



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



In the matter of:)
)
) ISCR Case No. 22-00860
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

10/03/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline H (drug involvement and substance misuse). Eligibility for access to classified information is denied.

Statement of the Case

On August 4, 2022, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. Applicant submitted an undated response to the SOR and requested a hearing before an administrative judge.

The case was assigned to me on August 23, 2023. The hearing convened as scheduled on September 18, 2023. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified, but he did not submit any documentary evidence.

Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. He worked for a contractor in support of his current employer from January 2019 until he was hired directly by his current employer in July 2019. He served on active duty in the U.S. military from 2009 until he was medically retired with an honorable discharge in 2014. He served on two deployments to Afghanistan while on active duty. He has a disability rating of 60% from the Department of Veterans Affairs. He seeks to retain a security clearance, which he has held since he was in the military. He earned a bachelor's degree in 2017 and a master's degree in 2019. He married for the third time in 2016 after his first two marriages ended in divorce. He has two children and two stepchildren. (Transcript (Tr.) at 16-23, 55; GE 1, 2)

Applicant used marijuana when he was in high school.¹ He used cocaine and ecstasy (3, 4-methylenedioxy-methamphetamine or MDMA) on one occasion each. He signed the contract to enlist in the military in about August 2008, but he did not go to boot camp until April 2009. He submitted a Questionnaire for National Security Positions (SF 86) in August 2008 as part of his enlistment paperwork. He informed his recruiter about his illegal drug use, but the recruiter told him not to report it, and he did not. He did not use any illegal drugs from the time he signed the contract until his discharge in 2014. (Tr. at 24-25, 55, 62-64)

Applicant used marijuana on about ten occasions from May 2016 through March 2020. He smoked it, vaped it, or ate it, always with his wife. He used cocaine on two occasions in May 2019. He and his wife used it with his neighbor who provided the cocaine. They were drinking on both occasions. Applicant held a security clearance during the entire period of his drug use from 2016 through 2020. From about October 2017 to January 2019, he had access to classified information. After that, he held a security clearance but did not have access to classified information. (Tr. at 20, 26-41, 57-59; Applicant's response to SOR; GE 1-3)

Applicant self-reported his marijuana use to his security officer after he was hired by his current employer in June 2019. He wrote that he last used marijuana in September 2018, with the following comment: "It was after that instance that 10 years of guilt and secrets were bearing down on me. I put it down and I have not touched marijuana or have any inclination to touch marijuana again." (Tr. at 16, 44-49, 56; GE 3) He added:

I was hired to work at [Employer] in June 2019. I knew that I would have to declare that I have never, nor will I ever, use drugs prior to being allowed into classified spaces. After 10 years of withholding the truth and keeping this secret, I could not bear to hold it any longer. I decided to self-report and disclose my past to [Employer] before they performed my indoctrination briefing that would allow me to have access to classified

¹ Any matters that were not alleged in the SOR will not be used for disqualification purposes. They may be considered in assessing Applicant's credibility, in the application of mitigating conditions, and when conducting the whole-person analysis.

material. I could not, in good consci[ence], betray the trust of [Employer] or continue living with this secret. I believe myself to be an honest and trustworthy man, but I could never live up to that if I continued to withhold my previous drug use. (GE 3)

Applicant did not report his cocaine use that occurred just the month before his statement. He wrote in the statement that high school “was the last time [he] used cocaine.” He used marijuana about two to three times after he submitted the statement to his security officer. He fully reported his illegal drug use on the SF 86 he submitted in July 2021 and during his background interview in October 2021. He initially testified that he had never used cocaine before the two recent times. He then admitted that he used cocaine in high school. (Tr. at 37-38, 49-52; GE 1-3)

Applicant has not used any illegal drugs since he last smoked marijuana in March 2020. His wife also no longer uses illegal drugs. The friend he smoked marijuana with stopped using marijuana, and the neighbor he used cocaine with moved away. Applicant used to drink regularly. In about November 2022, he and his wife decided to significantly cut down on their drinking and concentrate on their children and other activities. He estimates that he has had a total of fewer than ten drinks since then. He is committed to remaining drug free. He realizes that he made poor decisions when he used illegal drugs. He is willing to accept the consequences of his conduct. (Tr. at 16-17, 28, 39-44, 52, 56-57, 67)

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 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

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (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.

Applicant used marijuana on about ten occasions from about 2016 through March 2020 and cocaine twice in May 2019. AG ¶¶ 25(a) and 25(c) are applicable.

Applicant held a security clearance and was in a sensitive position during all the above drug use, but only his marijuana use between about October 2017 and January 2019 occurred while he was granted access to classified information. See ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). AG ¶ 25(g) is applicable to his marijuana use between about October 2017 and January 2019. AG ¶ 25(g) is not applicable to his cocaine use and his marijuana use while he did not have access to classified information. See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022) for a discussion on the distinction between holding a security clearance and having access to classified information.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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
- (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.

Applicant used marijuana while granted access to classified information and cocaine while holding a security clearance. He is credited with being honest on his July

2021 SF 86. He was less than completely frank during his June 2019 statement to his security officer. He wrote that his cocaine use in high school was the last time he used cocaine, when he had used it twice in the previous month. He then used marijuana two to three times after he submitted that statement. Applicant appears to be on the right track, and if he continues to abstain from illegal drug use, he will once again be a good candidate for a security clearance. At this time, he is not. None of the mitigating conditions are applicable.

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 relevant 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 have incorporated my comments under Guideline H in my whole-person analysis. I also considered Applicant's honorable military service and his two deployments to Afghanistan.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the security concerns under Guideline H.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant (except for the language "while granted access to classified information," which is found For Applicant)

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge