



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



In the matter of: )  
)  
) ISCR Case No. 22-01153  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Rhett Petcher, Esq., Department Counsel  
For Applicant: Christopher Snowden, Esq.

12/18/2023

**Decision**

HOGAN, Erin C., Administrative Judge:

On September 26, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense on June 8, 2017.

On October 26, 2022, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on June 7, 2023. On June 9, 2023, a Notice of Hearing was issued, scheduling the hearing on July 17, 2023. The hearing was held as scheduled. During the hearing, the Government offered three exhibits, which were admitted without objection as Government (GE) Exhibits 1 - 3. Applicant testified and offered 11 exhibits, which were admitted without objection as Applicant Exhibits (AE) A - K. The record was held open until August 17, 2023, to allow Applicant to submit additional exhibits. Applicant timely submitted three exhibits marked as AE L -N, which were admitted without objection. The transcript was received on July

26, 2023. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

### **Procedural Issues**

During the hearing, Department Counsel motioned to amend the SOR in order to conform with the evidence, in accordance with the Directive ¶ E3.1.1.17, as follows:

1.c You intentionally falsified material facts on an electronic questionnaires for investigations processing (e-QIP), executed by you on June 2, 2021, in your response to section 23 – Illegal Use of Drugs and Drug Activity. “In the last seven (7) years, have you illegally used any drugs or controlled substances?” You answered, “no.” In fact, you had used illegal drugs (federally) from 2018 to at least May 2021. (Tr 38)

2.b You used marijuana daily from approximately 2018 until at least May 2021. (Tr. 33)

There was no objection to the amended allegation SOR ¶ 1.c. However, Applicant’s counsel objected to the amended allegation SOR ¶ 2.b because of the short notice given this new allegation. He was not prepared to present evidence on this issue. I advised the parties that I intended to keep the record open one month to allow Applicant’s counsel to present new evidence regarding the new allegation. Applicant’s counsel mentioned the possibility of Applicant undergoing an assessment pertaining to substance abuse. Department Counsel objected to this assessment, because they would not have the opportunity to cross-examine the expert who will make the assessment. I advised Department Counsel if Applicant submits a substance abuse assessment, they have an opportunity to review the assessment and can request to reopen the proceedings to allow them the opportunity to cross-examine the expert. (Tr. 33-37) Both amendments were granted, subject to the conditions in the above paragraph.

### **Findings of Fact**

In his answer to the SOR, Applicant admits to all allegations in the SOR.

Applicant is a 26-year-old employee of a DOD contractor who seeks a security clearance. This is his first time applying for a security clearance. He has been employed with his current employer, Employer A, since September 2021. He also interned for Employer A while in college from June 2020 to December 2020. He earned a bachelor’s degree in May 2021. He is single and has no children. (GE 1, Tr. 15-17; AE F)

(Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant’s and his family’s privacy. The cited sources contain more specific information.)

## Personal Conduct

Under the Personal Conduct security concern, the SOR alleges Applicant's offer of employment was rescinded from Employer B because he failed a drug test. (SOR ¶ 1.a) Applicant admits this allegation. In May 2021, Applicant received a job offer from Employer B. His employment was contingent upon Employer B's pre-employment screening to include drug testing. Applicant passed his first drug test, which he provided in May 2021. Due to an administrative error, he was required to take a second drug test in June 2021. Applicant used marijuana between the first and second drug test. He failed the second drug test. On August 4, 2021, Employer B rescinded the offer of employment because he failed to successfully pass the drug screen. (Tr. 20-21, 39-41; GE 3)

The SOR also alleged Applicant falsified material facts during a February 28, 2022, interview with an authorized investigator for the United States Office of Personnel Management, by answering "No" when asked about whether he used illegal drugs within the last seven years. He denied any illegal drug use, even though he had failed a drug test in 2021, and smoked marijuana on a regular basis while in college. He lied because he thought he would lose another job if he admitted that he used illegal drugs. He wanted to protect his job. (SOR ¶ 1.b: Tr. 24-25; GE 2 at 7)

As stated above, the SOR also alleged Applicant deliberately falsified material facts on a security clearance application, dated June 2, 2021, when he answered "No" in response to "Section 23 – Illegal Use of Drugs and Drug Activity – Illegal Use of Drugs or Controlled Substances – "In the last seven 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." Applicant failed to list his marijuana use from 2018 to May 2021. (SOR ¶ 1.c: Tr. 31-32; GE 1 at 32-33)

After Employer B rescinded Applicant's job offer, he re-applied for a position with Employer A. Employer A offered him a position which he accepted. He completed the e-QIP in June 2021, and he passed a drug test in August 2021. He started work at Employer A in September 2021. (Tr. 17, 20-23; GE 1; GE 3)

Applicant started using marijuana in high school. He began using marijuana almost every day starting his sophomore year in college. He no longer socializes with the people he used marijuana with while in college. None of his personal friends use marijuana. He took and passed two drug tests in October 2022 and July 2023. (AE C and AE I) The last time he used marijuana was in May 2021. He has no intention to use marijuana in the future. On October 17, 2022, Applicant signed an affidavit declaring his intent to refrain from illegal drug use and acknowledging any future use of illegal drugs will result in the revocation of his security clearance. (Tr. 25 – 29; AE B; AE C; AE I)

The use of marijuana is legal in the state where Applicant resides. Applicant was aware that it remained illegal under federal law. He also admitted that he deliberately failed to disclose his illegal marijuana use on his June 2021 security clearance application because he wanted to hide it. He admits his decision to hide his illegal

marijuana use because he was selfish. Based on his testimony, Department Counsel motioned to amend the SOR in accordance with paragraph ¶ E3.1.1.17 of the Directive as discussed in the Procedural Section above. (SOR ¶ 1.c: GE 1 at 31-32; Tr. 30-32)

## **Drug Involvement**

Under the drug involvement security concern, the SOR alleged Applicant failed a urinalysis test in or about August 2021. (SOR ¶ 1.a: Gov 3) Applicant admits this allegation. However, it is likely Applicant submitted his urine sample in May or June 2021. He was notified by Employer B that their employment offer was rescinded in early August 2021.

On August 12, 2023, Dr. E., Ph.D., ABPP, a board-certified psychologist evaluated Applicant. The purpose of the evaluation was to determine whether Applicant had a substance use condition, personality patterns, or behavioral propensities that could negatively impact his reliability, trustworthiness or judgment. Applicant provided the information about the issues with his security clearance to Dr. E. Upon reviewing the documents, interviewing Applicant, and conducting several tests, Dr. E. concluded Applicant does not exhibit signs or symptoms of a substance use disorder at the present time, and it is unlikely he has ever met criteria for such a condition in the past. He notes that while Applicant's marijuana use in college was unhealthy and ill-advised, it is not unusual for college students to use marijuana. Studies have shown up to 44% of college-aged adults use marijuana. He notes Applicant last used marijuana in 2021, and he has no desire to use marijuana in the future. He also notes that the risk for future marijuana use by Applicant is extremely low. Applicant's prognosis for continued psychological wellness is excellent. (AE L)

On September 5, 2023, Applicant provided another urinalysis sample. His sample tested negative for illegal drugs to include marijuana. (AE M)

## **Whole-Person Factors**

Applicant submitted several character letters. Mr. T., his former supervisor recommends him for a security clearance. He describes Applicant as a highly professional, trustworthy individual. He supervised him for over one and half years. He observed Applicant being respectful and mindful of security policies and restrictions. He has always trusted Applicant and has had no reason to doubt or question him. He finds him worthy of having his security clearance reinstated so that he can continue in his promising career. (AE H; AE J)

Ms. B. has known Applicant for 21 years. She describes him as a person of high moral character, consistently demonstrating trustworthiness, honesty, and respect. He has constantly demonstrated "unwavering loyalty, kindness and support" to her family. (AE J)

Ms. L. has known Applicant since he was 13 years old. He lived across the street from her. She is aware he failed a drug test and lied on a security clearance application. While she understands dishonesty and drug use would be a serious concern in the

granting of security clearances, she states that Applicant learned from his mistakes. He takes his career very seriously and regrets his actions. She states he was never a “pot head” and believed he would not have any trouble leaving his marijuana use in the past. Through the years, he has helped her do things such as moving heavy furniture in her apartment. She has seen him make mistakes, but he takes responsibility and learns from his mistakes. She says, “He is smart, and he is a good man, with good values, and a good head on his shoulders.” She is comfortable with him having a security clearance. (AE J)

Two other co-workers provided letters on Applicant’s behalf. They both describe his excellent work ethic and integrity. They have no doubt that he is committed to upholding the security of the country. (AE J) His fellow employees at Employer A think highly of him.

Applicant has received several spot awards recognizing his positive contributions to Employer A. He was recognized for his collaboration and accountability. (AE E) In July 2023, he received an Achievement Award for his excellent duty performance. (AE N)

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant 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 the applicant may deliberately or inadvertently fail to protect or 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

### **DOD and Federal Government Policy on Marijuana Use**

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use,” addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use, but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus, knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

### **Guideline H, Drug Involvement**

The security concern relating to the guideline for Drug Involvement is set out in AG & 24:

The illegal use of controlled substances, to include the misuse of prescription drug 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 guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant's case.

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 amended SOR alleges and Applicant admits he used marijuana from 2018 to May 2021. Most of his use occurred while he was in college. Marijuana use is legal in the state where he resides, however, he is aware that marijuana use remains illegal under federal law. There is sufficient evidence to conclude that Applicant used and possessed marijuana. AG ¶ 25(a) and AG ¶ 25(c) apply.

Applicant tested positive for marijuana during a pre-employment drug test for Company B. AG ¶ 25(b) applies.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. 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. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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.

AG ¶ 26(a) applies because Applicant stopped using Marijuana in May 2021. His positive pre-employment drug test for Company B “scared him straight.” More than two and a half years have passed since Applicant’s last involvement with marijuana. While Applicant’s illegal use of marijuana raises questions about his judgment, his use occurred primarily in college, and he learned the hard way that it was time for him to follow the law.

AG ¶ 26(b) applies because Applicant acknowledged his illegal drug use and signed a statement of intent indicating he will not use marijuana in the future. He acknowledged any future illegal use could result in the revocation of his security clearance. He testified that he no longer associates with his college friends with whom he used marijuana.

Overall, Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

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

The security concern relating to the guideline for Personal Conduct 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 the national security or adjudicative processes. . . .

The following disqualifying conditions under AG ¶ 16 potentially apply to Applicant’s case:

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;

AG ¶ 16(b) deliberately providing false or misleading information; or concealing or omitting information concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

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 characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: deliberately providing false or misleading information; or concealing or omitting information concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative: (3) a pattern of dishonesty and rule violations; and

AG ¶ 16(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

AG ¶ 16(a) applies. Applicant admits that he deliberately omitted his illegal marijuana use in response to Section 23 on his June 2021 security clearance application. He omitted his marijuana use out of fear he would lose his job.

AG ¶ 16(b) applies. Applicant deliberately lied to the investigator conducting his background investigation in February 2022, when he denied using illegal drugs within the past seven years, when he had, in fact, used marijuana on a regular basis from 2018 to May 2021. This response is aggravated by the fact that Applicant was aware at the time that he lost the job offer with Employer B in August 2021 because of his positive drug test. Applicant admits he lied because he was worried about getting a security clearance and the potential for losing his job with Employer A.

AG ¶ 16(d) applies with regards to Applicant's pattern of dishonesty throughout the security clearance process regarding his illegal marijuana use. His lack of candor raises questions about his judgment, trustworthiness, and reliability.

AG ¶ 16(f) applies pertaining to his positive drug test, which resulted in Employer B rescinding the offer of employment because a clean drug test was a pre-condition of his employment.

Under Guideline E, the following mitigating conditions potentially apply in Applicant's case:

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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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; and

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(a) does not apply. Applicant withheld his deliberate omission of illegal marijuana use until after the SOR was issued. While credit is given to Applicant for fully disclosing the extent of his illegal marijuana use during the hearing, his disclosure cannot be considered prompt.

AG ¶ 17(c) does not apply. Applicant deliberately lied to the federal government on several occasions about his illegal drug use during the security clearance process. While he fully disclosed his illegal marijuana use during the hearing, he admitted he lied previously because he was afraid he would not be granted a security clearance and lose his job. While Applicant eventually provided full disclosure, his numerous deliberate falsifications still raise questions about his trustworthiness and judgment.

AG ¶ 17(d) partially applies. Applicant fully disclosed the extent of his illegal marijuana use during the hearing. I found him cooperative. He was assessed by a licensed psychologist who found no substance abuse issues. However, this mitigating condition is given less weight because of the extent of Applicant's false statements.

While Applicant has made steps to fully disclose his illegal drug use to the federal government, his deliberate falsifications during the security clearance process created doubt about his judgment and truthfulness. The federal government expects security clearance holders and applicants for a security clearance to be truthful with the government at all times. Deliberate falsifications during the security clearance process are serious violations of the government's trust and raise doubts about Applicant's ability to work with and protect classified information. 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered Applicant's performance awards and favorable character references. I considered he ultimately disclosed his illegal marijuana use during the hearing and expressed remorse for his past conduct. I considered that he learned a difficult lesson after his positive marijuana test in 2021 and stopped using marijuana in May 2021. I find Applicant mitigated the security concerns under Guideline H because it has been more than two and half years since he last used marijuana and he signed a statement of intent to no longer use illegal drugs in the future.

Under Personal Conduct, a security concern remains about Applicant's deliberate lies about his illegal marijuana use during the security clearance process. He deliberately lied about his illegal marijuana use on his June 2021 security clearance application and during his February 2022 background investigation interview. Questions about Applicant's truthfulness remain. The security concerns under Personal Conduct are not mitigated.

For the reasons stated above, I cannot grant Applicant a security clearance at this time. If he continues to progress, remains truthful, and continues to abstain from illegal drug use, he is likely to be granted a security clearance at some point in the future.

I considered the potentially disqualifying and mitigating conditions as well as the facts and circumstances surrounding this case. The security concerns under Personal Conduct are not mitigated. The security concerns under Drug Involvement are 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 E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant

## **Conclusion**

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

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ERIN C. HOGAN  
Administrative Judge