



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



In the matter of:)	
)	
)	ISCR Case No. 23-02909
)	
)	
Applicant for Security Clearance)	

Appearances

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

09/19/2024

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On September 6, 2022, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On April 12, 2024, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Misuse; and Guideline J, Criminal Conduct. The action was taken 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*, effective within the DoD after June 8, 2017.

Applicant answered the SOR on April 18, 2024, and requested a hearing before an administrative judge. The case was assigned to me on May 20, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 27, 2024, and the hearing was convened as scheduled on August 15, 2024. The Government offered eight exhibits, referred to as Government Exhibits 1 through 8, which were admitted without objection. The Applicant offered one exhibit, referred to as Applicant's

Exhibit A, which was admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on August 23, 2024.

Findings of Fact

Applicant is 28 years old, not married and has no children. He obtained a high school diploma and military training. Applicant is employed by a defense contractor as a General Flight Mechanic. He is seeking to obtain a security clearance in connection with his employment.

Applicant began working for his current employer, a defense contractor, on May 1, 2023. During the hiring process Applicant did not tell his employer that he had just been administratively separated from the Marine Corps seven months earlier for misconduct. He simply gave his employer a copy of his DD214, and did not discuss the particulars.

To provide some background, after graduating from high school, Applicant joined the U.S. Marine Corps and served from 2014 to April 2023. During his military career he possessed a security clearance. He was deployed two separate times in support of Operation Inherent Resolve to Kuwait and worked as a helicopter mechanic and a Door Gunner. His job stateside was working as a Maintenance Controller on the base. He was separated from the Marine Corps following a positive drug urinalysis and for an aggravated assault charge. He pled guilty in both instances and received Non-Judicial Punishment in July 2022, for violation of Article 112, wrongful use/possession of controlled substances; and on March 2021, for violation of Article 128, Aggravated Assault. He was administratively separated from the U.S. Marine Corps as an E-3, and received an Other Than Honorable Discharge on April 24, 2023.

Applicant explained that on or about June 17, 2022, the evening in question, he went out to a bar to have drinks (mixed drinks, hard alcohol) with an old friend from high school. They got separated and Applicant walked outside to look for his friend and ended up with a group of "shady individuals" in the parking lot that he did not know or recognize. Applicant stated that he does not remember the rest of the night, until he was calling for an Uber to pick him up. Applicant does not remember using cocaine but believes that he was not in the state of mind where he could make sound decisions.

On June 22, 2022, Applicant underwent a random drug urinalysis conducted by his command. The results of the drug urinalysis came back positive for cocaine at a level of over 200 nanograms per milliliter. Applicant stated that he does not remember using any illegal drug on the evening in question. Apparently, without his knowledge or while he was incapacitated, he did not use good judgement, and he used cocaine.

Documentation from the Navy Drug Screening Laboratory dated October 20, 2021, indicates that the detectable window for cocaine from a drug urinalysis is three days after use. Applicant was positive for cocaine five days after use. Based upon the science, it is impossible under the circumstances to determine how cocaine was in

Applicant's system five days after the use, unless he used it more recently than the date he hung out with the individuals on the evening in question. (Government Exhibits 7 and 8.) Applicant explained that he did not make the choice to go to trial, or raise the defense of "innocent ingestion", because he was at a point in his military career where he wanted to take ownership for his mistakes, and it was time to wrap up his career in the Marine Corps. (Tr. p. 42.)

Applicant's military records also show that he was involved in misconduct in 2020. He explained that he was at a Christmas Party on December 25, 2020, when a Sergeant attempted to take advantage of one of his junior Marines. The next morning the victim's roommate told the Applicant what had happened. Applicant and another Sergeant tried to take some action against the perpetrator but higher enlisted told them that they were going to handle the matter. Three months later, the perpetrator had not received punishment for his actions and so Applicant took the matter into his own hands. On or about March 12, 2021, Applicant was in an intoxicated state when he saw the Sergeant brush past the victim, which triggered something in him. Applicant hit him with his fist in the left eye socket and the right cheekbone. The Sergeant was taken to the hospital where he underwent surgery and titanium plates were put in his face. Applicant was reduced in rank to a Corporal. Applicant was placed in the brig for 45 days pending his NJP. In August 2021, Applicant pled guilty to aggravated assault under Article 128 and waived his right to an Administration Separation Board. He was administratively separated from the Marine Corps on April 24, 2023. (Government Exhibit 3.)

Applicant stated that after separating from the Marine Corps he has been building his bonds with his family and has gotten back into his faith.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 AG ¶ 2 describing 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.

Directive ¶ E3.1.14, requires the Government to present evidence that establishes 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person who applies for access to classified information seeks to enter 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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 at AG ¶ 25 contains three conditions that could raise a security concern and may be disqualifying:

- (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 an illegal drug, cocaine, while serving in the U.S. Marine Corps. This misconduct shows poor judgment, unreliability and untrustworthiness and violates Federal laws and military regulations that prohibit any illegal drug use. The aforementioned disqualifying conditions have been established.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns. The following conditions are 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's misconduct is fairly recent and shows poor judgment, unreliability, and untrustworthiness. Either without his knowledge or while he was incapacitated, Applicant used cocaine as evidenced from his random drug urinalysis. Applicant is well aware of the laws and regulations that prohibit the use of illegal drugs while serving in the military and while possessing a security clearance. Under the circumstances, Applicant has violated these rules and regulations and is not eligible for access to classified information. Accordingly, Guideline H is found against the Applicant.

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. 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 individual was formally charged, prosecuted, or convicted.

Applicant received Non-Judicial Punishment in about July 2022, for violation of Article 112, wrongful use/possession of a controlled substance. He also received Non-Judicial Punishment in about March 2021 for violation of Article 128 for Aggravated Assault. His misconduct is recent, egregious, and clearly demonstrates poor judgment, unreliability, immaturity, and untrustworthiness. The aforementioned disqualifying conditions have been established.

Four Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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.

It is noted that Appellant is now trying to change some of his past lifestyle patterns by bonding with his family and returning to his faith. He is commended for efforts at trying to make this change. However, Applicant's pattern of recent criminal conduct involving alcohol, drugs, and violence, remains very concerning. His aggravated assault followed by his illegal drug use in the Marine Corps, while possessing a security clearance, are indicative of behavior that shows immaturity and irresponsibility. This misconduct resulting in two recent Non-Judicial Punishment proceedings, a military separation, and an Other than Honorable Discharge from the Marine Corps does not show the requisite good judgment, reliability, and trustworthiness necessary to be eligible for access to classified information, and it presents doubts concerning his ability or willingness to abide by law, rules, and regulations. None of the mitigating conditions are applicable here.

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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E in my whole-person analysis. To hold a security clearance is a privilege and not a right. While holding a security clearance one is expected to show honesty, responsibility and good judgment at all times. Applicant has not demonstrated a positive pattern of conduct and the level of maturity needed for access to classified information. At this time, he is not an individual with whom the Government can be confident to know that he will always follow rules and regulations and do the right thing, even when no one is looking. Right now, he is not qualified for access to classified information, nor is it certain that sensitive information will be properly protected. Applicant does not meet the qualifications for a security clearance.

Overall, the record evidence leaves me with many questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Drug Involvement and Substance Misuse, and Criminal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a, and 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a, and 2.b:	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 national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge