



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



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 14-01843
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Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro Se*

10/07/2014

Decision

MALONE, Matthew E., Administrative Judge:

In June 2013, Applicant was convicted of reckless driving after being arrested and charged with driving while intoxicated (DWI) in February 2013. In October 2013, he tested positive for cocaine in a random workplace urinalysis. Applicant admitted being legally intoxicated when he was arrested for DWI, but he denied knowingly ingesting cocaine. His explanation for how cocaine was found in his blood stream lacked credibility. Clearance is denied.

Statement of the Case

Applicant has held a security clearance since 1984. He last applied to renew his eligibility for access to classified information when he submitted an Electronic Questionnaire for Investigations Processing (EQIP) on March 14, 2011. However, after receiving reports from the Joint Personnel Adjudication System (JPAS) between March 2013 and November 2013, adjudicators for the Department of Defense (DOD), could not determine that it is clearly consistent with the national interest to continue

Applicant's access to classified information.¹ On June 13, 2014, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guidelines (AG)² for criminal conduct (Guideline J) and drug involvement (Guideline H).

Applicant timely answered the SOR (Answer) and requested a decision without hearing. However, on July 28, 2014, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) requested a hearing.³ The case was assigned to me on August 15, 2014, and I convened a hearing on September 9, 2014. The parties appeared as scheduled. Department Counsel presented Government's Exhibits (Gx.) 1 and 2, which were admitted without objection. The Government also called a rebuttal witness. Applicant testified in his own behalf, and he submitted, post hearing, five character reference letters admitted collectively, and without objection, as Applicant's Exhibit (Ax.) A. DOHA received a transcript (Tr.) of the hearing on September 17, 2014. The record closed on September 22, 2014.

Findings of Fact

The Government alleged under Guideline J that Applicant was arrested in February 2013 and charged with DWI; that he pleaded guilty in June 2013 to reckless driving; that he was placed on probation for 11 months and 20 days; that he was ordered to perform community service; and that he was assessed fines and court costs totaling \$607 (SOR 1.a). Applicant admitted this allegation.

The Government alleged under Guideline H that on October 21, 2013, Applicant tested positive for cocaine through a random workplace drug test (SOR 2.a); and that he used cocaine while holding a security clearance (SOR 2.b). Applicant denied these allegations.

Applicant's admission to SOR 1.a is incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 57 years old and employed as a communications worker by a defense contractor for whom he has worked since 1988. He has held a security clearance since 1984. Applicant has an excellent reputation at work and in his community. Character references submitted in his behalf describe him as reliable, honest, professional, generous, and trustworthy. (Gx. 1; Ax. A; Tr. 6, 15, 18, 54 - 55)

Applicant has been married three times. His first marriage in 1975 ended by divorce in 1978, and produced one child, now age 38. Applicant remarried in 1980, but

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² The adjudicative guidelines were implemented on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ See Directive, E3.1.7.

his second wife died in 2001. Together they had one child, who is now 20 years old. Applicant and his third wife were married in 2006, but they have been separated since September 2010. (Gx. 1; Tr. 15 - 17)

Not long after midnight on February 23, 2013, Applicant was stopped by police while driving home from a bar about a mile from his apartment. He had been drinking by himself at the bar since early the previous evening and had consumed about six mixed drinks. Applicant was arrested and charged with DWI. On June 21, 2013, he pleaded nolo contendere. He was fined and ordered to complete alcohol and driving awareness classes, and to perform 50 hours of community service. Upon completion of the terms of his sentence, Applicant's charge was reduced to reckless driving. This was Applicant's only charged criminal offense, but he admitted that he was intoxicated when he was stopped by police, and that there have been other times when he has driven after drinking. Applicant has not consumed alcohol since his arrest. (Answer; Gx. 2; Tr. 26 - 34)

On Monday, October 21, 2013, Applicant was selected to take a random workplace drug test. This was the first time since he was hired by his employer that he was selected for testing. The results two days later showed positive for cocaine. Applicant has adamantly denied knowingly ingesting any illegal drugs. After receiving the test results, Applicant obtained his own negative test results. He also completed 12 weeks of company-mandated drug counseling, through which he was assessed as not being drug dependent. He also claims he has been tested several times since October 2013, all with negative results. In December 2013, he was suspended from his job pending resolution of his continued eligibility for a security clearance. (Answer; Gx. 2)

The previous Saturday, Applicant had played golf all day. When he returned home to his apartment, his neighbor asked him to go to a party in an upstairs apartment that evening. Applicant agreed and was one of about eight or nine people at the party. It was hosted by a woman about Applicant's age. Her daughter, her daughter's boyfriend, and two of their friends also attended. Aside from his downstairs neighbor, Applicant had not previously met anyone there. Applicant played cards most of the evening. One of the other card players was wearing a hat with the logo of a football team that was a rival of Applicant's favorite team. Applicant began kidding that person about the hat, but his banter was not well received and he felt some of the people at the party were bothered by his remarks. Applicant drank diet cola while he was playing cards and thought at times that the drinks tasted odd. In hindsight, he theorized that the persons who served him his drinks spiked them with quantities of cocaine sufficient to cause the positive drug test results two days later. He believes they did this because they did not like his comments about the rival football team. Applicant also stated that the hostess's daughter and her friends were using marijuana on the apartment balcony, so he knew some of the guests at the party were drug users. (Answer; Tr. 38 - 51)

In support of Applicant's version of events, he insisted that he had actually volunteered to be tested the Monday after the party. Why, he reasoned, would anyone willingly take a drug test so soon after intentionally using cocaine? However, his supervisor testified that Applicant was selected by human resources through a standard

procedure that does not provide for voluntary testing. Applicant's supervisor also testified that he has never asked for volunteers to take a drug test. (Tr. 59 - 72)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent⁴ with the national interest for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

⁶ See *Egan*, 484 U.S. at 528, 531.

any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Criminal Conduct

Available information supports the SOR 1.a allegation that Applicant was arrested for DWI, and was convicted of a lesser offense (reckless driving) even though he knew he was legally intoxicated at the time of the traffic stop that led to his arrest. This information is sufficient to raise the security concern about criminal conduct expressed at AG ¶ 30, as follows:

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.

More specifically, the record requires application of the disqualifying condition at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*). The fact that Applicant was convicted of a lesser offense does not make his conduct less serious. He knowingly violated a significant public safety law by driving after he had been drinking for several hours. He had done so on other occasions before, but this time he was caught.

By contrast, there is support for application of the mitigating condition at AG ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). Applicant has not consumed alcohol since his arrest; he completed all of the terms of his sentence and probation; and he has a good reputation among long-time friends and co-workers for good conduct. Without more, it would seem that Applicant has mitigated the security concerns under this guideline. However, due to my findings about Applicant's drug use, I am constrained against a finding that Applicant is fully rehabilitated. This guideline is resolved against the Applicant.

Drug Involvement

Applicant tested positive for cocaine in October 2013. Although Applicant was adamant in his denials of both allegations under this guideline, the version of events he presented was simply implausible. Also, his supporting claim that he volunteered for the drug test was directly contradicted by his supervisor. I did not find Applicant credible, and I conclude that he used cocaine as alleged. This information raises a security concern articulated at AG ¶ 24 as follows:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may

⁷ See *Egan*; AG ¶ 2(b).

impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, information about Applicant's drug use requires application of the following AG ¶ 25 disqualifying conditions:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use; and

(g) any illegal drug use after being granted a security clearance.

I also have considered the following AG ¶ 26 mitigating conditions, which may be pertinent to these facts and circumstances:

(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;

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant is known to have used cocaine once. He has an excellent reputation among friends and co-workers, who have not known him to use drugs or engage in other inappropriate behavior. However, Applicant has not presented information that supports either AG ¶¶ 26(a) or (b). Rather, he has presented consistent, yet unsupported denials of the conduct alleged. His version of events tends only to undermine confidence in his judgment and reliability. On balance, I conclude security concerns remain about his involvement with illegal drugs.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). I conclude that doubts remain about Applicant's suitability for access to classified information. Because protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge