



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



In the matter of:)
)
) ISCR Case No. 20-03111
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

05/11/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On December 7, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudication Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H. The DCSA CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 23, 2020, and requested a hearing. The case was assigned to me on October 21, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 8, 2021, and the hearing was held as scheduled on December 17, 2021. The Government offered exhibits (GE) 1-4, which were admitted into evidence without objection. Applicant testified and offered exhibits (AE) A-R, which were admitted without objection. His exhibit list is marked as hearing exhibit (HE) I. DOHA received the hearing transcript (Tr.) on December 30, 2021.

Findings of Fact

In Applicant's answer to the SOR, he denied the Guideline H allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 42 years old. He is divorced (date of marriage: 1999-2003), and has one child, age 21. Applicant provides financial support to his child in the amount of \$500 monthly. He began working as an engineer for a defense contractor in 2008. His employer is subject to the drug-free workplace provisions of 41 U.S.C. 701 *et seq.* He holds a bachelor degree. He served in the U.S. Army from 1997 until 2003 and received an honorable discharge. He held a security clearance while in the Army. His current employer sponsored him for a security clearance in 2008, which was granted. He is an active outdoorsman, whose activities include hiking, mountain climbing, camping, mountain biking, skiing, and motorcycle trail-riding. (Tr. 17-20; GE 1, AE M)

The SOR alleged Applicant used marijuana and cocaine in June 2017, while granted access to classified information. In his answer to the SOR, Applicant admitted using cocaine and marijuana once each in June 2017. He denied that he had access to classified information in June 2017. Applicant's security clearance application (SCA) established that he was granted access to classified information in 2008. Applicant's security manager authored an email in March 2021, stating that Applicant had "access with a clearance for [his employer] from 8/19/2008 through 10/12/2009 when he was downgraded as no longer requiring a clearance for his job duties." The Government produced a document from the Defense Information System for Security (DISS) showing that as of December 1, 2021, Applicant held a security clearance. While Applicant may not have had current access to classified information, he continued to possess a security clearance and could have been granted access at any time. (GE 1, 2; SOR answer)

In June 2017, Applicant met a woman (W1) at a bar. He did not know W1 before meeting her on this occasion. The two of them went back to her house. A female friend (W2) of W1's came to her house and brought cocaine with her. W2 laid the cocaine out on a coffee table. Applicant recalled that W2 snorted a line of cocaine, but he was not sure if W1 did as well. The women then offered him cocaine, but he refused. The two women then left the room and Applicant placed a small amount of cocaine on his finger and tasted it using his tongue. Applicant claimed he did not like the taste of it and he did

not ingest anymore of it. His explanation for trying the cocaine was to satisfy his curiosity about it. He claimed he never encountered W1 again after that night. Applicant claimed that he has not used cocaine since this incident and he has no intent to use cocaine in the future. (Tr. 20-22, 40; SOR answer; GE 1; AE B-C)

Later, in the same month, Applicant spent the night at a friend's house in the event he drank alcohol during the evening. The friend produced a marijuana pipe and apparently told Applicant that using marijuana helped him sleep. Applicant claimed that he smoked one puff of marijuana, that it did not agree with him, and he did not use any more. He claimed he used the marijuana because he was curious about it based upon his friend's reference to using it to help him sleep. He claims he has not used marijuana since that time and has no intention of using it in the future. He regularly associates with the friend who provided the marijuana by socializing with him every week or two. (Tr. 24-25, 43; SOR Answer; GE 1, 3; AE B-C)

Applicant admitted using marijuana previously in 1999 when he was in the Army and while he held a security clearance. He claimed he used it while on leave. Since this use of marijuana was not alleged in the SOR, I will not use it for disqualification purposes, but I may use it in assessing Applicant's credibility, in applying any mitigating conditions, and in my whole-person analysis. Applicant's initial admission to this marijuana use came in his 2008 SCA, where he also stated, "I have not used marijuana since that time and I don't intend to use in the future." (Tr. 36-37; GE 2-3)

As part of his on-boarding process with his employer in 2008, Applicant was required to take a drug test, which produced a negative result. He has not been drug-tested by his employer since that pre-employment test. He provided copies of self-procured drug-test results from January 2021 and October 2021. Both tests showed negative results for marijuana and cocaine, as well as other illicit drugs. Applicant admitted knowing his use of cocaine in 2017 was illegal. During cross-examination, when asked about the illegality of his marijuana use in 2017, Applicant stated that he just knew it was legal under state law. He admitted that from 2008 he was generally aware of his employer's no-drug-use policy. (Tr. 34-35, 41, 45-46; AE A)

Applicant listed both his 2017 cocaine and marijuana uses on his January 2019 SCA. He also revealed those uses to a defense investigator during his background interview in July 2019. He did not reveal these uses to his employer until after reporting it on his SCA in January 2019. (Tr. 25, 39; GE 1, 3; AE C)

In March 2021, Applicant underwent a self-procured substance-abuse evaluation by a licensed clinical social worker and certified substance abuse counselor, Ms. B. The evaluation consisted of an interview, a standardized drug assessment screening test, and a review of the SOR. Using the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), Ms. B opined that Applicant presented with "no use disorder" and further opined that "no treatment was warranted." In her evaluation report, Ms. B did not address Applicant's 1999 marijuana use while holding a security

clearance, or his pledge not to use marijuana in the future stated in his 2008 SCA. (GE 2-3; AE C)

Applicant offered character letters from five acquaintances, three current or former coworkers with his current employer and two other professional associates. They discussed his good character, trustworthiness, job knowledge, honesty, reliability, and integrity. Several recommended the granting of his security clearance. None of the statements referenced that the authors knew about Applicant's use of cocaine and marijuana while holding a security clearance. One author stated, "It is imperative to me to not be associated with someone against my morals, one of them being anyone who partakes in the use of drugs. [Applicant] is not that person." (AE L)

Applicant offered his job performance appraisals for years 2017-2020. They reflected overall ratings of "achieved/substantially achieved" for 2017, 2018, and 2020; and "exceeded" for 2019. As stated above, he also offered a written statement, from November 2021, expressing that he had no intentions to use illegal substances in the future. Applicant also offered his DD-214, showing his honorable discharge, his military training certificates, his job awards, and his college transcripts. (AE B, E, H, M, O-Q)

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 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 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 section E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive section 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 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 an 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 H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

- (a) any substance misuse; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

In June 2017, Applicant used cocaine and marijuana one time each. I find both of the above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

- (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; and

- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's marijuana use was infrequent and occurred over three years ago, however, there are two troubling aspects about his actions that go straight to the heart of his reliability, trustworthiness, and his willingness to comply with laws, rules, and regulations. First, when he revealed his 1999 use of marijuana in 2008, he pledged not to use it again. He broke that pledge with his 2017 use of marijuana and cocaine. Second, both of these uses were when he was aware of his employer's drug-free policy and after he was granted a security clearance in 2008. Even, if we believe he did not hold an active clearance in 2017, he was fully aware of his duties not to use illegal

substances as an employee of this defense contractor, from his time holding an active clearance in 2008, and from his days holding an active clearance in the Army. For these reasons. AG ¶ 26(a) does not fully apply.

Applicant acknowledged his use of both marijuana and cocaine in 2017. He explained those uses as allowing his curiosity to get the better of him. In 2017, he was 37 years old and a veteran of military service, who had experimented with marijuana when he was 19 years old. His claim of acting because of his curiosity lacks credibility. One thing Applicant offers to overcome his past actions is his pledge not to use illegal drugs in the future. However, based upon his past broken pledge from 2008, that is not a reliable option. He remains in weekly contact with his friend who supplied him with the marijuana. While, he received a substance abuse evaluation, there is no evidence of his completion of a drug treatment program. AG ¶¶ 26(b) and AG 26(d) do not fully apply.

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 guideline 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 considered Applicant's negative drug tests, his written statement of intent not to use illegal drugs in the future, his substance abuse evaluation conducted by Ms. B, his military service, his education, his letters of recommendation, and his job performance appraisals and awards. However, I also considered that he used both cocaine and marijuana in 2017, while holding a security clearance and while fully aware he was violating federal law and the no-drug policy of his employer. I also considered that in 2008 Applicant pledged not to use marijuana in the future, but he broke that pledge with his use in 2017, thereby undercutting his reliability, trustworthiness, and good judgment.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement.

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 – 1.b:	Against Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge