DOHA received the hearing transcript (Tr.) on November 28, 2022, and the record closed.

### **Findings of Fact**

Applicant admitted all of the allegations in his Answer to the SOR. (¶¶1.a and 1.b, and 2.a.) After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 57 years old. He was previously married from about 1984 to 2014, and he married his current spouse in 2020. He has three adult children. He graduated from high school in 1983, and attended college for one semester. He has been employed by his present employer, a federal contractor, since November 2018. His job title is director of information technology. Applicant was granted an interim DOD security clearance in August 2019, and he has never been notified that his interim DOD security was revoked. (Tr. 13-15; GE 1)

### **Drug Involvement and Falsification**

In his February 2019 SCA, Applicant intentionally failed to disclose, as required, that he had used and purchased marijuana from 2012 to present. He testified at the hearing that he did not disclose this information because he was worried that he would not get a DOD security clearance, and he would be fired by his employer. He also admitted that during his first background interview conducted in June 2019, he deliberately failed to disclose his use and purchase of marijuana to an authorized DOD investigator. A second interview was conducted in March 2020 to confront him about his failure to report illegal drug use. He then admitted that he had used marijuana from approximately “2014” to the present time. He reported that he smokes marijuana at least one time per week, and if he is on vacation, he will smoke it daily. He also estimated that he spends about \$400 to \$500 on a monthly basis to purchase marijuana. (GE 1, GE 2; Tr. 15-18, 23)

Applicant stated that even though he applied for a DOD security clearance with the submission of the February 2019 SCA, he never had the intention to abstain from smoking marijuana. Both he and his wife use marijuana in the home. He testified, however, that he recently made a decision to stop smoking marijuana. His last use of marijuana occurred on October 2, 2022. He decided that he would no longer smoke marijuana because he would like to keep his current employment. His wife continues to smoke marijuana in the home. He also acknowledged that using marijuana is illegal in his state of residence and in violation of federal law. He has not reported his illegal drug use to his facility security officer. (Tr. 18-22; GE 2)

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 ¶ 2(b) 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for drug involvement and substance misuse 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.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition);" "(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, . . . .;" and "(f) any illegal drug use while granted access to classified information or holding a sensitive position." The record establishes AG ¶¶ 25(a), 25(c), and 25(f).

The guideline also includes conditions that could mitigate security concerns arising from drug involvement and substance misuse. The following mitigating conditions under AG ¶ 26 are potentially applicable:

(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 to overcome the problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were being 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.

None of the mitigating conditions apply. Applicant's last use of marijuana occurred in October 2022 while he possessed an interim DOD security clearance. He failed to abstain from using marijuana despite acknowledging the use and purchase of illegal drugs violates federal law and is illegal in his state of residence. He has not changed his environment and cannot disassociate from his wife who continues to use marijuana in their home. In February 2019, he submitted a SCA to begin the process of obtaining a DOD security clearance. He continued to use and purchase marijuana for three years after he was granted an interim security clearance. Applicant's last use of marijuana was three months ago. His recent decision to stop using marijuana, although a step in the right direction, is too recent to show rehabilitation. Applicant failed to mitigate the drug involvement and substance misuse security concerns.

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

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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.

Applicant deliberately falsified his February 2019 SCA by intentionally failing to disclose his use and purchase of marijuana. His admissions and evidence in the record shows that AG ¶ 16(a) applies.

Applicant's SOR does not allege the deliberate omission of his illegal drug use and purchase during his June 2019 background interview. 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. 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 allegation will not be considered except for the five purposes listed above.

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 happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

None of the mitigating conditions apply. Applicant intentionally falsified his 2019 SCA, and although not alleged in the SOR, he deliberately failed to disclose his illegal drug use during his June 2019 background interview. It was not until March 2020, during his second background interview and only after being confronted with information about his drug use, that he finally admitted his illegal drug involvement to the investigator. This conduct does not demonstrate a prompt, good-faith effort to correct his previous omissions and falsifications. He has established a pattern of dishonesty, which casts doubt on his reliability, trustworthiness, and overall good judgment. The 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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant's use of marijuana while holding an interim security clearance places a heavy burden on him to establish mitigation. 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)).

After considering the record as a whole, to include the circumstances surrounding Applicant's use and purchase of marijuana, I conclude that Applicant has not met his heavy burden of proof and persuasion due to the recency of his last use of marijuana, and his continued drug involvement for three years while he possessed an interim DOD security clearance. His pattern of dishonesty continues to cast doubt on his reliability and trustworthiness. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H and Guideline E.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson  
Administrative Judge