



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



In the matter of:	)	
	)	
	)	ISCR Case No. 15-04891
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Allison Marie, Esq., Department Counsel  
For Applicant: *Pro se*

02/05/2018

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs between 1999 and 2012 while possessing a clearance during part of that period. There is no evidence of substance misuse after 2012. Nevertheless, he falsified his 2003 and 2009 security clearance applications (SCA) to cover the extent of his substance misuse. Drug involvement and substance misuse security concerns are mitigated. Personal conduct security concerns are not mitigated. Clearance denied.

**Statement of the Case**

Applicant submitted his most recent SCA on August 26, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) on December 13, 2015. Applicant answered the SOR on January 4, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on February 3, 2017. DOHA issued a notice of hearing that same day, setting the hearing for March 3, 2017. At the hearing, the

Government offered four exhibits (GE 1 through 4), which were admitted as evidence without objections. GE 4 was marked and made part of the record, but it is not evidence. Applicant testified on his own behalf, and submitted no other evidence. DOHA received the hearing transcript (Tr.) on March 9, 2017.

### **Findings of Fact**

Applicant admitted all of the SOR allegations under Guidelines H and E. His SOR and hearing admissions are incorporated as findings of fact. After a thorough review of the record evidence, and having considered Applicant's testimony and his demeanor while testifying, I make the following additional findings of fact:

Applicant is a 38-year-old employee of a federal contractor. He graduated from high school in 1997, and pursued no further formal education. He married in 2007 and has two sons, ages nine and six.

Applicant's work history indicates that he worked as a carpenter between 1998 and 2003, and between October 2008 and March 2009. He worked for federal contractors between August 2003 and October 2008, and between March 2009 and June 2012. His current employer and clearance sponsor, a federal contractor, hired him in June 2012, and he has worked there since. Applicant was granted a secret clearance in 2003, which was upgraded to a top-secret clearance in 2004. He has possessed a top-secret clearance since 2004. (Tr. 6-7)

On July 25, 2003, Applicant submitted an SCA. In his response to Question 27 (Your use of Illegal Drugs and Drug Activity-Illegal Use of Drugs) Applicant disclosed that he illegally used marijuana four times between May and June 1998. He deliberately failed to disclose that he had been illegally using marijuana, cocaine, and OxyContin during the preceding seven years. (Tr. 30-31)

On May 30, 2009, Applicant submitted another SCA. In response to Section 23 (Illegal Use of Drugs or Drug Activity), asking whether in the last seven years he had illegally used any controlled substance (including cocaine, marijuana, and prescription medications not prescribed to him) he answered "No" and disclosed no illegal drug use or possession. His 1998 illegal marijuana use and the OxyContin use between 1999 and 2001 were outside of the preceding seven year period asked by the question. However, Applicant deliberately falsified his 2009 SCA when he failed to disclose his use of marijuana and cocaine between 2003 and 2009. Section 23 also asked Applicant whether he had EVER illegally used a controlled substance while possessing a security clearance. Applicant answered "No" and deliberately falsified his 2009 SCA to cover his illegal use of cocaine and marijuana after he was granted a clearance in 2003.

Applicant disclosed in Section 23 (Illegal Use of Drugs or Drug Activity) of his 2014 SCA that he illegally used marijuana while possessing a security clearance. He estimated that his first use of marijuana was in January 2003, and his most recent use was in September 2011. He described his marijuana use as "Was used sporadically

with friends at band practices.” Applicant also used cocaine between January 2003 and March 2012, while possessing a security clearance. He described his cocaine use as “Used once a year with friends during special events (bachelor parties).”

Applicant testified he does not intend to use any illegal drugs or controlled substances in the future. (Tr. 23) In his 2014 SCA he stated: “I realized that my job and possibility of career advancement were more important than smoking weed or snorting cocaine with his band mates.” (GE 1)

Applicant explained that when he was in high school, at age 18, he was playing recreational music with high school friends. One of his band mates brought marijuana to practice and they illegally smoked marijuana during their weekly practices, or at least every other week. (Tr. 15, 25) In January 1999, at age 20, he moved out of his parent’s home to live in an apartment with one of his band mates. While living in the apartment, a friend of his roommate brought OxyContin to the apartment and Applicant experimented with the drug approximately twice a week during a two-year period. (Tr. 26) In late 2000, Applicant moved back with his parents. He claimed his last use of OxyContin was in 2001, but he continued to use marijuana and cocaine. (Tr. 16)

In 2003, Applicant’s uncle and vice-president of a company (federal contractor) hired Applicant. When he was completing the 2003 SCA, Applicant was concerned that disclosing his past illegal drug use would hinder his ability to get the job and a clearance, and he deliberately omitted his past illegal drug use. Applicant also lied about his illegal drug use when he applied for his top-secret clearance in 2004, and when he submitted his 2009 SCA for his top-secret clearance reevaluation. He believed he had to continue his falsifications to keep his clearance and his job. He was concerned about not being able to support his family. (Tr.16-17)

Applicant continued to associate with his illegal drug-using friends and to partake in their illegal marijuana and cocaine use until after his second son was born in 2011. Applicant claimed that his last contact with his drug-using friends, and the last time he illegally used drugs, was 2012. He claimed that by 2012, he had matured and was able to prioritize the most important things, like his family

In 2012, at age 31, Applicant was hired by his current employer, a federal contractor. He anticipated being assigned to work with government agencies in matters that required him to have access to sensitive compartmented information (SCI). In 2014, Applicant underwent interviews complimented with life-style polygraphs. He averred he was honest and forthcoming during his interviews, and that he passed the second polygraph-assisted interview.

Applicant testified that he now realizes the severity of lying about his drug use in the SCAs. He acknowledged that his behavior showed immaturity and selfishness. He believes that by disclosing his past illegal drug use and SCA falsifications he has taken responsibility for his criminal behavior.

## Policies

The SOR was issued 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* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

While the case was pending a decision, the Director of National Intelligence implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017, which replaced the 2006 AG. I decided this case under the current AGs implemented by SEAD 4.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are

merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 articulates the security concern for the illegal use of drugs:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802.

Between 1999 and 2012, Applicant illegally used controlled substances. Most of the illegal use occurred while he possessed a security clearance granted to him in 2003. AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (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.

The record established the disqualifying conditions under AG ¶¶ 25(a), (c), and (f) requiring additional inquiry about the possible applicability of mitigating conditions under 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;
- (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;

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

The above two mitigating conditions apply. The illegal drug use happened between 1999 and 2012. There is no evidence of any substance misuse after 2012. It has been about six years since Applicant's last substance misuse. He disclosed his past illegal drug use in his 2014 SCA.

## **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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . .<sup>1</sup>;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

Applicant's 2003 and 2009 SCAs (Sections 27 and 23 (respectively) specifically asked Applicant to disclose whether in the past seven years he had illegally use any controlled substance and whether he had ever used a controlled substance while possessing a clearance. Applicant deliberately failed to disclose his illegal use of controlled substances between 1999 and 2009, and that he illegally used drugs after he was granted a clearance in 2003. Applicant's false statements on his SCAs, satisfy the three above disqualifying conditions.

AG ¶ 16 describes conditions that could mitigate the personal conduct security concerns:

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

(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

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<sup>1</sup> The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

AG ¶ 17(a) partially applies because Applicant disclosed his illegal use of drugs in his 2014 SCA before being confronted about it. Notwithstanding, the security concerns are not mitigated. He disclosed his illegal drug use, in part, because he anticipated having to participate in polygraph-assisted interviews. He also claimed he had matured by then and realized the seriousness of his mistakes.

AG ¶ 17(c) does not apply because making a false statement is a serious offense (felony), it did not occur under unusual circumstances, and it continues to cast doubt on Applicant's reliability, trustworthiness, and good judgment.

AG ¶ 17(d) does not apply because Applicant presented no evidence of counseling. AG ¶ 17(e) applies because Applicant disclosed his criminal behavior in his 2014 SCA and that could be considered as taking positive steps to reduce or eliminate his vulnerability to exploitation.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 38-year-old employee of a federal contractor. He has worked for his employer since 2012, and has held a clearance since 2003, and a top-secret clearance since 2004. Applicant disclosed his substance misuse in his 2014 SCA. There is no evidence of any substance misuse after 2012. He testified that he is committed to not using any illegal drugs in the future. The substance misuse security concerns are mitigated.



Considering the record as a whole, Applicant's evidence is insufficient to mitigate the falsifications of his 2003 and 2009 SCAs. Applicant deliberately falsified both SCAs and continued to illegally use controlled substances knowing about the illegality of his actions, the Government's position against the use of illegal drugs, and the probable adverse consequences of his actions – losing his job and his eligibility for a clearance. Applicant's lack of judgment, candor, honesty, and his unwillingness to comply with rules and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. The 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 H:	FOR APPLICANT
Subparagraphs 1.a - 1.e:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.d:	Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance denied.

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JUAN J. RIVERA  
Administrative Judge