



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



In the matter of: )  
)  
) ISCR Case No. 23-00276  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Carroll Connelley, Esq., Department Counsel  
For Applicant: *Pro se*

06/25/2024

**Decision**

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E (personal conduct) alleged in the Statement of Reasons (SOR). Eligibility for access to classified information is denied.

**Statement of the Case**

On April 8, 2014, April 21, 2018, and May 17, 2022, Applicant completed and signed Electronic Questionnaires for Investigations Processing (e-QIP). On April 27, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; 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.

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 Guideline E.

On May 14, 2023, Applicant responded to the SOR (Answer) and requested a hearing. On February 22, 2024, the case was assigned to me. On April 5, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 9, 2024. The hearing was held as scheduled.

During the hearing, Department Counsel offered five Government exhibits (GE), and Applicant did not offer any documents. There were no objections, and GE 1 through 5 were admitted into evidence. On May 16, 2024, DOHA received a transcript of the hearing.

### **Findings of Fact**

In Applicant's SOR response, he admitted SOR allegations ¶¶ 1.a through 1.h, and he denied SOR ¶ 1.i. Applicant's admissions in his Answer and during the hearing are incorporated in my findings of fact.

Applicant is 55 years old. He received a bachelor's degree in 2006. He married in 1992 and has two adult children. He has been employed as an engineer by a federal contractor since January 2019. He currently possesses a secret DOD security clearance that was issued in July 2019. (GE 1; Tr. 16-17)

### **Personal Conduct**

SOR ¶ 1.e alleges that, in about 2004, Applicant's January 2003 interim DOD security clearance was revoked, and his final security clearance was denied, due to prior marijuana use. Applicant admitted this allegation in his Answer. Applicant had disclosed to the DOD investigator during his background interview that he had used marijuana recreationally, about 10 times, during the period he held the interim security clearance from January 2003 through April 2004. (Tr. 18-20)

SOR ¶ 1.f alleges that Applicant used marijuana with varying frequency from 2014 until at least 2015. Applicant admitted this in his Answer.

SOR ¶ 1.g alleges that Applicant used cocaine in or around 2014. Applicant admitted this in his Answer.

Applicant listed on his April 2018 e-QIP that he stopped all use of marijuana in 2004, after his interim security clearance was revoked. Based on this information, he was granted a secret security clearance in July 2019. He admitted, in his Answer and during the hearing, that he deliberately failed to list his most recent illegal drug use on his 2018 e-QIP because he was concerned he would not be able to obtain a DOD security clearance. (SOR ¶ 1.h) (Tr. 20-27, 34-35; GE 2)

Applicant completed another e-QIP in May 2022, after his employer sponsored him to obtain a top secret security clearance. He listed on this security application that his marijuana use ceased immediately in about April 2004, after his interim security clearance was withdrawn due to his illegal use of marijuana. He did not disclose his most recent use

of illegal drugs during his June 2022 background interview. Another background interview was triggered in September 2022, and Applicant was asked again if he had any illegal drug use required to be listed on his May 2022 e-QIP, which he denied. The investigator then confronted him with adverse information that was developed during his background investigation. Applicant then admitted that he had used marijuana on about five or six occasions from 2014 to 2015. He also admitted he had used cocaine one time in 2014. He told the investigator that he did not list the information on his 2022 e-QIP because he had not used illegal drugs in the past seven years. He admitted to the investigator he used marijuana and cocaine during the time he was working for another employer (E) which was not a federal contractor. (Tr. 20-27, 34-35; GE 1, 5)

Applicant listed on his April 2018 and May 2022 e-QIPs that he worked for E from April 2015 through April 2018, and for another federal contractor from August 2002 to April 2015. So, based on this information and Applicant's testimony, he actually used illegal drugs from approximately 2015 to 2016, not 2014 to 2015 as he previously reported. He admitted he intentionally did not disclose this illegal drug use on his April 2018 e-QIP, as required. During the hearing, he stated that he did not report his illegal drug use on his May 2022 e-QIP because it was past the seven-year cutoff in the question. The SOR did not allege facts concerning this omission from his May 2022 e-QIP. (GE 1, 2; Tr. 27, 38-39)

SOR ¶ 1.i alleges that Applicant falsified his April 2014 e-QIP for failing to disclose that he had used illegal drugs, marijuana and cocaine, in at least 2014. Applicant denied falsifying this e-QIP, and I agree with him based on the evidence in the record indicating that his actual dates of marijuana and cocaine use occurred after April 2015, when he was hired by E. (GE 1; Tr. 35)

SOR ¶ 1.b alleges that Applicant was arrested in March 1985 and charged with possession of a Class C Controlled Substance, LSD. (Tr. 32)

SOR ¶ 1.c alleges that Applicant was arrested in July 1996 and charged with Larceny. Applicant stated that he had bounced a check for \$60. He was required to pay restitution and court costs. (Tr. 32-33)

SOR ¶ 1.d alleges that Applicant was arrested in April 1999 and charged with possession of a Class B Controlled Substance, hashish. He was pulled over by police and he had hashish in his pocket. He went to court and was ordered to pay a fine and court costs. (Tr. 33)

SOR ¶ 1.a alleges that, in about March 2022, Applicant received a reprimand from his current employer for bringing a package of flash drives into a restricted area. Applicant testified that he had obtained the flash drives from his employer while he worked in an unsecured area. The flash drives would disappear quickly from his employer's supply room, and he wanted to make certain he had access to some. In August 2021, he was moved to a secure area, and he kept the unopened package of flash drives in his closed overhead cupboard. In March 2022, a security officer found the flash drives, and verbally

reprimanded Applicant. He was also required to repeat security training following this security infraction. (Tr. 28-31)

Applicant testified that he had changed several behaviors to stay away from illegal drugs. He has been a drummer for 48 years, and he used to play music in bars where illegal drugs were prevalent. He now only plays his drums in the privacy of his home. He also mentioned that he no longer participates in billiards at bars, and he has moved away from the city life and now lives in a remote, rural area. He no longer associates with friends who use illegal drugs. His current hobbies include flying remote-controlled airplanes and driving all-terrain vehicles (ATVs). He takes his job responsibilities seriously, and made assurances that he would not use illegal drugs since he fully understands the rules he must follow in order to maintain a security clearance. (Tr. 36-39)

### **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.

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 DNI 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 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**

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

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying conditions are potentially applicable in this case:

(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

(d) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other

characteristics indicating that the individual may not properly safeguard classified or sensitive information.

Applicant deliberately falsified his 2018 e-QIP when he failed to disclose, as required, his illegal use of marijuana and cocaine between approximately 2015 and 2016, because he was worried listing this information would prevent him from obtaining a security clearance. Applicant also admitted a withdrawal of an interim security clearance in 2004, three incidents of criminal conduct between 1985 and 1999, marijuana use from “2015 to 2016,” cocaine use once in “2015,” and a 2022 security infraction at his place of employment. AG ¶¶ 16(a) and 16(d) apply.

AG ¶ 17 provides conditions that could mitigate security concerns in this case: (This was indented on the right.)

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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.

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 ¶ 2(b).

Applicant has a long history of using illegal drugs, but there is no evidence he has used any illegal drugs after 2016. The illegal drug use, the dated criminal conduct, the 2004 loss of an interim security clearance, and the 2022 security infraction, taken

together, are not enough to convince me that Applicant's variety of misconduct will continue in the future. The most recent security incident in 2022 is isolated. Applicant received a verbal reprimand and was required to undergo security training to ensure this would not happen again. I believe enough time has passed without further incidents of criminal conduct, illegal drug use, or security infractions to find these behaviors are unlikely to recur.

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.

The Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

The non-SOR conduct will not be considered except for the five purposes listed above.

Although not alleged in the SOR, given the actual dates of Applicant's most recent use of marijuana and cocaine, it is clear that he should have reported his 2015 to 2016 illegal drug use on his May 2022 e-QIP. In addition, his statement on the 2022 e-QIP that his marijuana use ceased in about April 2004, after his interim security clearance was withdrawn is, at the very least misleading, if not an outright lie. What is most troubling, however, is the fact that he did not disclose his most recent illegal drug use until after he had been confronted with adverse information that was developed during the course of his background investigation. Only then did Applicant admit his 2015 to 2016 use of marijuana and cocaine while he was employed by E from April 2015 to April 2018.

It is clear in this instance that Applicant did not make prompt, good-faith efforts to correct the omission, concealment, or falsification of his illegal drug use from 2015 to 2016, before being confronted with developed adverse information. He admitted he had deliberately failed to disclose his 2015 to 2016 illegal drug use on his 2018 e-QIP, which enabled him to receive a secret security clearance in 2019. I find Applicant remained consistent in omitting this illegal drug use on his 2022 e-QIP, and during his June and September 2022 background interviews, in an effort to receive a top secret security clearance. Overall, Applicant's credibility is questionable and continues to cast doubt on his reliability, trustworthiness, and good judgment. 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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the adjudicative 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 Guideline E and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant, to his credit, has changed his behaviors and association with certain friends to avoid all contact with illegal drugs. He takes his work responsibilities and his security clearance seriously. The evidence against mitigation, however, is more persuasive in that Applicant deliberately failed to disclose his 2015 to 2016 illegal drug use on his 2018 e-QIP, and although not alleged in the SOR, he intentionally omitted this information on his 2022 e-QIP and during his June and September 2022 background interviews. He also provided misleading information on the e-QIPs that he ceased all marijuana use in about April 2004. I have taken all of the circumstances into consideration under the whole-person analysis, and I find that he intentionally tried to hide his most recent illegal drug use from the government. He did so in 2018, and he received a security clearance in 2019. I believe that was his intention when he did not disclose the 2015 to 2016 illegal drug use on his 2022 e-QIP, and during his June and September 2022 background interviews until confronted with adverse information. Overall, Applicant's behavior is untrustworthy, unreliable and does not support a finding of rehabilitation.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are not mitigated.



## **Formal Findings**

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a through 1.g, and 1.i:	For Applicant
Subparagraph 1.h:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Pamela C. Benson  
Administrative Judge