



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



Appearances

For Government: Lauren A. Shure, Esq., Department Counsel
For Applicant: *Pro se*

02/20/2025

Decision

BLAZEWICK, Robert B, Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines J (Criminal Conduct), H (Drug Involvement and Substance Misuse), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On August 16, 2024, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J, H, and E. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant responded to the SOR on August 16, 2024, and requested a decision on the written record in lieu of a hearing. The Government's written case was submitted on September 24, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on October 7, 2024, and he did not respond. The case was assigned to me on December 11, 2024. The Government exhibits included in the FORM are admitted in evidence, however, I note that Item 1, the SOR, is dated August 9, 2024, but Item 2,

Applicant's Answer, contains an SOR dated August 16, 2024, and Department Counsel uses August 16, 2024, as the date of the SOR in her submission of the Government's case. Apart from the dates, these two SORs are identical, and it seems the version dated August 9, 2024, is an earlier version of the same SOR.

Findings of Fact

The SOR alleges that Applicant left his assigned duty station with the U.S. Army without authorization in 2005 (SOR ¶¶ 1.a, 3.c); that he was arrested in 2006 for giving a false name and date of birth to avoid arrest for his 2005 leave without absence (SOR ¶¶ 1.b, 3.c); that he was arrested in 2016 for speeding and multiple drug offenses (SOR ¶¶ 1.c, 2.f, 3.c); that he was arrested in 2019 for cruelty to children (SOR ¶ 1.d); that he used and purchased marijuana from 1997 to at least August 2023 (SOR ¶¶ 2.a-2.b); that he used cocaine multiple times in 2016 (SOR ¶ 2.c); that he used and purchased Nandrolone Decanoate, an illegal anabolic steroid, from 2015 to at least August 2023 (SOR ¶¶ 2.d-2.e); that he was discharged from the U.S. Army in 2006 with an Other Than Honorable Discharge (SOR ¶ 3.a); and that he falsified material facts on his security clearance application (SCA) in 2023 when he failed to disclose his 2006 and 2016 arrests (SOR ¶ 3.b). In his answer, Applicant admitted all the allegations without further explanation.

Applicant is 44 years old. He has been married since 2019 and was previously married from 2005 to 2019. He has one minor biological child and two minor stepchildren. He served in the U.S. Army from 2005 to 2006, receiving an Other Than Honorable Discharge. He earned an associate degree in August 2023. He has been employed with a defense contractor since August 2023. (Items 3-5)

Applicant was attending Army basic training in March 2005 when he injured himself. He was told by his drill sergeant that his injury would cause him to be held back to the next training cycle. Applicant did not want to go through training again, so he called his stepfather to come pick him up, knowingly entering an absent without leave (AWOL) status. He was placed in a deserter status the following month. (Items 4-6)

In April 2006 Applicant was a passenger in a friend's car when they were pulled over by police. When the officer asked for everyone's identification, Applicant provided his brother's name and date of birth instead of his own, because he feared being arrested for his AWOL status. The officer obtained Applicant's real name from the other passengers and confirmed that Applicant was wanted by the U.S. Army. Applicant was arrested and charged with giving false information to a law enforcement officer. He was detained in the county detention center until being picked up by the Army for outprocessing. He received an Other Than Honorable Discharge in May 2006. In December 2006 his charges for giving false information were reduced to disorderly conduct. He pled guilty and was sentenced to 12 months of probation and fines. (Items 4-7)

In September 2016 Applicant was pulled over for going 93 miles per hour (MPH) in a 55 MPH zone. Law enforcement searched his vehicle and found cocaine, marijuana, and a smoking pipe. Applicant was arrested and charged with possession of

cocaine; possession of marijuana, less than an ounce; possession of drug-related objects; reckless driving; and speeding. He pled guilty to the cocaine, marijuana, and reckless driving charges and was sentenced to two years of probation and fines. When asked on his September 2023 SCA whether he had ever been charged with a felony offense and if he had ever been charged with an offense involving alcohol or drugs, Applicant answered "No." He did not report this offense anywhere else on his SCA until he was confronted with the evidence in his interview with an investigator. He told the investigator that he thought he had listed this offense, and that the omission was due to forgetting to list the arrest. (Items 3-5, 8)

Applicant was arrested in February 2019 for cruelty to children after school staff at his stepson's elementary school discovered significant bruises on the stepson's buttocks. Applicant admitted that he had spanked his stepson with a wooden paddle in response to the child's behavioral issues. Applicant was ultimately charged with and pled guilty to cruelty to children in the second degree and in January 2022 was sentenced to eight years of probation and a fine. He is currently still on probation. (Items 3-5, 9)

Applicant reported marijuana use on his September 2023 SCA. He first used marijuana in 1997 when he was in high school, only smoking it a few times. He did not use marijuana again until approximately 2015 or 2016, when he began using it for pain management. He smoked it a couple times a month until about 2020, when he switched to "legal" delta-8/9 gummies, which he uses two to three times per week. His last reported use was August 2023. He stated in his SCA that he did not intend to use in the future because he did not want to affect his security clearance and he would only use again if he had a prescription. (Items 3-5)

Applicant reported purchasing marijuana in his interview with an investigator. He estimated his first purchase was in 1997 and last purchase of marijuana was in 2020, however, he also reported purchasing delta 8/9 gummies from August to December 2023. He stated that he would quit purchasing and using the gummies if his security clearance requires him to. (Items 4-5)

Applicant reported cocaine use in his interview with an investigator. He could not recall when he first used cocaine but estimated using it a total of four to five times with his ex-wife and other friends until his last use in 2016. He no longer associates with his ex-wife and only keeps in contact with one friend who he used with, and that friend no longer uses drugs. Applicant does not intend to ever use cocaine again. (Items 4-5)

Applicant reported illegal steroid use on his September 2023 SCA. He first used steroids in about 2015 or 2016 for pain management. He has used steroids approximately three times a year for six weeks at a time on average. His last reported use was August 2023. He stated in his SCA that he did not intend to use in the future because he did not want to affect his security clearance and he would only use again if he had a prescription. (Items 3-5)

Applicant reported purchasing steroids, consisting of testosterone and Decanoate, in his interview with an investigator. He stated that he purchased the steroids from various online distributors. He first purchased steroids in 2015 or 2016 and last purchased them in August 2023. He purchases steroids about three to four times a year. He does not intend to continue the purchase or usage of steroids unless prescribed. (Items 4-5)

Policies

"[N]o 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 applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." EO 10865 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." EO 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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* 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan* at 531.

Analysis

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

The following disqualifying conditions are relevant:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(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;

AG ¶ 31(c): individual is currently on parole or probation; and

AG ¶ 31(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

AG ¶ 31(a) is established by Applicant's series of criminal offenses beginning in 2005 when he went AWOL, continuing with his 2006 conviction, his 2016 felony conviction, and his 2022 felony conviction. These are substantiated by his admissions and the military, court, and police records included in the government's evidence.

AG ¶ 31(b) is established by Applicant's admissions and court and police records pertaining to his 2006, 2016, and 2022 convictions as well as his military records

establishing that he was in violation the Uniform Code of Military Justice (UCMJ) Article 85, Desertion, and Article 86, Absence Without Leave.

AG ¶ 31(c) is established by Applicant's court records for his 2022 conviction for cruelty to children in the second degree, for which he was sentenced to 8 years of probation. He will remain on probation until approximately January 2030.

AG ¶ 31(e) is established by Applicant's admissions and military records indicating he received an Other Than Honorable Discharge.

The following mitigating conditions are potentially relevant:

AG ¶ 32(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

AG ¶ 32(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.

AG ¶¶ 32(a) and 32(d) are not established. Applicant has a long record of criminal conduct. He is on probation until January 2030. Insufficient time has passed to establish rehabilitation.

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

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. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Furthermore, the U.S. Department of Justice, Drug Enforcement Administration (DEA), in a memorandum dated February 13, 2023 concerning the control status of tetrahydrocannabinol acetate ester (THCO) and the chemical structures of delta-9-THCO and delta-8-THCO, states:

The Controlled Substances Act (CSA) classifies tetrahydrocannabinols (THC) as controlled in schedule I. 21 U.S.C. Section 812, Schedule I(c)(17); 21 CFR 1308.11(d)(31). Subject to limited exceptions, for the purposes of the CSA, the term 'tetrahydrocannabinols' means those 'naturally contained in a plant of the genus Cannabis (cannabis plant) Delta-9-THCO and delta-8-THCO do not occur naturally in the cannabis plant and can only be obtained synthetically, and therefore do not fall under the definition of hemp. Delta-9-THCO and delta-8-THCO are tetrahydrocannabinols having similar chemical structures and pharmacological activities to those contained in the cannabis plant. Thus, delta-9-THCO and delta-8-THCO meet the definition of 'tetrahydrocannabinols,' and they (and products containing delta-9-THCO and delta-8-THCO) are controlled in schedule I by 21 U.S.C. Section 812(c) Schedule I; and 21 CFR Section 1308.11(d).

The following disqualifying conditions are relevant:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

AG ¶ 25(a) is established by Applicant's admissions regarding his long history of drug use. It is unclear whether he understands the legal status of the delta 8/9 gummies he has been using, which are in fact considered a controlled substance under federal law and are illegal.

AG ¶ 25(c) is established by Applicant's admissions and the police and court records pertaining to his 2016 arrest and conviction.

The following mitigating conditions are potentially applicable:

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;

AG ¶ 26(b): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

AG ¶ 26(a) is not established for Applicant's marijuana use and purchase, his steroid use and purchase, and his felony drug conviction (SOR ¶ 2.a-b, 2.d.-f). His involvement was recent, frequent and did not occur under circumstances making recurrence unlikely. Despite a felony conviction for drug possession, he continued to use and purchase drugs. His drug use was as recent as August 2023 and his drug purchases were as recent as December 2023. He did not provide evidence regarding what steps he has taken to legally address his pain such as obtaining medication legally prescribed to him, physical therapy, or other pain management options. In the absence of a realistic pain management plan that does not involve the illegal use and purchase of marijuana and steroids, Applicant has not shown that his drug use is unlikely to recur.

AG ¶ 26(b) is not established for Applicant's marijuana use and purchase, his steroid use and purchase, and his felony drug conviction. As discussed above, he has not provided evidence of actions taken to overcome his drug involvement and substance misuse. Given that the drugs he most recently used are for self-medication rather than socially, AG ¶ 26(b)(1) and (2) do not apply to his marijuana and steroid use and purchase. He did not provide a signed statement of intent.

AG ¶ 26(a) and AG ¶ 26(b) are established for Applicant's cocaine use. He only used cocaine four to five times and has not used since 2016, therefore his use was not recent nor frequent. Given the near-decade of abstinence, recurrence is unlikely. Furthermore, he is no longer married to the spouse who provided him cocaine and the friend who he also used it with no longer uses cocaine. Therefore SOR ¶ 2.c is mitigated.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) 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; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations.

Applicant began a pattern of rule-breaking almost 20 years ago when he went AWOL from Army basic training, ultimately resulting in an Other Than Honorable Discharge as well as associated civilian criminal charges. Applicant continued this pattern of unwillingness to follow rules and regulations with his lengthy history of drug use and purchase, leading to a 2016 drug arrest and conviction. This long history of poor judgment and rule-breaking clearly establish AG ¶¶ 16(c) and 16(d) with respect to SOR ¶ 3.a. and SOR ¶ 3.c.

SOR ¶ 3.b alleges that Applicant deliberately falsified material facts pertaining to his 2006 and 2016 arrests on his SCA, specifically in the “EVER” portion of Section 22 – Police Record. In brief, the questions ask if the Applicant has been: convicted and then sentenced to and incarcerated for over a year; charged with a felony; and/or charged with a crime of violence or an offense involving firearms, explosives, alcohol, or drugs. Applicant’s 2006 arrest was a misdemeanor for which he was not incarcerated, and it does not fit in any of the categories listed above. The government’s FORM does not explain its theory on why this arrest and charge should have been reported in this section of the SCA. There is no other evidence indicating that the 2006 arrest should have been reported in this section of the SCA.

Applicant's 2016 arrest was a drug-related felony and should have been reported in this section of the SCA. Though he admits this allegation in his Answer to the SOR, Applicant told the investigator that he thought he had listed it on his SCA and that he must have forgotten to list it. Given how forthcoming Applicant was on the rest of his SCA regarding his criminal history and drug use, and in the absence of evidence of deliberate falsification, I am not persuaded that Applicant deliberately falsified material facts with regard to this arrest. AG ¶ 16(a) is not established for the conduct alleged in SOR ¶ 3.b.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

- (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.

Neither of these mitigating conditions apply. As discussed above, Applicant's Other Than Honorable Discharge was a result of voluntarily becoming a deserter when he decided to leave Army basic training without authorization. The circumstances surrounding both his decision to go AWOL and his deceptive actions when he was caught by local authorities reflects serious defects in judgment and integrity, regardless of it happening many years ago. In fact, this incident was the first in a years-long series of criminal behaviors that were not minor, infrequent, nor did they occur under unique circumstances. Though his last arrest and conviction is not alleged under this Guideline, the fact that he was arrested, convicted, and is currently on probation after the three prior criminal incidents alleged in SOR ¶ 3.c indicates that his criminal behavior is not in his past. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for whole person analysis ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). He did not provide evidence of steps taken to change his behavior, nor evidence that his behavior is unlikely to recur.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

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). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

"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." ISCR Case No. 09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 4999 U.S. 905 (1991). Applicant has not overcome this presumption. After weighing the disqualifying and mitigating conditions under Guidelines J, H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct, drug involvement and substance misuse, and personal conduct.

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 J (Criminal Conduct): **AGAINST APPLICANT**

Subparagraphs 1.a-1.d: **Against Applicant**

Paragraph 2, Guideline H (Drugs/Misuse): **AGAINST APPLICANT**

Subparagraphs 2.a-2.b: **Against Applicant**

Subparagraph 2.c: **For Applicant**

Subparagraphs 2.d-2.f:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct): AGAINST APPLICANT	
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	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.

Robert B. Blazewick
Chief Administrative Judge