



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



In the matter of:)
)
) ISCR Case No. 15-06150
)
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

12/22/2017

Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the drug involvement and substance misuse, and personal conduct security concerns. National security eligibility for access to classified information is granted.

History of Case

On July 11, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) and Guideline E (Personal 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 (AG) effective within the DoD after September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

¹I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR in writing on August 30, 2016 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on April 27, 2017. DOHA issued a Notice of Hearing on May 15, 2017, setting the hearing for June 27, 2017. Department Counsel offered Government exhibits (GE) 1 through 5 into evidence. Applicant testified, and offered exhibits (AE) A through P into evidence. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on July 6, 2017.

Findings of Fact

Applicant is 31 years old and married. He and his wife have a two-year-old daughter. In June 2004, he graduated from high school. In November 2004, he enlisted on active duty with the Navy. He served until December 2014. He was an E-6, working as an Operations Specialist when he was discharged. He held a security clearance while serving. (GE 1; AE A)

Applicant was 18 years old and in high school when he enlisted. In his enlistment application, he disclosed that he illegally used marijuana 10 times when he was 17 years old. In March 2005, he acknowledged that he was briefed on the Navy's policy prohibiting the use of illegal drugs. (Tr. 29; GE 3)

During his service, Applicant was a leading petty officer and trained junior sailors. He created a software program for evaluating performance for his command. He spent eight years at sea and was selected for a highly competitive leadership program in 2014. (AE A, AE B) He received awards and commendations. His performance evaluations documented him as a "top performer and superb leader who stands head and shoulders above his peers." (AE E) In a recommendation for an officer program in 2013, Applicant's commanding officer stated that Applicant "demonstrates superior professional abilities and leads subordinates with a technical expertise that is unmatched." (AE E)

On July 10, 2014, Applicant ingested cocaine while attending a concert. He was with a group of friends and had been consuming alcohol. He was inebriated when he used cocaine he received from a friend. He admitted that he demonstrated a huge lapse of judgment in using the drug. He explained that he was drinking more at that time, having lost an aunt a few months previously and learning that his girlfriend (now wife) had been raped by his good friend. He said those events affected him emotionally and contributed to his lapse in judgment. (Tr. 17-21, 42)

On July 11, 2014, Applicant tested positive for cocaine during a random drug urinalysis ordered by his command. Applicant learned of the results on July 18, 2014. (Tr. 33) After admitting to using cocaine, a Captain's Mast was conducted on July 29, 2014. He received a reduction in rank to E-5, served 45 days of extra duty, and forfeited a half month's pay for two months. On October 7, 2014, Applicant appeared before an administrative separation board, which recommended an involuntary separation and a

general discharge. On December 18, 2014, Applicant was discharged from the Navy. (GE 2)

Soon after testing positive for cocaine, Applicant participated in a drug and alcohol evaluation program offered by the Navy. He said he was not diagnosed with an alcohol or drug dependency.² (Tr. 38, 41) In response to a question about his current alcohol consumption, he said he drinks occasionally. (Tr. 37)

Applicant acknowledged that he did not inform his command of a possible positive urinalysis before or after he participated in the random screening. The command learned of the results on July 18, 2014, the same day Applicant did. (Tr. 36) He acknowledged that he should have informed his command about the possible results and his use of cocaine sooner than July 18, 2014. (Tr. 41)

In March 2015, Applicant began a position with a defense contractor and submitted a security clearance application (SCA). In it, he disclosed his discharge from the Navy and the underlying drug offense. (GE 1)

Applicant's performance evaluation for 2015 documented that he has a "better than expected" rating in half of the performance factors for his first year. (AE F) Applicant subsequently transferred to another defense contractor, who offered him a higher salary and a better position. He is a project lead for a large team. He recently received an excellent performance evaluation from his current employer. (Tr. 23-25)

Applicant has no intention to use cocaine or illegal drugs again. He no longer associates with the people with whom he used cocaine, and in fact has moved to a different location since the incident. (Tr. 21) He expressed remorse over his conduct. The situation cost him "an impeccable career" in the Navy that he loved. (Tr. 23) His priority is now his family. (Tr. 21) He has matured through this process. (Tr. 24) His wife is supportive and has helped him understand the psychological issues he wrestled with at the time of the cocaine incident. (Tr. 45) He has never had a security incident in the 13 years that he has held a clearance. (Tr. 26) He anticipated earning a bachelor's degree in August 2017.

Applicant submitted a Statement of Intent to never use illegal drugs again. He stated that if he did, he would consent to an automatic revocation of his security clearance. (AE L)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

²This evaluation is not in the record.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an "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 applying for national security eligibility 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern involving drug involvement and substance misuse as follows:

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.

AG ¶ 25 sets out conditions that could raise a security concern. Three may be disqualifying:

- (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 that he ingested cocaine on July 10, 2014, and tested positive for the illegal drug on July 11, 2014. He held a security clearance at the time. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate drug involvement and substance misuse security concerns are provided in AG ¶ 26. The following two 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.

The evidence establishes mitigation under AG ¶ 26(a). The last and only time Applicant ingested cocaine was in July 2014. That was more than three years ago, and occurred while he was attending a concert, inebriated, and distressed about personal issues. As a consequence of using cocaine, the Navy involuntarily separated him from service, which ended his Navy career aspirations. His priorities have changed since the incident, and he now focuses on his family and drinks responsibly in moderation. Applicant's wife has been supportive and has helped him resolve the emotional issues that contributed to his lapse in judgment. The circumstances surrounding the incident are unlikely to recur, and do not cast doubt on his current trustworthiness.

Applicant acknowledged that he made a serious mistake in using the cocaine. He no longer associates with the people with whom he attended the concert and used cocaine. He has moved to another area. He submitted a signed statement of his intent not to use illegal drugs again. The evidence established mitigation under AG ¶¶ 26(b)(1), (2), and (3).

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following two disqualifying conditions are potentially applicable:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant failed to timely report his use of cocaine after he used it while attending a concert. While he did not affirmatively conceal his cocaine use from his command, security clearance holders have a duty to disclose relevant information about their fitness to hold a security clearance. His cocaine use was relevant to the Navy and its concerns about national security eligibility. The evidence established the disqualifying condition under AG ¶ 16(b). In March 2005, Applicant acknowledged the Navy's policy regarding the illegal use of drugs while serving. AG ¶ 16(f) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. Two may potentially apply:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

The evidence establishes mitigation under AG ¶ 17(c) for the reasons articulated concerning AG ¶ 26(a) above. Although Applicant has not participated in structured counseling, he acknowledged his mistake and exhibited sincere remorse. His wife has helped him understand the emotional issues that contributed to his untrustworthy behavior that occurred in July 2014, such that it is unlikely to recur. AG ¶ 17(d) applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. Prior to Applicant's discharge from the Navy, he served commendably for ten years. Since losing the opportunity to have a naval career as a consequence of using cocaine in July 2014, he has matured and is now strongly focused on his young family. After observing his demeanor and listening to his testimony, I found him to be candid and honest. He displayed remorse over his

misconduct and the ramifications it has had in his life. Given these facts, and his recent positive performance evaluations from his employer, I do not believe that he will foolishly engage in similar conduct in the future. Overall, the evidence does not raise doubt as to Applicant's present eligibility and suitability for a security clearance.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant access to classified information. National security eligibility is granted.

SHARI DAM
Administrative Judge