



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



In the matter of:)
)
) ISCR Case No. 22-00980
)
Applicant for Security Clearance)

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: *Pro se*

March 31, 2023

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H (drug involvement and substance misuse), E (personal conduct), and J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On March 30, 2022, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 19, 2022, the Department of Defense Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H, E, and J. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On August 9, 2022, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated September 28, 2022, was provided to him by letter on October 11, 2022. Department Counsel attached as evidence to the FORM Items 1 through 12.

Applicant was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30-day period. I received Items 1 through 12 into evidence. On January 19, 2023, the case was assigned to me.

Findings of Fact

Background Information

Applicant is a 31-year-old business operations specialist employed by a defense contractor since March 2022. He seeks a security clearance, which is a condition of his continued employment. (Item 3)

Applicant graduation from high school in June 2010. He was awarded an associate degree in contract management in May 2020. He attended an online university from January 2016 to March 2022 but did not receive a degree from that university. (Item 3)

Applicant served in the Air Force Reserve from June 2010 to April 2012, and was separated with an honorable discharge. He served on active duty in the Air Force from April 2012 to January 2022, and was separated involuntarily with a General Discharge under Honorable Conditions. See discussion below. (Items 3, 12) Applicant has never married and has no dependents. (Item 3)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges that Applicant used cocaine in August 2021; SOR ¶ 1.b alleges that he failed a urinalysis test in September 2021, testing positive for cocaine; and SOR ¶ 1.c alleges that he used cocaine in August 2021, while granted access to classified information. He admitted all of these allegations in his SOR Answer. (Item 2)

On the weekend of August 21, 2021, Applicant attended an off base popular overseas nightclub and while there engaged in heavy drinking. While at the club he states that he “was offered cocaine and made the bad judgment of accepting.” (Item 2 at 1) In the drug treatment documentation provided by Applicant, the report indicates that he used “cocaine twice that weekend.” (Item 2 at 9)

On August 25, 2021, Applicant provided a urine sample during a random drug test. On September 8, 2021, the drug laboratory reported that his sample tested positive for cocaine with a confirmation level of 402 ng/ml. The cutoff was 100 ng/ml. (Items 4, 5) As a result of testing positive for cocaine, on September 27, 2021, his commander notified Applicant that his current access to classified information would be suspended. On September 28, 2021, Applicant’s command followed up with a classified information debriefing. (Items 7, 8)

As a result of testing positive for cocaine, Applicant's command referred him to the on base Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT) where he received treatment from September 21, 2021, to November 5, 2021. (Item 2)

The course of treatment was as follows:

Pt was referred to ADAPT on 14 Sep 2021 by CC/CCF. Pt's referral stated, "Member received positive results for cocaine from a random DDRP screening." Pt did NOT meet criteria for Alcohol Use Disorder and successfully completed 3 sessions of brief education on 05 Nov 2021. Pt has met all ADAPT requirements, case closed. DSM-5 Diagnosis at TERMINATION: No diagnosis, Alcohol Education. Prognosis: Good. (Item 2)

Applicant's ADAPT records reflect compliance with the program and his coming to terms with the adverse effects of alcohol. He noted in his SOR Answer that his excessive consumption of alcohol led to him not being "in the right head space due to being influenced by alcohol and this led me to do something I still regret until this day." (Item 2)

Criminal Conduct and Personal Conduct

SOR ¶ 2.a alleges that Applicant was discharged from the U.S. Air Force in January 2022 for illegal use of a controlled substance. SOR ¶ 2.b cross-alleges the information in SOR ¶ 1.a, above. Applicant admitted both of these allegations in his SOR Answer.

SOR ¶ 3.a cross-alleges the information in SOR ¶ 1.a, above.

Following up on the report of Applicant testing positive for cocaine, the Air Force Security Forces Squadron conducted an investigation. The investigation revealed that Applicant wrongfully used a controlled substance in violation of Article 112a, Uniform Code of Military Justice (UCMJ). (Items 6, 10) Applicant's commander imposed nonjudicial punishment, pursuant to Article 15, UCMJ, on September 22, 2021, reducing him from staff sergeant (pay grade E-5) to senior airman (pay grade E-4), and ordered that he be given a formal reprimand. His commander further ordered that he be administratively separated from the Air Force. (Items 9, 10, 11) On January 13, 2022, Applicant was separated from the Air Force with a General Discharge under Honorable Conditions. (Items 11, 12)

Character Evidence

Applicant submitted two reference letters: (1) a civilian co-worker who worked with Applicant in the base contracting office from December 2020 to October 2021 (letter dated October 25, 2021); and (2) an active duty Air Force master sergeant, who worked with Applicant in an overseas location from December 2019 to November 2020 (letter dated October 22, 2021). Both individuals spoke highly of Applicant's work ethic,

dedication, and professionalism. These letters were submitted in support of Applicant to recommend that he be retained in the Air Force when he was pending disciplinary proceedings in 2021. (Item 2)

Applicant's SOR Answer contained a personal statement. In that statement, he accepts full responsibility for his error in judgment in using cocaine. He stated that his ADAPT was successful and taught him coping mechanisms to deal with stress and not to resort to binge drinking. He added that since his discharge from the Air Force, he has strong family support in the form of his two older brothers. He lives with his oldest brother and spends time with his other brother. Both brothers have Top Secret clearances. He states that his brothers have been a positive influence on him by encouraging him to finish his bachelor's degree and to pursue his goals in spite of setbacks. He gave his assurances that he would not use illegal drugs again and would like the opportunity to serve the Government in the future. (Item 2)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective 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 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(c), 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."

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 clearance favorable 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

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern about drug involvement and substance misuse:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case:

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

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record establishes AG ¶¶ 25(a), 25(b), 25(c), and 25(f). Further discussion is required.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained an applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

I have considered all of the mitigating conditions under drug involvement and substance misuse and especially considered AG ¶¶ 26(a) and 26(b).

Concerning AG ¶ 26(a), there are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows, “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis, the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

Applicant’s most recent cocaine use occurred in August 2021, 11 months before his July 2022 SOR was issued, and 13 months before Department Counsel’s FORM. Applicant asserts that he has turned his life around, that he no longer wants to use illegal drugs, and will not use illegal drugs in the future. Among the problems here is the recency of his illegal drug use and his use while granted access to classified information.

Additionally, Applicant’s written assertions that he is drug-free and has no intention of using illegal drugs in the future lack corroboration. While Applicant’s ADAPT progress notes are favorable, his ADAPT program ended in November 2021. There is no recent information comparable to his ADAPT progress notes confirming sobriety since he was discharged from the Air Force in January 2022. Accordingly, mitigation

credit under AG ¶ 26(a) is not warranted at this time. Applicant is able to receive partial credit for acknowledging his drug involvement and substance misuse under AG ¶ 26(b) for and changing or avoiding the environment where drugs were used under subsection (2). However, the overall circumstances do not warrant full mitigation of security concerns under Guideline H. In summary, apart from partial application of AG ¶ 26(b), no other mitigating conditions fully apply.

Personal Conduct

SOR ¶ 3.a cross-alleges the information under SOR ¶ 1.a (drug involvement and substance misuse) as a personal conduct concern. A review of the disqualifying conditions under personal do not warrant application with regard to the facts of this case. However, and more appropriately, disqualifying conditions under drug involvement and substance misuse and criminal conduct do apply. Accordingly, I find for Applicant under personal conduct security concerns.

Criminal Conduct

AG ¶ 30 describes the security concern about criminal conduct: “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes a condition that could raise a security concern and may be disqualifying in this case:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The evidence establishes AG ¶ 31(b). Further review is required.

AG ¶ 32 lists conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution,

compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The comments under drug involvement and substance misuse are incorporated in this section. Applicant deserves credit for acknowledging his behavior and for participating in ADAPT before being discharged from the Air Force. He also deserves credit for pursuing his college degree and choosing an environment where he has strong family support and positive role models in the form of his two older brothers. Partial credit under Application of AG ¶ 31(d) is warranted. However, the facts do not warrant application of the remaining mitigating conditions under this concern. As noted in the discussion under drug involvement and substance misuse, not enough time has elapsed since Applicant's drug use coupled with the lack of recent documented sobriety.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. A careful weighing of a number of variables in considering the "whole-person" concept is required, including the totality of Appellant's acts, omissions, and motivations. Each case is decided on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, the administrative judge and the PSAB 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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines H, E, and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Appellant honorably served on active duty in the Air Force for almost ten years and achieved the rank of staff sergeant. Reference letters from two individuals who knew him well described his positive contributions to the Air Force, potential for future service, and argued for leniency. However, using cocaine while granted access to classified information constituted a breach of trust as well as a violation of the UCMJ that the Air Force could not ignore. Applicant's choice to use drugs proved to be very costly.

Applicant has sought to rehabilitate himself. He participated in ADAPT while in the Air Force and embraced the program. Since his discharge from the Air Force, he seems sincere in his efforts to turn the corner and put this past incident behind him. He is in a supportive environment, especially with his two older brothers serving as role models for him. However, what is lacking is additional time, but more important is evidence of sobriety. With that said, there is no reason Applicant cannot in the future recover and regain eligibility for access to classified information in the future.

Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the security concerns raised. By failing to provide such information, and in relying on an explanation lacking sufficient detail to fully establish mitigation, drug involvement and substance misuse considerations and criminal conduct security concerns remain.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 12968, DOD Manual 5200.02, the AGs, and other cited references to the facts and circumstances in the context of the whole person. For the reasons stated, I conclude Appellant failed to mitigate security concerns under Guidelines H and J.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is denied.

ROBERT TUIDER
Administrative Judge