



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



In the matter of: )  
)  
) ISCR Case No. 22-01311  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: Chris Snowden, Esq.

11/28/2023

**Decision**

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guidelines H (drug involvement and substance misuse), J (criminal conduct), and E (personal conduct) are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On September 30, 2020, and April 19, 2018, Applicant completed and signed Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance applications (SCA). (Government Exhibit (GE) 1; GE 2) On November 18, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAS 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, J, and E. (HE 2) On December 28, 2022, Applicant provided a response to the SOR and requested a hearing. (HE 3) On March 8, 2023, DOHA issued an amended SOR. (HE 4) On March 29, 2023, Applicant provided his response to the Amended SOR. (HE 5) On April 13, 2023, Department Counsel was ready to proceed.

On May 26, 2023, the case was assigned to me. On June 23, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for August 10, 2023. (HE 1) The hearing was rescheduled, and DOHA issued the second notice on August 10, 2023, setting the hearing for September 8, 2023. The hearing was held as rescheduled.

Department Counsel offered 16 exhibits into evidence; and Applicant offered 15 exhibits into evidence. (Transcript (Tr.) 13, 15-16; GE 1-GE 16; Applicant Exhibit (AE) A-AE O) Applicant objected to the admissibility of GE 3, an Office of Personnel Management (OPM) summary of an interview of Applicant because it was not authenticated or adopted by Applicant, and I sustained the objection to GE 3. (Tr. 14-15) GEs 1, 2, and 4-16 and AE A to AE O were admitted. (Tr. 15) GE 3 is not admitted; however, it is attached to complete the record. On September 22, 2023, DOHA received a transcript of the hearing. Applicant provided two exhibits after his hearing, which were admitted without objection (AE P-AE Q). The record closed on September 22, 2023. (Tr. 110)

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

### **Findings of Fact**

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a through 1.d, and 1.f, and he denied the remaining SOR allegations. (HE 3) He admitted the allegations in the Amended SOR. He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 50-year-old maintenance technician who has worked for federal contractors since 2009. (Tr. 25, 68-70; GE 1) In 1991, he graduated from high school. (*Id.*) In 2005, he completed an apprenticeship. (*Id.*) From 2017 to 2020, he was self-employed in addition to his employment by a contractor. (*Id.*) He has not served in the military. (*Id.*) His resume and biography provide additional details about his background and professional experience. (AE J; AE N)

For many years, Applicant was an elite athlete who competed in international competitions on behalf of the United States. (Tr. 18; AE L) As part of his sports career, he met the President and First Lady at the White House. (AE L; AE M) He ended his competition in the sport three years ago. (Tr. 19)

In 2002, Applicant married, and in 2015, he was divorced. (Tr. 19; GE 1) One of his children was born in 2002, and the other five children were born in 2006 (quintuplets). (Tr. 20-21; GE 1; AE F; AE O) He has held a security clearance since 2009. (Tr. 71) He

has had access to a military base; however, he never had access to classified information. (Tr. 26, 44, 71-72)

### **Drug Involvement and Substance Misuse and Criminal Conduct**

Applicant said he does not currently use illegal drugs. (Tr. 34, 42; AE B; AE M; AE Q) He said he ended his use of illegal drugs when he was arrested for driving under the influence of alcohol (DUI) in 2019. (Tr. 35) He first used marijuana around 1994 or 1995. (Tr. 75) In March 1997, he was arrested for possession of drug paraphernalia. (Tr. 73; GE 2) His first driving under the influence of alcohol arrest was in 1998. (Tr. 75) His driver's license was suspended for two years. (Tr. 76) In 2000, he received a ticket for driving with a suspended driver's license. (Tr. 76) In 2002, he was arrested for DUI, and he pleaded guilty to negligent driving. (Tr. 77; GE 2) He said he only used marijuana once before 2005. (Tr. 74) Multiple complaints and allegations were made against Applicant from 2008 to 2016 from a neighbor, church members, and family members about his treatment of his former wife, children, or both; however, none of the complaints resulted in convictions. (Tr. 78-85) He said he could not remember half of his arrests and "the years all run together." (Tr. 77) As to those making complaints about him, he said "They're cop callers. They call them all the time for nothing." (Tr. 85)

Applicant had difficulty remembering dates of events and periods of sobriety. He said, "I have no recollection of what year was what. The years, they're written down. I could look at it and read them and know them. But that's how I'd have to do it. If I'm just picking it out of the air, out of the sky and trying to remember, I have no . . . recollection." (Tr. 98-99) The years were "just a blur" to him. (Tr. 104) He said the SCAs are a good source for dates of events. (Tr. 103)

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from about April 2005 to about May 2020. He occasionally used marijuana during these timeframes. (Tr. 28) When he was in international sports competitions, he refrained from marijuana use for extended periods of times, sometimes for five to seven years. (Tr. 29) He said his actual marijuana usage was "very minimal." (SOR response) A June 1, 2017 Chemical Dependency Assessment Summary (CDAS) states Applicant "reports smoking marijuana for the first time at age 18. Recent use is described as a few puffs three times a week. His last reported use was February 2017." (GE 13 at 1)

SOR ¶ 1.b alleges Applicant used methamphetamine with varying frequency from about April 2005 to about May 2020. After his divorce in 2015, he was involved with a woman who introduced him to methamphetamine. (Tr. 32-33, 106) He said he used methamphetamine about two or three times. (Tr. 33, 107) He said the last time he used methamphetamine was around the 2019 DUI arrest when methamphetamine were found in his pocket. (Tr. 107) He does not associate with the woman who gave him methamphetamine. (Tr. 107)

SOR ¶ 1.c alleges Applicant used cocaine with varying frequency from about December 1993 to about December 1996. He admitted the alleged cocaine usage, and said he was not using cocaine "with any frequency." (SOR response) He has not used

cocaine after 1996. (Tr. 42) A June 1, 2017 CDAS states Applicant “reports occasional snorting cocaine in his 30’s.” (GE 13 at 1)

SOR ¶ 1.d alleges Applicant was arrested in about September 2020 and charged with DUI. SOR ¶ 1.e alleges Applicant tested positive on a urinalysis test in about May 2020 for marijuana, methamphetamine, and amphetamine. Department Counsel moved to withdraw SOR ¶¶ 1.d and 1.e because more accurate information was contained in Amended SOR ¶ 2.b. (Tr. 112) Applicant did not object, and I granted the motion. (Tr. 112)

SOR ¶ 1.f alleges Applicant used amphetamine, methamphetamine, and marijuana from about January 2018 to about May 2019 while granted access to classified information. He admitted the SOR allegation, and he said, “I’m not an everyday every month user. I was hanging around the wrong person and made bad choices on two occasions. (SOR response)

SOR ¶ 1.g alleges Applicant received alcohol and drug counseling from about September 2020, and he was diagnosed with alcohol use disorder in early remission and cannabis use disorder in early remission. (Tr. 38; GE 11 at 7) He received inpatient treatment for five or six weeks. (Tr. 30)

Applicant provided urine samples on September 15, 2020, and August 25, 2023, which tested negative for the use of illegal drugs; however, he may have received advance notice of the tests. There was no evidence presented about the detection windows for use of marijuana and methamphetamine related to these two drug tests. (SOR response; AE M)

SOR ¶ 2.a alleges Applicant engaged in criminal conduct as alleged in SOR ¶¶ 1.a through 1.f. He is not currently attending drug or alcohol counseling or therapy. (Tr. 105)

Amended SOR ¶ 2.b alleges that on or about May 20, 2019, Applicant was arrested and charged with DUI. “The blood test taken incident to [his] arrest revealed the presence of tetrahydrocannabinol (THC), methamphetamine, and amphetamine[s]. [He] pled guilty to a lesser offense and was placed on probation for two years.” (Amended SOR ¶ 2.b)

The police report for the May 20, 2019 arrest states that the police officer noticed the smell of marijuana emanating from Applicant’s vehicle; Applicant was not alone in the vehicle; he asked Applicant when he last smoke marijuana; and Applicant told the police officer that he “ha[d] a few hits from a joint” about five hours earlier. (GE 8 at 2) Applicant said he had marijuana inside the vehicle. (*Id.*) The police officer asked Applicant how often he smoked marijuana, and Applicant initially said he smoked weekly, and then he clarified, “he smoked nightly before bed.” (*Id.*) The police report does not indicate marijuana was found in his vehicle. (GE 8)

A September 2, 2020 progress note from his drug and alcohol treatment, states that Applicant said he “smokes nightly” and “started out smoking weed on weekends then

smokes before bedtime.” (GE 11 at 2, 4) He also indicated he stopped using marijuana. (GE 11) The treatment summary states:

[Applicant] reports smoking marijuana for the first time at age 18, and became a regular user at age 20 when he would use cannabis on weekends. He reports his cannabis use to have decreased in the past 10 years. His last reported use was in May 2019 when he would occasionally use cannabis at nighttime for relaxing. (GE 11 at 6)

Applicant agreed the May 20, 2019 blood test results reflected THC, methamphetamine, and amphetamines. (Tr. 38) He tried some drugs shortly before the arrest. (Tr. 40) He was unsure of the disposition of the charges or allegations. (Tr. 40) After the successful completion of probation and an eight-hour defensive driving course, the DUI charge was reduced to negligent driving. (SOR response; AE C; AE D)

Amended SOR ¶ 2.c alleges on about March 23, 2017, Applicant was “arrested for and charged with two counts of Domestic Violence Assault, 4th degree. [He] entered into a Pre-Trial Diversion Agreement.” Applicant’s children called their mother and complained that Applicant was assaulting them. (Tr. 36-37; 45-51, 86-90) His former spouse and her boyfriend arrived, and a physical altercation between Applicant and the boyfriend of his former spouse and Applicant’s former spouse ensued. (*Id.*) Applicant said his former spouse’s boyfriend was the aggressor. (*Id.*) He accused his former spouse, her boyfriend, and his children of lying about his behavior. (*Id.*) The police arrested Applicant. (Tr. 37) When the police searched him, they found methamphetamine in his pocket. (Tr. 47) Applicant said his girlfriend put the methamphetamine in his pocket. (Tr. 47) He pleaded guilty to the two domestic violence charges in return for having the methamphetamine charge dismissed. (Tr. 55) He entered a diversion program. (Tr. 55) He successfully completed a one-year anger management program and a 10-week parenting class. (Tr. 55; AE E) He is on good terms with his former spouse and children. (Tr. 56)

Amended SOR ¶ 2.d alleges on about October 6, 2014, Applicant was “arrested for contacting [his] ex-wife in violation of a no-contact order then in place.” Applicant said he was assisting his daughter, and he was falsely accused of violating the restraining order. (Tr. 59-60) The charge was dismissed. (Tr. 58, 61) There is currently no restraining order on Applicant. (Tr. 61)

Applicant said he “will never misuse substances in the future. This shall include use or possession of any illegal drug or the use of a legal prescription drug without a valid prescription or in a manner inconsistent with their intended purpose.” (AE A) He “acknowledge[d] that any future involvement or misuse is grounds for revocation of national security eligibility.” (*Id.*)

## **Personal Conduct**

Applicant said he filled out five SCAs from 2018 to 2022. (Tr. 62) However, only two SCAs were admitted into evidence. (GE 1; GE 2) Applicant said he did not report his involvement with illegal drugs on his SCAs because he hurried through the SCAs, and he

was complacent. (Tr. 63) He revealed his arrests to security when they occurred. (Tr. 64) He believed he did not need to disclose information that was previously disclosed. (Tr. 64) He said he was honestly trying to disclose accurate information on his SCAs. (Tr. 65)

Amended SOR ¶ 3.a supersedes and replaces SOR ¶¶ 3.a, 3.b, and 3.c. (Tr. 113) Amended SOR ¶ 3.a alleges Applicant falsified material facts on his September 30, 2020 SCA when he responded to the following question in Section 23 – Illegal Use of Drugs or Drug Activity as follows:

“In the last seven (7) years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance.” [He] answered: “No,” and thereby deliberately failed to disclose that information as set forth in [SOR ¶¶] 1.a through 1.f. above.

In his September 30, 2020 SCA, Applicant disclosed that in March 2017, the police arrested him for possession of methamphetamine (one count), and domestic violence assault in the 4<sup>th</sup> degree (two counts). (GE 1 at 34) In October 2017, he was found guilty of the two assaults. (*Id.*) The methamphetamine charge was dismissed. (*Id.* at 35) He completed two years of probation. (*Id.*) In May 2019, he was arrested for DUI, and he was pending trial, which was scheduled for October 2020. (*Id.* at 36) However, he did not disclose any possession and use of illegal drugs which was unrelated to the charges in law enforcement and court records. (*Id.* at 37-38)

Amended SOR ¶ 3.b alleges Applicant falsified material facts on his April 19, 2018 SCA when he responded to the following question in Section 23 – Illegal Use of Drugs or Drug Activity as follows:

“In the last seven (7) years, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance.” [He] answered: “No,” and thereby deliberately failed to disclose that information as set forth in [SOR ¶¶] 1.a through 1.f. above.

In his April 19, 2018 SCA, Applicant disclosed the March 2017, arrest, charges, and disposition in October 2017, as indicated on his September 30, 2020 SCA, *supra*. (GE 2 at 31-32) He disclosed the following criminal charges: his March 1997 possession of drug paraphernalia charge and conviction; his April 1998 DUI charge and conviction; and his April 2002 “DUI Possible paraphernalia” charge, which resulted in a reckless driving conviction. (*Id.* at 33-36) He disclosed treatment for “THC (Such as marijuana, weed, pot, hashish, etc.)” in January 2005. (*Id.* at 37) However, he did not disclose any possession and use of illegal drugs which was unrelated to the charges in law enforcement and court records and the 2005 drug treatment records. (*Id.* at 36-37)

Amended SOR ¶ 3.c alleges Applicant falsified material facts in his responses to DOHA Interrogatories, signed by him on August 9, 2022, in response to the following question:

“Have you EVER ... illegally used any drugs or controlled substances? Use includes injecting, snorting, inhaling, swallowing, experimenting with, or otherwise consuming any drug or controlled substance?” [He] answered “Yes,” but deliberately provided only partial dates of use for methamphetamine and marijuana, and deliberately omitted [his] use of amphetamines and cocaine.

Applicant wrote in his response to the DOHA interrogatory about his history of drug involvement that he used methamphetamine twice in October 2017, and marijuana four times in May 2019. (Tr. 92; GE 4 at 4) At his hearing, he said he went through the DOHA interrogatory quickly because he was trying to get the document completed. (Tr. 92-93) He believed the government already had the information about his drug involvement. (Tr. 93, 96)

For the falsification allegations, Applicant said, “[i]t’s not done on purpose. It’s not trying to say that I didn’t do anything. I’ve said that I’ve done all of these things. I own up to them. I had a lapse of judgment at these times. I’ve done the wrong thing, you know, when I’ve done stuff that I shouldn’t have done. . . . I’m not trying to cover it up.” (Tr. 96-97)

### **Character Evidence**

Applicant loves his job, and he would like to continue in his current employment. (Tr. 67, 111) He received a coin and a letter of appreciation from his employer for voluntarily working overtime, showing initiative, and resolving problems. (Tr. 67-69, 109; AE P) He is trustworthy, reliable, and responsible. (Tr. 67) He does not believe he is a risk to security. (Tr. 67)

Applicant provided 12 character statements from friends, family, and coworkers. (SOR response; AE F; AE O) The general sense of their statements is that he is friendly, hardworking, honest, and family oriented.

### **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;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and

The record establishes AG ¶¶ 25(a), 25(c), and 25(d). AG ¶ 25(b) is not established because Department Counsel withdrew SOR ¶ 1.e. AG ¶ 25(f) is not established because there is no evidence that Applicant holds a sensitive position or had access to classified information. Additional discussion of the disqualifying conditions 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 admitted that he possessed and used marijuana, methamphetamine, and cocaine. He was diagnosed in 2020 with Cannabis Use Disorder in Early Remission. Possession of Schedule I and II controlled substances are federal criminal offenses. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. See Drug Enforcement Administration listing at <https://www.dea.gov/drug-information/drug-scheduling>. See also *Gonzales v. Raich*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). (HE 5) Methamphetamine and cocaine are Schedule II controlled substances. Information not alleged in the SOR will not be considered for disqualification purposes.

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 possessed and used marijuana, methamphetamine, and cocaine. The police report for his May 20, 2019 arrest states that the police officer noticed the smell of marijuana emanating from Applicant’s vehicle, and he asked Applicant when he last smoked marijuana, and Applicant told the police officer that he had “a few hits from a joint” about five hours earlier. (GE 8 at 2) The police officer asked Applicant how often he smoked marijuana, and Applicant initially said he smoked weekly, and then he clarified, “he smoked nightly before bed.” (*Id.*) A September 2, 2020 progress note for his drug and alcohol treatment, said Applicant “smokes nightly” and “started out smoking on weekends then smoke before bedtime.” (GE 11 at 2, 4) He also indicated he stopped using marijuana. (GE 11) A substance use treatment summary states:

[Applicant] reports smoking marijuana for the first time at age 18, and became a regular user at age 20 when he would use cannabis on weekends. He reports his cannabis use to have decreased in the past 10 years. His last reported use was in May 2019 when he would occasionally use cannabis at nighttime for relaxing. (GE 11 at 6)

I find that the most accurate and truthful description of Applicant’s history of abuse of illegal drugs occurred when he was seeking treatment for his drug abuse. The police officer’s statement provides corroboration for the 2020 progress note. Applicant said at his hearing that he also used methamphetamine two or three times. When he was arrested on March 23, 2017, for assaulting his former spouse and her boyfriend,

methamphetamine was found on his person, and he tested positive in a blood test on May 20, 2019, for marijuana and methamphetamine after he was arrested for DUI.

Applicant's decisions to repeatedly possess and use marijuana and methamphetamine are an indication he lacks the qualities expected of those with access to national secrets. He used marijuana and methamphetamine after he completed his 2018 SCA and while holding a security clearance.

Applicant provided some important mitigating information. His cocaine use in the 1990s is not recent, and there is no evidence of subsequent cocaine use. He used methamphetamine two or three times with the most recent use possession and use occurring on May 20, 2019. His methamphetamine possession and use are not recent. SOR ¶¶ 1.b and 1.c are mitigated. He provided evidence of actions taken to overcome his involvement. He attended and successfully completed substance abuse counseling. He provided 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.

However, Applicant's statement of intent to refrain from future marijuana use is not reliable because of his falsifications of security documents, discussed *infra*. His credibility was damaged when he falsified his SCAs in 2018 and 2020 and his 2022 DOHA interrogatories. Applicant wrote in his response to the DOHA interrogatory about his history of drug involvement that he used methamphetamine twice in October 2017, and marijuana four times in May 2019. Because of these intentional false statements, I do not believe his statements about refraining from marijuana possession and use since 2019 or 2020. See ISCR Case No. 22-00657 4-5 (App. Bd. Apr. 18, 2023) (reversing judge's mitigation of drug involvement and substance misuse concerns stating, "Having found that Applicant deliberately falsified not one, but two security clearance applications, the Judge implicitly opined about Applicant's lack of trustworthiness and [failed to explain] his reasons for believing her most recent claim of abstinence and the promises advanced in her Statement of Intent.") Applicant provided urine samples on September 15, 2020, and August 25, 2023, which tested negative for the use of illegal drugs; however, he may have received advance notice of the tests, and they may not show a substantial period of abstinence of illegal drug use because detection windows are limited for urinalysis tests.

I am not convinced Applicant's marijuana possession and use "happened under such circumstances that it is unlikely to recur." AG ¶ 26(a). His marijuana involvement continues to "cast doubt on [his] current reliability, trustworthiness, [and] good judgment." (*Id.*) He failed to prove his marijuana use ended in 2019 or 2020, and he has not established a sufficient pattern of abstention from marijuana use. I have lingering concerns that he has continued to use marijuana, and he might violate security rules in the future. Guideline H security concerns are not mitigated at this time.

## **Criminal Conduct**

AG ¶ 30 describes the security concern about criminal conduct: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very

nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

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

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶¶ 31(a) and 31(b) are established. Discussion is in the mitigation section, *infra*.

AG ¶ 32 lists conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

SOR ¶ 2.a alleges Applicant's possessions of marijuana, cocaine, and methamphetamine are criminal offenses. His multiple marijuana possessions are not mitigated; however, his multiple cocaine and methamphetamine possessions are mitigated because they are not recent.

Amended SOR ¶ 2.b alleges that on or about May 20, 2019, Applicant was arrested and charged with DUI; however, he was convicted of a lesser offense. His blood test showed THC use, and marijuana possession is a criminal offense.

Amended SOR ¶ 2.c alleges on about March 23, 2017, Applicant was "arrested for and charged with two counts of Domestic Violence Assault, 4th degree. He pleaded guilty to the two assaults. These two crimes are substantiated; however, they are not recent,

and there is no proof similar offenses have recurred. His methamphetamine possession is mitigated for the reasons in the drug involvement and substance misuse section, *supra*.

Amended SOR ¶ 2.d alleges on about October 6, 2014, Applicant was “arrested for contacting [his] ex-wife in violation of a no-contact order then in place.” Applicant denied the offense, and it was dismissed. This offense is not substantiated.

Applicant’s falsifications of security documents, discussed *infra*, are not used for disqualification; however, they show lack of credibility and rehabilitation. None of the mitigating offenses apply to all SOR allegations. In sum, SOR ¶¶ 2.a and 2.b are not mitigated, and SOR ¶¶ 2.c and 2.d are mitigated. Criminal conduct concerns are not mitigated.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. . . .

AG ¶ 16 provides one personal conduct condition that could raise a security concern and may be disqualifying in relation to his provision of inaccurate information on his SCA:

(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.

Applicant falsely denied that he had ever used marijuana on his April 19, 2018, and September 30, 2020 SCAs. He said he only used marijuana four times on his August 9, 2022 response to Interrogatories. Applicant said he did not deliberately and intentionally provide false information in his SCAs and in his DOHA interrogatories. He hurried through the SCAs without carefully reviewing his responses to the questions.

“Applicant’s statements about his intent and state of mind when he executed his Security Clearance Application were relevant evidence, but they [are] not binding on the Administrative Judge.” ISCR Case No. 04-09488 at 2 (App. Bd. Nov. 29, 2006) (citation omitted). In ADP Case No. 17-03932 at 3 (App. Bd. Feb. 14, 2019), the Appeal Board recognized the importance of circumstantial evidence of intent in falsification cases:

When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. See, e.g., ADP Case No. 15-07979 at 5 (App. Bd. May 30, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. *Id.*

I conclude that Applicant knowingly and intentionally provided false information about his history of marijuana use. In his two SCAs, he denied any marijuana use. He informed medical personnel that he frequently used marijuana, and he was diagnosed with Substance Use Disorder. In his April 19, 2018 SCA, he disclosed treatment for "THC (Such as marijuana, weed, pot, hashish, etc.)" in January 2005; however, this disclosure is insufficient to show he acted in good faith when he denied that he ever used marijuana. The April 19, 2018 SCA does not include any information about his marijuana use while holding a security clearance.

AG ¶ 17 includes five conditions which could mitigate personal conduct security concerns:

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

(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.

None of the mitigating conditions apply. His falsifications of security documents are recent, repeated, serious, and intentional. 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, J, and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 50-year-old maintenance technician who has worked for federal contractors since 2009. In 2005, he completed an apprenticeship. His resume and biography provide additional details about his background and professional experience. For many years, Applicant was an elite athlete who competed in international competitions on behalf of the United States. As part of his sports career, he met the President and First Lady at the White House. He has held a security clearance since 2009.

Applicant loves his job, and he would like to continue in his current employment. He received a coin and a letter of appreciation from his employer for voluntarily working overtime, showing initiative, and resolving problems. He provided 12 character statements from friends, family, and coworkers. The general sense of their statements is that he is friendly, hardworking, honest, and family oriented. The character evidence supports reinstatement of his security clearance.

The evidence against grant of a security clearance is more persuasive. Applicant possessed and used marijuana on many occasions, including while holding a security clearance. His decisions to repeatedly possess and use marijuana is an indication he lacks the qualities expected of those with access to national secrets. He falsely denied that he had ever used marijuana on his April 19, 2018 and September 30, 2020 SCAs. He said he only used marijuana four times on his August 9, 2022 response to Interrogatories. These statements are not true, and Applicant knew they were not true when he made them.

A failure of an applicant to provide honest and candid self-reports of derogatory information on security documents is an important indication that, if granted security clearance eligibility, that applicant would likely not disclose any threats to national security, 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 fully mitigate drug involvement and substance misuse, criminal conduct, and personal conduct security concerns.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b and 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Withdrawn
Subparagraphs 1.f and 1.g:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant
Subparagraphs 2.c and 2.d:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a, 3.b, and 3.c:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge