



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



In the matter of:)
)
) ISCR Case No. 23-00649
)
Applicant for Security Clearance)

Appearances

For Government: George Hawkins, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2024

Decision

OLMOS, Bryan J., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 31, 2022. On June 6, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H and Guideline E. The DOD issued the SOR 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 Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on June 23, 2023, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On July 2, 2024, DOHA issued a notice scheduling the hearing for July 23, 2024.

The hearing convened as scheduled. Government Exhibits (GX) 1 and 2 and Applicant Exhibits (AX) A through C were admitted in evidence without objection. Applicant testified and the record closed at the conclusion of the hearing. DOHA received the hearing transcript (Tr.) on July 30, 2024.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the allegations. His admissions are incorporated into my findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 33 years old. He married his second wife in 2022 and has two minor step-children from this relationship. He was previously married from 2013 through 2022 and has three minor children from that relationship. He enlisted on active duty in the Army in April 2012. As part of his military service, he served in two combat deployments. In about 2019, he submitted an SCA and was granted a security clearance. Subsequently, his duties in the Army generally required him to have access to classified or sensitive information. (GX 1-2; AX A; Tr. 8-18, 22-25)

In February 2020, while serving overseas, Applicant communicated with a tax preparer to submit his joint marital tax returns for tax year 2019. In March 2020, his tax preparer requested that he sign and submit a release so that the preparer could submit the tax returns on his behalf. Applicant did not recall signing and returning any such forms. He later figured the tax preparer prepared and submitted the tax return without any additional information. (GX 2; AX B; Tr. 28-32)

Leading up to this period, Applicant's relationship with his wife had deteriorated and, a few weeks after communicating with the tax preparer, he filed for divorce. However, he never adjusted his joint tax filing and the tax refund was eventually deposited into his individual account. In May 2020, when his wife discovered this, she complained to Applicant's leadership and alleged that he forged her signature on their 2019 tax returns and claimed the refund for himself. Applicant denied forging her signature on any tax return but admitted that the funds were deposited into his individual account. He stated that he had intended to provide his wife with her share of the refund once he returned from overseas, in about June or July of 2020. (GX 2; AX B; Tr. 28-32, 50-55)

Nonetheless, Applicant's leadership began an investigation into his actions. Ultimately, a general officer memorandum of reprimand (MOR) was issued against Applicant. He claimed he felt betrayed by the Army over this action but agreed not to contest the processing of his general discharge under honorable conditions. (GX 2; Tr. 32-35)

In August 2020, while he was pending discharge, Applicant continued to perform his duties. On a Friday or Saturday night that month, he went to a bar to clear his mind. He met a woman and took her home. She brought cocaine and introduced it to Applicant. That weekend, he snorted about four or five lines of cocaine. He had never used cocaine

before that weekend. However, he decided to try it to relieve the stress of losing his career and his marriage. He recognized that this decision exhibited poor judgment. (GX 2; Tr. 34-37, 60-64)

On that following Monday, Applicant was notified that his entire unit was to be drug tested. He informed his superiors that he had used cocaine and he subsequently tested positive for cocaine. Applicant testified that, because he was already being processed for discharge, his superiors elected not to pursue any additional disciplinary action. In September 2020, he received a general discharge under honorable conditions as an E-6, staff sergeant. Under Guideline H, Applicant's use of cocaine is alleged under SOR ¶ 1.a. His August 2020 positive drug test is alleged under SOR ¶ 1.c. His use of cocaine while in a position of access to classified information is alleged under SOR ¶ 1.b. (GX 2; Tr. 25-29, 60-64)

After a brief period of unemployment, in January 2021, Applicant began working with his security clearance-sponsoring employer as a security professional. As part of the hiring process, he was required to take a drug test which came back negative for any illegal substances. He is required to hold a security clearance for this position. In August 2022, Applicant submitted an SCA, as required, to renew his security clearance eligibility. (GX 2; Tr. 8, 20, 32-35)

Applicant testified that he completed his August 2022 SCA on a computer at work and that the application prepopulated with information from his prior SCA. Still, he testified that he spent about eight hours on the SCA as he had to update several parts. A review of his August 2022 SCA reflects that he updated information about his divorce and subsequent marriage as well as his residential address and employment history. He also updated one of the individuals in "Section 16 – People Who Know You Well" of his SCA and included information about his September 2020 general discharge from the Army under honorable conditions. He did not update the SCA to disclose that he used cocaine in August 2020. (GX 1; Tr. 40-44)

Under Guideline E, SOR ¶¶ 2.a and 2.b allege that Applicant falsified his August 2022 SCA in response to the following questions: "Section 23 - Illegal Use of Drugs or Drug Activity, Illegal Use of Drugs or Controlled Substances, In the last seven (7) years, have you illegally used any drugs or controlled substances?"; and "Have you EVER illegally used or otherwise been illegally involved with a drug or controlled substance while possessing a security clearance other than previously listed?" The SOR alleged that Applicant answered "no" to each question and deliberately failed to disclose that information set forth in SOR ¶¶ 1.a-1.c.

Applicant testified that, during his November 2022 background interview with a DOD investigator, he was immediately asked about his drug use. At that time, he provided details of his encounter with the woman in the bar and his subsequent cocaine use. Applicant admitted that he did not know that his positive drug test had been included in his military record. However, he told the investigator that he did not disclose his cocaine use in his August 2022 SCA because he filled out the case papers using a previous form

that was already in the system. He claimed that he just went down the list of questions, answered “no” to each of them, and that he did not update many of his answers. He told the investigator that he should have paid closer attention to the questions. He denied that it was his intention to provide false or misleading answers to the questions. He also told the investigator that he was in a good place in his life and had no intention of using any illegal drugs in the future. (GX 2; Tr. 45-52)

During his testimony, Applicant stated that, when he was stateside, his duties included being the Unit Prevention Leader. As such, he received additional training and was required to assist in the administration of the unit’s random drug screenings. He fulfilled this role from about 2015 into 2020. As an administrator of the screenings, he was also required to be tested every time drug screenings occurred. He claimed he was regularly screened for drugs and never tested positive beyond the single instance in August 2020. (Tr. 35-38)

In his Answer, Applicant admitted that he failed to list his use of cocaine in his August 2022 SCA. However, while he acknowledged the omission, he testified that he did not intentionally falsify his application as is alleged in the SOR. He stated, “I didn’t make a conscious effort to mark the “no” box because I don’t do that every day.” (Tr. 35) In clarifying his statement, Applicant claimed that his previous drug use “was the last thing that was in my mind. ... I’m not sitting here thinking about a mistake that was made one time in my life.” (Tr. 39) He later stated, “I really didn’t even - probably didn’t even read the question, just skimmed over it.” (Tr. 49) He also stated, “I figured I would just be able to provide an explanation to the federal agent that I met with.” (Tr. 35-39)

Applicant has not undergone additional drug tests with his employer since his initial screening. However, he continues to take various health-related drug tests through his physician and claims to have never tested positive for an illegal substance. He asserted that his cocaine use was a single event that occurred under uniquely stressful circumstances. He no longer has contact with the woman he met at the bar with whom he used cocaine and does not associate with anyone who uses illegal drugs. (GX 2; Tr. 32-37, 62-66)

Since starting with his current employer, Applicant has been promoted on three occasions. In December 2023, he became an account manager and is now responsible for monitoring over 50 accounts, some of which involve classified projects. He estimates that he monitors approximately \$10 million in funds. (GX 2; Tr. 20-24; 67-69)

Applicant submitted an NCO Evaluation Report for the rating period from August 2019 through August 2020, prior to his cocaine use. The report reflected that he either exceeded or far exceeded all standards and was considered highly qualified. Rating officials noted that he was “clearly capable of thinking through problems and arrive at creative solutions.” It was also noted that he should be promoted and was capable of increased responsibilities. (AX A).

Applicant also submitted three reference letters in support of his character. All three letters, from senior NCOs in his command, were prepared in June 2020 and predate his use of cocaine. Nonetheless, Master Sergeant L described Applicant as one of the best NCOs he had worked with in his 20-year career. He noted that Applicant was a dependable and competent leader. Master Sergeant R stated that Applicant “demonstrated sound judgment and decision-making skills far beyond his age.” Command Sergeant Major F had supervised Applicant for nearly two years when he wrote that Applicant was a “stalwart of professionalism” and an “easy-going leader.” (AX C)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988)

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline 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.

I have considered the disqualifying conditions for drug involvement and substance misuse under AG ¶ 25 and the following are potentially applicable:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant admitted to using cocaine while in the Army in August 2020 and he subsequently tested positive for cocaine. His use occurred while he held a security clearance and worked in a position that required access to classified or sensitive information. All of the above disqualifying conditions apply.

Conditions that could mitigate the drug involvement and substance misuse security concerns are provided under AG ¶ 26. 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.

In August 2020, Applicant placed himself in a highly compromised position, using drugs with a stranger that he took home. His use occurred during a period of high stress, as his Army career was ending and he was in the process of a divorce. He recognized that he exhibited extremely poor judgment.

Four years have passed since Applicant used cocaine. In that time, he has remarried and his personal life has stabilized. He described himself as being in a good place. Additionally, he no longer associates with the individual who he used cocaine with or any other individuals who use drugs and he has repeatedly stated his intent to not use drugs in the future. These are all circumstances in favor of mitigation and must be weighed against the seriousness of Applicant's actions.

However, as discussed within the analysis of the SOR allegations under Guideline E, Applicant falsified his August 2022 SCA by failing to disclose his drug use. He denied this falsification during his testimony. His inability to be fully transparent about his drug use during the investigatory process continues to cast doubt on his current reliability, trustworthiness, and judgment. As he initially attempted to conceal his drug use from his most recent security investigation, it cannot be said that he fully acknowledged his drug involvement. His lack of candor about his illegal drug use undercuts consideration of mitigating evidence here. None of the mitigating conditions fully apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern:

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. ...

I have considered the disqualifying conditions for personal conduct under AG ¶ 16 and the following is potentially applicable:

(a) deliberate 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.

In order to prove a deliberate omission within a security clearance application, an applicant must have understood the question at issue and must have knowingly failed to disclose the requested information. See ISCR Case No. 21-01570 (App. Bd. Dec. 12, 2022) In falsification cases, the key issue is usually whether the omission of required information on a security clearance application was deliberate. ISCR Case No. 19-03939 (App. Bd. Feb. 21, 2023)

In his Answer, Applicant admitted the SOR allegations that he falsified two sections of his August 2022 SCA by failing to disclose his August 2020 cocaine use. He then testified that his admission was limited to the omission, and not to intentional falsification. In either instance, I conclude that the Government has met its burden to establish that Applicant's failure to disclose his cocaine use was deliberate.

Applicant was familiar with the process of filling out an SCA in August 2022 as he testified to previously filling out an SCA in 2019. He also testified to spending eight hours on the SCA while at work and making several substantive updates during that process. Yet, when asked about the drug-related questions within the SCA, he stated that he "probably didn't read the question" and that he "just skimmed over it." He then claimed that he was not thinking about his drug use at the time he filled out the SCA. However, he also told the investigator that he was unaware that his positive drug test had been included in his military record. Given the time that Applicant spent filling out the August 2022 SCA, the extent that he made substantive updates to other parts of the SCA, and his initial belief that his positive drug test was not included in his military record, I find that his omission of cocaine use in his August 2022 SCA was deliberate and that he knowingly failed to disclose the requested information.

Conditions that could mitigate the personal conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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 security clearance process relies on those who are trusted with our nation's secrets to be honest and forthcoming regardless of the consequences. Applicant's failure to disclose his cocaine use in his August 2022 SCA is not a minor offense and he did not make a prompt good-faith effort to correct his omission and concealment. While he volunteered details about his cocaine use to the investigator once asked, he has not acknowledged his initial effort to conceal that use from his current security clearance investigation. He further exacerbated that action during his testimony by denying the falsification. He has not taken full responsibility for his conduct. None of the mitigating conditions 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 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and Guideline E in my whole-person analysis.

Applicant served in the Army for over eight years and went on two combat deployments until he received a general discharge under honorable conditions following allegations of forgery. He denied those allegations and, even while that matter was pending, his supervisors and colleagues spoke of his "sound judgment" and "professionalism."

However, Applicant then chose to exhibit poor judgment in choosing to use cocaine. In transferring to civilian life, he again exhibited poor judgment by deliberately omitting his drug use history in his most recent SCA. His refusal to acknowledge that conduct raises ongoing questions regarding his judgment, reliability and trustworthiness.

The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H (drug involvement and substance misuse), and Guideline E (personal conduct).

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.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

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

Bryan J. Olmos
Administrative Judge