



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 22-01267
)	
Applicant for Security Clearance)	

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro Se*

09/07/2023

Decision

HOGAN, Erin C., Administrative Judge:

Applicant mitigated the security concern under Guideline H (Drug Involvement and Substance Misuse). He did not mitigate the security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 30, 2020. The Defense Counterintelligence & Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) on September 28, 2022, detailing security concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, Personal Conduct. DCSA CAS acted 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant answered the SOR on October 31, 2022, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals

(DOHA). On February 22, 2023, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 8. Applicant received the FORM on March 31, 2023. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the prescribed time period. The SOR and the answer (Items 1 and 2) are the pleadings in the case. Items 3 through 8 are admitted into evidence without objection. The case was assigned to me on June 20, 2023.

Findings of Fact

In Applicant's SOR response, he admitted SOR allegations ¶¶ 1.a and 2.a. He denied SOR allegations ¶¶ 2.b – 2.e. Applicant's admissions are accepted as findings of fact. (Item 2)

Applicant is 35 years old. Since January 2020, he has been employed by a defense contractor and is applying for a security clearance. He served on active duty with the United States Army from January 2007 to August 2011, separating with an honorable discharge. His highest level of education is a general equivalency degree (GED). He is not married but currently lives with a cohabitant. They have a three-year-old child. (Item 3)

The SOR alleges under Guideline H that Applicant smoked marijuana (THC) in November or December 2019 and tested positive for THC in a work-related urinalysis test. (SOR ¶ 1.a: Item 4; Item 6) Under Guideline E, Personal Conduct, it is alleged Applicant was fired by his employer in 2019 after his positive urinalysis test. (SOR ¶ 2.a: Item 4; Item 6) Several falsifications are also alleged under Guideline E, to include:

SOR ¶ 2.b: Applicant falsified material facts in response to DOD CAF Interrogatories, dated November 9, 2021, in response to question 8, "Have you ever failed a scheduled or random drug test?" Applicant answered "No." He failed to mention his 2019 urinalysis test which was positive for THC. (Item 4; Item 5 at 5; Item 6)

SOR ¶ 2.c: Applicant falsified his January 31, 2020 SCA in response to Section 13A - Employee Activities, concerning his employment with Employer A, "for this employment, have any of the following happened to you in the last seven (7) years? Fired; Quit after being told you would be fired; Left by mutual agreement following charges or allegations of misconduct; [or] Left by mutual agreement following notice of unsatisfactory performance?" Applicant answered, "No." He failed to disclose he was fired by Employer A because of his positive urinalysis in 2019. He listed on the SCA that his reason for leaving his employment with Employer A was "baby on the way." (Item 3 at 14-15; Item 4 at 7-8)

SOR ¶ 2.d: Applicant falsified his January 31, 2020 SCA in response to Section 23 – Illegal Use of Drugs or Drug Activity. "In the last seven (7) years, have you illegally used any drugs or controlled substances?" Applicant answered "No." He failed to disclose his 2019 marijuana use. (Item 3 at 31; Item 4)

SOR ¶ 2.e: Despite receiving a citation for driving with no evidence of current registration in March 2019, Applicant continued to drive the same vehicle without a valid registration. He received another citation for the same offense in November 2019. He was found guilty of both offenses. He did not pay the \$867 fine and civil assessment that was imposed for the first offense, which resulted in the court sending the debt to a collection agency in June 2021. (Items 7 – 8) He admits that he drove his car without a current registration. He continued to drive the car after receiving a citation because it was the only way he could get to work. Although he claims he paid the fines and civil assessment, he did not provide proof that it was paid. (Item 6 at 9-11) In his Response to the SOR, Applicant denied this allegation, stating that he was not aware of this issue. (Item 2)

In his response to the SOR, Applicant claims he misunderstood the questions regarding SOR ¶¶ 2.b – 2.d. In other words, he did not intentionally withhold any information on his security clearance application. On April 30, 2020, he was interviewed by an investigator in conjunction with his security clearance background investigation. The investigator questioned him about his employment with Employer A, specifically whether he ever received a written warning, been officially reprimanded, suspended or disciplined for misconduct in the workplace, or terminated. Applicant replied, “No.” The investigator confronted him with information that Employer A fired him because he failed a post-accident drug screen. Once confronted, Applicant admitted to having a positive drug test for marijuana in November or December 2019. He said Employer A allowed him to resign in lieu of being terminated. He admitted to using marijuana on one occasion to treat back pain after he hurt his back at work. Employer A later sent him to an urgent care clinic to have his back checked because it was a work-related injury. Applicant was required to provide a urine sample as part of the treatment. The sample tested positive for marijuana. (Item 6 at 7-8)

A few days later, Applicant’s supervisor informed him that he violated the drug policy and would be terminated. He told his supervisor that he would resign because he needed a better paying job. He believed his employment record with Company A would indicate he resigned. He did not list his termination on the January 2020 SCA because he did not believe he was terminated. He claims he only used marijuana on one occasion. He has not used marijuana since. He is aware that he is not allowed to use marijuana or other drugs while holding a security clearance. (Item 6 at 8)

The investigator who interviewed Applicant prepared an unsworn summary of Applicant’s Personal Subject Interview. On September 18, 2022, Applicant certified that the unsworn summary of his April 30, 2020 personal subject interview was accurate in response to DOHA interrogatories. (Item 6) He indicated:

I swear (or affirm) that the statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form or attachments can be punished by fine or imprisonment or both.

In response to the same interrogatory, he answered, “Yes,” to question (1) “Does the report accurately reflect the information that you provided during your interview?” (Item 6 at 2, 17-18) I find SOR ¶ 2.b for Applicant. While Applicant denied failing “a scheduled or random drug test” in response question 8 on interrogatories sent to him by the Department of Defense on November 9, 2021, he previously admitted to testing positive for marijuana during a work-related urinalysis during his personal subject interview on April 30, 2020. The Government was on notice that Applicant failed a urinalysis test. His incorrect answer to question 8 on the November 2021 Interrogatory was not material because he admitted his failed urinalysis during his personal subject interview after being confronted by the background investigator.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 access to classified information will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. 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 as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern for drug involvement:

The illegal use of controlled substances . . . 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.

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

AG ¶ 25(a) any substance misuse;

AG ¶ 25(b) testing positive for an illegal drug; and

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The record evidence shows that Applicant possessed and used marijuana on one occasion to treat his back pain after a work-related injury. His illegal use of marijuana resulted in a positive urinalysis test during his employment with Employer A. AG ¶¶ 25(a), 25(b), and 25(c) apply.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline H. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

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

AG ¶ 26(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.

Applicant used marijuana on one occasion after suffering a back injury at work. This incident occurred four years ago. There is no evidence that he used and possessed

marijuana on more than one occasion. AG ¶ 26(a) applies. The concern under Guideline H is found for Applicant.

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16: Conditions that could raise a security concern and may be disqualifying include:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶ 16(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 the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(3) a pattern of dishonesty or rule violations.

AG ¶ 16(a) applies with respect to SOR ¶¶ 2.c and 2.d. Applicant's illegal marijuana use, positive urinalysis, and resignation in lieu of being terminated occurred a few months before he completed his January 2020 security clearance application. These incidents

were very recent at the time he completed his SCA. The questions in Section 13A – Employment Activities, and Section 23 – Illegal Use of Drugs or Drug Activity were clear. I cannot conclude Applicant misunderstood these questions. I also note that Applicant did not disclose his illegal marijuana use, positive urinalysis and termination from Employer A, until he was confronted by the investigator with the facts during his April 2020 background investigation interview.

AG ¶ 16(d) applies with respect to the SOR ¶¶ 2.a and 2.e. Applicant's past conduct has shown a pattern of dishonesty or rule violations. He failed to follow his workplace drug testing policy, which resulted in his termination in 2019. He also failed to follow his state traffic laws, specifically, he failed to renew his automobile registration and continued to drive his unregistered automobile. He initially received a citation for this offense in March 2019. He continued to drive his unregistered car and received another citation in November 2019. He was found guilty and was fined and received a civil assessment. He did not prove he paid the fines and civil assessments. His failure to follow rules raises questions about his judgment, trustworthiness, and reliability.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 potentially apply

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(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

AG ¶ 17(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.

AG ¶ 17(a) does not apply with respect to Applicant's deliberate falsifications regarding his illegal marijuana use and subsequent termination by Employer A on his January 2020 SCA, as alleged in SOR ¶¶ 2.c and 2.d. During his personal subject interview, he did not admit that he used marijuana and later tested positive for marijuana in a subsequent urinalysis until he was confronted about it. While he believed he was allowed to resign rather than be fired from Employer A, he should have answered affirmatively in response to Section 13A - Employment Activities, with regard to whether in the last 7 years had he ever been fired, or quit after being told you would be fired? He did not volunteer this information until he was confronted by the investigator conducting his background investigation interview. He did not make a prompt good-faith effort to correct his falsehoods before being confronted with the facts.

AG ¶ 17(c) does not apply because Applicant's falsifications on his SCA are not considered minor. A person applying for a security clearance is expected to be truthful with the Government at all times. Applicant's deliberate falsifications on his SCA regarding his illegal marijuana use and his subsequent termination from Employer A raises questions about his reliability, trustworthiness, and judgment.

AG ¶ 17(d) does not apply because Applicant has a history of rule violations that raise questions about his reliability and judgment. He has not demonstrated any steps taken to prevent future rule violations. In fact, the fines for the traffic citation alleged in SOR ¶ 1.e remain outstanding.

Applicant did not mitigate the concerns raised under Personal Conduct.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E and the AG ¶ 2(d) factors in this whole-person analysis.

I considered Applicant's honorable service with the United States Army. Applicant's illegal marijuana use occurred more than four years ago. There is no evidence in the record indicating that Applicant's illegal use of marijuana occurred more than one time. I find for Applicant related to the concerns raised under Guideline H.

More concerning is Applicant's deliberate failure to disclose his illegal drug use and subsequent termination from Employer A on his January 2020 SCA. This occurred just two months after he was terminated by Employer A for testing positive for marijuana during a urinalysis test. He did not admit to these issues until he was confronted by the investigator conducting his background investigation. With the exception of SOR ¶ 2.b,

all allegations under Guideline E raise questions about Applicant's trustworthiness and reliability. Overall, I conclude the concerns under personal conduct are not mitigated.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a, 2.c -2.e:	Against Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented, 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.

Erin C. Hogan
Administrative Judge