



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



In the matter of:

)
)
)
)
)

ISCR Case No. 22-01941

Applicant for Security Clearance

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

07/11/2023

Decision

HARVEY, Mark, Administrative Judge:

Guidelines H (drug involvement and substance misuse) and E (personal conduct) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 7, 2022, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 5). On December 7, 2022, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 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* (AGs), effective June 8, 2017. (Item 1)

The SOR detailed reasons why the CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines H and E. (Item 1)

On February 20, 2023, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 4) On March 14, 2023, Department Counsel completed a File of Relevant Material (FORM). Department Counsel included Items 1-6 as exhibits with the FORM; Applicant did not object, and Items 1-6 were admitted into evidence. On March 29, 2023, Applicant received the FORM. Applicant did not respond to the FORM. On June 28, 2023, the case was assigned to me.

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

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a, 2.a, 2.b, and 2.c. (Item 4) He also provided clarifying and mitigating information. (*Id.*) Applicant's admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 45-year-old senior analyst who is seeking employment with a DOD contractor. (Item 5 at 5; Item 6 at 3) In 2014, he was awarded an associate degree, and in 2017, he was awarded a bachelor's degree. (*Id.* at 9) He has been married since 2003, and his three children are ages 6, 17, and 23. (Item 5; Item 6 at 3, 5) He did not disclose any arrests, abuse of alcohol, possession or use of illegal drugs, or security violations. (Item 5)

Drug Involvement and Substance Misuse and Personal Conduct

The SOR states as follows:

SOR ¶ 1.a alleges Applicant used marijuana on various occasions between 1996 and November 2020. (Item 3) In his SOR response he said, "I admit I used THC but it was not between 1996-2020. I tried it in 1996 in college and never did it again until 2020." (Item 4) Tetrahydrocannabinol or THC is the psychoactive ingredient of marijuana.

SOR ¶ 2.a alleges in about November 2020 Applicant was terminated from his employment with S for failing a random drug test by testing positive for marijuana and for attempting to falsify the results of a drug test. (Item 3) In his SOR response he said, "I admit that." (Item 4)

SOR ¶ 2.b alleges on April 7, 2022, Applicant responded to the question on his SCA about why he left employment that he held from August 2014 to November 2020 and stated he was laid off because of COVID. (Item 3; Item 5 at 12) He deliberately failed to disclose the information in SOR ¶ 2.a. (Item 3) In his SOR response he said, "I admit that I wasn't truthful. Everything was moving so fast I should have been more accountable." (Item 4)

SOR ¶ 2.c alleges on April 7, 2022, Applicant responded to the question on his SCA about illegal use of drugs and controlled substances in the previous seven years, and he stated, "No." (Item 3) He deliberately failed to disclose his marijuana use in

November 2020. (*Id.*) In his SOR response he said, “I admit I had THC in my system, and yes, I should have answered yes.” (Item 4)

In Applicant’s May 10, 2022 Office of Personnel Management (OPM) personal subject interview (PSI), he confirmed the information he reported in the SCA, that is, he was laid off from his employment with S due to COVID. (Item 6 at 4) He said he was not involved with illegal drugs in the previous seven years. (*Id.*)

In Applicant’s June 13, 2022 OPM PSI, the investigator confronted Applicant with the allegation that he was terminated from employment with S “for attempting to falsify the results of a random drug test by hiding a bag of urine within his clothing. Subject ultimately failed the drug test and tested positive for marijuana. Subject was terminated 11/2020 and is not eligible for rehire.” (Item 6 at 10) Applicant said he failed to list this information on his SCA due to “oversight.” (*Id.*) Applicant told the OPM investigator that when he went to provide the urine sample, the observer noticed a bulge in one of his pockets. (*Id.*) Applicant said he “accidentally left pill bottle in his cargo pants pocket. The pill bottle contained two high blood pressure pills.” (*Id.*) Applicant threw the pill bottle in the trash as instructed. (*Id.*) He explained the positive test result was due to eating “gummy snacks that were laced with THC.” (*Id.* at 11) He claimed that at the time he consumed the gummy snacks he was unaware of the presence of the THC. (*Id.*) He promised not to use marijuana in the future. (*Id.*) He said he does not associate with marijuana users. (*Id.*)

Applicant concluded his SOR response with the following statement:

I take full responsibility for my actions of not holding myself accountable and being upfront with the truth during the security questions. I have been ashamed of myself because I knew better and chose not to and for that I fully understand why I was rejected. I can promise you and myself that this will never happen again and that I have taken the necessary measures to ensure that it doesn't. It is very important to me that you all trust me to do what I am suppose[d] to do as well as honoring my commitments.

I let myself down, and more importantly I let my wife down, and I let my company down and I regret the whole incident. I am deeply embarrassed to have put myself as well as the agents through something that could have been avoided by being truthful, but I was not thinking clearly at the time, and I have taken full responsibility for my actions. I would be honored to be able to get my security clearance, but I also understand I do not get to make that decision based [on] my decisions. (Item 4 at 3)

In the FORM, Department Counsel described Applicant’s security-significant behavior and noted the absence of persuasive mitigation. The FORM informed Applicant that he had 30 days from the receipt of the FORM “**in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.** . . . If [Applicant does] not file any objections or submit any additional information . . . [his] case will be assigned to an Administrative Judge for a determination

based solely” on the evidence set forth in this FORM. (FORM at 9 (emphasis added)) Applicant did not provide any response to the FORM.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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 Director of National Intelligence 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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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

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 conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition); “(b) testing positive for an illegal drug”; and “(c) illegal possession of a controlled substance. . . .” The record establishes AG ¶¶ 25(a), 25(b), and 25(c). Additional discussion is 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.

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).

Applicant knowingly used marijuana in November 2020, and his marijuana use was detected when his employer administered a urinalysis test. He possessed marijuana before he used it. I do not believe Applicant's claim in his OPM interview that his marijuana use was unknowing or a case of innocent ingestion.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Possession of controlled substances without a lawful prescription is a federal criminal offense. For marijuana, a lawful prescription is not authorized under federal law. Marijuana is listed on Schedule I. See Drug Enforcement Administration listing of controlled substances on Schedules I through IV at https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf.

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a "whole-person concept." This requires

adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)).

Applicant said he used marijuana once in November 2020, and that marijuana use was detected in a urinalysis test. He said he does not intend to use marijuana in the future. However, Applicant attempted to adulterate his urine sample during the collection of his urine sample for urinalysis testing to keep his employer from discovering his marijuana use. He was not honest and candid on his SCA about his marijuana use.

The SOR does not allege that Applicant failed to provide accurate information during his May 10, 2022 OPM PSI, when he confirmed information in his SCA that he was laid off from his employment with S due to COVID. He also told the OPM investigator that he was not involved with illegal drugs in the previous seven years. 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. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014)). The non-SOR allegation will not be considered except for the five purposes listed above.

A false statement during the security clearance process increases the risk that an applicant will not provide accurate information about his or her history of illegal drug use

or rehabilitative efforts. See ISCR Case No. 22-00657 at 3-5 (App. Bd. Apr. 18, 2023) (discussing impact of false statements on SCAs in assessment of credibility of applicant's statements about current and future marijuana use). I am not convinced Applicant's marijuana possession and use "happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [his] current reliability, trustworthiness, [and] good judgment." I am uncertain about his history and future marijuana use. 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 one disqualifying condition 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.

AG ¶ 16(a) applies 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.

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)). In about November 2020 Applicant was terminated from his employment with S for failing a random drug test by testing positive for marijuana and for attempting to falsify the results of a drug test.

On April 7, 2022, Applicant responded to the question on his SCA about why he left employment that he held from August 2014 to November 2020 and stated he was laid off because of COVID. He deliberately failed to disclose the actual information about why he was terminated from employment with S. On April 7, 2022, Applicant responded to the question on his SCA about illegal use of drugs and controlled substances in the previous seven years, and he stated, "No." He deliberately failed to disclose his marijuana use in November 2020.

Applicant failed to honestly and candidly disclose negative information on his April 7, 2022 SCA. He provided false information during his May 10, 2022 OPM PSI, when he verified the accuracy of the false information he provided on his April 7, 2022 SCA. His provision of false information during his OPM PSI will not be considered for disqualification purposes; however, it will be considered for the five purposes on page 7, *supra*.

Applicant knowingly and intentionally fabricated his SCA with intent to deceive. 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 H 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 45-year-old senior analyst who is seeking employment with a DOD contractor. In 2014, he was awarded an associate degree, and in 2017, he was awarded a bachelor's degree. He did not disclose any arrests, abuse of alcohol, or security violations on his SCA, and there is no evidence to the contrary.

The evidence against grant of a security clearance is more persuasive at this time. In November 2020, Applicant unsuccessfully attempted to adulterate his urine sample, which subsequently tested positive for the presence of the THC metabolite. He lied on his April 7, 2022 SCA and during his initial OPM PSI about why he was terminated from employment with company S and about using marijuana in November 2020. I find that he deliberately provided false information on his SCA and during his initial OPM PSI.

An honest and candid self-report of security-relevant personal information is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation.

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 drug involvement and substance misuse and personal conduct security concerns.

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 drug involvement and substance misuse 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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a, 2.b, and 2.c:	Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge