



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



In the matter of: )  
)  
) ISCR Case No. 22-00442  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: Redacted, Personal Representative  
06/13/2023

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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 September 15, 2021. On June 2, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and 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.

On June 9, 2022, Applicant answered the SOR and requested a hearing before an administrative judge. (Answer) The case was assigned to me on March 9, 2023. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 28, 2023, setting the hearing for April 26, 2023. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 - 4; Applicant testified, and submitted four documents labeled Applicant Exhibits (AE) A - D. I admitted all proffered exhibits into evidence without objection. I held the record open for one week in the event either party wanted to supplement the record with documentation. Applicant's personal representative sent the federal contractor's drug policy (AE E) after the hearing ended. I admitted the document into evidence without objection. DOHA received the hearing transcript (Tr.) on May 3, 2023, and the record closed on May 4, 2023.

### **Findings of Fact**

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

Applicant is 58 years old. He was previously married from about 1986 to 2004, and he is currently single. He has one adult daughter. He graduated from high school in 1983. He has been employed by his present employer, a federal contractor, since May 2001. His job title is machinist. Applicant was granted a DOD security clearance in December 2001. He needs to maintain his security clearance to perform his employment duties. (Tr. 22-25; GE 1)

### **Drug Involvement and Falsification**

In his September 2021 security clearance application (SCA), Applicant intentionally failed to disclose, as required, that he had used and purchased marijuana from May 2001 to the time he submitted the SCA and while possessing a security clearance. (SOR ¶ 2.a.) He testified at the hearing that he did not disclose this information because he was worried that he would lose his DOD security clearance and be fired by his employer. He also admitted that he deliberately failed to disclose his use and purchase of marijuana to an authorized DOD investigator during his November 2021 background interview. (SOR ¶ 2.b.) Applicant told the investigator that he had stopped using marijuana ten years ago. The investigator was aware that Applicant had not disclosed any illegal drug use during his previous investigation that had occurred about ten years earlier. The investigator interrogated him further, and Applicant stated he realized the investigator caught him in a lie. He was tired of lying about his marijuana use and decided to disclose the full details about his marijuana use. (GE 1, GE 2; Tr. 17-21, 32-35)

Applicant stated that even though he possessed a DOD security clearance at the time he submitted the September 2021 SCA, he never had the intention to abstain from smoking marijuana. He has lied about his illegal drug use since he was hired by his

employer in May 2001. Despite his history of using marijuana, he stated that he has consistently been a valued and hard-working employee. (Tr. 21)

Applicant admitted that in August 1986, he was arrested and charged with possession of a controlled substance. (SOR ¶ 1.a.) He testified that he actually had two incidents of getting into trouble with the police for illegal drugs, but due to the age of the arrest, he could not specifically recall any details about the incident. (Tr. 25-27; GE 2, GE 3)

According to an interrogatory completed by Applicant on May 18, 2022, he listed that he had used marijuana daily from January 1980 to May 17, 2022, and he had future intentions of using marijuana. Applicant testified that he did not use marijuana daily during that entire period. When he was first hired by his employer, he believed he may have abstained from using marijuana for about a year. He admitted during the hearing that he continues to use marijuana. (GE 2; Tr. 27-29)

Applicant admitted that he had also purchased marijuana while holding a DOD security clearance. (SOR ¶ 1.c.) He disclosed during his background interview that he spends about \$100 every two months to purchase marijuana from a friend who possesses a medical marijuana card. He smokes marijuana in the evenings to relax and it also helps with his arthritis pain. He testified that in September 2022, he obtained a medical marijuana card and he has recently purchased marijuana from a dispensary. He provided documentation from September 2022 that his application to participate in his state's medical marijuana program had been approved. He was aware the use of marijuana is illegal under federal law, and that the Federal Government and his employer have a policy against people holding a security clearance and using illegal drugs. (GE 2; Tr. 29-32, 35-36; AE C, AE D)

Applicant submitted two character reference letters from his direct supervisor and the operations manager from his place of employment. Both references praised Applicant's outstanding work ethic and personal commitment to the mission. They believe Applicant is an asset for his employer and the DOD. (AE A, AE B)

### **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 two conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition);" and "(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase . . . ." The record establishes AG ¶¶ 25(a) and 25(c).

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 has used marijuana from about 1980 to the present time, and during many of those years while he possessed a DOD security clearance. He knew that the use of marijuana is illegal under federal law, and that the Federal Government and his employer have a policy against people holding a security clearance and using illegal drugs. Applicant's purchase, possession, and use of marijuana cast doubts on his current reliability, trustworthiness, good judgment, ability or willingness to comply with laws, rules, and regulations, and suitability to hold a clearance, especially because his substance misuse occurred while he possessed a clearance. 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 two conditions that could raise security concerns and may be disqualifying. The following disqualifying conditions are 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; and

(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.

Applicant deliberately falsified his September 2021 SCA by intentionally failing to disclose his use and purchase of marijuana while holding a DOD security clearance. During his November 2021 background interview, he deliberately falsified his marijuana history when questioned by an investigator. His admissions and evidence in the record show that AG ¶¶ 16(a) and 16(b) apply.

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 2021 SCA, and he deliberately failed to disclose his illegal drug use and purchase during his November 2021 background interview. He admitted he lied because he was worried about losing his security clearance and his job. Applicant only admitted his illegal drug involvement to the investigator after he had been caught in a lie. This conduct does not demonstrate a prompt, good-faith effort to correct his previous omissions and falsifications. He has 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 a 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

