



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



In the matter of: )  
)  
) ISCR Case No. 21-02269  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: *Pro se*

06/28/2023

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant failed to mitigate security concerns arising under Guidelines E (personal conduct), G (alcohol consumption), H (drug involvement), and J (criminal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On April 23, 2020, Applicant completed and signed a Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On March 31, 2022, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant. This action was taken under Executive Order (Exec. Or.) 12968, *Access to Classified Information*, dated August 2, 1995; DoD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, effective on April 3, 2017 (DoDM 5200.02); and Security Executive Agent Directive 4 (SEAD 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 (AG)*, effective on June 8, 2017.

The SOR detailed reasons why the DoD CAF notified Applicant that it intended to deny or revoke his security clearance because it did not find that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guidelines E, G, H, and J. (Hearing Exhibit (HE) 2)

On March 1, 2023, DOHA issued a notice of hearing, setting the hearing for March 20, 2023. (HE 1) Applicant's hearing was held as scheduled using the Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered five exhibits, and Applicant did not offer any exhibits. (Tr. 14, 18-19; GE 1-5) All proffered exhibits were admitted into evidence without objection. (Tr. 19; GE 1-5) On March 30, 2023, DOHA received a transcript of Applicant's security clearance hearing. The record was scheduled to close on April 20, 2023, and an extension was granted until May 19, 2023. (Tr. 115, 122; HE 4) No post-hearing documents were received.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

Applicant admitted the allegations in SOR ¶ 1.g, 1.h, 1.i, and 3.b, and he denied the allegations in SOR ¶¶ 1.a through 1.f, 2.a, 3.a, and 4.a through 4.d. (HE 3) He also provided mitigating information. (*Id.*)

Applicant is a 50-year-old chief of software architecture for a defense contractor. (Tr. 6-7) In 1991, he graduated from high school. (Tr. 6) He has not attended college. (Tr. 6) He has several information technology certifications. (Tr. 8) He has not served in the military. (Tr. 6) In 1997, he was married and divorced in 1997 or 1998. (Tr. 7, 23) He did not have any children from his marriage. (Tr. 7) He subsequently had five children from two relationships, and their ages are 7, 11, 11, and 12. (Tr. 24) His oldest son is deceased. (Tr. 25) He has worked for the same employer for 13 years. (Tr. 7) There is no evidence of security violations, improper disclosure of classified information, or that Applicant compromised national security. I asked him to send in a resume after his hearing; however, he did not provide it. (Tr. 8)

Applicant said he had some difficulties filing his tax returns. (Tr. 26-31, 93) At one point the IRS wanted \$50,000 from him. (Tr. 27) He paid the IRS \$13,000. (Tr. 93) Applicant said he would provide his IRS Form 1040s for the past three years after his hearing (Tr. 93); however, he did not provide them.

### **Alcohol Consumption, Criminal Conduct, Drug Involvement, and Personal Conduct**

SOR ¶ 3.b alleges and Applicant admitted that he used marijuana with varying frequency from August 1986 to at least August 2019. (Tr. 69-70, 109-111; GE 2 at 13) He held a public trust position; however, he did not believe he held a sensitive position in August 2019 while he was possessing and using marijuana. (Tr. 112-114)

SOR ¶ 1.i alleges Applicant was arrested on January 3, 1995, and he was charged with possession of marijuana (between 10 and 30 grams) and manufacturing and/or delivering a controlled dangerous substance, a felony. (GE 3 at 17-18) He pleaded guilty to possession of marijuana, a lesser-included misdemeanor offense. (Tr. 34) He claimed

that he pleaded guilty even though he did not possess marijuana because it was “the easiest way out.” (Tr. 34) He was sentenced to 12 months of probation before judgment and ordered to pay fines and court costs totaling \$921. (GE 3 at 21)

SOR ¶¶ 1.h and 2.a allege Applicant was arrested on December 21, 1997, and he was charged with driving under the influence of alcohol (DUI), driving on a suspended or revoked driver’s license, and operating an uninsured motor vehicle. On January 7, 2000, he pleaded guilty to DUI, and he was sentenced to 12 months of supervised probation before judgment and assessed fines and court costs totaling \$800. (Tr. 35-36; GE 3 at 23) Applicant said he was in a car accident, and he consented to a blood-alcohol test (BAT). (Tr. 35) His BAT was above the legal limit. (Tr. 35-36) He completed the alcohol counseling classes, and his driver’s license was reinstated. (Tr. 36)

SOR ¶ 1.g alleges Applicant was arrested on August 22, 1998, and he was charged with obstruction of justice/destruction of evidence and attempted false report of an offense, both felonies. He was convicted of these offenses and sentenced to 11 months of probation and assessed fines and court costs totaling \$250. (GE 3 at 24-26) Applicant said he remembered being arrested after he swore at a police officer; however, he claimed he could not recall ever going to court or being charged with the offenses. (Tr. 37) Somehow he was found guilty and he “never knew about it again until [he] went through this investigation process right here.” (Tr. 37) He said his mother checked with the police department and they did not have any record of the arrests. (Tr. 38) He did not indicate she checked the court records for evidence of his conviction.

SOR ¶ 1.f alleges Applicant was arrested on March 29, 2003, and he was charged with possession of marijuana (less than 2.5 grams) and possession of drug paraphernalia. (GE 3 at 27-31) Applicant said a police officer was harassing him, and the police officer found a bottle with a marijuana stem in it under his vehicle’s seat. (Tr. 38, 40) When he arrived at the police station, “the chief of police” pleaded with Applicant not to make a complaint against the [arresting] officer because he was in the process of being dismissed as a result of the police officer’s disorderly conduct. (Tr. 39) Applicant was charged; however, the charges were eventually dismissed. (Tr. 39; GE 3 at 31-32) He said the marijuana was under the passenger’s seat, and it was not his marijuana. (Tr. 41)

SOR ¶ 1.e alleges Applicant was arrested on January 29, 2011, and he was charged with possession of marijuana (less than 1 ounce). SOR ¶ 1.d alleges Applicant failed to appear for a court date on September 16, 2011, and a warrant was issued for his arrest. (GE 3 at 5-10) Applicant said he was in a vehicle with five other individuals, and the police found marijuana in one of their bags. (Tr. 43) He said it was not his marijuana. (Tr. 43) On November 4, 2019, an Office of Personnel Management (OPM) investigator interviewed Applicant about the warrant for his arrest, and Applicant said he did not intend to resolve it until his child custody issues were resolved. (OPM Report of Investigation (ROI) at 7) As of March 31, 2022, the charge was pending.

At Applicant’s hearing, he said he recently paid \$1,150 to resolve the charge. (Tr. 42) He said he “called and over the phone paid with [his] credit card and then that was pretty much it, a done deal.” (Tr. 43-44) He said he would provide documentation after

the hearing showing the charge was resolved; however, he did not provide anything. (Tr. 43)

SOR ¶ 1.c alleges Applicant was arrested on August 10, 2017, and he was charged with domestic battery. The mother of his children obtained 11 orders of protection. (Tr. 45-48) She told the police he assaulted her. (Tr. 47) When he went to court, she withdrew her allegations. (Tr. 47) He denied that he was violent towards her. (Tr. 49) He believed it would be best if he moved to a different state to get away from her. (Tr. 50)

SOR ¶ 1.b alleges Applicant was arrested on February 7, 2018, and he was charged with violation of a civil no contact order. (GE 3 at 33-34) Applicant said the charge was dismissed because the civil no contact order did not exist. (Tr. 51-52)

SOR ¶¶ 1.a and 2.a allege Applicant was arrested on July 22, 2019, following a multi-vehicle collision, and he was charged with aggravated DUI resulting in great bodily harm. Applicant said the accident was not his fault. (Tr. 71) The accident was at about 10:46 p.m. (GE 4 at 19) He said he only had one drink, and that was about 4:45 p.m. when he was at dinner. (Tr. 71) The accident occurred at about 10 p.m. (Tr. 71) One report said he had a breathalyzer which registered .075 (no time specified in the report); however, his breathalyzer at 12:14 am said .054. (Tr. 74, 86-87; GE 4 at 2, 18-19)

Applicant said they tested urine samples in the jail, and they found cocaine metabolites in his urinalysis sample; however, he disagreed with this finding. (Tr. 76, 101) He was taking Adderall for ADHD, and it was not detected in the test. (Tr. 76-77) He believed they switched his urine sample with one of the other prisoners. (Tr. 101) Forty-eight hours after he was arrested, he had a blood test, which was negative for the cocaine metabolite. (Tr. 103, 106) I asked Applicant to provide a copy of the blood test results after his hearing; however, he did not provide them. (Tr. 116)

Applicant was arrested for failure to appear on March 6, 2023, and he was released on March 13, 2023. (Tr. 79-80, 96) Applicant pleaded guilty to DUI in order to get released from jail. (Tr. 82) He was placed on probation for 18 months. (Tr. 109) He intends to appeal his conviction. (Tr. 82) He was unaware of the status of the civil lawsuit the woman seriously injured in the accident filed against him. (Tr. 83; GE 5)

Applicant told the police officer he drank a double vodka at about 5:00 p.m., and he said he had not smoked marijuana in the previous three days. (Tr. 86; GE 4 at 19)

The woman who was seriously injured in the accident on July 22, 2019, was pregnant. In her lawsuit, she seeks damages from Applicant in the amount of \$50,000. (GE 4) The lawsuit states Applicant was under the influence of alcohol and/or marijuana at the time of the accident.

Applicant was arrested or served with papers in the summer of 2022 for not paying his child support. (Tr. 60, 68) He said, "they put me in jail twice to pay child support in a total amount of \$9,000 one time, and then \$6,000 the next time. So, that's \$15,000. So, how could I possibly owe them anything?" (Tr. 59) The hearing is supposed to clarify the

amount of his child support payments, and possibly designate who should take the deductions for the children for income tax purposes. (Tr. 59-62) He had a hearing scheduled the last week of March 2023 concerning child support payments. (Tr. 58-59) He believes his child support is current. (Tr. 60)

### **Personal Conduct-Falsification of SCA**

SOR ¶¶ 4.b, 4.c, and 4.d allege Applicant failed to disclose on his April 23, 2020 SCA the conduct alleged in SOR ¶¶ 1.e, 1.f, 1.g, 1.h, 1.i, and 3.b in response to questions about felony charges, charges involving alcohol and illegal drugs, and involvement with marijuana in the previous seven years.

In his April 23, 2020 SCA, Applicant disclosed: his 2017 or 2018 domestic violence charges which was dismissed; his emergency order of protection in 2019 was denied; his aggravated DUI charge in 2019 was pending; and he was accused of violation of parenting order or plan in 2020 (GE 1 at 32-39) He did not disclose any alcohol offenses except the 2019 DUI or any drug offenses or involvement in response to the specific questions about alcohol-related charges and drug involvement. (GE 1)

On November 4, 2019, Applicant confirmed to an OPM investigator that his only arrest for or charge of DUI was in 2019, and he did not have any drug-related charges. (OPM ROI at 6) He was confronted with and confirmed marijuana possession charges in 1995, 2003, and 2011. (*Id.* at 6-9; SOR ¶¶ 1.e, 1.f, and 1.i) He confirmed: his 1997 DUI arrest and conviction in 2000, and his arrest in 1998, for obstruction of justice/destruction of evidence. (OPM ROI at 8; SOR ¶¶ 1.g and 1.h) He indicated he used marijuana from August 1986 to August 2019, and his average use was three or four times a month. (OPM ROI at 9) He said he “has never tested positive on a drug test.” (*Id.* at 10) He told the OPM investigator that he believed he was only required to disclose marijuana offenses and DUIs in the previous seven years. (*Id.* at 6-9) In his response to DOHA interrogatories he explained the urinalysis test result showing cocaine metabolites found in his urine sample were erroneous, and he predicted the charges would be removed from his records. (GE 2 at 2)

At his hearing, Applicant said he had no idea he was charged with the felonies in SOR ¶ 1.g. (Tr. 89) He misread the question concerning alcohol and drug offenses. (Tr. 90-91) He thought he only had to disclose the offenses in the last seven years. (Tr. 90-91)

### **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). “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

### Criminal Conduct

AG ¶ 30 describes the security concern about criminal conduct, “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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case:

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

AG ¶¶ 31(a), 31(b), and 31(c) are established. Discussion of the disqualifying conditions is in the mitigating section *infra*.

AG ¶ 32 lists conditions that could mitigate security concerns:

- (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;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;
- (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.

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).

SOR ¶ 1.i. Applicant was arrested on January 3, 1995, and he was charged with possession of marijuana (between 10 and 30 grams) and manufacturing and/or delivering a controlled dangerous substance, a felony. He pleaded guilty to possession of marijuana, a lesser-included misdemeanor offense. He was sentenced to 12 months of probation before judgment and ordered to pay fines and court costs totaling \$921.

SOR ¶ 1.h. Applicant was arrested on December 21, 1997, and he was charged with DUI, driving on a suspended or revoked driver's license, and operating an uninsured motor vehicle. On January 7, 2000, he pleaded guilty to DUI, and he was sentenced to 12 months of supervised probation before judgment and assessed fines and court costs totaling \$800.

SOR ¶ 1.g. Applicant was arrested on August 22, 1998, and he was charged with obstruction of justice/destruction of evidence and attempted false report of an offense, both felonies. He was convicted of these offenses and sentenced to 11 months of probation and assessed fines and court costs totaling \$250. Applicant said he remembered being arrested after he swore at a police officer; however, he claimed could not recall ever going to court or being charged with the offenses. Somehow he was found guilty and he "never knew about it again until [he] went through this investigation process right here." Applicant failed to prove that he was not convicted of the offenses.

SOR ¶¶ 1.d and 1.e. Applicant was arrested on January 29, 2011, and he was charged with possession of marijuana (less than 1 ounce). He failed to appear for a court date on September 16, 2011, and a warrant was issued for his arrest. At his hearing, he said he recently paid \$1,150 to resolve the charge. He said he would provide documentation after the hearing showing the charge was resolved; however, he did not provide anything. He failed to prove the offense has been adjudicated and resolved.

SOR ¶ 1.a. On July 22, 2019, following a multi-vehicle collision, Applicant was charged with aggravated DUI resulting in great bodily harm. On March 13, 2023, he pleaded guilty to DUI, and he was sentenced to 18 months of probation. He continues to be on probation.



The six offenses with findings of guilty are substantiated: (1) Possession of marijuana in 1995 (SOR ¶ 1.i); (2) DUI in 1997 (SOR ¶ 1.h); (3) obstruction of justice/destruction of evidence and attempted false report of an offense in 1998 (SOR ¶ 1.g); (4) possession of marijuana in 2011 (SOR ¶ 1.e); (5) failure to appear to address the 2011 marijuana possession offense (SOR ¶ 1.d); and (6) DUI in 2019 (SOR ¶ 1.a). The other alleged criminal offenses are not substantiated.

Applicant's six criminal offenses show a pattern of poor judgment. None of the mitigating conditions are fully established because he is currently on probation, and he failed to prove the open arrest warrant from 2011 is resolved. Criminal conduct security concerns are not mitigated.

### **Alcohol Consumption**

AG ¶ 21 articulates the Government's concern about alcohol consumption, "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

AG ¶ 22 lists conditions that could raise a security concern and may be disqualifying in this case including:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.

AG ¶ 22(a) is established. Discussion of the disqualifying conditions is in the mitigating section *infra*.

AG ¶ 23 details conditions that could mitigate security concerns including:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

On December 21, 1997, he was charged with DUI, driving on a suspended or revoked driver's license, and operating an uninsured motor vehicle. On January 7, 2000, he pleaded guilty to DUI, and he was sentenced to 12 months of supervised probation before judgment and assessed fines and court costs totaling \$800.

On July 22, 2019, following a multi-vehicle collision, Applicant was charged with aggravated DUI resulting in great bodily harm. On March 13, 2023, he pleaded guilty to DUI, and he was sentenced to 18 months of probation. He continues to be on probation.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶¶ 23(a) and 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption or responsible alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). See also ISCR Case No. 08-04232 (App. Bd. Oct. 9, 2009) (affirming denial of security clearance for Applicant with alcohol-related criminal offenses for six years prior to hearing). In ISCR Case No. 18-02526 (App. Bd. Dec. 20, 2019), the Appeal Board emphasized the lack of an established benchmark period of abstinence from alcohol consumption stating:

As we have previously stated, the Directive does not specify how much time must pass to mitigate the various types of misconduct identified in the adjudicative guidelines. Contrary to the Judge's conclusion, the Board has repeatedly declined to establish a "benchmark" or "bright-line" rule for evaluating the recency of misconduct. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole.

*Id.* at 3 (citing ISCR Case No. 18-01926 at 4 (App. Bd. Sept. 20, 2019) (reversing grant of security clearance for applicant with three alcohol-related driving incidents with most recent occurring in 2017)).

I have carefully considered the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption. The evidence against full mitigation is more persuasive at this time. Insufficient time has elapsed since his July 22, 2019 DUI to enable a reasonable predictive judgment that his maladaptive use of alcohol is safely in the past. He has not presented evidence of alcohol-related counseling or therapy after the 2019 DUI. No alcohol consumption mitigating conditions fully apply. Alcohol consumption security concerns are not mitigated.

## 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 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. . . ." The record establishes AG ¶¶ 25(a) and 25(c). Additional information is contained in the mitigation section, *infra*.

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.

Applicant was found guilty of possession of marijuana in 1995. He possessed and used marijuana from about August 1986 to about August 2019. He denied guilt of the marijuana possession offenses in 2003 and 2011, and there is insufficient evidence to prove he committed those offenses.

Possession of a Schedule I controlled substance is a federal criminal offense. 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 I controlled substance. 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).

Applicant's SOR did not allege that he used cocaine, and it was allegedly detected with a urinalysis test after he was arrested for DUI. This offense is not substantiated because the evidence showing the urinalysis, such as laboratory report and chain of custody documentation were not presented.

Applicant's most recent marijuana possession occurred after he was aware of federal rules against marijuana possession. "An applicant who [possesses] marijuana . . . may be lacking in the qualities expected of those with access to national secrets." See ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) ("An applicant's misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability)). Applicant did not provide corroborating documentation showing the 2011 marijuana charge was resolved. Applicant's marijuana involvement is recent, and I cannot rule out future marijuana involvement. Guideline H security concerns are not mitigated.

## **Personal Conduct**

AG ¶ 15 describes the security concern about personal conduct as follows:

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 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; 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.

AG ¶ 16(d) does not apply because Applicant's conduct involving use of marijuana, abuse of alcohol, and other criminal offenses are adequately addressed under Guidelines J, G, and H, *supra*. AG ¶¶ 16(a) and 16(e) apply and will be addressed in the mitigating section, *infra*.

AG ¶ 17 provides conditions that could mitigate security concerns as follows:

(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; and

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

Applicant committed six criminal offenses, and he possessed and used marijuana from about August 1986 to about August 2019. His 2019 DUI resulted in serious injury to a pregnant woman. Applicant's behavior adversely affects his "personal, professional, and community standing." See AG ¶16(e).

On November 4, 2019, Applicant confirmed to an OPM investigator that his only arrest for or charge of DUI was in 2019, and he did not have any drug-related charges. (OPM ROI at 6) He was confronted with and confirmed marijuana possession charges in 1995, 2003, and 2011. (*Id.* at 6-9; SOR ¶¶ 1.e, 1.f, and 1.i) He confirmed: his 1997 DUI arrest and conviction in 2000, and his arrest in 1998, for obstruction of justice/destruction of evidence. (OPM ROI at 8; SOR ¶¶ 1.g and 1.h) He indicated he used marijuana from August 1986 to August 2019, and his average use was three or four times a month. (OPM ROI at 9) He told the OPM investigator that he believed he was only required to disclose marijuana offenses and DUIs in the previous seven years. (*Id.* at 6-9)

Applicant failed to disclose his three marijuana possession charges, his DUI charge in 1997, and his felony-level arrest in 1998 and subsequent conviction. At his hearing, he said he was unaware of the disposition of the 1998 offense. He said he thought the marijuana and DUI charges which he failed to disclose were more than seven years before he completed his April 23, 2020 SCA.

The Appeal Board has 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 failed to disclose multiple offenses on his SCA, and the burden shifted to Applicant to explain the omissions.

Applicant failed to honestly and candidly disclose negative information. His claims that he did not know about the disposition of the 1998 felony-level offense are not credible. The OPM interview in 2019 highlighted the issue of drug involvement and alcohol abuse offenses not being limited to those occurring within seven years of completion of the SCA. I do not believe he honestly believed he did not have to disclose alcohol and drug offenses if they were more than seven years before completion of his SCA.

Applicant denied at his hearing that he knowingly and intentionally fabricated his SCA with intent to deceive. I do not find his denials to be credible. His false denials show a lack of rehabilitation and weigh against mitigation of the personal conduct security concerns. None of the mitigating conditions fully apply. 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 G, H, J, 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 50-year-old chief of software architecture for a defense contractor. He has several information technology certifications. He has worked for the same employer for 13 years. There is no evidence of security violations, improper disclosure of classified information, or that Applicant 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 mitigation is more persuasive. Applicant's six criminal offenses show a pattern of poor judgment. He is on probation for his 2019 DUI offense which involved serious injury. He possessed and used marijuana on numerous occasions from August 1986 to at least August 2019. He intentionally failed to disclose information of security significance on his April 23, 2020 SCA.

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 failed to mitigate alcohol consumption, criminal conduct, drug involvement, and 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b through 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g, 1.h, and 1.i:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	For Applicant
Subparagraph 4.b, 4.c, and 4.d:	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 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