



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



In the matter of:)
)
) ISCR Case No. 14-05095
)
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esquire
For Applicant: *Pro se*

12/08/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally purchased and used cocaine once in 2013, while serving in the Navy and possessing a security clearance. Additionally, he accumulated five misdemeanor convictions of traffic offenses between 2008 and 2014. The passage of time so far is insufficient to establish a track record for judgment, reliability, and compliance with the law, rules, and regulations. He failed to mitigate the drug involvement and criminal conduct security concerns. Clearance denied.

Statement of the Case

Applicant submitted his most recent SCA on March 26, 2015. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline J (criminal conduct) on March 26, 2015.¹ Applicant answered the SOR on April 20, 2015, and requested a hearing before

¹ The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

an administrative judge. The case was assigned to me on July 1, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 26, 2015, scheduling a hearing for September 15, 2015.

At the hearing, the Government offered eight exhibits (GE 1 through 8). Applicant testified and submitted no documents at his hearing. I note; however, that Applicant attached to his SOR answer a statement of intent with automatic revocation of clearance for any violation and three reference statements. Applicant's documents and the Government's exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on September 23, 2015.

Findings of Fact

In his response to the SOR, and at his hearing, Applicant admitted all the factual allegations in the SOR, with comments. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 26-year-old information technology and network engineer employed by a federal contractor. He graduated from high school in 2007, and attended college between August and November 2007. Applicant has never been married, and he has no children.

After his short period in college, Applicant worked odd jobs from November 2007 until July 2008, when he enlisted in the U.S. Navy. He served on active duty in the Navy until he was administratively discharged in September 2013. During his service, Applicant held a top secret security clearance, and he achieved the rank and rate of electronic technician second-class petty officer.

In July 2013, Applicant and another sailor illegally purchased and used cocaine. Several days later, he participated in a drug test that resulted positive for cocaine. Applicant received non-judicial punishment and was processed for administrative separation. He was issued a general discharge under honorable conditions. Applicant explained that he received a general discharge because his cocaine use was an isolated incident and he was considered to be good sailor. During the separation proceeding, he received good recommendations from his supervisors because of his duty performance. After his discharge, he was unemployed from September 2013 until February 2014, when he was hired by his current employer, a federal contractor.

Applicant expressed remorse and regret for his illegal drug use. He believes that his illegal drug use was the worst mistake of his life. He loved the Navy and was planning to make the Navy a career. He had reenlisted shortly before his illegal drug use.

After his non-judicial punishment, Applicant participated in a Navy substance abuse rehabilitation screening program. Apparently, the counselors determined that any

follow-up treatment was unnecessary because Applicant was not a frequent illegal drug user (he claimed he only used cocaine once), and he had no dependency. Applicant averred that after his discharge he disassociated from his illegal drug-using friends. He relocated to his current residence and started a new career.

Applicant likes his current job. He believes that he is a valuable asset to his employer. He claimed that he now understands the scope of duties and responsibilities associated with maintaining eligibility for a security clearance. Applicant promised to never use illegal drugs in the future. To show his commitment, he submitted a written statement of intent to abstain from any illegal drug-related behavior with automatic revocation of clearance for any violation.

In addition to the above offense, between March 2008 and October 2014, Applicant was involved in misdemeanor or traffic offenses:

In October 2014, Applicant pled guilty to reckless driving by failure to maintain control of his car. He explained that it was raining and, although he was driving at the posted speed limit, he lost control of his car and was involved in a one-car collision. He was convicted of improper driving, a traffic offense, and required to pay a \$100 fine and \$65 in court costs.

In December 2013, Applicant was convicted of reckless driving for exceeding the speed limit. He was driving at 102 miles per hour in a 55 miles per hour zone. He was sentenced to 20 days in jail (suspended), two years unsupervised probation, his driver's license was suspended 30 days, and he was required to pay a fine and court costs.

In June-July 2013, Applicant was charged with public intoxication. He was required to pay a fine and court costs. He explained that he and some friends were drinking, and one of his friends was robbed. They assisted their friend to get cleaned up, and while walking to meet the designated driver, they were stopped by the police. He was charged with public intoxication.

In November 2009, Applicant was stopped by the police for driving a motorcycle at 83 MPH in a 55 MPH zone. He was convicted of reckless driving in January 2010, and was required to pay a \$250 fine and court costs of \$75. Applicant explained that he was riding his motorcycle and it started to rain. He was speeding attempting to get home before the rain.

In March 2008, Applicant was charged with destruction of private property and petit larceny. He explained that, at the time, he was young and immature and was associating with the wrong people. He claimed that he was sleeping in the car when his friend stopped in a private place and started to break into a soda machine with a crowbar. They were discovered by a police officer, and he was charged with the offenses. His friend confessed to breaking into the soda machine. Applicant's petit

larceny charge was dismissed, and he pleaded guilty to destruction of property. He was required to pay restitution.

Applicant disclosed in his February 2014 SCA his illegal use of cocaine and his criminal record. During an April 2014 interview with a government investigator, Applicant disclosed that he used marijuana during high school. The 2014 SCA did not ask for Applicant to disclose any illegal drug use that occurred seven years before he submitted the application. Apparently, he did not disclose his use of marijuana in prior SCAs.

Applicant is not interested in using illegal drugs or being around people who use illegal drugs. He is currently dedicated to his work and establishing a career. He no longer associates with any illegal drug users.

Applicant's supervisors consider him to be a good employee and person. He displays a positive attitude, has a strong work ethic, and is dependable. Applicant's supervisors have been impressed with Applicant's professionalism, integrity, and work ethic. His supervisors trust Applicant with sensitive information and equipment. They favorably recommended Applicant's eligibility for a clearance.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter 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 those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Applicant illegally purchased and used cocaine once in 2013. He used cocaine while serving in the Navy and possessing a top secret clearance.

AG ¶ 25 describes drug-involvement disqualifying conditions that raise a security concern and may be disqualifying in this particular case: “(a) any drug abuse;” “(b) testing positive for illegal drug use;” and “(g) any illegal drug use after being granted a security clearance.” AG ¶¶ 25(a), (b), and 25(g) apply. Applicant disclosed his illegal drug-related behavior in his 2014 SCA and during an interview in April 2014. He also admitted his drug-related behavior in his SOR response, and at his hearing.

AG ¶ 26 provides potentially applicable drug involvement mitigating conditions:

(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) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the above drug-involvement mitigating conditions fully apply, and do not mitigate the security concerns. Applicant's most recent drug-related behavior occurred in July 2013, as such it could be considered not recent. I considered Applicant's claims that he only used cocaine once; that he has disassociated from his drug-using friends and contacts; that he has changed his lifestyle with respect to illegal drug use; and his statement of intent with automatic revocation of clearance for any violation. He claimed that he is now dedicated to his girlfriend and his work.

Notwithstanding, Applicant's evidence is insufficient to establish that his drug-related behavior is unlikely to recur, and the passage of time so far does not mitigate the security concerns about his current reliability, trustworthiness, and judgment. At the time of his illegal drug use, Applicant was 24 years old, had been on active duty in the Navy three years, had the rank of petty officer second class, and possessed a top secret clearance. Applicant knew or should have known that the use of cocaine was illegal, against Navy rules and regulations, and that it would impact on his ability to possess a clearance. Nonetheless, he illegally used cocaine.

Applicant testified that he enlisted in the Navy to separate himself from bad company and influences, and to change his then lifestyle. While in the Navy, Applicant established a reputation as a good sailor, and received favorable endorsements from his supervisors. He loved the Navy and wanted to make his service a career. Nevertheless, that did not stop him from illegally using cocaine in 2013. I considered Applicant's current references' statements about his excellent job performance, and his claims of a change in his lifestyle. Notwithstanding, in light of Applicant's past use of cocaine while holding a top secret clearance, I find that the passage of time so far is insufficient to mitigate the security concerns about his current reliability, trustworthiness, and judgment.

Guideline J, Criminal Conduct

Under Guideline J, the concern is that 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 ¶ 30.

Between 2008 and October 2014, Applicant was convicted of five misdemeanor or driving offenses – destruction of property in 2008, reckless driving (or improper control) in 2009, 2013, and 2014, and public intoxication in 2013.

Applicant's criminal behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(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; and

(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.

For the same reasons discussed under Guideline H, incorporated herein, I find that none of the mitigating conditions apply. Applicant was convicted of destruction of property in 2008 and reckless driving in 2009. Notwithstanding these convictions, he continued to engage in reckless or negligent or criminal behavior three times in 2013 (public intoxication, reckless driving, or improper control, and illegal purchase and use of cocaine), and reckless driving in 2014.

Considering the record as a whole, Applicant's actions demonstrate lack of judgment, reliability, and trustworthiness. It also shows Applicant's lack of reform and rehabilitation after several convictions, and his unwillingness to comply with laws, rules, and regulations. I note that there is no evidence of Applicant being involved in any additional criminal conduct after October 2014. It is possible that Applicant is starting to mature and become a responsible adult; however, the passage of time so far is insufficient to establish a track record for judgment, reliability, and compliance with the law, rules, and regulations.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines H and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant, 26, has been working for his employer since February 2014. His good service to his employer (and the Navy) serves as some evidence of his possible rehabilitation. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant failed to mitigate the security concerns pertaining to drug involvement and criminal 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 and 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a through 2.e:	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 eligibility for a security clearance. Clearance denied.

JUAN J. RIVERA
Administrative Judge