



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



In the matter of:)
)
) ISCR Case No. 18-01255
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: *Pro se*

02/19/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse) or Guideline E (personal conduct). Applicant's eligibility for access to classified information is denied.

Statement of the Case

On May 21, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. Applicant timely answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's file of relevant material (FORM) on August 7, 2018. Applicant received the FORM on August 18, 2018, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence, and he provided a five-page response to the FORM on September 7, 2018, with attachments (time-card entries from March to August 2018, Applicant's earnings statements from February to August 2018, a statement of intent, and a field bonuses - expenses document). (Response).

In his Response, Applicant requested an additional 45 days to respond to the FORM to gather evidence. Department Counsel granted the extension. On October 25, 2018, he submitted additional documentation comprised of a cover letter with a two-page psychologist's report of an alcohol and other substance use/abuse evaluation of Applicant. This has been marked as Applicant's Exhibit (AE) A and admitted without objection. The Government's evidence, identified as Items 1 through 7, is admitted into evidence without objection. The case was assigned to me on January 17, 2019.

Findings of Fact¹

Applicant is 39 years old. He graduated from high school in 1998, and has been employed as a systems administrator by a federal contractor since January 2016. Applicant reports no military service and he has never married. Applicant reports previous employment in the information technology field and in the oil fields. He was terminated from a job in May 2015 for supposedly poor performance. He reports no previous security clearance.

In January 2016, Applicant completed a security clearance application (SCA),² and in section 22 (Police Record), he disclosed a May 2013 arrest for driving while intoxicated (DWI). However, he did not disclose any previous involvement with, or use of illegal drugs in section 23 (Illegal Use of Drugs or Drug Activity). In his July 2017 clearance interview, he volunteered his repeated use of various illegal drugs, to the investigator.³ Applicant stated that he had extensive use of various illegal controlled substances including cocaine, mushrooms, ecstasy, marijuana, Ritalin, Vicodin, and various pain pills. He started using cocaine as a senior in high school in 1998, and he continued to use it recreationally about once every six months, until 2002.

In 2002, Applicant moved in with his girlfriend and his drug use intensified. Together, they used a panoply of illegal drugs every weekend for three years, until they broke up in 2005. Then, Applicant's illegal drug use slowed down again to once every six months or so.⁴ He stated that he last used marijuana two years ago, and he last used un-prescribed pain killers in 2005. Applicant never purchased or sold illegal drugs. They were usually provided to him by friends in social settings. He stated he last used cocaine in April 2017. He estimated he has driven under the influence of cocaine 12 to 16 times. Applicant initially stated that he did not intend to discontinue his recreational drug use unless it is required for his current employment.⁵ However, if he gets the job he has

¹ Unless stated otherwise, the source of the information in this section is Applicant's January 19, 2016 Security Clearance Application (SCA) (Item 3) and his summaries of clearance interviews by a background investigators dated July 2, 2017, and July 23, 2017. (Item 4).

² Item 3.

³ Item 4.

⁴ Item 4.

⁵ Item 4, p. 9.

applied for, he will not be using illegal drugs or alcohol because he will be deployed to Kuwait, where they are unavailable.

In his June 2018 Answer to the SOR, Applicant admitted all of the allegations including his illegal use of various drugs (SOR ¶¶ 1.a – 1.f) and testing positive on a drug test administered by his employer in May 2015. (SOR ¶ 1.g) He clarified his admission to the allegation in SOR ¶ 1.h since he has started a new job in the oil fields that requires random drug testing and he quit using recreational drugs. In SOR ¶ 2.a, Applicant admitted to falsifying his responses in section 23 of his SCA, and termination from his employment after testing positive on the May 2015 random drug test (SOR ¶ 2.b) He also admitted to three DWI arrests in 2000, 2006, and 2013 (SOR ¶¶ 2.c – 2.e). The 2000 case was dismissed, and the 2006 DWI was reduced to a lesser offense.

Applicant was evaluated for alcohol and other substance use/abuse on October 18, 2018. The evaluating doctor found no evidence of any Diagnostic and Statistical Manual of Mental Disorders 5 (DSM 5) alcohol or substance use disorder. He did not find that Applicant manifests features of either addiction or dependence. Applicant told the evaluator that he last used cocaine in February 2017. (AE A) Applicant provided no evidence of character references or performance evaluations from his employer. He did provide a statement of his unequivocal intent to not use illegal drugs after being granted a security clearance and agreeing to automatic revocation of his security clearance if he does. (attachment D to Answer) He also provided time card and earnings documents reflecting that he earned approximately \$21 per hour, and \$31.50 per hour for overtime, in 2018. He routinely worked six or seven days a week on 12 hour shifts.

Policies

DOD took action in this case 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 (AGs) implemented by DOD on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who seeks access to classified information enters 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 that an applicant may deliberately or inadvertently fail to 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 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

¶ 24: The security concern for drug involvement and substance misuse is set out in AG

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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable 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
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant admitted he used marijuana and other illegal drugs for several years. He also initially expressed an intent to continue using recreational in the future unless his current employment prohibited such use. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially 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;
- (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.

Applicant has continued to use cocaine as recently as February 2017 (AE A) or April 2017 (Item 4). He started using cocaine recreationally in 1998. He was terminated from his employment in May 2015 for testing positive on a random drug test. Yet, he continued to use illegal drugs. He has not abstained and appears to be only willing to refrain from illegal drug use, and comply with the law, if he obtains a security clearance. In addition to marijuana, he used an assortment of other illegal or unprescribed drugs,

including cocaine, pain pills, and Ritalin. He provided no evidence of completion of a substance abuse-course or rehabilitation.

Applicant appears to be sincere in his efforts to abstain, but that is insufficient to mitigate the well-established pattern of illegal drug use. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable, and AG ¶ 26(b) is partially applicable.

Guideline E, Personal Conduct

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

The Concern. 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 following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (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;
- (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;

(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

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant admitted to deliberately failing to disclose his illegal drug use on his 2016 SCA. However, he volunteered this information to an investigator at the outset of his clearance interview in early July 2017, before he was confronted with it. Moreover, he credibly asserted in his Response to the FORM, that he felt rushed when he completed the SCA. He had no specific intent to deliberately deceive the government. AG ¶ 16 (a) and (b) do not apply. Applicant admitted to three arrests for DWI in 2000, 2006, and 2013. The first DWI was dismissed and the second resulted in conviction for a lesser offense. The only arrest that resulted in a DWI conviction was his 2013 arrest. That conviction was over five years ago, but it still raises questions about Applicant's judgment, when considered in conjunction with simultaneous and ongoing illegal drug use. He admitted to termination by his employer for testing positive on a random drug test in violation of a recorded commitment to his employer, in May 2015. AG ¶¶ 16 (c) and (f) are implicated and the focus shifts to a determination of which, if any of the mitigating conditions apply.

AG ¶ 17 provides conditions that could potentially mitigate security concerns including:

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

(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.

Applicant promptly corrected his omission of his illegal drug use in his SCA when he broached it at the outset of his clearance interview. AG ¶ 17 (a) applies to mitigate the allegation of falsification in SOR ¶ 2.a. He did not deliberately intend to deceive the

government about his drug use. He claims to have completed a court-ordered substance abuse course and had counselling, but he produced no evidence. He has modified his behavior and unequivocally expressed his intention to refrain from any illegal drug use in the future in an attached statement to his Answer. He rarely drinks currently, and if he is deployed to Kuwait, he will abstain completely. AG ¶¶ 17 (c) and (d) apply partially, but insufficient time has passed since Applicant was terminated from employment in 2015, and he last used cocaine in 2017, to safely conclude that he will not have a recurrence.

Whole-Person Concept

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

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

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant has worked six or seven days a week, on 12-hour shifts, for a contractor. He has completed court-ordered DWI counseling and he has unequivocally declared his intention to refrain from further use of illegal drugs. Nevertheless, Applicant did not present sufficient evidence to assure me that he will remain sober and drug-free, since he failed to learn his lesson even after he was terminated, and he indulged in long-term illegal drug and alcohol use/abuse. Inadequate time has elapsed to conclude that he will honor his commitment to change. He has not met his burden of persuasion.

Applicant's drug involvement and substance misuse remain a security concern. These offenses were not minor or infrequent, and they were not committed under such unusual circumstances that they are unlikely to recur. There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of his drug involvement or taken steps to alleviate the stressors or circumstances that contributed to his behavior to insure that it does not recur. He has not met his burden of persuasion. The record

evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guidelines H and E.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b through 2.e:	Against Applicant

Conclusion

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

Robert J. Kilmartin
Administrative Judge