



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



In the matter of:)
)
) ISCR Case No. 18-00949
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq., The Edmunds Law Firm

February 12, 2019

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On August 22, 2017, Applicant submitted a security clearance applications (e-QIP). (Government Exhibit 1.) On April 10, 2018, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Misuse. 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) effective within the DoD after June 8, 2017.

Applicant answered the SOR on April 25, 2018, and requested a hearing before an administrative judge. The case was assigned to me on August 27, 2018. The Defense Office of Hearings and Appeals issued a notice of hearing on November 15, 2018, and the hearing was convened as scheduled on December 7, 2018. The Government offered two exhibits, referred to as Government Exhibits 1 and 2, which

were admitted without objection. The Applicant offered three exhibits, referred to as Applicant's Exhibit A through C, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on January 11, 2019.

Findings of Fact

Applicant is 25 years old. He is not married and has no children. He has a Bachelor's of Science degree. He is employed by a defense contractor as a Software Developer. He is seeking to obtain a security clearance in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse

The Government alleges that the Applicant has used controlled substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose, which can raise questions about an individual's reliability and trustworthiness.

Applicant has a history of illegal drug use that includes the use of cocaine, twice from about January 2012 to May 2017; the use of marijuana, at least ten times from October 2012 to May 2014, and the use of Vyvance, on two occasions, a prescription drug not prescribed to him. Applicant began working for his current employer in February 2017, a job with a DoD contractor that he cherished and hoped to have someday. This defense contractor, like all defense contractors, has a zero tolerance drug policy.

Applicant stated that he used cocaine on two occasions, once in January 2012, and again in May 2017. The first time was New Years Eve, 2012. He explained that he was in his second year at college, and at a night club consuming alcohol with his siblings and friends. Unbeknownst to him, one of his five siblings came up behind him and stuck something in his nose, and pulled it out without his consent. Applicant stated that his nose started bleeding. He states that he later learned that it was cocaine. Applicant's second time using cocaine occurred in May 2017. (Tr. p. 18.) On this occasion, he was in a Las Vegas hotel with some friends. Applicant was getting ready to go out to a club and used cocaine. On this occasion, Applicant was working for a defense contractor and was aware of the company's zero drug tolerance policy.

Applicant also used marijuana while in college from about October 2012 to about May 2014, about ten times. He stated that he no longer uses marijuana because he does not like the smell of it. He also stated that he no longer associates with anyone who uses illegal drugs. He states that he has no desire to use any illegal drug in the future.

Applicant admitted to using the prescription drug. Vuvance "a stimulant," that was not prescribed to him, from about June 2016 to December 2016. He stated that he

used it twice. Applicant explained that without asking, he took the drug, without permission, from his roommate who had the prescription. It was during final examinations when Applicant was sick and behind on his studies. He knew that the drug would help him focus. Applicant's roommate asked Applicant if he had taken his drug, and Applicant acknowledged that he had. (Tr. p. 27.) Applicant testified that the first time he took it, the drug did not help him. The second time he took it, in December 2016, Applicant was given permission by his roommate to use it. This time, Applicant found it helpful. He ultimately passed his final exams. (Tr. p. 28.)

There is a question as to whether Applicant's first use of cocaine in January 2012 when his siblings stuck it up his nose without his consent can really be counted as his first use of cocaine. If that first experience with cocaine was not bad enough, what is clear is the fact that he chose to use it in May 2017, while working for a defense contractor, and after being made aware of the company's no drug tolerance policy. Applicant testified that he has since grown up and matured from using illegal drugs. He stated that he now understands the responsibilities that come with working for a defense contractor and holding a security clearance. He submitted a notarized Statement of Intent dated November 1, 2018, swearing to never use illegal drugs again. He also understands that any future involvement with illegal drugs is grounds for immediate revocation of his national security eligibility. (Applicant's Exhibit B.)

A letter from a post-doctoral researcher, who was Applicant's direct supervisor from April 2014 to June 2016, before Applicant started working for his current employer, indicates that Applicant is considered to be diligent and hard-working. The writer considers Applicant to be responsible and trustworthy, and is recommended for a security clearance. (Applicant's Exhibit A.)

A letter from a software engineer and friend, who has known the Applicant since March 2017, and has worked closely with him on several software projects, finds him to be trustworthy and reliable. Applicant is intelligent, and his work product is held to the highest standard. Applicant is recommended for a security clearance. (Applicant's Exhibit A.)

A letter from his college advisor and supervisor during Applicant's undergraduate career at college from 2011 to 2013 indicates that she has watched him grow up from a quiet and shy student, to a well-rounded and dedicated scholar and leader. He is described as an honest individual, and a person of high integrity. He is recommended for a security clearance. (Applicant Exhibit A.)

Two letters, one from a systems administrator, who is also a coworker, and one from a high school friend, attest to Applicant's honesty, hard-work ethic, and dedication to seeing the task through completion. Applicant is also described as kind, responsible, smart, ridiculously driven, and one of the most capable individuals they have encountered. Applicant is recommended for a security clearance. (Applicant's Exhibit A.)

Unrelated to his employment, Applicant voluntarily underwent a drug test on October 25, 2018, which was negative for illegal drugs. (Applicant's Exhibit C.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information)

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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.

The guideline at AG ¶ 25 contains two conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. None of the conditions are applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and

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

None of the mitigating factors demonstrate full mitigation. Applicant is a young and immature man, who is applying for a security clearance, and now promises not to use illegal drugs in the future. However, in the recent past, even after being hired to work for a defense contractor in February 2017, and cognizant of their zero drug use policies, he used cocaine three months later in May 2017. There is no excuse for this misconduct, and his actions do not show the requisite good judgment, reliability and trustworthiness necessary to be eligible for access to classified information.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Applicant is a well-respected individual. His most recent use of any illegal drug was cocaine in May 2017. This occurred over a year and half ago. This use is considered fairly recent. More time without drug use will show the Government that Applicant has matured and is sincere about his commitment to a drug free lifestyle. At this time, he has failed to provide sufficient evidence to demonstrate that he meets the qualifications for a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Substance Misuse security concern.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge