



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



In the matter of:)
)
) ISCR Case No. 19-02609
)
)
 Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Charles S. Lazar, Esq.
03/10/2021

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concerns raised by his history of illegal drug use, alcohol abuse, and resulting criminal history. Clearance is denied.

Statement of the Case

On December 11, 2019, DOD issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct, drug involvement and substance misuse, alcohol consumption, and financial consideration guidelines. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals

(DOHA) administrative judge to determine whether to grant or deny his security clearance.

Applicant timely answered the SOR and requested a hearing. The hearing was initially scheduled for April 30, 2020, but was continued due to the Covid-19 pandemic. The parties agreed to reschedule the case for September 17, 2020; however, neither party received the Notice of Appearance. Applicant appeared as agreed and requested a continuance. Without objection from Department Counsel, I continued the hearing until October 21, 2020, the date agreed upon by the parties. (Transcript (Tr.) at 1). At the hearing, which convened as scheduled, I admitted as Hearing Exhibits (HE) I – III: (I) the case management order I issued in this case; (II) the proposed amendments to the SOR and Applicant's responses; and, (III) the discovery letter the Government sent to Applicant, dated February 20, 2020. I also admitted Government's Exhibits (GE) 1 through 14, without objection. After the hearing, Applicant timely submitted Applicant's Exhibits (AE) A through C, totaling four pages. The documents were admitted without objection. DOHA received the transcript (Tr.) on November 13, 2020.

Procedural Matters

On February 20, 2020, the Government served Applicant with proposed amendments to the SOR. He provided his written response on September 27, 2020. (HE II) He did not object to the amendments. Accordingly, the SOR is amended as follows:

1. The Government amended the criminal conduct guideline to add four allegations:
 - 1.g. In June 2007, Applicant was charged with an open container violation that was *nolle prossed*;
 - 1.h. In July 2011, Applicant was charged with assault. He was convicted.
 - 1.i. In January 2019, Applicant was charged with speeding. He pleaded guilty and received one year of probation before judgment beginning April 2019; and
 - 1.j. In May 2019, Applicant was charged with speeding. He pleaded guilty and received six months of probation before judgment beginning July 2019.

Applicant admitted each allegation.

2. The Government amended the drug involvement and substance misuse guideline to add two allegations:
 - 2.a. Applicant used cocaine on various occasions between January 2000 and August 2018, not August 2017 as alleged in the December 2019 SOR; and
 - 2.c. Applicant tested positive for cocaine in August 2018 while participating in a court-ordered substance-abuse program.

Applicant admitted each allegation.

3. The Government amended the alcohol consumption guideline to add two allegations:

3.b. Applicant tested positive for alcohol in July 2018 while participating in a court-ordered substance-abuse treatment program; and

3.c. In June 2007, Applicant was charged with an open container violation that was *nolle prossed*.

Applicant admitted each allegation.

4. The Government withdrew all allegations under the financial considerations guideline.

5. The Government amended the SOR to add concerns under the personal conduct guideline, specifically:

5.a. The conduct alleged under the criminal conduct guideline (1.a – 1.j), and the drug involvement and substance misuse (2.a – 2.c) guideline; and

5.b. Applicant deliberately falsified his September 2019 responses to DOHA interrogatories when he reported that he last used cocaine in August 2017, not August 2018.

Applicant admitted each allegation.

Findings of Fact

Applicant, 43, has worked for his current employer, a federal contracting company since April 2018. He completed a security clearance application, his first, in May 2018, disclosing derogatory information about his criminal history and past use of illegal drugs. The ensuing investigation revealed that Applicant has been arrested nine times between 2007 and 2019; that he attended a court-ordered substance-abuse program in April 2018; and that he is currently on unsupervised probation until April 2021. The investigation also revealed that he continued using illegal drugs after completing his 2017 security clearance application and while participating in a substance-abuse program.

Criminal History

Assault Arrests

Applicant was charged with assault twice in July 2011. On the first occasion, he was charged with first-degree assault after an altercation with the tenant renting his

basement. (SOR ¶¶ 1.f, 5.a) The charge was not prosecuted. Days later, Applicant was arrested and charged with second-degree assault (SOR ¶1.h, 5.a). The details of the incident are unclear from the record, but he was convicted and sentenced to probation before judgment for one year. (Tr. 64-65; GE 2, 9, 11, 67)

The SOR also alleges two arrests stemming from Applicant's interactions with his ex-wife, to whom he was married from 2007 to 2011. Applicant maintains contact with her because they share custody of their two minor children. Applicant was arrested in August 2011, and charged with assault on a family member (SOR ¶¶ 1.e, 5.a). According to the police report, Applicant punched his ex-wife on the forehead during an altercation between him, his ex-wife, and his then girlfriend, who is the mother of Applicant's third child. The fight occurred when Applicant picked up the children from his ex-wife's home for his scheduled visitation. Applicant testified that the police report was incorrect. According to Applicant, his girlfriend admitted to the responding officers that she assaulted Applicant's ex-wife. Applicant maintains that the police officer chose instead to believe his ex-wife's accusations against him, which were corroborated by her parents who witnessed the altercation. Applicant entered an *Alford plea* on the assault charge; however, his sentence is unclear from the record. Applicant's ex-wife obtained a protective order in September 2011, requiring him to stay a minimum of 5,000 feet away from her and prohibiting him from having any contact with her. The court also ordered the couple to execute visitation through a supervised exchange program. (Tr. 61-64; GE8)

Protective Order Violation

In January 2015, Applicant contacted his ex-wife by telephone and texts regarding their children, in contravention of the protective order. Applicant claims he did not call his ex-wife, but that their son used Applicant's phone to call her. (SOR ¶¶1.d, 5.a) The court determined that Applicant violated the protective order and extended it to March 2017. Applicant described his relationship with his ex-wife as contentious. He testified that she tried, without success, to have the protection order extended on at least four other occasions. (Tr.58-61; GE 7)

Theft Arrest

In October 2016, Applicant was arrested and charged with theft after failing to pay for an item in his shopping cart at a hardware store. (SOR ¶¶ 1.c. 5.a) In his response to the SOR and during his statements at the hearing, Applicant claimed that his failure to pay for the item was an oversight. However, in the September 2018 subject interview, Applicant told the investigator that he intentionally hid the item in his shopping cart to avoid paying for it. Applicant adopted the contents of the subject interview in his September 2019 response to DOHA interrogatories. Although Applicant made some corrections to the subject interview summary, he did not make any corrections to the paragraph recounting the incidents of the October 2016 arrest. Applicant pleaded guilty to theft less than \$100. (Tr.57-58; Answer; GE 1-2, 6)

Alcohol and Drug Related Arrests

Between 2007 and 2018, Applicant was arrested three times for conduct related to alcohol or illegal drug use. In June 2007, Applicant was charged with having an open container of alcohol in a parking lot where he was socializing with his friends. The charge was not prosecuted. (SOR ¶¶ 1.g, 3.c, 5.a) In August 2017, Applicant was charged with driving while intoxicated (DWI) on cocaine, after he fell asleep while driving and hit a street sign. (SOR ¶¶ 1.b, 2.b, 5.a). At the hearing, Applicant stated that the night of the accident, he took Xanax, not cocaine. Although Applicant admits that the blood test administered after the accident tested positive for cocaine, he maintains that he used the drug the weekend before the accident, which occurred on a Sunday. The court found Applicant guilty of DWI – first offense. The court restricted Applicant's driving privileges for 12 months, ordered him to attend a substance-abuse program, and required the installation an interlock device on his vehicle. The court also placed Applicant on unsupervised probation for three years to end in April 2021. (Tr. 53-57, 66, 84-85; GE 1, 2, 5, 10; AE B-C)

Fifteen months later, Applicant was cited for DWI - alcohol while transporting a minor, his daughter, and exceeding the speed limit. (SOR ¶ 1.a, 3.a, 5.a) The traffic stop occurred at 1:30 a.m. At the hearing, Applicant explained that the night before he was stopped, he consumed alcohol at a friend's home. He took a nap before driving home with his daughter and girlfriend, the child's mother. Applicant explained that while he slept, his girlfriend continued to drink. Applicant believed that the alcohol the officer smelled in the vehicle emanated from his girlfriend and not him. Applicant passed the field sobriety tests, but refused to take a breathalyzer test. The court found Applicant not guilty on the DWI-alcohol charge and dismissed the related charge regarding the transportation of a minor while impaired. The court convicted Applicant of speeding for driving 81 miles per hour (mph) in a 55 mph zone. (Tr. 46-51; GE3; Answer)

Traffic Violations

Applicant's most recent criminal charges occurred in 2019. In January 2019, he was charged with speeding for driving nine miles over the speed limit (SOR ¶¶ 1.i., 5.a) He pleaded guilty and was sentenced to unsupervised probation before judgment, which ended in April 2020. In May 2019, while he was still on probation, Applicant was again cited for speeding nine miles over the speed limit. (SOR ¶¶ 1.j, 5.a) He pleaded guilty and was sentenced to one-year of unsupervised probation before judgment that ended in July 2020. (Tr. 72-73; GE 12-13)

Alcohol and Substance Abuse History

During the background investigation and at hearing, Applicant discussed his history of alcohol and illegal drug use. During his twenties, Applicant consumed alcohol five times per week. Although he drank heavily, his drinking did not adversely impact his life. During his marriage from 2007 to 2011, Applicant testified that his alcohol consumption decreased to three nights per week, but that he was regularly drinking to

intoxication. He testified that his drinking habits changed significantly after the 2017 DWI. He now consumes alcohol on average twice per month. (Tr. 89-95)

Applicant reported that he first used cocaine in January 2000. He purchased the drug from an acquaintance and used it recreationally without issue until his August 2017 car accident and resulting DWI conviction. As a result of his arrest and subsequent detainment, Applicant failed to report to work and lost his job. Applicant explained during his July 2018 subject interview that his cocaine use adversely effected his ability to sleep and interfered with his ability to take care of his family. Applicant reported during his subject interview and in his September 2019 response to DOHA interrogatories that he last used cocaine in August 2017. In both statements, Applicant stated that he had no intention of using the drug in the future because doing so was incompatible with his personal and professional responsibilities. (Tr. 37-38, 85; GE 1-2, 5)

As part of his sentence for the 2017 DWI conviction, Applicant was ordered to participate in a substance-abuse program, which he did from April to September 2018. At each session, Applicant submitted to urinalysis. According to the program provider's report, Applicant tested positive for alcohol in July 2018. (SOR ¶ 3.b) Five weeks later, in August 2018, more than 12 weeks into the program, he tested positive for cocaine. (SOR ¶ 2.c) Applicant admitted that he continued to use alcohol even though he was ordered by the court to abstain. He denied using cocaine during the program, testifying that the counselor alerted him to the positive urinalysis result, but told Applicant that the result was inconclusive. The treatment record does not support this statement, but it does not appear that Applicant experienced any repercussions from the court for the positive urinalysis results. According to the treatment record, Applicant completed the 20-hour substance abuse program as required, participating in 15 group sessions, and 5 individual counseling session. The treatment notes do not contain a diagnosis or a prognosis. Applicant does not participate in any sobriety management program. (Tr. 38-39, 73; Answer)

Despite the program notes establishing that Applicant tested positive for cocaine use in August 2018, he maintains that he has not used cocaine since his DWI arrest in August 2017. He believes that he accurately reported his illegal drug use on his security clearance application and in response to DOHA interrogatories. When asked why he admitted the amended SOR ¶ 2.a that he used cocaine from 2007 until August 2018, he testified that he did so on the advice of counsel. (SOR ¶ 5.b) (Tr. 38-39, 73; GE 2; Answer)

Applicant testified that his difficult past is behind him. He has developed better and less contentious relationships with his children's mothers. Applicant also attributed his lifestyle change to moving to another town. He began attending church in September 2018 and is now in a relationship with another parishioner. Most of his friends are people he met through church. When he is not working, Applicant spends his free time with his daughter, age eight, of whom he shares custody. He also spends time exercising and participating in church activities. Applicant's current girlfriend describes him as the "most responsible person she knows." Applicant's supervisor described

Applicant as trustworthy and reliable. Both recommended Applicant for eligibility for access to classified information. (Tr. 18-30, 33-35, 43-45, 95-96, 98-103)

Policies

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 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 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.

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

The SOR alleges disqualifying conduct under the criminal conduct, drug involvement and substance misuse, alcohol consumption, and personal conduct guidelines. The government has established a *prima facie* case under each.

Criminal Conduct

An individual's criminal conduct creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, criminal conduct also calls into questions a person's ability or willingness to comply with law, rules, and regulations. (AG ¶ 30). The record establishes that Applicant has a history of criminal conduct, ranging from minor infractions, such as speeding, to more serious crimes, such as assault and driving while intoxicated. Applicant's conduct has resulted in two unprosecuted cases, one acquittal, one dismissed charge, and seven convictions. As a result of a conviction on a 2017 DWI charge, Applicant is on unsupervised probation until April 2021. Accordingly, the following criminal conduct disqualifying conditions apply:

AG ¶ 31(b) Evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and,

AG ¶ 31(c) The individual is currently on parole or probation.

None of the criminal conduct mitigating conditions apply. Applicant has a long and recent history of criminal conduct that shows a disregard for rules and regulations, even while under court supervision. Applicant's criminal history continues to cast doubt on his reliability, trustworthiness, and good judgment.

Drug Involvement and Substance Misuse

The illegal use of controlled substances . . . that cause physical or mental impairment . . . 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. (See AG ¶ 24). Applicant admits to a history of recreational cocaine use, from 2007 to 2017. However, the record establishes that he continued to use cocaine until at least August 2018, when he tested positive for the drug while participating in a court-ordered substance-abuse program. Applicant's conduct requires the application of the following disqualifying conditions:

AG ¶ 25(a) Any substance misuse; and

AG ¶ 25 (b) Testing positive for an illegal drug.

None of the relevant mitigating conditions apply. Applicant's last use of cocaine occurred less than three years ago. He continued to use the drug after his 2017 DWI

conviction and sentencing, and during the present security clearance adjudication. Applicant used cocaine one month after his July 2018 subject interview in which he acknowledged the negative consequences and promised that he would not use illegal drugs in the future. These choices continue to reflect negatively on his current reliability, trustworthiness, and judgment. His decision to use illegal drugs while under court-supervision and while participating in a court-ordered substance abuse program also indicates an unwillingness to abide by laws, rules, and regulations.

These concerns are not mitigated by Applicant's satisfactorily completion of the court-ordered substance-abuse program. Applicant presented no evidence of a favorable diagnosis and prognosis. Neither are the concerns mitigated by the lifestyle changes he has made to support sobriety. These actions are recent and have not been in effect long enough to establish their effectiveness, or to overcome his long history of illegal drug use and subsequent poor decisions.

Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment or failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. (AG ¶ 21) The record establishes the three alcohol-related events alleged in the SOR: that applicant was arrested for DWI – alcohol in November 2018; that he was charged with having an open container of alcohol in 2007; and that he tested positive for alcohol during a court-ordered substance abuse program in August 2018. The following disqualifying conditions apply:

AG ¶ 22(a) Alcohol-related incidents away from work . . . regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

AG ¶ 22(g) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

The 2007 and 2018 charges, while disqualifying, do not negatively reflect on Applicant's current security worthiness. Both incidents were *nolle prossed*. The 2007 incident was a minor violation. Based on the information in the record, it is not clear that Applicant was actually driving under the influence of alcohol, leading the court to dismiss that particular charge. These allegations merit the application of:

AG ¶ 23(a) So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur, or does not cast doubt on the individual's current reliability, trustworthiness, or judgment.

However, this does not mitigate the overall security concerns regarding Applicant's misuse of alcohol. Applicant's continued use of alcohol while participating in a court-ordered substance abuse program that required abstinence, continues to cast doubt on his current security worthiness. This conduct is not mitigated because he did

not face any legal consequences for his actions. Applicant's questionable behavior is another example of his intentional disregard for the court-imposed orders and restrictions.

Personal Conduct

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 provide truthful and candid answers during national security investigative or adjudicative processes. (AG ¶ 15)

The SOR also alleges that Applicant falsified his responses to DOHA interrogatories by intentionally failing to disclose his August 2018 cocaine use. Applicant denies the allegation, maintaining that he last used cocaine in August 2017. However, the program treatment notes clearly state that his urinalysis tested positive for cocaine in August 2018. Applicant did not provide a credible explanation for the discrepancy. Applicant agrees that the treatment notes are otherwise accurate. There is nothing in the record to suggest that the notation regarding Applicant's cocaine use was a mistake. The fact that the program director chose not to report Applicant's positive urinalysis to the court does not mean that his drug use did not occur. Based on the information in the record, I find that Applicant intentionally falsified his answer to the DOHA interrogatories. The evidence supports the application of the following personal conduct disqualifying condition:

AG ¶ 16(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.

The Government cross-alleges under the personal conduct guideline, all of the conduct alleged under the criminal conduct, drug involvement and substance misuse, and alcohol consumption guidelines. Applicant's conduct is independently disqualifying under each of the alleged adjudicative guidelines; however, when considered in its totality, Applicant's conduct establishes a negative whole-person assessment that shows a history of questionable judgment, unreliability, untrustworthiness, lack of candor, and unwillingness to comply with laws, rules, and regulations that indicate the he may not properly safeguard or classified or sensitive information.

This negative whole-person assessment is not mitigated by Applicant's favorable reputation at work or the other good character information in the record. Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours; off-duty conduct can be considered in evaluating an applicant's security eligibility. (Appeal Board Decision in ISCR 99-0068 (November 30, 1999)) In his personal life, Applicant has repeatedly engaged in conduct that shows a disregard for the law: illegal drug use, driving a car while under the influence of cocaine, theft,

violation of a protective order, and continued drug and alcohol use while participating in court-ordered substance abuse treatment. Applicant continued to engage in unlawful conduct while on unsupervised probation and after making promises to the government that he would not do so in the future. None of the personal conduct mitigating conditions apply.

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. (*Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988.)) Applicant's conduct establishes that he will not modify his behavior to conform to the law or to existing court orders. Furthermore, his inability to honor his own promise to abstain from illegal drug use suggests that he has difficulty with self-regulation or that he has a blatant disregard for rules and regulations. Accordingly, Applicant lacks the good judgment, reliability, and trustworthiness required of those granted access to classified information.

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, Criminal Conduct	AGAINST APPLICANT
Subparagraphs 1.a – 1.j	Against Applicant
Paragraph 2, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c	Against Applicant
Paragraph 3, Alcohol Consumption	AGAINST APPLICANT
Subparagraphs 3.a and 3.c	For Applicant
Subparagraph 3.b	Against Applicant
Paragraph 4, Financial Considerations	WITHDRAWN
Paragraph 5, Personal Conduct	AGAINST APPLICANT
Subparagraphs 5.a – 5.b	Against Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge