



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



In the matter of:)
)
) ISCR Case No. 22-01874
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2023

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct and Guideline E, personal conduct. He mitigated the concerns under Guideline G, alcohol consumption and Guideline H, drug involvement and substance misuse, or the concerns were not established. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On October 24, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, G, H, and E. The DCSA CAS acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on November 11, 2022, and requested a hearing. The case was assigned to me on April 19, 2023. I emailed Applicant on May 8, 2023, initially informing him of the hearing date. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 10, 2023, and the hearing was held as scheduled on May 24, 2023. The Government offered exhibits (GE) 1-7, which were admitted into evidence without objection. The Government's exhibit list and discovery letter were marked as HE I and II. Applicant testified and offered two exhibits (AE A-B), which were admitted without objection. His transmittal email was marked as HE III. DOHA received the hearing transcript (Tr.) on June 5, 2023.

Findings of Fact

In Applicant's answer, he admitted all the allegations under Guidelines J, G, and H, in the SOR with some explanation. He failed to address the allegations under Guideline E, which are cross allegations previously alleged. I will adopt Applicant's admissions to the cross-alleged allegations as his response to the Guideline E allegations as well. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 27 years old. He is married for the second time. He served in the U.S. Marine Corps from approximately 2015 to 2019 when he was administratively separated with a general discharge as further explained, *infra*. He has worked for a defense contractor since June 2020. He has two biological children and a stepchild. He is a high school graduate and has taken some college courses. (Tr. 6, 25-27; GE 1)

Under Guideline J, the SOR alleged Applicant was charged in January 2021, with illegal discharge of a firearm, intoxication, and with carrying a dangerous firearm under the influence of alcohol. He entered a plea in abeyance agreement and was sentenced to pay fines and fees, and a term of 12 months' probation. He was required to abstain from alcohol consumption during his probation. In about September 2018, Applicant, while serving in the Marine Corps, was charged with wrongful use of controlled substances under the Uniform Code of Military Justice (UCMJ). As a result of this investigation, he was administratively separated from the Marine Corps and received a general discharge. (SOR ¶¶ 1.a-1.b)

Under Guideline G, the SOR alleged Applicant was required to attend an alcohol education class in March 2019. It also cross-alleged the firearm-alcohol arrest from January 2021. (SOR ¶¶ 2.a-2.b)

Under Guideline H, the SOR alleged Applicant used steroids from September 2016 to April 2017, while holding a security clearance. It also cross-alleged the September 2018 UCMJ offense. (SOR ¶¶ 3.a-3.b)

Under Guideline E, the SOR cross-alleged the allegations from SOR ¶¶ 1.a, 1.b, and 3.a. (SOR ¶¶ 4.a-4.c)

Criminal Conduct.

Applicant testified that he was using steroids while on active duty in the Marine Corps for about six weeks in 2016-2017. He testified that he had access to classified information at the time of his use. He admitted in his August 2020 security clearance application (SCA) that he used steroids from September 2016 to April 2017. He obtained the steroids from another Marine. He claimed that he began using steroids because he was concerned about being able to meet the required physical fitness standards of the Marine Corps. He also received advice from former Marines whom he considered mentors. They recommended using steroids. He stated that he has not used steroids since this time frame. (Tr. 24-25, 31, 33-35, 40; GE 1)

While Applicant was investigated and interviewed by the Naval Criminal Investigative Service (NCIS) for his steroid involvement, there is no evidence that he was charged under the UCMJ. He admitted receiving an administrative discharge with a general discharge under honorable conditions characterization related to his steroid involvement. (Tr. 25; GE 1, 4)

Alcohol Consumption.

When Applicant was interviewed by NCIS regarding his steroid abuse, he also admitted drinking approximately 10 beers the previous weekend at a housewarming party. This information was related to Applicant's command who ordered him to attend alcohol-education classes. Applicant attended the classes. (GE 2; Answer to SOR).

The second alcohol-related allegation involves Applicant's criminal arrest in January 2021. He stated that he and his family were at a friend's apartment complex to celebrate New Year's Eve. The apartment complex was in a residential area. There was a vacant field close to the apartment complex that Applicant described as about three miles long. He and his friend had been drinking alcohol that evening. At approximately midnight, Applicant and his friend fired a small caliber rifle into the air three to four times to celebrate the new year. A neighbor called the police and Applicant was cited for gun and alcohol violations, upon which he later entered a plea agreement, *supra*. (Tr. 36-37; GE 1-3, 6-7)

Drug Involvement and Substance Misuse.

As stated *supra*, Applicant admitted illegal steroid use sometime between September 2016 and April 2017. He was an active-duty Marine then and had access to classified information. His use, while a Marine, resulted in his administrative discharge with a general discharge. He stopped using steroids in 2017. (Tr. 24-25, 31, 33, 35; GE 1)

Personal Conduct.

The factual background for the personal conduct allegations have been previously described and will not be repeated here.

Applicant's Mitigation.

Applicant presented his 2021 year-end performance review and his 2022 midpoint review. He is described as an effective team player. He makes an outstanding contribution to the team's productivity. He documented that he complied with the terms of his probation and his 2021 gun and alcohol charges were dismissed. He testified that he has had no further involvement with law enforcement since his January 2021 arrest. (Tr. 44; AE A-B)

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 careful weighing 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, 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 J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

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 conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual’s judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was investigated for and admitted illegal steroid abuse while in the Marine Corps. He was arrested in 2021 on gun and alcohol charges. Both of the above conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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; 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.

Applicant's steroid abuse happened in 2018, and might otherwise be mitigated because of the passage of time, except for his 2021 arrest, which makes his 2018 actions relevant. The common theme with both incidents was Applicant's bad judgment. He admitted he let others, whom he considered mentors, convince him to use steroids. This demonstrates his poor judgment. He continued to show poor judgment when he and a friend engaged in celebratory gunfire, in a residential area, while consuming alcohol as recently as 2021. While he successfully completed his probation term in July 2022, it is too soon to say whether he has been successfully rehabilitated. I cannot conclude that additional crimes are not likely to recur in the future. His actions cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) do not fully apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed with alcohol use disorder.

The allegation stating Applicant was required to attend an alcohol education class does not state a disqualifying condition and SOR ¶ 2.a is resolved in favor of him. Applicant's arrest in 2021 on gun charges also involved his use of alcohol at the time. AG ¶ 22(a) applies to SOR ¶ 2.b.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(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.

Applicant had no further alcohol incidents after his 2021 arrest. He successfully completed his one year probation, which included abstention from alcohol. AG ¶ 23 (a) applies to SOR ¶ 2.b.

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.

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.

Applicant used illegal steroids at various times between 2016 and 2017, while in the Marine Corps and having access to classified information. AG ¶¶ 25(a) and AG 25(f) apply.

AG ¶ 26 provides conditions that could mitigate security concerns. One 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.

Applicant used illegal steroids anywhere from six weeks to several months between 2016 and 2017. He was discharged from the Marine Corps because of his use. He has not used illegal steroids since 2017. His use of steroids was infrequent and he

no longer needs to meet Marine fitness standards, so there is no reason for him to start using steroids again. AG ¶ 26(a) applies.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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.

Applicant's steroid involvement and arrest on gun charges demonstrate his poor judgment over time. His administrative discharge from the Marine Corps should have sent a powerful message that he needed to use better judgment. His arrest in 2021 is evidence that he did not respond to that message. His conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. AG ¶ 16(c) is not perfectly applicable because that conduct is sufficient for an adverse determination under the criminal conduct guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following is potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

The analysis under Guideline J applies equally here. 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 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 guidelines 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 military service and his performance appraisals. However, I also considered that he repeatedly exercised poor judgment and failed to follow established rules and laws. Applicant failed to provide sufficient evidence to mitigate the criminal conduct and personal conduct security concerns.

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 under Guidelines J and E. He mitigated the concerns under Guidelines G and H, or those concerns were not established.

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

Paragraph 4, Guideline E:
Subparagraphs 4.a - 4.c:

AGAINST APPLICANT
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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge