



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



In the matter of:)
)
XXXXXXXXXXXXX) ISCR Case No. 22-01359
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: Sean Rogers, Esq.

01/13/2025

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant did not provide sufficient evidence to mitigate the national security concern arising from his personal conduct. He did provide evidence sufficient to mitigate his criminal conduct and drug involvement. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application (SCA) on September 11, 2019. On December 22, 2022, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under Guideline J (criminal conduct), Guideline H (drug involvement and substance misuse), and Guideline E (personal conduct). This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on June 8, 2017, apply here.

Applicant answered the SOR on March 23, 2023 (Answer) and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 11, 2023. The case was assigned to me on November 6, 2023. On May 30, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on July 16, 2024.

I convened the hearing as scheduled. Government Exhibits (GE) 1 through 6 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through R which were admitted without objection. He also called four character witnesses who testified on his behalf. Email correspondence dated June 18, 2024, from the administrative judge to both counsel was marked as Hearing Exhibit 1 (HE 1) and admitted without objection. DOHA received the transcript (Tr.) on July 24, 2024.

Procedural Issue

Applicant's brief accompanying his Answer requested as an alternative remedy that he be considered for a waiver with appropriate conditions, as authorized by Security Executive Agent Directive (SEAD) 4, Appendix C. I explained that DOD has not yet issued implementing regulations or guidelines under that SEAD that would allow the issuance of such an order. (Tr. 13; HE 1.)

Findings of Fact

Under Guideline J, the SOR alleged that in January 2020 Applicant was arrested and charged with three felony counts of distribution of marijuana and three felony counts of distribution of marijuana on or near school property. It also alleged that in May 2020 he pled guilty to two misdemeanor counts of distribution of marijuana. (SOR ¶ 1.a.) He admitted those allegations, with explanations. (Answer.)

Under Guideline H, the SOR alleged that Applicant sold marijuana on October 4, 12, and 30, 2017. (SOR ¶ 2.a.) He admitted this allegation, noting that he pled guilty to lesser charges and that the original charges were not prosecuted. (Answer.)

Under Guideline E, the SOR alleged that Applicant deliberately falsified his SCA by failing to disclose the information alleged under Guideline H. (SOR ¶ 3.a.) He denied that he "intentionally or deliberately" answered the question incorrectly. (Answer.)

Applicant is 28 years old, never married, and has no children. His father served 27 years in the U.S. Navy, and Applicant was born overseas. They moved around frequently but settled in State A, where Applicant went to high school and college. He enrolled in college in the fall of 2014. His first years' grades were not that good, so he took a fifth year. He was on the Dean's List both semesters his last year. His major was Political Science, and his minor was Homeland Security and Global Security Politics. He graduated in May 2019. (GE 1; Tr. 25-26.)

After graduation, Applicant moved to his parents' home, then in State B. For employment, he split his time between jobs as a Golf course greens keeper and an associate at a sporting goods store. He next worked as a driver for a kitchen and bath company and as a carpenter's apprentice, but he worked mostly as an apprentice. During those periods, he applied to defense contractors, which had a large presence in that area of State B. It took him two years to get an interview, and his most recent employer was the first to offer him a job. He took that job and started in January 2020. Due to his current clearance suspension, he was terminated in January 2023 by that employer, which is his current clearance sponsor. (Tr. 32-35, 50-51.)

In October 2017, Applicant got some marijuana from a source and sold it to make some money. That took place near his college campus, where he lived. He has never used marijuana himself or other illegal drugs. It was a small school, and it was easy to get marijuana and "make some quick money." (Tr. 26-27; GE 1.)

One day after a class in August 2018, Applicant received a voice mail from a Special Agent G. Applicant called him back. The Agent said he had six indictments out for Applicant, three felonies for distribution of marijuana and three for distributing near school grounds. The Agent said if he helped him, there would be no need to go to court. Applicant did not know for whom the Agent worked. The Agent never took him to court, never took him to the police station, and never took him to a courthouse "[T]hat's when I became [an] informant." (GE 6; Tr. 27-28.)

Applicant was "a little scared." It was the Agent's suggestion that he become a confidential informant. He was to give the Agent one to three names every other week. Applicant would have to work around his class schedule. He worked to the best of his ability to help the Agent "take down more people, and [the Agent] "would want more and more. And it went on pretty much like that until I graduated and when I stopped hearing from him." The Agent knew that once Applicant graduated, he would move back home to State B. The Agent knew his address, and Applicant's cellphone number was the same. After graduation, he did not even hear once from the Agent. (Tr. 29-31.)

Applicant was asked if there was any danger associated with working as an informant. He answered:

Yeah, of course. There always is when you're dealing with drugs at any time. But I outweighed the danger versus the choices I had made and realized that if I was going to have a chance to graduate and get my degree and put all of this behind me, that this was going to be my best option to do it. (Tr. 30.)

The following are summarized excerpts from GE 6, an undated chronological write-up of Applicant's assistance as a Confidential Informant (CI) that he prepared for this hearing: (Tr. 87.)

Later the same week as Applicant's call from Agent G in August 2018, they met in a nearby park. The Agent picked him up in a black sedan. The Agent showed him documents and indictments, stating they had audio and video evidence of him selling marijuana on three separate occasions. He was not shown the evidence, nor did he ask to see it. The Agent said Applicant was scheduled to appear in court on January 25, 2019, or he could begin work as a CI to show the judge he was cooperating. In that way, Applicant could "help himself." The Agent told Applicant that he was to set up three persons in deals in the same way he, Applicant, had been set up. He signed some papers that he would act as a CI. He did not remember what the papers were. (GE 6 at 1.)

Applicant began as a CI in September 2018, working around his class schedule. Agent G would provide him with money to purchase marijuana for each set-up. He wore a wire and a camera under his clothes and was told to get each sale on tape. After each purchase, he met with the Agent, turned over the marijuana, and filled out a detailed report. He was to make three purchases from each person. As it turned out, each of the persons he set up were students at the college. (GE 6 at 1-2.)

The first person Applicant met in September was Stan. In September and October 2018, he set up three meetings with Stan to purchase marijuana. At each purchase, Applicant got audio and video evidence, then reported back to the Agent, and filled out a report. (GE 6 at 1.)

In December 2018, Applicant set up the second person, Mac. Because the semester was coming to an end, he was only able to make one purchase from Mac. Because that deal happened in a car, Applicant was unable to get Mac's face on video but got audio, reported to the Agent, and filled out a report. (GE 6 at 2.)

In February 2019, Applicant began to set up meetings with Chip. On February 19, Applicant met at Chip's house near campus, made one purchase, and made the usual report to the Agent. (GE 6 at 2.)

In March 2019, Applicant made numerous attempts to set up more meetings with Chip. Due to schedule conflicts, it was not until April 4 that Applicant was able to make a purchase. He made his usual report back to the Agent. In May Applicant contacted Chip about buying more marijuana. Chip told him he was done selling marijuana for the semester. Applicant relayed that information to the Agent. (GE 6 at 3.)

The Agent never told Applicant when he would be done as a CI but said Applicant could "help myself as long as I wanted to." Applicant's last communication with the Agent was via text on May 2, 2019, not long before graduation. He gave the Agent the name of a person he knew was selling

marijuana, said he did not know his phone number, and would try to get it. The Agent just said “okay.” He never heard anything from the Agent after that. (GE 6 at 3.)

Applicant testified about completing his SCA in September 2019. He was asked what was going through his mind when he answered “no” to the question whether he had sold illegal drugs. He answered:

“A simple answer, I lied and I knew that I was lying. But I thought it was my best chance at getting a clearance for something that I didn’t think was in my life anymore . . . [I]t was a mistake I made when I was – when [I] was younger and much more stupid. But it had been three-plus years at that point, or two-plus years since I had – I hadn’t heard from [the Agent]. I hadn’t heard from anyone . . . I figured that it was something that [the Agent] had found a way to sweep under the rug and that bit was no longer – it was gone from my life.” (Tr. 37-38.)

About five months later, in January 2020, Applicant was entering the gate of the military station where he worked. He had just been issued his CAC (Common Access Card) a few days earlier. The guard told him the CAC was not scanning. His drivers license was scanned, and he was told to pull over. He was told there was a fugitive warrant for his arrest. He was taken to jail at the military station and held overnight. He posted bond and was released the next day. (Tr. 40-43.)

When Applicant was released, he drove to State A [where the indictments were issued]. The judge in State A said he did not have a court date for him until May [2020]. He released me on “good conscience and said, ‘I’ll see you in May’.” (Tr. 43.)

Applicant was able to return to work for the entire time [before the May 2020 hearing]. He gave his then boss “a bit of an update on what was going on and why I was missing a few days here and there in the office.” He had also made his FSO [Facility Security Officer] aware of the situation. In May, his “security clearance popped in JPAS [Joint Personnel Adjudication System].” He “came in . . . and told her [the FSO] everything.” He kept his CAC and was able to get on station, although he rarely needed to come in. He continued to work on a foreign sales project but could no longer access classified information. (Tr. 43-45.)

Agent G did not attend Applicant’s May 2020 court hearing in State A. The judge thought it strange that Agent G waited three years before filing the fugitive arrest [warrant] in early January 2020. His lawyer explained that Applicant had turned his “life around” and had a job that required a security clearance. The judge said: “If I were to continue working and . . . staying the straight path, he would drop all felonies down and give me the bare minimum of two misdemeanors with all time served in the hope that it would not affect my job.” Applicant knew jail time was possible, six months per charge, but the judge suspended all 12 months. Applicant paid court fees, had his driver’s license suspended, and is on unsupervised probation until May 4, 2025, and shall not violate any of the laws

of State A during that period. Other than the clearance problem, it did not have “a negative effect” on his job. (Tr. 45-47; GE 5.)

At Applicant’s May 2020 hearing, the judge had pulled his college transcript. The judge saw he made Dean’s List while doing confidential informant work. His character was good, he understood the mistakes he made, and was trying for the best possible outcome. He believes that “heavily weighed” in why the judge gave him the light sentence. He has not been involved in any criminal activity since [2017]. “Not so much as a speeding ticket.” (Tr. 48-49.)

Applicant learned lessons from selling marijuana and not being truthful about it in his SCA. “I would never . . . put myself in a situation like that again. I can clearly see how . . . it’s affected my life, potentially affecting my entire career . . . I would never be stupid enough to put myself in that type of position again where I would have to lie.” (Tr. 49.)

Since the 2017 events that led to his convictions, Applicant has moved away from the small college campus area where it was easy to obtain marijuana. He no longer associates with people selling marijuana. He would not associate in the future with people he knew were selling marijuana. Today he is more mature than he was in 2017 and 2019. He can be trusted to safeguard classified material. He has pledged to have nothing to do with marijuana or any other illegal drugs in the future. (Tr. 50-53.) In substantial conformity with AG ¶ 26(b)(3), AE G is his written statement of intent to abstain from all drug involvement in the future.

Applicant’s CAC expired on January 6, 2023. He was unable to get it renewed. The specific reason was that this clearance issue “was hanging out there in [his] background.” He could not access his Government computer, so his employer temporarily terminated him, on January 6, 2023. (Tr.35, 50-51.)

Applicant was referred to GE 1, his SCA, Section 23 at 34 and his answer to the question whether in the last seven years he had trafficked in illegal drugs. He reiterated that he deliberately lied in answering “No” to this question. [alleged in the SOR]. (Tr. 54.)

Applicant was referred to GE 1, Section 22 at 33 and the questions about his police record. The first question asked whether in the last seven years, he had been charged, convicted, sentenced, or on probation for a crime in any court, to which he had answered “No.” He testified that this was a deliberate lie. This was not alleged in the SOR. Department Counsel did not move to amend the SOR. The second question asked whether he had ever been charged with an offense involving alcohol or drugs, to which he had answered “No.” He testified that this was a lie. This was not alleged in the SOR. Department Counsel did not move to amend the SOR. (Tr. 55.)

Applicant was referred to GE 2 at 3, an interrogatory that asked whether he had ever sold any marijuana. He answered “Yes” and said “3” as to the “Number of Sales” and indicated between October 4, 2017 and October 30, 2017. He agreed that those were just the three times he had been caught. He also agreed that his answer was not entirely

accurate: “[I sold] the three times that I was caught and one time before that.” This last sale was not alleged in the SOR. Department Counsel did not move to amend the SOR. (Tr. 59-60.) (The record does not show the date he received the interrogatories, but his responses were verified on December 14, 2022.)

Applicant was referred to GE 2 at 9, second full paragraph of the personal subject interview (PSI), beginning “In 2017.” That paragraph reported that for one month [not stated], he sold marijuana on the weekends to eight to ten regular customers. He was confronted by his hearing testimony that he “sold once to one other person,” which is contradicted by his PSI, which he had an opportunity to correct and did adopt. He was asked “which is true?” He answered: “What’s in the subject interview is what’s true.” These sales were not alleged in the SOR. Department Counsel did not move to amend the SOR. (Tr. 60-66.)

When Applicant was arrested at his military base in January 2020, he informed his then boss. His FSO found out in May 2020. He did not inform her earlier, because he was afraid he would be fired “on the spot.” He admitted he was not “entirely forthcoming to [his] FSO.” He told her everything, from the beginning in 2017, what had happened, where he was specifically in the process, and about the time going to court. He also told her he had lied on his [SCA]. (Tr. 71-73.)

Applicant was referred to GE 2, his verified PSI at 10, second full paragraph. The PSI reports that he failed to report the six criminal charges on his SCA, because he assumed the charges had been dropped. He agreed with the PSI. He “lied because of confusion . . . and was not sure how to accurately report something that had no paperwork . . . there were no indictments . . . [t]here was nothing.” He did not report the charges to his employer before being hired, because he thought they had been dropped. His employer only asked him “standard background check questions.” (Tr. 74-76.)

Applicant was asked about August 2018, his first confrontation with Agent G. Agent G. showed him “paperwork which I believe were . . . indictments with the judge’s name at the bottom and all that.” Applicant believed the “charges weren’t charges yet as long as I helped the detective.” The Agent “made it abundantly clear that they [the charges] were going to go away and I would never have to show up in court.” After Applicant’s arrest in January 2020, the judge told him Agent G had filed the warrant for his arrest. (Tr. 77-79.)

Applicant is shown GE 4, county circuit court sealed indictments dated January 26, 2018. He testified that this exhibit looks something like what the Agent showed him in August 2018. It is noted that the exhibit is signed by the foreman of the Grand Jury not a judge. That did not mean anything to Applicant at the time. He did not understand how a sealed grand jury indictment worked. (Tr. 80-82.)

Character Evidence

Professional Recognition. While working for his employer [from January 2020 until his temporary termination in January 2023], Applicant was a member of an award-

winning team that was instrumental in landing a five-year multimillion dollar Government contract. He had full responsibility “to crunch all the numbers and account for inflation” and parts availability over five years. His team received a contract award from the Government in January 2023. He was one of the team members specifically named in that award certificate. (AE I; Tr. 35-36.)

Mr. K submitted a character reference letter dated January 12, 2023, the salient points of which are summarized below:

The author was a program manager while Applicant was employed full-time from January 6, 2020 to January 3, 2023. He was Applicant’s overarching supervisor and is knowledgeable about his performance.

He found Applicant to be an intelligent and motivated individual who was very organized, professional, and was developing into “an amazing analyst.” He distinguished himself as a dedicated, loyal, and responsible employee. He was well-respected by employees and the client team. The author looks forward to working with him again in the future. (AE K.)

Ms. L testified as a fact witness and as a character witness as follows:

The witness has worked for her employer at the military station since 1984 and has held security clearances for 40 years. She was working at the military station when Applicant started in January 2020. She is the Site Manager. There are a couple of FSOs, but she does the majority of the security work for her division. She does security-related briefings. (Tr. 107-110.)

The witness knows why this hearing is being held. Her understanding is that Applicant gave her and his supervisor a call and reported what happened when he tried to access the military station that day [in January 2020]. This was before there was any follow-on action with his clearance, “just a quick letting you know.” (Tr. 110-111.)

After Applicant self-reported, the witness submitted an incident report in JPAS on July 10, 2020. She then received a CAF (Consolidated Adjudication Facility) notification on August 3, 2020 requesting an e-QIP from Applicant, a new one to add the adverse information “he didn’t even know about.” “As soon as he reported that, we immediately . . . went into JPAS and did an adverse report reporting that incident.” He “self-reported it in July of 2020 . . . that’s when I submitted the incident report via JPAS.” Leading up to that report, he gave her information on being convicted in court of two misdemeanors. (Tr. 111-112.)

The witness, her employer, and the Government customer “did not want to let [Applicant] go.” “So while we waited for . . . the outcome of the adjudication - - the customer allowed [him] to stay on while we waited for . . . something to come back.” His security status did not cause a security concern. The employer and the Government customer supported him. With her history of holding clearances for four decades, in her professional capacity, the witness did not have any problem with [Applicant] staying on while [awaiting his

adjudication].” In her opinion, he should be granted a clearance ultimately. She trusts him as someone who would comply with rules that govern holding a clearance and handling classified information properly. She was aware that he had been arrested in January 2020. She recalled “the day that [he] came to both his supervisor and I and explained this to us, but unfortunately I maybe have the dates a little mixed up” (Tr. 114-117.)

Ms. L also submitted a character reference letter dated January 13, 2023. (AE L.)

Mr. M testified as a character witness as follows:

The witness served 20 years in the Navy from 1984 until his retirement in 2004. He has been a defense contractor since his retirement. He has held security clearances for 39 years. He understands the importance of being entrusted with a Government clearance and safeguarding classified information. (Tr. 102-104.)

The witness heard about Applicant from his son, who had gone to the same university. He first met him face-to-face in July 2021 at a 4th of July party at the witness’ house. Over the years, he and Applicant spoke by telephone “every now and then.” He’s had face-to-face meetings with him at least three times and talk “on the phone once every month or two. (Tr. 104.)

Applicant let the witness know the reason for this hearing. The witness said: “[H]e’s a super guy. He’s always energetic. He likes talking to people . . . He’s just a easy-to-get-along-with-kind of individual.” Applicant told him about his misconduct in 2017. “It surprised me a lot that he actually did something like that.” It caught him “kind of off guard . . . [yes] very big surprise.” The witness said that if “[Applicant] gave his word that he would never again engage in that kind of misconduct, the witness would “certainly” trust him. The witness thinks Applicant has “learned a lot from his past and in a very, very good way.” Asked whether Applicant should be entrusted with a clearance, the witness said: “I have no problem with him having a clearance . . . I really think his past is his past. He’s not that person anymore . . . [Applicant] has a strong love for his country . . . he’s a true patriot.” (Tr. 105-106.)

Mr. M also submitted a character reference letter dated February 13, 2023. (AE M.)

Ms. N testified as a character witness as follows:

The witness works at the military station where Applicant was employed. She is a DOD civilian employee. She is a program manager and lead for a platform with various missions for sales overseas. She has been in that position for three years. She met Applicant when he came into her program. He was a program analyst and reported to her. (Tr. 17-19.)

The witness testified about Applicant’s performance as a program analyst. “[He] performed his duties very well. He was timely, he was responsive . . . if he had a question on anything, any sort of tasking . . he would ask me directly what . . . exactly needed to be done.” She testified further that the job had “a lot of complexity and sensitivities . . . and some of the

data and content . . . is classified.” He handled his “regular job duties with ease . . . and the sensitive and classified data he was privy to with care.” (Tr. 19-20.)

The witness was asked whether Applicant needed oversight and close supervision. The witness explained:

“No, no, that was one other great thing about [Applicant] and his character was . . . we were working in the covid environment when he was an employee supporting me. And the majority of the time we worked via . . . telework . . . [Applicant] performed his day-to-day job duties with no issues at all.”

She testified she trusts him 100% to hold a clearance. She knows that this hearing is due to two misdemeanor convictions he had seven years ago. Notwithstanding that, she is still okay with having him back and holding a clearance. (Tr. 20-22.)

Ms. N also submitted a character reference letter dated January 23, 2023, (AE N.)

Ms. O submitted a character reference letter dated January 18, 2023, the salient points of which are summarized below:

The author worked closely with Applicant from January 6, 2020 to November 3, 2021. They were on the same team, and as the senior analyst, she was his mentor. He was efficient, detail-oriented, an organized professional, and an asset to the team. He was always prompt to work and put in extra time to meet deadlines without hesitation. He is a quick learner, responsible, and a dedicated responsible employee. His commitment to exceed in all of his responsibilities were apparent in day-to-day operations. The author looks forward to working with him in the future. (AE O.)

Mr. P submitted a character reference letter dated January 16, 2023, the salient points of which are summarized below:

The author met Applicant at a young age when his father and the author worked together at a U.S. Navy station. He watched Applicant play high school lacrosse and grow into a mature adult during and after his university studies. At all times, the author has found Applicant to be dependable, reliable, hard-working, conscientious, honest, and a patriotic citizen. He highly recommends him for future Government and private employment. (AE P.)

Mr. Q submitted a character reference letter dated February 3, 2023, the salient points of which are summarized below:

The author is a retired Naval officer with over 32 years of active duty military service. He became acquainted with Applicant in 2010, while working with his father at a Navy programs office. He and Applicant’s father are close friends, and he had the opportunity to follow Applicant’s accomplishments as he grew up and matured into the confident, self-motivated, and driven young man he is today.

Shortly after Applicant's university graduation, he became employed at a Naval command. Since the author worked in the same close-knit field, he came to know that Applicant had established himself as a dependable analyst who is liked by his co-workers and supervisors. He has unlimited potential to make increasing levels of contributions to the success of our country in this line of work. The author has no reservations that he has demonstrated outstanding character and highly recommends him for Government employment. (AE Q.)

Mr. R testified as a character witness as follows:

The witness and Applicant date back to their first year in college, when they lived on the same hallway in the same dormitory. They did not have the same majors but were in similar fields and in the same academic building. He did not complete college in four years, because due to some family matters, he left in his senior year. During that time apart, he did not stay in personal contact with Applicant but "sustained . . . a close friendship over the phone." For the better part of a year-and-half now, they live 10 to 12 miles from each other. (Tr. 94-96.)

The witness works for a social media marketing agency. He does not need a security clearance. He is aware of the reason for this hearing, i.e., Applicant sold marijuana during college and he is now trying to get his clearance. The witness has never known Applicant to use marijuana or any illegal drug. If Applicant gave his word that he is not going to have anything to do with selling or possessing marijuana, the witness would believe him "one hundred percent." He believes Applicant is "one of, if not the most dependable and reliable people I've ever met in all my days . . . [t]hroughout the course of our now 10-year friendship." Applicant is "not one to break trust or . . . act in a way that's not in accordance with rules and regulations." The witness was not around Applicant in college when he was selling marijuana. The witness and Applicant lived together for the first, second, and third years [of college] but not in their senior year. The witness did not live with Applicant in 2017. (Tr. 96-101.)

Law and Policies

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

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, then 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 in seeking a favorable security decision.

Analysis

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30 as follows:

Criminal activity creates doubt about an Applicant’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.

The guideline notes conditions that could raise security concerns under AG ¶ 31. The disqualifying conditions applicable in this case are:

- (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; and
- (c) individual is currently on parole or probation.

Applicant admitted that he was arrested and charged with three felony counts of distribution of marijuana and three felony counts of distribution of marijuana near school property. He also admitted that in May 2020, he pled guilty to two misdemeanor counts of distribution of marijuana. Therefore, disqualifying condition AG ¶ 31(b) applies. He also admitted that he is on unsupervised probation until May 4, 2025. AG ¶ 31(c) was not alleged in the SOR. Therefore, it cannot be used as an independent basis for a denial. It is considered here in the whole-person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

AG ¶ 32 provides conditions that could mitigate security concerns. The following conditions are potentially applicable:

- (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.

Applicant's criminal conduct occurred in 2017, quite some time ago. Its effects, however, are continuing, and he remains on unsupervised probation until May 4, 2025. As of the hearing date, he has not been involved in any criminal activity since 2017, "not so much as a speeding ticket." His conduct is unlikely to recur. Even though he has not yet successfully completed his probation period, it appears likely that he will do so. I find that AG ¶¶ 32(a) and (b) have mitigated SOR ¶ 2.

Guideline H: Drug Involvement and Substance Misuse

Under AG H, illegal drug involvement may raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, as follows:

The illegal use of [or involvement with] 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.

In this case, the following disqualifying condition applies:

AG ¶ 25(c) illegal possession of a controlled substance, including . . . purchase, sale, or distribution.

The potentially applicable mitigating conditions here are quoted below:

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

Marijuana is a Schedule I controlled substance, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

On December 21, 2021, the Director of National Intelligence signed the memorandum, *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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior medicinal or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Applicant admitted that he sold marijuana on three separate occasions in October 2017. Therefore, disqualifying condition AG ¶ 25(c) has been established. The next question is whether any mitigating conditions apply.

I considered mitigating condition AG ¶ 26(a). Applicant’s sales of marijuana occurred in October 2017. That was over seven years ago and happened under circumstances unlikely to recur. Although he is still on probation until May 4, 2025, his successful completion appears likely. I find that AG ¶ 26(a) applies and mitigates SOR ¶ 2.

I have also considered mitigating condition AG ¶ 26(b). Since the 2017 events that led to Applicant’s convictions, he has moved away from the college town with easy access to marijuana. He no longer associates with individuals buying or selling marijuana. He testified that he is more mature and would not in the future associate with individuals he knew were selling marijuana. There is no evidence that he has had any drug involvement since 2017. Finally, he has proffered his written statement of intent to abstain from all drug involvement in the future. I find that AG ¶ 26(b) applies and mitigates SOR ¶ 2.

Guideline E - 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.

More specifically, in assessing an allegation of deliberate falsification, I consider not only the allegation and applicant's answer but all relevant circumstances. See AG ¶¶ 2(a) and (d)(1)-(9) (explaining the "whole-person" concept and factors). A statement or omission is false or dishonest when it is made deliberately (knowingly and willfully).

The SOR alleged that Applicant deliberately falsified material facts by failing to disclose in his September 11, 2019 SCA that in the past seven years he had been involved in the illegal trafficking, transfer, or sale of marijuana. He denied that allegation. This alleged conduct falls squarely within AG ¶ 16(a), which states in pertinent part:

[D]eliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations.

Applicant testified about completing this SCA and was asked what was going through his mind when he answered "no" to whether he had sold illegal drugs. He answered unequivocally: "I lied and I knew that I was lying. But I thought it was my best chance at getting a clearance" He repeated his testimony about deliberately lying on this point later in the hearing. AG ¶ 16(a) has been established.

AG ¶ 17 enumerates seven conditions that may mitigate security concerns. AG ¶ 17(a) states in pertinent part the only condition here that may mitigate disqualifying condition AG ¶ 16(a):

[The] individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

After completing his September 2019 SCA which started the clearance process, Applicant was served with interrogatories. He responded and verified his responses on December 14, 2022. One asked how many times he had sold marijuana. He answered three times between October 4 and October 30, 2017. Asked about that response at hearing, Applicant testified that those were just the three times he had been caught. He agreed that that was *not* what the interrogatory asked. He then further testified that "[I sold] the three times that I was caught and one time before that." At that point, his total sales of marijuana went from three to four. This fact was not alleged in the SOR. Department Counsel did not move to amend the SOR to allege this additional sale.

Applicant next testified about his PSI. Specifically, he was asked about its report that for one month (not stated), he sold marijuana on the weekends to eight to ten regular

customers. He was confronted by his hearing testimony that he “sold once to one other person,” which was contradicted by his PSI, that he had an opportunity to correct. He was asked “which is true?” He answered: “What’s in the subject interview is what’s true.” At that point, his total sales likely exceeded ten. This fact was not alleged in the SOR. Department Counsel did not move to amend the SOR to allege these additional sales.

The foregoing was the factual predicate to assess whether AG ¶ 17(a) applies to Applicant’s deliberate falsification of his SCA in September 2019. By that time, he had been recruited by Agent G (in August 2018) and had completed his stint as a CI. His first opportunity to correct his deliberate falsification in his SCA was when he responded to interrogatories in December 2022. Asked in those interrogatories how many marijuana sales he had made, he responded, “3” between October 4 and 30, 2017. His response, therefore, could be deemed a correction to his initial falsification. In his response, he did not, however, admit that his falsification was deliberate. To the contrary, in his Answer, he insisted that his failure to disclose his marijuana sales was *not intentional or deliberate*. He persisted in that position. It was not until his testimony at hearing that he said: “I lied and I knew that I was lying.” Mitigating condition AG ¶ 17(a) does not apply.

Conduct not alleged in a SOR cannot be an independent basis for a denial. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). It may be relevant for credibility determinations or in performing a whole-person analysis. See, e.g., ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). Applicant’s responses to interrogatories stated that he sold marijuana three times during October 2017. He then testified that there was one additional sale in that month. He explained at hearing that the “three times” were only when he had been “caught.” This explanation and his failure to disclose his other eight to ten sales in his interrogatory response reflects negatively on his credibility. Truthful and candid answers during the security clearance process, not hairsplitting, are expected from those seeking positions that require the responsible handling of the nation’s secrets.

A second question in Applicant’s September 2019 SCA asked whether in the last seven years he had been charged with an offense involving drugs. He had answered “No.” He testified that this was a lie. This was not alleged in the SOR. Department Counsel did not move to amend the SOR to allege this failure as a deliberate falsification. By the time Applicant completed his SCA, he had spent almost a year as a CI for the Agent. He did so because he believed he had been charged with felonies for distribution of marijuana. Honesty and candor in the security clearance process should have compelled him to answer “Yes” to this question. But he did not answer truthfully, which reflects negatively on his credibility.

Whole-Person Concept

I have carefully considered Applicant’s character evidence, which included seven reference letters and four testimonial appearances. Four of his reference letters were from professional colleagues who came to know him first-hand from working with him during his three years at his clearance sponsor. They described him as dedicated, loyal, and responsible. Notwithstanding knowing of his security clearance issue, they supported his

effort to gain a clearance. The reference letters and testimony described him as a commendable individual worthy of their trust.

In addition to the foregoing evidence, while working for his clearance sponsor, Applicant was a member of a team that won a lucrative Government contract. His responsibility in that effort was “to crunch all the numbers and account for inflation” and parts availability. He was one of the team members specifically named in the award certificate.

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. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors). In my analysis above, I considered the potentially disqualifying and mitigating conditions and the whole-person concept in light of all the facts and circumstances surrounding this case.

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

Formal Findings

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

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

Conclusion

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

Philip J. Katauskas
Administrative Judge