



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



In the matter of:)
)
) ISCR Case No. 23-01956
)
Applicant for Security Clearance)

Appearances

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

07/08/2024

Decision

KATAUSKAS, Philip J., Administrative Judge

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He failed to mitigate the security concerns stemming from his drug involvement and substance misuse. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant submitted his security clearance application (SCA) on March 21, 2023. The Department of Defense issued Applicant a Statement of Reasons (SOR) on December 11, 2023, detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* 1960), as amended; DOD Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

On February 24, 2024, Applicant submitted an answer (Answer) to the SOR and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 8, 2024, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 5. DOHA sent the FORM to Applicant on April 11, 2024, who received the FORM on April 17, 2024. He was afforded 30 days after receiving the FORM to file objections

and submit material in refutation, extenuation, or mitigation. Applicant submitted an undated response (Response) to the FORM, which receipt was also undated. The SOR and the Answer (Items 1 and 2 respectively) are the pleadings in the case. Items 3 through 5 and the Response are admitted without objection. The case was assigned to me on June 6, 2024.

Findings of Fact

Applicant is 26 years old, a high school graduate, and has completed about two years of college. He has never married and has no children. Since August 2019, he has worked in a retail business and is sponsored by a defense contractor. This is his first application for a security clearance. (Item 3.)

Under Guideline H, the SOR alleged that Applicant: (a) used cocaine on at least three occasions from May 2020 to about February 2023; (b) used marijuana with varying frequency from about May 2011 to August 2022; and (c) used a prescription medication for ADHD (attention-deficit/hyperactivity disorder) that was not prescribed for him in about May 2022. (Item 1.) He admitted his use of cocaine (over a year ago) and marijuana (five times over eleven years), but denied ever purchasing those drugs. (Item 2.) His clearest admissions of the use of cocaine and marijuana are in his SCA, which matches the periods of use alleged in the SOR. (Item 3.) He used cocaine and marijuana in "group settings" or "social gatherings." He also answered that "I will never do [cocaine or marijuana] again." He answered SOR ¶ 1.c that he used the alleged "prescription medication" one time and "will not do this drug again." (Items 2 and 3.)

Law and Policies

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

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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 then 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 in seeking a favorable security decision.

Discussion

Guideline H, Drug Involvement and Substance Abuse

Under AG ¶ 24 for illegal drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules and regulations:

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.

Possession of a Schedule I or II controlled substance is a federal criminal offense. Schedules I and II, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance, and cocaine is a Schedule II controlled substance. See Drug Enforcement Administration, Drug Scheduling listing at <https://www.dea.gov/drug-information/drug-scheduling/>

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, ...

Applicant admitted that he possessed and used cocaine, marijuana, and misused another person's prescription medication. Those admissions trigger disqualifying conditions AG ¶¶ 25(a) and (c).

The next inquiry is whether the security concerns raised by Applicant's cocaine, marijuana, and unauthorized prescription drug use have been mitigated. The following mitigating conditions under AG ¶ 26 for drug involvement are potentially applicable here:

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.

Applicant's most recent use of cocaine was in February 2023. His most recent use of marijuana was in August 2022. His most recent misuse of a prescription drug was in May 2022. These episodes of illegal drug use call into question his current reliability, trustworthiness, and good judgment. His drug involvement and substance abuse are not mitigated by AG ¶ 26(a).

AG ¶ 26(b) at the outset requires that an applicant show an "established ... pattern of abstinence." The three recent incidences of Applicant's illegal drug use are not a good start. Those uses were not that long ago, and the marijuana use extended over a lengthy period of time. The record shows that his use has been in "group settings " or "social gatherings." He has not shown what he will do - or has done - to avoid such settings or gatherings. Nor has he shown his plan to disassociate himself from drug-using associates, or changing or avoiding environments where drugs are used in the future. His Answer that he will not do cocaine, marijuana, or misuse prescription drugs was made subject to the penalties set forth in 18 U.S.C. §1001. While his statement is believable, there has been an insufficient period of time to establish a pattern of abstinence. On balance, he has not satisfied AG ¶ 26(b), and his drug use is not mitigated by that condition.

Whole-Person Concept

Under AG ¶ 2(a), 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. AG ¶¶ 2(a) and (d)(1)-(9) (explaining the "whole-person" concept and factors). In my analysis above, I considered the potentially disqualifying and mitigating conditions and the whole-person concept in light of all the facts and circumstances surrounding this case.

Applicant leaves me with questions about his eligibility and suitability for a security clearance. For those reasons, I conclude that Applicant has not mitigated the security concerns arising under Guideline H, drug involvement and substance abuse.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H (Drug Involvement): Against Applicant

Subparagraphs 1.a - 1.c:

Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. National security eligibility for access to classified information is denied.

Philip J. Katauskas
Administrative Judge