



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



In the matter of:)	
)	
)	ISCR Case No. 23-00438
)	
Applicant for Security Clearance)	

Appearances

For Government: Sakeena Farhath, Esq., Department Counsel
For Applicant: *Pro se*

03/05/2024

Decision

MURPHY, Braden M., Administrative Judge:

Applicant used marijuana one time in October 2020, while serving in the Army and while in possession of a security clearance. This came to light when he tested positive a month later during a random urinalysis. He was then charged and convicted under the Uniform Code of Military Justice (UCMJ). Applicant then deliberately failed to disclose his drug use on his April 2022 security clearance application (SCA) and in a subsequent background interview. Security concerns relating to his drug involvement are mitigated given the isolated, dated nature of the conduct, but criminal conduct and personal conduct security concerns are not mitigated. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a SCA on April 28, 2022. On June 1, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement), Guideline J (criminal conduct), and Guideline E (personal conduct). The DOD issued the SOR under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20,

1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant subsequently submitted an answer to the SOR. His answer is undated and it was not clear whether or not he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). However, DOHA processed the case as a request for a hearing, and the case was assigned to me on August 29, 2023. The case was initially scheduled for October 31, 2023, but was rescheduled by mutual agreement due to a DOHA scheduling conflict. DOHA issued a hearing notice on October 18, 2023, for a hearing on November 7, 2023, via video-conference through an online platform.

The hearing then convened as scheduled. At the start of the proceeding, Applicant confirmed that he had requested a hearing. (Tr. 4) Department Counsel offered Government's Exhibits (GE) 1 and 2, which I admitted without objection. During the hearing, Department Counsel produced and offered GE 3, a 2017 SCA prepared by Applicant. GE 3 was admitted only for purposes of rebuttal. Applicant testified and offered Applicant's Exhibits (AE) A through E, all of which were admitted without objection.

At the end of the hearing, I held the record open to provide Applicant the opportunity to submit additional documents. Later the same day, he submitted an e-mail (AE F) and several other documents (AE G through AE N) for consideration. These documents are discussed in the Facts section, below. They were all admitted into the record without objection. The record closed on November 7, 2023. DOHA received the hearing transcript (Tr.) on November 15, 2023.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, and 2.a under Guidelines H and J. Under Guideline E, he "admitted" SOR ¶¶ 3.a and 3.b, and he denied SOR ¶ 3.c. However, he included a narrative statement in which he denied any deliberate attempt to conceal information. I read his statement as applying to all three of the Guideline E allegations, so I consider that he denied each of them. His admissions are incorporated into the findings of fact. Additional findings follow.

Applicant is a 25-year-old employee of a defense contractor. He has never married, and he has no children. He has a high school diploma and an associate degree. He is currently pursuing a bachelor's degree. He enlisted in the Army at age 17, in June 2017. He served for four years, until he was administratively discharged. (GE 1; Tr. 27-28, 33)

In October 2020, Applicant used marijuana one time while he was stationed at Fort X in State 1 as a supply sergeant (E-5) in the Army. (SOR ¶ 1.a) He had a

clearance at the time, having filled out a prior SCA in 2017, when he joined the Army. He consumed a marijuana “edible” while out in town at a bar with friends that someone had given him. He later took a random drug test and tested positive for tetrahydrocannabinol (THC), the active ingredient in marijuana. (SOR ¶ 1.b) He knew what he did was illegal, was not allowed while he held a clearance, and that he should not have done it. (Tr. 24, 40) He acknowledged that he had access to classified documents while in the Army. (Tr. 21-23, 34-36) It is not clear from the record, however, whether or not he had been “granted access to classified information” at the time, as alleged in SOR ¶ 1.a.

Applicant was subsequently charged under the UCMJ with violating Article 112a, wrongful possession, distribution, and introduction of a controlled substance. In January 2021, he had an Article 15 hearing before his battalion commander, and he was found to have violated UCMJ Article 112a for wrongful use of THC, a controlled substance. He was reduced in rank to E-4 (specialist), forfeited \$1,291 in pay for two months, placed on extra duty and restriction for 45 days, and given an oral reprimand. (SOR ¶ 2.a) (Tr. 25-27, 31-41)

Applicant was also told that he had to pass an alcohol and drug abuse prevention training (ADAPT) if he was to remain in the Army. Along with the ADAPT classes, he participated in counseling from April 2021 to August 2021. (AE A) He learned about the consequences of illegal drug use. (Tr. 38-39) He feels misled because he took drug tests every two weeks and passed the ADAPT class but was ultimately told he was not being retained by the Army. He was administratively separated in August 2021, with a general discharge under honorable conditions. (Tr. 25-27, 31-41; GE 1; AE A)

Applicant testified that before the drug test, he had been having problems in his command with the way he was being trained. He raised his concerns with superiors, noting that he worked longer hours than many others in his unit and dealt with fatigue. He was often the only supply clerk on duty. The unit had just returned from Korea (June 2019-March 2020) and he was overworked. He asserted that this stress and fatigue was what led him to use the marijuana. He no longer feels “micro-managed” and demeaned in his current job as he did in the Army. Applicant testified that he “made a big mistake and messed up my career. I understand that.” (Tr. 19-20, 23, 31, 36-37)

Applicant filled out an SCA in April 2022 in connection with his current job. In answering questions under Section 23 – Illegal Use of Drugs or Drug activity, he failed to disclose his use of marijuana in October 2020, both in answer to a question asking for disclosure of any illegal drug use in the last seven years and in answer to a separate question asking, “Have you EVER illegally used or been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed?” (GE 1 at 23) (SOR ¶¶ 3.a, 3.b) When asked why he did not disclose his drug use on his 2022 SCA, Applicant said, “I have no reason for that” and “no excuse.” (Tr. 29, 43) He acknowledged completing the April 2022 SCA and certifying its accuracy, under penalty of 18 USC ¶ 1001, a federal criminal offense. (Tr. 41-42; GE 1) He

denied, however, that he was deliberately hiding information on the SCA. He said he read the question too quickly. (Tr. 43, 44-46, 50)

Applicant also failed to disclose his UCMJ charge, and the fact that the charge involved a drug offense, in answer to certain questions on his SCA about his police record. (GE 1 at 22-23). This omission was not alleged in the SOR. He testified that he did not list it on his SCA because he thought it was “all connected” to his discharge and drug use. (Tr. 30, 44-46)

Applicant also failed to disclose his illegal drug use during his background interview in November 2022. He initially affirmed his negative answer about prior drug use on GE 1. During his background interview, he initially only acknowledged using marijuana in high school between August 2015 and June 2017. He first denied using marijuana at any time after 2017, and he initially denied using marijuana in the Army. (GE 2 at 6; Tr. 51-52) He denied having disciplinary issues at work. He denied having been charged under the UCMJ. (GE 2 at 4-5)

Applicant was asked at the completion of interview questioning whether he had updated all his information (on his SCA) correctly and truthfully. He answered, “Yes,” but nonetheless failed to disclose either his marijuana use while in the Army, or the fact that it led to charges under the UCMJ. (GE 2) (SOR ¶ 3.c) At the end of the interview, he said he denied his prior issues in the Army because he wanted to put them behind him and did not want to talk about it. (GE 2 at 8) He acknowledged that he did not come clean about his drug use during his interview until he was confronted about it. He acknowledged having been given multiple chances during the interview to do so. (Tr. 30-31, 47-49, 51-53) Applicant adopted the summary of his background interview as accurate in an interrogatory response in May 2023. (GE 2)

Applicant completed an earlier SCA in June 2017, when he first joined the Army, so he was familiar with the questions on the form. (Tr. 43) He acknowledged that he should have disclosed his earlier, high-school era marijuana use on both his 2017 SCA and the 2022 SCA. (GE 1-3;Tr. 45-46) During the hearing, Government Counsel offered the 2017 SCA (GE 3) as a rebuttal exhibit, and it was admitted for that limited purpose. (Tr. 58-63)

After leaving the Army, Applicant struggled to find employment, in part because his DD-214 discharge paperwork references “drug abuse.” Federal jobs also require a drug test. He believes his prior clearance in the Army (granted after the 2017 SCA) carried over and remained active. (Tr. 27-29)

Applicant said he has not used marijuana since October 2020. He has had no subsequent criminal charges or citations. He took drug tests every two weeks, as required, for a year. He takes random drug tests for his job, and last took one about a year before the hearing. He now lives in another state, and no longer associates with anyone he knew when he was stationed at Fort X. He has not been around anyone using marijuana since he was in the Army. He has had no disciplinary actions in his

current job. He described himself as a loner in his new city. He works at home. He has few friends. He goes to class, studies, and goes to the gym. (Tr. 31-35, 53-55)

Prior to testing positive for marijuana, Applicant received funds in preparation for a move to another duty station and received money so he could do that. He is required to pay it back since he left the Army before he transferred duty stations. He owes the government about \$5,200 and, since October 2023, he has been on a repayment plan of \$173 a month. (Tr. 56-57)

Applicant provided several letters of reference from fellow non-commissioned officers (NCOs) in his unit, written in July 2021, likely in connection with his administrative separation proceeding. They support his assertions that he had been under stress at the time of his marijuana use and his belief that his unit's leadership had failed him. His references asked that he be given a second chance. (AE B – AE E)

Applicant provided several news articles about leadership problems at Fort X when he was there, some of which were widely publicized in the national media. (AE G – AE N) He acknowledged, however, that these incidents were not the reason for his failed drug test. He closed by accepting responsibility for his actions. He requested a chance to regain his professional reputation and serve the country. (AE F; Tr. 54)

Policies

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

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H: Drug Involvement

AG ¶ 24 details the security concern for drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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.

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

- (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; and

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

While in the Army, Applicant used marijuana one time, in edible form, in October 2020, when he was out at a bar off base with friends. He held a clearance and was “in a sensitive position, but it is not established that he had actually been granted access to classified information at the time. He later tested positive for THC and was charged with drug-related offenses under the UCMJ. AG ¶¶ 25(a), 25(b), and 25(c) all apply. AG ¶ 25(f) applies, but only because he was in the Army at the time and was therefore “holding a sensitive position.” (Applicant’s earlier marijuana use in high school is not alleged).

The following mitigating conditions under AG ¶ 26 are potentially applicable:

(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; and

(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 is grounds for revocation of national security eligibility.

Applicant used marijuana one time, in October 2020, now more than three years ago. He paid a heavy price, since his actions led to an Article 15 hearing and his administrative separation from the Army. He took and completed an ADAPT class. There is no indication of subsequent illegal drug use or involvement, and he has disassociated himself from the friends from his Army service with whom he used the marijuana. AG ¶¶ 26(a) and 26(b) both apply, and drug involvement security concerns are mitigated.

Guideline J: Criminal Conduct

AG ¶ 30 details the security concern for 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. The following disqualifying conditions are potentially applicable:

(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.

Applicant's drug use and positive drug test led to an Article 15 hearing under the UCMJ, which resulted in reduction of rank, restricted duty, and a loss in pay, as well as, ultimately, his separation from the Army. AG ¶ 31(b) applies.

AG ¶ 32 sets forth the potentially applicable mitigating conditions:

(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; 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.

Given the isolated nature of the incident and the fact that it occurred more than three years ago, AG ¶¶ 32(a) and 32(d) warrant consideration for the same reasons as set forth under Guideline H, above. However, there is the additional matter of the fact that Applicant lied on his SCA and in his background interview, as discussed under Guideline E, below. His deliberate falsifications constitute additional, subsequent criminal conduct (since he violated 18 USC ¶ 1001), that undercuts any mitigation that might have otherwise been shown. Neither mitigating condition therefore fully applies, and criminal conduct security concerns are not mitigated.

Guideline E: Personal Conduct

AG ¶ 15 details the security concerns for personal conduct:

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 or candid answers during national security

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

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

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

I considered the following disqualifying conditions under AG ¶ 16:

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

(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.

The SOR alleges that when he submitted his April 2022 SCA, Applicant deliberately failed to disclose both his use of marijuana in October 2020 and the fact that his use occurred while he possessed a clearance (which it did, even if he did not have actual access to classified information at the time). The SOR also alleges that Applicant deliberately failed to disclose his drug use during his background interview soon thereafter.

Applicant asserted that he did not intend to mislead the government or to give false information. His assertions are simply not credible. He repeatedly offered “no excuse” for his omissions. He had ample opportunities to disclose his drug use to the Government, both on the SCA and in his interview, yet he persistently denied his actions. He even made several affirmatively false statements during the interview. He initially affirmed his negative responses in his SCA to any history of drug use. Then, on further questioning, he only acknowledged using marijuana in high school, between August 2015 and June 2017 and denied any additional marijuana use, including any use in the Army. He denied having disciplinary issues at work. He denied having been

charged under the UCMJ. Applicant's repeated false statements on his SCA and in his interview satisfy AG ¶¶ 16(a) and 16(b).

AG ¶ 17 sets forth the following potentially applicable mitigating conditions under Guideline E:

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

(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.

Neither mitigating condition applies. Applicant did not disclose his use of illegal drugs, his positive drug test, or his UCMJ charges, until he was confronted during his background interview. Indeed, as noted above, he made multiple false statements about his drug use during his interview. I cannot conclude that his lack of candor is unlikely to recur and does not cast doubt on his reliability, trustworthiness, or good judgment. Neither AG ¶¶ 17(a) nor 17(c) applies to mitigate his repeated false statements during the security clearance process.

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(d):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H, J, and E in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

Formal Findings

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2: Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.c:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge