



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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 REDACTED ) ISCR Case No. 18-02929  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

03/05/2020

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was court-martialed for wrongful use of cocaine detected by urinalysis test and given a bad conduct discharge from the United States military. On an August 2014 security clearance application (SCA), he falsely claimed that he had received a general discharge; that he had never been convicted of a crime, including in a military court; and that he had not used any illegal drugs while possessing a security clearance. He initially denied that he had received a bad conduct discharge and lied about his drug use when interviewed by a government investigator in December 2016. The personal conduct security concerns raised by his lack of candor are not mitigated. Clearance eligibility is denied.

**Statement of the Case**

On March 18, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E, personal conduct. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On May 25, 2019, Applicant responded to the SOR allegations and requested a decision based on the written record in lieu of a hearing. On October 23, 2019, the Government submitted a File of Relevant Material (FORM), containing three exhibits (Items 1-3). The Defense Office of Hearings and Appeals (DOHA) forwarded a copy of the FORM to Applicant, and instructed him that any response was due within 30 days of receipt. Applicant received the FORM on November 18, 2019. No response was received by the December 18, 2019 deadline. On January 15, 2020, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. I received the case file on January 21, 2020.

### **Findings of Fact**

The SOR alleges under Guideline E that Applicant received a bad conduct discharge from the U.S. military in approximately July 2010 after being found guilty at a court-martial for wrongfully using cocaine, and that he was reduced in rank to E-1, and given 30 days of hard labor and 30 days restriction (SOR ¶ 1.a). Applicant is also alleged to have falsified an August 2014 Electronic Questionnaire for Investigations Processing (SCA) in several aspects: by claiming that he received a general discharge (SOR ¶ 1.b); by denying he had been subject to a court-martial or other disciplinary proceeding under the Uniform Code of Military Justice (UCMJ) in the last seven years (SOR ¶ 1.c); by denying he had been charged, convicted, or sentenced of any crime in any court, including a military court, in the last seven years (SOR ¶ 1.d); and by denying that he had illegally used any drug in the last seven years or ever while possessing a security clearance (SOR ¶ 1.e). Additionally, Applicant is alleged to have initially denied to an authorized investigator for the DOD under oath on December 12, 2016, that he received a bad conduct discharge and to have falsely denied any use of illegal drugs since the age of 18 despite a urinalysis positive for cocaine in 2007 (SOR ¶ 1.f). (Item 1.)

When he responded to the SOR allegations, Applicant did not answer SOR ¶ 1.a concerning the bad conduct discharge and court-martial for wrongful use of cocaine. He admitted SOR ¶¶ 1.b-1.d and 1.f and denied SOR ¶ 1.e without any explanations. (Item 1.) After considering the FORM, I note that evidence of Applicant's military discharge, court-martial proceeding, and sentence imposed is limited to what is set forth in an uncontested report of Applicant's December 2016 interview with an Office of Personnel Management (OPM) investigator (Item 3) and from what can be reasonably inferred from Applicant's admissions without explanation to SOR ¶¶ 1.b-1.d and 1.f. The FORM does not include the record of the urinalysis that led to the court-martial or any military records of the court-martial proceeding, which could confirm the charge and sentence imposed, or shed light on the date and circumstances of the proceeding, including whether Applicant had legal representation. Nor does the file before me for review include any military records showing

the bad conduct discharge and its date. Based on the evidence available, I make the following findings of fact:

Applicant is a 35-year-old high school graduate. He has never married and has no children. He entered on active duty in the U.S. military in January 2004. He was granted a DOD secret clearance for his military duties in approximately March 2005. (Item 2.) Applicant received a bad conduct discharge from the U.S. military after he was court-martialed for wrongful use of cocaine, in violation of Article 112A of the UCMJ, after apparently testing positive for cocaine in 2007. Applicant indicates that he served in the military until October 2008. (Item 2.) The SOR alleges a July 2010 date for his bad conduct discharge. (Item 1.) There is no explanation in the record for the apparent discrepancy in dates between the end of his military service and bad conduct discharge.

After his bad conduct discharge, Applicant worked as a civilian for a succession of defense contractors in Kuwait, Iraq, Afghanistan, and then back to Kuwait. While employed as a data clerk in Kuwait, on August 14, 2014, Applicant completed and certified to the accuracy of a SCA. He indicated that he was given a "General" discharge from the U.S. military in October 2008, stating "Opted to be discharged after first duty station completed" (SOR ¶ 1.b). He answered "No" to the following inquiry concerning any discipline in the military (SOR ¶ 1.c):

**In the last 7 years**, have you been subject to court martial or other disciplinary procedure under the Uniform Code of Military Justice (UCMJ), such as Article 15, Captain's mast, Article 135 Court of Inquiry, etc.?

In response to the SCA's employment inquiries, Applicant indicated that his main reason for leaving active duty "was to seek a higher paying salary." In Section 22 concerning any police record, he was directed to report information regardless of whether his record had been sealed, expunged, or stricken, or whether the charge was dismissed. Applicant responded negatively to all of the police record inquiries, including the following:

**In the past seven (7) years** have you been charged, convicted, or sentenced of a crime in any court? (Include all qualifying charges, convictions or sentences in any Federal, state, local, military, or non-U.S. court, even if previously listed on this form) (SOR ¶ 1.d); and

Have you **EVER** been charged with an offense involving alcohol or drugs?

Applicant also responded negatively to the Section 23 inquiries concerning illegal use of drugs or drug activity, including the following:

**In the last seven (7) years**, have you illegally used any drugs or controlled substances? Use of a drug or controlled substance includes injecting, snorting, inhaling, swallowing, experimenting with or otherwise consuming any drug or controlled substance; and

Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed? (SOR ¶ 1.e). (Item 2.)

In December 2016, the contract under which Applicant worked overseas was acquired by another contractor. On December 12, 2016, Applicant was interviewed under oath by an authorized investigator for the Office of Personnel Management (OPM). When asked about his military discharge, Applicant initially denied that he had a bad conduct discharge from the military in 2010, but after he was confronted with developed information about his discharge, Applicant acknowledged that he received a bad conduct discharge for testing positive for cocaine in 2007. However, he denied having used any cocaine, and explained that he hired an attorney and fought the charge, believing that the sample was bad or mishandled. He admitted that he had been reduced in rank to E-1, but stated that his attorney had told him in 2009 that “his conviction had been reduced and all charges dismissed and expunged.” Applicant claimed he could not recall the jurisdiction, the details of the appeal process, or his attorney’s name. He acknowledged the importance of obtaining the information for adjudication on appeal of a clearance denial. He stated that he did not list his bad conduct discharge on his SCA because he “thought” it had been reduced to a general discharge and was told it was expunged. He believed it was no longer a matter of record, “which meant he did not have to list it.” However, he then acknowledged that he intentionally omitted the derogatory information about his discharge from his SCA. Applicant expressed some concern to the OPM investigator about the impact his bad conduct discharge could have on his clearance, but he denied it was a source of vulnerability for him. Concerning any illegal drug involvement, Applicant denied to the OPM investigator that he had used any illegal drug “dating back to 2002 when he was 18.” (Item 3.)

During his adjudication of his security clearance eligibility, Applicant was provided a copy of a summary of his December 2016 interview prepared by the OPM investigator containing the aforesaid representations. On February 11, 2019, Applicant affirmed that the investigator’s report accurately summarized the interview, and he made no corrections, additions, or deletions. (Item 3.)

On March 18, 2019, the DOD CAF issued a SOR to Applicant because of his court-martial and bad conduct discharge and his lack of candor on his SF 86 and December 2016 interview about his military discipline and discharge and his drug involvement. In his May 25, 2019, Answer to the SOR allegations, Applicant essentially admitted his lack of candor on his August 16, 2014 SCA about his military discipline and discharge and when first queried under oath by the OPM investigator on December 12, 2016. On his SCA, he listed his discharge as general and misrepresented the circumstances of his discharge, including stating that he “opted” to be discharged at the end of his first duty station, and he concealed his court-martial proceeding and conviction for wrongfully using cocaine. Applicant lied under oath to an OPM investigator on December 12, 2016, when, on first inquiry, he denied that he had received a bad conduct discharge.

Applicant responded “I deny” to whether he falsified his August 2014 SCA by responding negatively to questions concerning whether he had used any illegal drug use in the last seven years, and whether he had ever used any illegal drug use while possessing a security clearance. He responded “I Admit” with respect to telling the OPM investigator in December 2016 that he had not used any illegal drug since age 18. Applicant offered no explanation for his seemingly inconsistent responses to SOR ¶¶ 1.e and 1.f. He submitted no documentation to substantiate his claims made during his OPM interview that the urinalysis that led to his court-martial and discharge was tainted or mishandled. Also, he has not denied the court-martial, or his conviction for wrongful drug use for which he was reduced in rank and which is enough to meet the government’s burden of establishing substantial evidence that he used cocaine on at least one occasion in 2007.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overall 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. Under Directive ¶ E3.1.14, the Government must present evidence to establish 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain 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 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. 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 E: Personal Conduct**

The security concern about personal conduct is articulated 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 investigations or adjudicative processes.

Applicant was given a bad conduct discharge from the U.S. military following a court-martial where he was convicted for wrongful use of cocaine. That drug use was detected in a drug test in 2007. Applicant compounded the concerns for his personal conduct by deliberately misrepresenting the character of his discharge and the reason for it when he completed his August 2014 SCA. He falsely denied that he had been disciplined in the military and that he had ever been charged or convicted in a court, including a military court, of a criminal offense. During his OPM interview in December 2016, when first asked about his discharge, he falsely denied he had received a bad conduct discharge. He also claimed that there was no factual basis to his court-martial conviction for wrongful use of cocaine and stated that he had not used any illegal drug since 2002 when he was 18 years old. His lack of candor on his SCA implicates disqualifying condition AG ¶ 16(a). AG ¶ 16(b) applies because he was not forthright with the investigator about the character of his discharge, or about his illegal drug use. His cocaine use in 2007, for which he was court-martialed, may not be sufficient for disqualification under another guideline because of the passage of time, but the cocaine use, when considered with his SCA falsifications in 2014 and his deliberate misrepresentations during his December 2016 interview, supports a whole-person assessment of questionable judgment, untrustworthiness, and unreliability under AG ¶ 16(c). AG ¶¶ 16(a), 16(b), and 16(c) provide:

(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 national security 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; and

(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.

The SOR also alleges that Applicant falsified his August 2014 SCA by responding negatively to drug use inquiries concerning whether he had used any illegal drug in the last seven years, and whether he had ever used an illegal drug while possessing a security clearance. Applicant denied the allegation (SOR ¶ 1.e) without comment. The DOHA Appeal Board has 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)).

Applicant's court-martial conviction for wrongful use of cocaine, as detected in a 2007 drug test, is prima facie evidence of illegal drug use that occurred while he held a security clearance. Applicant reported on his SCA that he was granted a DOD Secret clearance in March 2005, and there is no evidence that it had been withdrawn or suspended while Applicant was in the military. Applicant's uncorroborated claims that his sample was somehow tainted and that he had not used the cocaine detected in his urine in 2007 fall considerably short of meeting his burden of proof and persuasion that he was wrongfully convicted and not guilty of using the cocaine. His credibility is suspect because of his false statements about his military discharge. Moreover, the military is not likely to have imposed a punitive discharge for drug use without proof beyond a reasonable doubt. The weight of the evidence shows that Applicant falsified his SCA when he denied any drug use while possessing a security clearance, and AG ¶ 16(a) applies. However, the evidence of record does not reflect when Applicant used cocaine in 2007. It may have been early that year and therefore not within seven years of his August 2014 SCA.

The burden is on Applicant to mitigate the negative implications for his personal conduct. Application of the aforesaid disqualifying conditions triggers consideration of the potentially mitigating conditions under AG ¶ 17. One or more of the following conditions may apply in whole or in part:

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

(b) the refusal to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional 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 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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions apply in this case. Although his cocaine use that led to his court-martial occurred some time ago, his misrepresentations on his SCA and to the OPM investigator about the character and circumstances of his military discharge continue to raise concerns about his judgment, reliability, and trustworthiness. During his December 2016 interview, he acknowledged that he had received a bad conduct discharge only after he was confronted with the information. He subsequently acknowledged that he intentionally did not report relevant information about his military discharge on his SCA, but only after he told the investigator that the bad conduct discharge had been reduced to a general discharge on appeal, and that he did not list his bad conduct discharge because it was no longer a matter of record.



Applicant presented no rebuttal to the Government's FORM, in which Department Counsel asserted that Applicant admitted that he was discharged from the military after being court-martialed for wrongfully using cocaine, and also that he falsified his SCA when he said he received a general discharge. Applicant presented no evidence from others attesting to his commitment to his work, his involvement in his local community, or other aspects of behavior that could weigh in his favor with respect to demonstrating that he is reformed and that his representations can reasonably be relied on. The personal conduct security concerns are not mitigated.

### **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 her conduct and all relevant circumstances in light of the nine adjudicative process factors in 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.

Applicant requested a decision on the written record, so it was incumbent on him to provide the evidence that might extenuate or mitigate the poor judgment raised by his deliberate misrepresentations about the circumstances that led to his discharge from the U.S. military, and he failed to do so. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). After applying the disqualifying and mitigating conditions to the evidence presented, I conclude that it is not clearly consistent with the national interest to grant or continue security clearance eligibility for Applicant.

### **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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1.f:	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 or continue eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

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Elizabeth M. Matchinski  
Administrative Judge