



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 22-01346
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

03/22/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement and Substance Misuse) and E (Personal Conduct). Applicant refuted the allegation under Guideline E, but he did not mitigate the security concerns under Guideline H. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 1, 2021. On August 8, 2022, Department of Defense Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on August 10, 2022, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on November 8, 2022. On November 9, 2022, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. The FORM consists of five items. FORM Items 1 and 2 are the pleadings in the case, and FORM Items 3-5 are the Government's evidence, which were admitted without objection. Applicant received the FORM on December 2, 2022, and he responded with an undated three-page statement, which was marked as Applicant's Exhibit (AX) A and admitted without objection. The case was assigned to me on February 23, 2022.

Evidentiary Issue

The FORM Item 3 is a summary of an enhanced subject interview (ESI) conducted on February 1, 2022. The summary was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the summary; make any corrections, additions, deletions, or updates; or to object to consideration of the summary on the ground that it was not authenticated. Applicant submitted a detailed response to the FORM but did not comment on the accuracy or completeness of the summary, nor did he object to it. I conclude that he waived any objections to FORM Item 3. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016).

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations of drug involvement in SOR ¶¶ 1.a-1.c. He stated that he "technically" admitted the allegation of falsification in SOR ¶ 2.a, but he denied intending to deceive. I have treated his answer to SOR ¶ 2.a as a denial. His admissions are incorporated in my findings of fact.

Applicant is a 35-year-old information technology technician employed by a defense contractor since June 2021. His work site is on a military installation, and he has access to classified information.¹ He received a bachelor's degree in criminal justice in December 2010 and a technical certification in January 2019. He married in June 2016 and has no children. He has held a security clearance since March 2020. (FORM Item 3 at 55)

¹ Eligibility for access to classified information and actual access to classified information are separate determinations. ISCR Case No. 20-0311 (App. Bd. Aug. 10, 2022). Applicant admitted in his answer to the SOR that he had actual access to classified information when he used cocaine, and he described his duties involving classified information in FORM Item 3.

On March 21, 2021, Applicant and a group of former college classmates gathered for a birthday celebration that consisted of bar hopping, heavy drinking, and snorting cocaine. While walking between bars, the group was confronted by two loud, obnoxious, and aggressive men, resulting in an affray that was stopped by nearby police officers. All the participants were handcuffed and transported to the police station. When Applicant was searched by the police, they found a small quantity of cocaine in a plastic bag in his pocket. He was charged with participating in an affray, a misdemeanor, and felony possession of a Schedule II controlled substance.

In May 2021, with the assistance of an attorney and pursuant to a plea agreement, Applicant pleaded guilty to possession of drug paraphernalia. The charges of participating in an affray and the felony drug charges were dismissed. He was required to complete a 16-hour program of drug classes, and he was placed on unsupervised probation for one year. (FORM Item 3 at 50-51; FORM Item 5 at 6) During the ESI in February 2022, Applicant admitted that he had used cocaine in college as well as on the night of the affray. (FORM Item 5 at 5.)

When Applicant submitted an SCA in December 2021, he answered “yes” to a question in Section 22—Police Record, asking whether, in the last seven years, he had been or was currently on probation or parole. He disclosed an arrest in April 2014 for driving under the influence (DUI), his conviction in August 2015, and a sentence that included one year of unsupervised probation. He also disclosed his arrest in May 2021 for the drug offense and participating in an affray, his conviction of possessing paraphernalia, and his sentence that included probation for one year.

However, Applicant answered “no” to two questions in Section 23—Illegal Use of Drugs or Drug Activity. The first question asked if, in the last seven years, he had illegally used any drugs or controlled substances, and the second question asked if he had ever illegally used or had otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed. His answers to the questions in Section 23 are the basis for the allegation that he falsified his SCA.

In Applicant’s response to the FORM, he stated that when he completed his SCA, it contained the answers from previous SCAs, and he updated the portion asking about arrests but skimmed through the section asking about use of drugs. He stated that during the ESI, the investigator went through each section of the SCA, and when they reached the section on drug use, he told the investigator that the subject was addressed in the section involving arrests. He told the investigator that there were multiple sections in the SCA with similar questions, and he thought that providing the information in one section was sufficient. (FORM Response at 2-3)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to

“control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No.

01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The SOR alleges that Applicant used cocaine in March 2021 while having been granted access to classified information (SOR ¶ 1.a); that he used cocaine with varying frequency while in college (SOR ¶ 1.b), and that he was arrested in March 2021 and charged with possession of a Schedule II controlled substance and “simple affray.” The secure concern under this guideline is set out in AG ¶ 24:

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.

Applicant's admissions and the evidence in the FORM establish the following disqualifications under this guideline;

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions are potentially applicable:

AG ¶ 26(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; and

AG ¶ 26(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

AG ¶ 26(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.

AG ¶ 26(a) is not fully established. Applicant's use of cocaine in college is not recent, but his use of cocaine at the birthday celebration in March 2021 is recent, and it reflects a continuation of his college-age attitude toward illegal drug use.

AG ¶ 26(b) is not fully established. Applicant completed the drug-education program that was a condition of the probation imposed after his most recent conviction. However, he continues to associate with some of the same college friends who used cocaine in March 2021, and he has not provided the statement of intent in AG ¶ 26(b)(3).

AG ¶ 26(d) is not established. Applicant completed an drug education program, but he has not completed a "prescribed drug treatment program" that includes rehabilitation and aftercare requirements, and he has not provided a "favorable prognosis by a duly qualified medical professional.

Guideline E, Personal Conduct

The SOR ¶ 2.a alleges that Applicant falsified his SCA by answering "no" to the questions asking if he had, in the last seven years, illegally used any drugs or controlled substances and asking if had ever illegally used or been illegally involved with a drug or controlled substance while possessing a security clearance, other than previously listed.

The security concern under this guideline is set out 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 investigative or adjudicative processes. . . .

The relevant disqualifying condition is AG ¶ 16(a):

[D]eliberate 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.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant's explanation for his negative answers in Section 23 after disclosing his drug use while holding a security clearance in Section 22 is plausible and credible. He was careless, but not intentionally deceptive. His full disclosure of his drug-related conduct in Section 22 is sufficient to refute the allegation that he was attempting to conceal it in Section 23. AG ¶ 16(a) is not established. No other disqualifying conditions under Guideline E are alleged.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation that he falsified his SCA, but he has not mitigated the security concerns raised by his drug involvement.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge