



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-03223
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

02/11/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the drug involvement and personal conduct concerns. He used cocaine from 2005 to 2012. His last use occurred after he accepted a position with a defense contractor and was aware of his employer’s drug-free workplace policy. Under the circumstances, Applicant’s conduct raises unresolved questions about his judgment and his conduct is too recent to mitigate concerns that he would engage in similar conduct in the future. Clearance is denied.

Procedural History

On July 29, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant’s conduct raised security concerns under the drug involvement and personal conduct guidelines (Guidelines H and E). On August 15, 2014, Applicant answered the SOR and requested a hearing to establish his continued eligibility for access to classified information.¹

¹ This action was taken under Executive Order (E.O.) 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 implemented by the Department of Defense on September 1, 2006.

On December 12, 2014, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's hearing for January 9, 2015. The hearing was held as scheduled. Department Counsel offered exhibits (Gx.) 1 – 3, which were admitted into evidence without objection. Applicant appeared and testified in support of his case. The hearing transcript (Tr.) was received on January 9, 2015.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:²

Applicant, 27, is single with no children. He used cocaine while in college from 2005 to 2009. After graduating from college, Applicant submitted an application for appointment as a commissioned officer in the U.S. military. He submitted a security clearance application (SCA) in conjunction with his overall military application. On his initial SCA, Applicant disclosed a past conviction for driving while under the influence and that he used marijuana on one occasion while in college. He deliberately omitted his cocaine use on the advice of friends who told him that the disclosure of such derogatory information would likely result in the denial of his military application. His application for appointment as a commissioned officer was ultimately denied, but unbeknownst to Applicant his application for access to classified information was granted. (Tr. at 8, 21-23, 25-27, 34-35; Gx. 2 at 32-33)

In 2012, Applicant accepted a position as an information technology project manager for a cyber-intelligence unit with his current employer, a defense contractor. Shortly before starting his new job, Applicant went on vacation with friends. He was offered cocaine and decided to use it. He immediately regretted the decision. (Tr. at 23-24, 27-29) Applicant explained that he used the cocaine because he understood he would never be able to use illegal drugs again after he started his new job, as his employer has a drug-free workplace policy. He was also aware that he would have to take a pre-employment drug screen before starting his new job. (Tr. at 36)

In 2013, Applicant submitted a SCA in connection with his current employment. Applicant disclosed his past drug use, to include his use of cocaine in college and while on vacation. He has not used any illegal drugs since 2012. (Tr. at 36-37; Gx. 1 at 36-37) At hearing, Applicant expressed his intent to remain drug free. He also stated that his decision to seek and accept a position with his current employer was his way (after his application to serve in the military was rejected) to support the defense of the nation. (Tr. at 40-41)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to

² In reaching my findings of fact, I have made only those inferences reasonably supported by the evidence and, where necessary, resolved any potential conflict raised by the evidence.

classified information “only 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, 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 common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.³ However, a judge must decide each case based on its own merits because there is no *per se* rule requiring disqualification.⁴

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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7.⁵ Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

³ See *also*, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

⁴ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

⁵ See *also*, ISCR Case No. 11-13626 at 4 (App. Bd. July 25, 2014) (“an adverse decision under the Directive is not a determination that the applicant is disloyal. Rather, such a decision signifies that the applicant has engaged in conduct or has otherwise experienced circumstances that raise questions about his or her judgment and reliability.”).

Analysis

Guideline H, Drug Involvement

The security concern regarding illegal drug involvement is set forth at AG ¶ 24:

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

Applicant's cocaine use from 2005 to 2012 raises the drug involvement concern and the applicability of the following disqualifying conditions:

AG ¶ 25(a): any drug abuse; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

Applicant's cocaine use meets the definition of "drug abuse" set forth in the Directive.⁶ AG ¶ 25(a) applies. His use of cocaine after being granted a security clearance triggers application of AG ¶ 25(g), because the disqualifying condition does not require that the individual have actual knowledge they were granted a clearance at the time of the drug use. However, I have given this disqualifying condition less weight in my overall analysis because Applicant was not aware at the time he last used cocaine that his initial clearance application had been granted.⁷

The guideline also sets forth a number of conditions that could mitigate the drug involvement concern. I have considered all the mitigating conditions and only the following were potentially raised by the evidence:

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): 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.

⁶ The Directive defines "drug abuse" as the "illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." See AG ¶ 24(b).

⁷ I recognize that but for Applicant's intentional falsification of his initial SCA it is unlikely he would have been granted a security clearance.

Applicant last used cocaine almost three years ago, which would generally tend to support the proposition that it is unlikely the behavior will reoccur. However, the circumstances under which Applicant last used cocaine raise continuing doubts about his judgment and the likelihood of recurrence. Applicant, after having not used any illegal drugs since graduating from college in 2009, decided to use cocaine while on vacation in 2012. Only three years have again passed since Applicant last used cocaine and, in light of his history of illegal drug use, a lengthier period of abstinence is required before an affirmative favorable finding can be made that the security concerns raised by his conduct have been mitigated.

Additionally, although Applicant immediately regretted his latest decision to use cocaine, he had already accepted a position with a federal contractor and knew his employer had a drug-free workplace policy. He was thus on clear notice that the use of illegal drugs was inconsistent with his new position as a federal contractor. Under such circumstances, even after crediting Applicant's testimony, it is too soon to conclude that he will not engage in similar security significant conduct in the future.⁸ AG ¶¶ 26(a) and 26(b) do not apply.

Guideline E, Personal Conduct

The personal conduct security concern is explained at 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's cocaine use, and in particular his latest use after accepting his current position with a federal contractor, raise the personal conduct security concern. Applicant's poor judgment in using cocaine establishes the disqualifying condition listed at AG ¶ 16(c).⁹ The personal conduct guideline also sets forth several factors that may

⁸ ISCR Case No. 14-01669 at 5 (App. Bd. Feb. 9, 2015) (favorable credibility determination does not preclude a judge from finding that an individual failed to meet their burden of persuasion); ISCR Case No. 11-09172 at 2-3 (App. Bd. Mar. 19, 2013) (reaffirming precedent that no bright-line rule exists for determining recency of illegal drug use and such determination will depend on the circumstances of each case); ISCR Case No. 10-07312 (App. Bd. Nov. 3, 2011) (notwithstanding four year abstinence of illegal drug use before SOR was issued, unfavorable decision sustained due to applicant's history of illegal drug use); ISCR Case No. 10-06480 (App. Bd. Aug. 19, 2011) (four year abstinence of illegal drug use insufficient to overcome evidence raising questions about applicant's judgment).

⁹ Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not safeguard protected information.

mitigate the security concern raised by Applicant's conduct. The relevant personal conduct mitigating condition is similar to that found under the drug involvement guideline,¹⁰ and for similar reasons it is not applicable. Applicant's personal conduct remains a security concern.¹¹

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. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹² I gave due consideration to all the favorable and extenuating factors in this case, including Applicant's honesty in finally revealing the extent of his past drug use and testimony about his heartfelt desire to serve the nation. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concerns at issue. Security clearance adjudications are by their very nature predictive judgments, where an applicant's past history is the best indicator of future conduct. Applicant's past conduct leaves me with doubts as to his current eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement)	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

¹⁰ *Compare*, AG ¶ 17(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."), *with*, AG ¶ 26(a) (similar language).

¹¹ I considered Applicant's past dishonesty, but he corrected the misleading information about his past drug use during his current security clearance investigation. Although his action to correct the previous misleading information cannot be considered prompt, the evidence supports a finding that it was done in good-faith and not after being confronted with the adverse information. See AG ¶ 17(a).

¹² The non-exhaustive list of 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.

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge