



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-07295
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esq., Department Counsel
For Applicant: *Pro se*

12/08/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his extensive history of illegal drug use and substance misuse, including while in the military and after being granted a security clearance. Clearance is denied.

Statement of the Case

On April 7, 2016, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse). Applicant answered the SOR (Answer) and requested a determination on the administrative (written) record.

On June 10, 2016, Department Counsel sent Applicant the Government's written case, known as a file of relevant material (FORM). With the FORM, Department Counsel forwarded to Applicant four exhibits (Items 1 – 4) that the Government offers for admission into the record. These exhibits are admitted into the record without objection.

On July 6, 2016 and September 5, 2017, Applicant submitted his written responses to the FORM. Applicant's responses and the documents enclosed with the responses were collectively marked Item 5 and admitted into the record without objection.

On November 3, 2017, I was assigned the case. Department Counsel confirmed that Applicant remains sponsored for a security clearance and, thus, I have jurisdiction to issue a decision in this case. ISCR Case No. 14-03753 (App. Bd. Sep. 23, 2016).

Findings of Fact

Applicant, 31, is married with two young children. He began using marijuana in 2002. He enlisted in the U.S. Navy in 2004. He was told by his recruiter not to disclose his pre-service drug use on his security clearance application. He did not disclose it on the application and was granted a security clearance in approximately 2005. He was a search and rescue swimmer while in the Navy. He was involuntarily separated from the Navy in November 2012, for the commission of serious misconduct. Specifically, Applicant used illegal drugs while in the military, to include marijuana (multiple times), the synthetic drug spice (multiple times), and heroin (one time). He also misused and abused the painkiller Percocet while in the military.¹

Before being discharged from the military, Applicant entered into a substance abuse rehabilitation treatment program following a drug-induced psychosis. He was in this first treatment program from February 2012 to May 2012. Upon discharge from the treatment program, Applicant was diagnosed with a polysubstance dependence in early full remission. He received a favorable prognosis, as long as he maintained his sobriety.²

Applicant began using cocaine in July 2013. He reports using the cocaine to help relieve stress caused by his wife's medical issues and to self-medicate. He became addicted to cocaine. He also resumed using marijuana. He voluntarily entered into a substance abuse rehabilitation treatment program in September 2013. He was in this second treatment program from September to October 2013. Upon being discharged, Applicant was diagnosed with cocaine dependency.³

Since Applicant's discharge from the second treatment program, he states that he has been able to maintain his sobriety through positive lifestyle changes, counseling, and active participation in a 12-step program. He and his wife celebrated the birth of their two children following his discharge from the treatment program. He is committed to raising his children in a healthy and nurturing environment. He earned his undergraduate degree, graduating with top honors. He continues to advance his education, having completed a number of courses through the Defense Acquisition University. He has a good employment record. His employer promoted him to a managerial position in less than a year's time. Applicant is active in his community, and several persons who know him professionally and socially submitted favorable reference letters.⁴

¹ Item 1, Answer, Enclosures 1, 3; Items 2 – 5.

² Item 1, Enclosures 3, 4; Items 2, 3.

³ Item 1, Enclosure 3; Items 2, 3.

⁴ Item 1, Enclosures 2, 5-8; Item 5.

Applicant submitted a security clearance application in connection with his current job in February 2015. He reported his past substance abuse issues, involuntary discharge from the military for illegal drug use, and the drug-related treatment programs. He then discussed these matters with a security clearance investigator.⁵ (Items 2, 3)

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as

⁵ Items 2, 3.

adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.⁶

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD-4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

Applicant’s extensive history of substance abuse from 2002 to 2013 raises a serious security concern, which is explained at 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.

In assessing the security concern in this case, I have considered all the disqualifying and mitigating conditions listed under Guideline H, including:

AG ¶ 25(a): any substance misuse;

AG ¶ 25(c): illegal possession of a controlled substance, including . . . purchase . . . or possession of drug paraphernalia;

⁶ However, a judge’s mere disbelief of an applicant’s testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

AG ¶ 25(d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder;

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position;

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;

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 . . .; and

AG ¶ 26(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.

Applicant's illegal drug involvement from 2002 to 2013 establishes the disqualifying conditions in AG ¶¶ 25(a), 25(c), 25(d), and 25(f). Once disqualifying conditions are established, the burden shifts to an applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision.⁷ Illegal involvement with a controlled substance(s) after being granted a security clearance raises heightened concerns about a person's judgment, reliability and trustworthiness, and requires a judge to closely scrutinize any claim of reform and rehabilitation.⁸

Here, Applicant states that he has remained sober since his discharge from the second treatment program in October 2013. He further reports being able to maintain his sobriety with the help of counseling and participation in a 12-step program. He did not provide supporting documentation to corroborate these statements. He also did not provide a current diagnosis and prognosis from his treating physician or counselor. In light of Applicant's lengthy history of substance abuse problems, including while in the military and after being granted a security clearance, his failure to present such evidence leaves me unable to find that the above-noted mitigating conditions fully apply.

Applicant failed to demonstrate that it is unlikely similar security-significant conduct will recur. His past illegal drug involvement continues to raise questions about his

⁷ ISCR Case No. 15-01208 at 4 (App. Bd. Aug. 26, 2016) (citing Directive ¶ E3.1.15). See *also* ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when AGs were last revised, Board held that its prior decisions remained valid when they were "not dependent on the language of any specific guideline," or "where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent.")

⁸ ISCR Case No. 16-02005 at 3 (App. Bd. June 2, 2017).

reliability and ability to follow the law, rules, and regulations. Thus, the favorable evidence of reform that Applicant provided and the passage of time since he last used illegal drugs is insufficient to mitigate the heightened security concerns in this case. Guideline H security concerns remain.⁹

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. AG ¶ 2. An administrative judge should consider the whole-person factors listed at AG ¶¶ 2(d) and 2(f). I hereby incorporate my above analysis and highlight some additional whole-person factors.

Applicant's efforts to this point to overcome his substance abuse problems are encouraging. In addition, I considered the fact that he served in a highly stressful and dangerous position in the military and, notwithstanding the involuntary misconduct that led to his involuntary separation, he received an honorable discharge from the Navy. I further took into account Applicant's positive lifestyle changes, the recommendation letters, and the other favorable record evidence. However, without credible, corroborating evidence regarding Applicant's continued sobriety without relapse and a current favorable diagnosis and prognosis from his treating physician or counselor, doubts regarding his suitability for a security clearance remain.¹⁰

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 –1.g:

Against Applicant

⁹ See ISCR Case No. 15-06277 (App. Bd. July 19, 2017) (notwithstanding the fact that applicant's last use of marijuana was five years before the judge issued his decision, the Appeal Board upheld the adverse decision because applicant had used marijuana for an extensive period of time (1994-2012), including while holding a security clearance). See *a/so* ISCR Case No. 14-03522 (App. Bd. Feb. 24, 2016) (applicant's use of marijuana to help him recover from a serious back injury and four years of abstinence were insufficient to mitigate heightened security concerns raised by his illegal drug use while holding a clearance).

¹⁰ I considered the exceptions listed in SEAD-4, Appendix C, including, conditioning eligibility on Applicant maintaining his sobriety, which would be independently verified through random drug screens. See SEAD-4, ¶ E.3 and Appendix A, ¶ 2(h). However, such random screens were unable to detect Applicant's past extensive drug involvement while in the military. Moreover, questions remain as to the applicability of this Appendix to cases involving contractors adjudicated under the Directive. Furthermore, even if applicable, no implementation guidance has yet been issued. Accordingly, at this time, I decline to rule or give a formal recommendation on this issue.

Conclusion

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge