



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



In the matter of: )  
)  
) ISCR Case No. 22-00966  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Patricia Lynch-Epps, Esq., Department Counsel  
For Applicant: *Pro se*

07/07/2023

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**Decision**

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OLMOS, Bryan J., Administrative Judge:

Applicant did not provide sufficient evidence to mitigate the security concerns under Guideline H, Drug Involvement and Substance Misuse, regarding his use of marijuana and misuse of prescription narcotics as recently as 2021. Additionally, he did not mitigate the security concerns under Guideline E, Personal Conduct, regarding his 2012 attempt to submit a false urine sample for a drug test. Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 14, 2021. On July 15, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. The CAF issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4), National Security Adjudicative Guidelines (AG), effective June 8, 2017.

Applicant answered the SOR on July 21, 2022, and requested a hearing before an administrative judge. The case was assigned to me on April 11, 2023. On April 24, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for May 18, 2023. I convened the hearing as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GX) 1 and 2, which were admitted without objection. Applicant testified and did not submit any exhibits. The record closed on the date of the hearing. DOHA received the hearing transcript (Tr.) on May 25, 2023.

### **Amendment to the SOR**

Before the hearing, Department Counsel amended the SOR to add the following allegation under Guideline E (Personal Conduct):

- 2.a: On or about June 2012, you used someone else's specimen during an employer conducted drug urinalysis test.

Applicant did not answer the new allegation before the hearing. During preliminary matters, he acknowledged receipt of the amended SOR, offered no objections and admitted the allegation. (Tr. 9-12)

### **Findings of Fact**

In his Answer, Applicant admitted SOR ¶¶ 1.a -1.d with explanations. During the hearing, he admitted SOR ¶ 2.a, as noted above. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 41 years old. He has never married and has one child. He did not attend college, instead earning a trade certification in 2004. He submitted his SCA through a previous employer. In September 2022, he began working for his current employer as an electrical technician. He has not previously held a security clearance. (GX 1-2; Tr. 17, 20)

### **Marijuana Use**

Applicant began using marijuana in about 1999 when he was eighteen years old in high school. He would smoke three to seven times per month, mostly with friends. Initially, others gave the marijuana to him. However, he later purchased marijuana from drug dealers at local gas stations. (GX 1-2; Tr. 28-29)

In 2003, Applicant joined a job program through another federal agency. The program required drug screenings for participants. He tested positive for marijuana during his initial screening but was allowed to remain in the program and had no additional positive drug tests. (This is not alleged in the SOR). In 2004, he left the job program and resumed using marijuana. (GX 2; Tr. 33-36)

Over time, Applicant's marijuana use increased to almost daily. His use continued until 2012, when he refused to provide a second urine sample, as requested, during an employer-directed drug test. His refusal was considered a failed drug test by his employer and he was released from his assigned contract. (See further discussion, below). With the loss of income, he could no longer afford marijuana and stopped using it for about a year. However, once he got another job, he resumed smoking marijuana about twice a week. (GX 1-2; Tr. 62-65)

Applicant would often smoke on his own, with his son's mother or with friends. In about 2018, he stopped seeing his son's mother and obtained full custody of his son. Although he stopped seeing the friends with whom he used marijuana, he continued to regularly purchase and use marijuana through about April 2021. He stopped using marijuana in order to pass an initial drug screening for his employer. (Tr. 30-32, 75-76)

In his May 2021 SCA, Applicant disclosed that he had purchased and used marijuana "hundreds of times" up until a month before his security clearance application. However, he also stated his intent to terminate future marijuana use. (GX 1)

At his hearing, Applicant testified that he was committed to not using marijuana in the future. He described his personal growth, health and life changes as well as trying to be a good father as reasons why he no longer intended to use marijuana. (Tr. 69-70, 77)

### **Misuse of Prescription Medications**

In about 2003, while working with the job program, Applicant experienced a painful medical condition and was given a prescription for Percocet. Later, he received Vicodin at the hospital for a toothache. In both instances, he liked the way these narcotics made him feel and described becoming addicted to them. (Tr. 46-49)

After his prescriptions ran out, Applicant continued using Percocet or Vicodin weekly. He would illegally use these narcotics with his son's mother. She would either get them from the doctor's office where she worked, or she would purchase them from a friend. Applicant would give her money to purchase the narcotics. (GX 1; Tr. 51-53)

Applicant testified that he stopped using Percocet in 2018, primarily because it resulted in stomach issues. However, he continued taking Vicodin without a prescription through late 2020 or early 2021. He did not seek out any treatment or counseling to assist in terminating his use. However, he testified that he has no further intent to take narcotics without a prescription because he was getting older and was trying to set a good example for his son. (Tr. 44, 57, 73-77)

## **Attempted Submission of a False Urine Sample for Drug Test**

In about June 2012, following a work injury, Applicant was directed by his employer to take a urinalysis drug test, as referenced above. Knowing that he would test positive for marijuana, Applicant called several friends in an effort to obtain clean urine to submit for the test. He then concealed the friend's urine in his jeans when he entered the testing facility. However, when he submitted the sample, the lab technician suspected something was wrong and asked him to submit a second sample. He refused, pretended to be sick and left the facility. His refusal was considered a failed drug test by his employer and he was released from his assigned contract. (Tr. 59-68)

Although Applicant disclosed details of this event in his Answer to the SOR and at hearing, he provided conflicting accounts during previous aspects of his investigation. In both his SCA and background interview, he stated he did not know why he was requested to submit a second urine sample. Yet, he knew the first sample was not his urine. He later claimed that he did not share details of his efforts to subvert the 2012 drug test during the investigation because he forgot. (GX 1-2; Answer)

Applicant acknowledged that his attempt to submit a false urine sample was a "horrible idea" that he would not repeat. However, he did resume using marijuana afterwards. (Tr. 78)

## **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." 484 U.S. 518, 531 (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 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(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 ¶ 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 not drawn 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. Under 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 to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline H, Drug Involvement and Substance Misuse**

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant began using marijuana in high school in 1999. He stopped using marijuana in 2003 after failing a drug test and again in 2012 after he attempted to submit a false urine sample to a drug test and lost his job. However, besides those two brief periods of abstinence, he regularly used marijuana through spring 2021. He also misused prescription Percocet from 2003 through 2018 and prescription Vicodin from 2003 through about 2020-2021. AG ¶¶ 25(a) and 25(c) apply to SOR ¶¶ 1.a through 1.c.

Applicant's conduct in 2012 was initially alleged under Guideline H, SOR ¶ 1.d which essentially stated that Applicant failed a drug test in 2012, when he refused to comply with a request for a second urinalysis test after the first test proved inconclusive. However, Applicant's urine was never tested in 2012. He explained in his Answer that what he really did was attempt to subvert the test by submitting someone else's urine as his own sample. As a result, the Government amended the SOR to allege that conduct under Guideline E, Personal Conduct. (See discussion below). While he was considered by his employer to have "failed the drug test" since he did not complete it, in fact he did not actually test positive for an illegal drug. Therefore, AG ¶ 25(b) is not applicable and the security concern alleged under SOR ¶1.d has not been established under Guideline H. (The security significance of his personal conduct is discussed under Guideline E, below).

The adjudicative guideline includes two conditions in AG ¶ 26 that could mitigate the security concerns arising from Applicant's drug use:

(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 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 is grounds for revocation of national security eligibility.

Applicant's drug involvement and substance misuse was both recent and frequent. In 2021, he stopped using marijuana and misusing prescription narcotics in order to maintain his employment. He also no longer associates with several of the persons with whom he previously used drugs. He described several recent changes to

his environment and other circumstances that reflect positively on his ability to abstain from future drug use or misuse of prescription narcotics. Nevertheless, on two prior occasions, he stopped using marijuana for a brief period, only to eventually resume his use. He has not yet established a sufficient pattern of abstinence to show that his drug involvement and substance misuse are fully behind him. The circumstances and extent of Applicant's illegal drug use preclude application of either mitigation conditions AG ¶¶ 26(a) or (b).

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern regarding 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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

I have considered the disqualifying conditions for personal conduct under AG ¶ 16 and the following is potentially applicable:

(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.

In 2012, Applicant attempted to submit another person's urine sample for an employer-directed drug test. In so doing, he attempted to conceal his drug use from his employer and failed to follow rules and regulations. Applicant's actions raise serious questions of judgment, trustworthiness and reliability. AG ¶ 16(d) is applicable. The general security concern under AG ¶ 15 also applies.

The adjudicative guideline includes two conditions in AG ¶ 17 that could mitigate the security concerns arising from Applicant's personal conduct:

(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; and

(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.

At his hearing, Applicant described details of his efforts to subvert an employer-directed drug test in 2012. His attempted submission of a false urine sample during the test was not a minor offense. Further, he previously stated during his investigation that he did not know why he was requested to submit a second urine sample. That was plainly not the case since he knew the first sample was not his urine. While significant time has passed since this event, these subsequent conflicting statements about what he did undercut his candor and credibility. This, coupled with the recency of his drug use, continues to raise concerns regarding his reliability, trustworthiness and judgment and do not show sufficient changed circumstances to mitigate the personal conduct concerns. Neither AG ¶¶ 17(c) or (d) is applicable.

### **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 relevant 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 Guideline H and Guideline E in my whole-person analysis.

Applicant regularly used marijuana and misused prescription narcotics for nearly twenty years. In 2012, he attempted to conceal his drug use from his employer by devising an elaborate scheme to submit someone else's urine for a drug test. Despite his recognition that it was a "horrible idea," he continued using marijuana and misusing prescription narcotics until 2021. Although he described several changed circumstances and his own maturation as factors in support of his efforts to remain drug free, the frequency, recency and seriousness of his conduct leaves me with questions and doubts as to his suitability for a security clearance. I conclude that Applicant did not provide sufficient evidence to mitigate the security concerns 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-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Bryan J. Olmos  
Administrative Judge