



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07127

Appearances

For Government: Aubrey De Angelis, Esquire, Department Counsel

For Applicant: *Pro se*

November 8, 2017

Decision

ROSS, Wilford H., Administrative Judge:

Applicant used marijuana with varying frequency from 1999 to January 2017. He used cocaine from 2004 to approximately June 2016. He also used Percocet without a prescription from 2009 to 2014. Applicant falsified a government questionnaire in 2015 concerning his drug use. Based on a review of the pleadings, testimony, and exhibits, national security eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on February 27, 2015. (Government Exhibit 1.) On June 14, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as

amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.¹

Applicant answered the SOR in writing (Answer) on or after June 22, 2016, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 19, 2016. The case was assigned to me on August 31, 2016. The Defense Office of Hearings and Appeals (DOHA) issued Notices of Hearing on November 22, 2016; and December 14, 2016. I convened the hearing as scheduled on January 23, 2017. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on February 1, 2017.

Findings of Fact

Applicant is a 35-year-old construction manager. He is married with two children. He is seeking to obtain a security clearance in connection with his work with the DoD. This is his first application for a security clearance.

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all the allegations under this paragraph.

1.a. Applicant abused the prescription pain killer Percocet from approximately 2009 through approximately 2014. He was involved in motor sports and was injured several times. At first his use was with a prescription. Eventually he became addicted to Percocet and would purchase it illegally. He became concerned about his continuing use of Percocet and began treatment in 2012. He continues in that treatment, as further described under allegation 1.g, below. (Government Exhibit 2 at 7-8; Tr. 18-19, 24-25.)

1.b. Applicant began using marijuana in 1999, when he was in high school.² He last used marijuana during New Year's 2017. Applicant has used marijuana three or four times a year for the past several years. Applicant stated that he plans not to use marijuana in the future. However, he has made plans not to use marijuana in the past, and has used it again. (Government Exhibit 2 at 12-13; Tr. 26-29, 46-47.)

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

2 The SOR stated Applicant began use in 1989. This is an obvious typographical error, since Applicant was 8 years old at that time. Allegations 1.b and 2.a of the SOR were amended to comport with the evidence to read "1999." See Directive, Enclosure 3, ¶E3.1.17.

1.c. Applicant first used cocaine in approximately 2004. He last used cocaine in approximately June 2016. He used cocaine from two to four times a year during this period. Applicant stated that he plans not to use cocaine in the future. However, he has made plans not to use cocaine in the past, and has used it again. (Government Exhibit 2 at 12-13; Tr. 30-32; 46-47.)

1.d. Applicant has been receiving drug abuse treatment from December 2012, as further described under allegation 1.g, below. In June 2015, as part of that treatment, he tested positive for a drug called B30, which Applicant described as a muscle relaxant. Applicant was given this drug by a friend because Applicant was having muscle cramps after a day of hiking. There is no evidence in the record as to whether or not B30 is a controlled substance. This allegation is found for Applicant. (Government Exhibit 2 at 12; Tr. 22-23, 32-33.)

1.e. Earlier in treatment, in February 2015, Applicant tested positive for THC, the active ingredient in marijuana. (Government Exhibit 2 at 12.)

1.f. In March 2013, while in treatment, Applicant tested positive for cocaine and oxycodone. (Government Exhibit 2 at 12.)

1.g. Applicant has been attending voluntary drug treatment for his use of Percocet since 2012. His treatment consists of drug counseling and prescription of a substitute medication for the Percocet. He was unclear about what this treatment consists of, how often he attends the treatment, or what he has gotten from the treatment. (Government Exhibit 2 at 7-8; Tr. 19-21, 29.)

Applicant has also been attending an informal self-help group to assist with lifestyle issues, including drug abuse. He has been attending this group on an occasional basis for several years. Applicant tries to go to group meetings once or twice a month. (Tr. 20-22, 34-36.)

Paragraph 2 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability. Applicant admitted all the allegations under this paragraph.

2.a. and 2.b. Applicant filled out an e-QIP on February 27, 2015. (Government Exhibit 1.) Section 23 of the questionnaire asked Applicant about his drug use history. First of all, that section asked whether Applicant had used controlled substances during the previous seven years. Applicant stated, “No.” This was a false answer to a relevant question concerning Applicant’s drug use history, since he had used marijuana and cocaine as described above. Applicant admitted his intentional falsification of this questionnaire during his testimony at the hearing. Applicant stated that his decision to put down a false answer was due to fear of losing his job. (Tr. 38-39.)

2.c Applicant was subsequently questioned by an investigator from the Office of Personnel Management on April 1, 2015. During that interview Applicant deliberately failed to disclose that he had three positive drug tests during treatment. When re-interviewed on July 30, 2015, Applicant stated that he believed the question only applied to “drug tests taken in the workplace.” He reiterated this statement at the hearing. (Government Exhibit 2 at 8, 11-12; Tr. 39-40.) Given Applicant’s background and lack of experience with the security clearance process, his belief was not unreasonable. Based on the available information, I find that Applicant did not have the intent to falsify his statements to the investigator on this point. This allegation is found for Applicant.

2.d Applicant continued to associate with individuals who use illegal drugs. He stated that he was doing this as recently as New Year’s 2017, when he used marijuana. (Tr. 42-43.)

2.e Section 22 of Government Exhibit 1 asked Applicant whether he had “EVER been charged with an offense involving alcohol or drugs?” (Emphasis in original.) Applicant answered, “No.” This was a false answer. Applicant had been arrested on November 22, 2002, for possession of alcohol while a passenger in a vehicle. The charges were eventually dismissed. Applicant believed he did not have to list this incident because the charges were dismissed. (Government Exhibit 2 at 6-7; Tr. 44-45.) Given Applicant’s background and lack of experience with the security clearance process, his belief was not unreasonable. Based on the available information I find that Applicant did not intend to falsify this answer. This allegation is found for Applicant.

Policies

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

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, “Any 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. 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 seeks access to classified information enters 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, “Any 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 *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse is set forth in 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. (Emphasis in original.)

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug;
- (e) failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health practitioner; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has a long history of using illegal drugs, as well as the prescription drug Percocet without a prescription. Applicant admitted using marijuana and cocaine within months of the hearing in this case, with knowledge of the Government's concern over his drug use. His statement that he intends not to use these illegal drugs in the future was unconvincing. While he does attend some kind of a drug treatment program, there is insufficient evidence to find that it has been of any value to Applicant in controlling his illegal drug involvement. None of the potentially mitigating conditions under this guideline apply to his conduct. As stated, allegation 1.d is found for Applicant because there is no evidence that B30 is a controlled substance. With that exception, Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E – Personal Conduct)

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Three are potentially applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(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

(g) association with persons involved with criminal activity.

Applicant knowingly falsified material facts about his drug use on a Government personnel security questionnaire in 2015. He continues to associate with people who illegally use drugs. None of the potentially mitigating conditions under this guideline apply to his conduct in this case. As stated, allegations 2.c and 2.e are found for Applicant because those incorrect answers were not deliberate falsifications. With those exceptions, Paragraph 2 is found against Applicant.

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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has not mitigated his long-term Percocet, marijuana and cocaine use, or his falsifications to the Government concerning his drug involvement. Overall, the record evidence does create substantial doubt as to Applicant's present eligibility and suitability for national security eligibility and 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 Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:

AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	For 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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge