



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 22-01397
)
 Applicant for Security Clearance)

Appearances

For Government: Daniel O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

09/29/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct), J (Criminal Conduct), and H (Drug Involvement and Substance Misuse). The concerns under Guidelines J and H are mitigated, but the Guideline E concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 12, 2022. He submitted a second SCA on July 24, 2022. On November 18, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E, H, and J. The DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on December 12, 2022, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 19, 2023, and the case was assigned to me on June 30, 2023. On August 1, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on August 31, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I kept the record open until September 22, 2023, to enable him to submit additional evidence. He timely submitted AX E through AX I, which were admitted without objection. DOHA received the transcript (Tr.) on September 12, 2023.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations, with explanations, except for the allegation in SOR ¶ 3.a, which he denied. His explanations for the allegations in SOR ¶¶ 2.b, 2.c, and 2.d amount to denials, and I have considered them as such. His admissions are incorporated in my findings of fact.

Applicant is a 26-year-old forklift operator employed by a defense contractor since June 2016. He has never married. He has served in the U.S. Army Reserve (USAR) since January 2016. His military job is culinary specialist. He received an Army Achievement Medal in March 2019. (AX H) He has held a security clearance since October 2015. (Tr. 5, 16; GX 10). He needs a security clearance to enter the shipyard for his civilian job. (Tr. 16)

In 2014, while Applicant was in high school, one of his friends who was with him grabbed another person's laptop. Applicant and his friend ran away, but they were later detained and charged with felony larceny. Because Applicant was a juvenile, the felony charge was *nolle prosequi*, and he was placed on probation for six months and required to apologize and pay restitution. (Tr. 29-30) This incident was not alleged in the SOR.

In 2015, while Applicant was still in high school, he was with a friend who started throwing rocks at a girl. Applicant testified that he did not throw any rocks, but he was charged with assault and battery and required to appear in court. In November 2015, the charge was dismissed on "request of petitioner." (AX B) Applicant enlisted in the USAR in August 2015, but his active duty for basic training was delayed until the case was resolved. This incident was not alleged in the SOR.

In March 2017, while Applicant was on active duty, he attended a gun show and attempted to purchase a firearm. When he filled out the criminal consent form for his background check, he answered "No" to a question whether he had ever been arrested for a felony. He did not disclose his arrest for felony larceny in 2014. Based on this omission, he was charged with making a false statement on a firearm consent form. (GX 5) In June 2018, the charge was dismissed. (GX 4 at 9) When Applicant was questioned by his platoon sergeant, he told him that he had misunderstood the question. At the

hearing, Applicant testified that he thought the 2014 incident was “cleared” and he was not required to report it on the criminal consent form. (Tr. 37) Applicant’s USAR commander was informed of the felony charge, Applicant’s explanation, and the ultimate dismissal of the charges. His commander told the battalion security manager that he wanted to keep Applicant in the unit and wanted Applicant to keep his security clearance. (GX 10; AX A) This incident is alleged in SOR ¶ 1.a. In Applicant’s answer to the SOR, he admitted that he was charged with a felony, and he apologized for his negligence.

In September 2019, Applicant was charged with speeding 82 miles per hour (mph) in a 60-mph zone. The charge was amended to speeding 71 mph in a 60-mph zone, an infraction. (GX 5 at 3) He pleaded guilty and was fined \$66. This incident was not alleged in the SOR.

In October 2019, Applicant was arrested and charged with driving while intoxicated (DWI) (1st offense) and reckless driving. He was driving at night in the rain, and he ran off the road and hit a light pole. He testified that he had not been drinking, but he failed a field sobriety test because he could not recite the alphabet backwards. Two breathalyzer tests failed to detect alcohol. (Tr. 40-41) He went to trial, was represented by an attorney, and was found not guilty of both offenses. (GX 5 at 7) This arrest for DWI was alleged in SOR ¶ 1.b, and Applicant admitted it in his answer. The charge of reckless driving was not alleged in the SOR.

In July 2020, Applicant was charged with driving 44 mph in a 30-mph zone, an infraction. Disposition was deferred and the charge was dismissed in December 2020 (GX 5 at 9) This charge was not alleged in the SOR.

In August 2020, Applicant was charged with assault and battery involving his girlfriend at the time. They began arguing while they were in his car. When they got out of the car, the girlfriend threw a drink at him and tried to slap him. He went into the girlfriend’s house to retrieve his belongings, and when he stepped outside, his girlfriend sprayed him with pepper spray. He pushed her away with the palm of his hand and hit her nose, which began bleeding, and she fell to the ground. He then left the scene. After he was served with a warrant, he filed an assault complaint against her. Both parties were represented by attorneys, and they mutually agreed to dismiss both complaints. (Tr. 48-51; GX 3 at 7) This incident is alleged in SOR ¶ 1.c, and Applicant admitted being charged in his answer to the SOR.

On a later date in August 2020, Applicant was in a restaurant with a female friend. They had agreed that each would pay their own bill, but his friend left without paying her bill. The restaurant owner demanded that Applicant pay both bills, but when he refused, the restaurant owner called the police, who charged him with restaurant fraud. Applicant testified that he would have paid the entire bill if he had enough money, but he was “in a tough spot at the time.” (Tr. 54) He eventually paid it. (Tr. 55) He went to court on October 7, 2020, and was found not guilty. (GX 3 at 8; GX 4 at 10) This incident is alleged in SOR ¶ 1.d, and Applicant admitted his arrest in his answer.

In April 2021, Applicant was charged with evasion of a traffic control device, reckless driving, and failure to obey a highway sign. The reckless driving charge was reduced to exercising improper control. He was convicted of improper control and failure to obey a highway sign. The charge of evading a traffic control device was dismissed. He was fined \$25 for each of the two other violations. (GX 5 at 11-15) He testified that he was driving through a very congested and confusing construction zone, and he drove around one of the traffic barriers. (Tr. 56-57) This incident is alleged in SOR ¶ 1.e, and Applicant admitted the arrest in his answer. SOR ¶ 1.e is not fully established, because the failure to obey a traffic sign is an infraction, not a criminal offense. The reckless driving, reduced to exercising improper control, was not alleged.

On March 22, 2022, Applicant underwent a random urinalysis administered by his USAR unit that tested positive for tetrahydrocannabinol (THC). (GX 7) In a sworn statement he provided to his company commander, he stated that he purchased an electronic cigarette (vape) from a gas station. He stated that he specifically asked the store clerk if the vape he purchased contained THC, and he was informed by the store clerk that it did not. The information from the store clerk was incorrect, and Applicant tested positive for THC. (GX 8 at 5)

In June 2023, Applicant voluntarily provided a urine sample to his civilian employer, and the results were negative for cocaine, marijuana, opiates, amphetamines, and phencyclidine. (AX E) He was screened for drug involvement and was found to have no alcohol or other drug problem. (AX D)

When Applicant submitted his SCA in July 2020 he answered “no” to the question asking if, in the past seven years, he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding against him; if he had been arrested by any police officer, sheriff, marshal or other type of law enforcement official; and if he had been charged, convicted, or sentenced for a crime in any court. When he was interviewed by a security investigator in October 2020, he told the investigator that he did not realize that he had been charged with a felony for his involvement in the laptop theft in 2014. When the investigator confronted him with his arrest record, he told the investigator that he did not list his arrests in his SCA because he did not read the questions carefully. (GX 3 at 7-8) In his answer to the SOR, he stated that he did not disclose his arrest record in July 2020 because he misread the question.

Applicant submitted another SCA in May 2022, and he answered “no” to the same question about his arrest record. He also answered “no” to a question asking if he had ever been charged with an offense involving alcohol or drugs, and he did not disclose his arrest for DUI in October 2019. In his answer to the SOR, he claimed that he misread the questions.

After Applicant was charged with falsifying the criminal consent form in March 2017, his commander requested that he retain his security clearance and remain in the unit. (AX A) Applicant received the Army Achievement Medal in March 2019 for exceptional service. (AX H) He completed a course in Security Education, Training, and

Awareness, in June 2020. (AX I) A fellow member of the USAR has known Applicant since September 2019 and regards him as a friend and “awesome mentor.” Her position in the USAR is not reflected in her statement. (AX G)

One of Applicant’s co-workers states that he is a skilled forklift operator and a very diligent worker. His work ethic and dedication are noted and appreciated by all the employees working with him. (AX F)

Policies

“[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 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. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "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."

The SOR alleges that Applicant made a false statement on a firearm consent form (SOR ¶ 1.a), was arrested and charged with DWI (SOR ¶ 1.b), was arrested and charged with assault and battery (SOR ¶ 1.c), was arrested and charged with restaurant fraud (SOR ¶ 1.d), and arrested and charged with evasion of a traffic control device and failure to obey a highway sign (SOR ¶ 1.e)

SOR ¶ 1.a is not established. Based on Applicant's age and the lenient treatment he received for failing to disclose his juvenile arrest on the firearm consent form, I am not satisfied that he knew he had been charged with a felony when he submitted the firearm consent form.

SOR ¶ 1.b is not established, because the only evidence of intoxication was Applicant's inability to recite the alphabet backwards. The breathalyzer did not detect alcohol.

SOR ¶ 1.c is not established. The evidence showed that Applicant and his then girlfriend had an affray initiated by her and he tried to push her away. Both accused the other of assault, and both decided to withdraw their accusations.

SOR ¶ 1.d is not established. Applicant eventually paid his restaurant bill, and he was found not guilty.

SOR ¶ 1.e is not established. The charge of evading a traffic control device was dismissed, and failure to obey a highway sign is an infraction, but not a criminal offense. The conviction of exercising improper control was not alleged.

Although Applicant admitted each of the arrests alleged in the SOR, he refuted the allegations of criminal conduct. No disqualifying conditions are established under this guideline.

Guideline H, Drug Involvement and Substance Misuse

The SOR alleges that Applicant used marijuana with varying frequency from about January 2022 to about March 2022, while granted access to classified information (SOR ¶ 3.a, and that in March 2022 he tested positive for marijuana (SOR ¶ 3.b)

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *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.

The relevant disqualifying conditions under this guideline are:

AG ¶ 25(a): any substance misuse (see above definition);

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

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

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

SOR ¶ 3.a is not fully established. The evidence establishes only one instance of marijuana involvement in January 2022. Even though Applicant held a security clearance, there is no evidence that he had access to classified information. A security clearance alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (i.e., a security

clearance), but also must have signed a nondisclosure agreement and have a “need to know.” See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022).

SOR ¶ 3.b is established by the evidence of Applicant’s urinalysis that tested positive for THC. His urinalysis was conducted by his USAR unit. The 2019 edition of the Manual for Courts-Martial (MCM) was applicable to his conduct. The MCM, Part IV, ¶ 50.c.(5) provides that possession or use of a controlled substance is not wrongful (i.e., illegal) if it was without knowledge of the contraband nature of the substance. This requirement of knowledge is also recognized in many civilian courts.

Knowledge of the contraband nature of the substance is not an element of AG ¶ 25(b). Thus, I conclude that AG ¶ 25(b) is established. However, AG ¶¶ 25(a) and 25(c) are not established because the evidence shows that Applicant did not know that he was in possession of an illegal substance. AG ¶ 25(f) is not established because there is no evidence that Applicant had actual access to classified or sensitive information.

The relevant mitigating condition is 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.” This mitigating condition is established. Applicant’s drug involvement was a single, isolated incident that gained his attention. He has a long record of arrests, but none were for drug-related offenses. He did not know he had ingested THC until he received the urinalysis results. He realizes that any further drug involvement will cost him his civilian and military jobs, and recurrence is unlikely.

Guideline E, Personal Conduct

SOR ¶ 2.a cross-alleges the conduct alleged in SOR ¶¶ 1.a through 1.e. SOR ¶¶ 2.b and 2.c allege falsification of an SCAs submitted in May 2022. SOR ¶ 2.d alleges falsification of an SCA submitted in July 2020.

The security 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The following disqualifying condition under this guideline is relevant:

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.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is not a neophyte regarding the security-clearance process. He submitted an SCA at some time after he enlisted in the USAR, and he received a security clearance. He completed another SCA in July 2020 in which he omitted information about his arrest record. He was confronted with those omissions when he was interviewed by a security investigator in October 2020. Nevertheless, he omitted the same information when he submitted a third SCA in May 2022. His explanations for omitting the information about his arrest record from his July 2020 SCA and May 2022 SCA are not credible

The fact that Applicant was not convicted of most of the offenses alleged in the SOR does not mitigate his falsification of the SCAs concerning the related arrests. An act of falsification has security significance independent of the underlying conduct. See ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). The mitigation of the underlying conduct has little bearing on the security significance of the falsification, particularly where there are multiple falsifications. ISCR Case No. 08-11944 at 3 (App. Bd. Aug 15, 2011).

The following mitigating conditions are relevant:

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

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.

AG ¶ 17(a) is not established. Applicant made no effort to correct the omissions from his July 2020 until he was confronted with the evidence during his security interview in October 2020. Even after being confronted with his omissions, he made the same omissions in his May 2022 SCA.

AG ¶ 17(c) is not established. Applicant's falsifications of his two SCAs are recent and serious offenses. Falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines J, H, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under those Guidelines and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the security concerns under Guideline J and mitigated the security concerns under Guideline H, but he has not mitigated the security concerns under Guideline E.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Paragraph 3, Guideline H (Drug Involvement)	FOR APPLICANT
Subparagraphs 3.a and 3.b:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge