



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



In the matter of:)	
)	
)	ISCR Case No. 14-06135
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew Henderson, Esquire, Department Counsel
For Applicant: Arran Treadway, Esquire

February 16, 2016

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on February 3, 2014. On May 21, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. 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 (AG), effective within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on June 8, 2015. He answered the SOR in writing through counsel on June 24, 2015, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on September 15, 2015. I granted Applicant's request for a delay until November 12, 2015, in order for his counsel to be available. DOHA issued a notice of hearing on October 15, 2015, and I

convened the hearing as scheduled on November 12, 2015. The Government offered Exhibits (GXs) 1 and 2, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) 1 through 13, which were received without objection. DOHA received the transcript of the hearing (TR) on November 20, 2015. I granted Applicant's request to keep the record open until December 11, 2015, to submit additional matters. On December 7, 2015, he submitted Exhibit 14, which was received without objection. The record closed on December 11, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in all the Subparagraphs of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Guideline H - Drug Involvement & Guideline E - Personal Conduct

Applicant was first granted a security clearance in 1987 while attending "Air Force ROTC." (TR at page 26 line 15 to page 27 line 6.) He later spent "seven and a half" years on active duty, achieved the rank of Captain, and "was Honorably Discharged from the Air Force in 1996." (*Id.*, and TR at page 62 line 24 to page 63 line 5.)

1.a., 1.c. and 2.a. Applicant was again granted a security clearance in 1999, and in 2009 he was granted a "Top Secret" security clearance. (TR at page 40 line 9 to page 41 line 8, and GX 1 at pages 45~47.) At the age of 44, in June of 2010, Applicant first used cocaine at a friend's birthday party. (TR at page 28 lines 8~19, and at page 41 line 15 to page 42 line 25.) In December of 2010, he used cocaine at the same friend's "New Year's Eve" party. (TR at page 28 lines 19~20, and at page 43 lines 1~20.)

1.b., 1.c. and 2.a. Applicant also used marijuana, four times, during the June 2010 through December 2010 time frame. (TR at page 33 lines 10~13.) In April of 2013, he was diagnosed with "Deep Vein Thrombosis." (TR at page 33 lines 14~25.) He was prescribed "Tylenol with Codeine" for his condition, but Applicant thought this prescribed medication did not provide enough relief. (*Id.*, and TR at page 49 lines 4~22.) As a result, he self-medicated with marijuana, provided by friends who had a prescription for medical marijuana, about 20 times from April 2013 to his last usage in October of 2013. (TR at page 33 line 25 to page 34 line 3, and at page 50 lines 11~16.)

1.d. and 2.a. In August of 2011, Applicant was arrested and charged with possession of cocaine. (GX 1 at pages 39~41.) He avers that he was in Las Vegas with a group of friends, and when one friend returned monies he owed Applicant, the wad of \$20 bills included a plastic bag, which contained cocaine, folded therein. (TR at page 27 line 18 to page 31 line 3, and at page 44 line 4 to page 46 line 17.) Applicant

further avers that he did not know of the cocaine's presence. (*Id.*) His testimony is supported by an affidavit from the friend who tendered the tainted money. (AppX 14 attachment C.) He was arrested when he tried to enter a "Pool Club - - Beach Club," and they found the drug in his "jeans" that he had placed in a beach bag. (TR at page 28 line 23 to page 29 line 13.) As a result of this possession charge, Applicant completed court ordered drug counseling and the charge was dismissed. (TR at page 27 line 18 to page 31 line 3, and at page 44 line 4 to page 46 line 17.) This is supported by documentation from the court where Applicant was arraigned for the possession. (AppXs 12 and 13.) This allegation is found for Applicant.

Applicant avers that he intends no future illegal drug use. (TR at page 32 line 22 to page 33 line 4, and AppX 11.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

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 the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 2(c), the entire process is a conscientious scrutiny 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. Paragraph 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security 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 access to classified information. 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 information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H - Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), “*any drug abuse*” may be disqualifying. In addition, under Subparagraph 25(g), “*any illegal drug use after being granted a security clearance*” may also be disqualifying. Here, Applicant has used cocaine twice, and marijuana 24 times after being granted a security clearance. I can find no countervailing mitigating condition that is applicable here. As a former Captain in the U.S. Air Force, he clearly knew the gravity of his conduct. Guideline H is found against Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(d)(3), “*a pattern of dishonesty or rule violations*” may be disqualifying. Here, Applicant used illegal substances, cocaine and marijuana, from June 2010 to

October 2013. Again, I can find no countervailing mitigating condition that is applicable here. His last usage was a little more than two years ago; and despite being prescribed pain killers, he chose not to seek further prescribed relief for his medical condition, but rather self-medicated with marijuana, 20 times. Guideline E 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 the circumstances. Under AG Subparagraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 2(a):

- (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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Applicant is highly respected in the work place and by his friends. (AppXs 1~9.) The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated the security concerns arising from his Drug Involvement and Personal 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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. Eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge