



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 17-02653
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

03/25/2019

Decision

HESS, Stephanie C., Administrative Judge:

Applicant mitigated the potential security concerns raised by his 2012 one-time illegal drug use, his 2014 positive drug test, and his failure to timely file and pay his 2010 state taxes. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on February 24, 2016. On August 29, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines H (Drug Involvement), F (Financial Considerations), and E (Personal Conduct). The DOD acted under Executive Order (Ex. Or.) 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) implemented by DOD on June 8, 2017.

Applicant submitted his Answer to the SOR on September 18, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on November 1, 2017, and the case was assigned to me on March 20, 2018. On May 22,

2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant through counsel that the hearing was scheduled for June 7, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted into evidence without objection. Applicant testified, called six witnesses, and Applicant's Exhibits (AX) A through I were admitted without objection. I left the record open until June 14, 2018, to enable Applicant to submit additional documentary evidence. He timely submitted AX J, which I have admitted without objection. DOHA received the transcript (Tr.) on June 14, 2018.

Findings of Fact

Applicant is a 31-year-old electronics technician currently employed by a defense contractor since February 2016. He received his general equivalency degree in 2005. He served on active duty in the U.S. Army from July 2008 until April 2013, when he received a general discharge. He was granted a secret security clearance while on active duty. (GX 1; Tr. 18-19.)

Under Guideline H, the SOR alleges that in November 2012, while on active duty, Applicant tested positive for cocaine. He received an Article 15 and was fined, sentenced to extra duty, placed on restriction for 45 days, and reduced in rank. He was later separated from the Army with a general discharge. Applicant tested positive for opiates in 2014¹ while enrolled in a Veterans court deferred program after having been arrested and charged for suspicion of driving under the influence of alcohol. Under Guideline F, the SOR alleges that Applicant failed to file and/or pay state taxes for tax year 2010. Finally, the SOR cross-alleges the Guidelines H and F allegations under Guideline E. Applicant admits the cocaine-related allegation, and that he tested positive for opiates, however, he denies having ever used opiates. He admits that he did not timely file or pay his 2010 taxes, but states that he has since resolved all his tax obligations. Applicant's admissions are incorporated in my findings of fact.

In November 2012, Applicant was 24 years old and on active duty in another state. He was living in an off-base apartment complex where other soldiers who he worked with also lived. Applicant was at a party that was attended by soldiers and civilians who lived in the apartment complex. Applicant was drinking alcohol. One of the civilians, with whom Applicant was previously acquainted, offered Applicant cocaine. He made a "poor decision" and tried the cocaine. Later that month, Applicant tested positive for cocaine in a random urinalysis. He was ultimately separated from the Army with a general discharge. (GX 2; Tr. 38-40.) Although unalleged, Applicant held a security clearance at the time he tried cocaine, and his clearance was revoked when he was separated. (GX 2.) He regrets his behavior and considers it to be a serious mistake. Applicant has not used any illegal drugs or misused prescription drugs on any other occasion. (Tr. 41-49.) Applicant provided 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 his security clearance. (AX F.) He moved back to his home state and does not associate with any of the people who were at the party or anyone else who uses illegal drugs. (Tr. 41.)

¹ Applicant's positive urinalysis was actually on July 6, 2014, not in November 2014, as alleged in the SOR. AX H.

In July 2013, Applicant was arrested and charged with suspicion of driving under the influence of alcohol (DUI). The previous night, Applicant met up with a friend in the friend's hometown and they took a cab to a bar. Applicant had left his vehicle at his friend's apartment complex. His friend left the bar before Applicant, who later took a cab back to his friend's apartment. Applicant's friend was not home, so Applicant slept in his vehicle. When he awoke, his cell phone battery was dead. Applicant was attempting to drive home when he was pulled over for speeding. The officers smelled alcohol on Applicant, had him perform field a sobriety test, and asked him to take a breathalyzer. Applicant refused the breathalyzer and was arrested for suspicion of DUI. (Tr. 41-43.)

The DUI charge was referred to the veterans court where Applicant's case was placed in a deferral program. Applicant was required to pay approximately \$1,200 in fines and court costs. The program required that Applicant call in every day for one year to find out whether or not he was scheduled for urinalysis on that day. In July 2014, Applicant tested positive for opiates, specifically morphine, on a random urinalysis. Applicant adamantly denies any use of any type of opiate ever, and does not have an explanation for the positive test result. His drug screenings from the day before and five days after the positive result were both negative. (Tr. 45-49; Tr. 56-61.) Applicant's 39 other random drug screenings were negative. (AX H.) Protocol for testing positive for drug use was 48 hours in jail and an additional 6 months in the program. Applicant spent 48 hours in jail, but was not given any additional time. Applicant successfully completed the deferral program in November 2014. (AX I.) He has not had any subsequent alcohol-related events. (Tr. 70.) His voluntary June 2018 drug screening was negative. (AX J.)

While in the Army, Applicant was deployed overseas for just under one year in 2010 and 2011. He did not file his state tax return or pay his state taxes owed for tax year 2010 because he mistakenly thought he was exempt due to his deployment. When preparing his 2011 tax returns, Applicant realized he was required to file his 2010 state tax return and filed it with his 2011 return. However, Applicant did not pay the 2010 taxes owed at that time. Between 2011 and 2016, the state retained Applicant's refunds to offset the balance owed by Applicant, which was approximately \$250. Applicant fully paid the balance owed for his taxes before September 2017. Applicant timely filed and paid Federal and state taxes for all other tax years including 2018. (GX 2; Tr. 72-77; AX G; Tr. 52.)

Applicant's supervisor, site lead, and operations lead testified that they have known Applicant since February 2016 and are aware of the SOR allegations. Collectively they consider Applicant to be trustworthy, reliable, and a person of strong moral character. They do not think that Applicant's past mistakes are reflective of the person he is today. (AX A; Tr. 14-33.) Applicant's field support lead, site supervisor, and assistant program manager have also worked with Applicant since February 2016 and consider his honesty and integrity to be unquestionable. (AX A.) Each of Applicant's character references highly recommend Applicant for a security clearance. (AX A; Tr. 14-33.) Applicant was sincere, candid, and humble while testifying.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances . . . 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.

Applicant’s admissions, corroborated by the record evidence, establish the potentially disqualifying conditions under this guideline:

AG ¶ 25(a) any substance misuse.

The following mitigating conditions may also apply:

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, 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.

Applicant used cocaine on one occasion in 2012, more than six years ago. He was punished and ultimately separated from the Army with a general discharge as a result of this conduct. He has not used cocaine or any other illegal substance since 2012. Over the course of one year from November 2013 until November 2014, as a requirement of a deferral program for a DUI arrest, Applicant underwent 40 random drug screenings, 39 of which were negative. In July 2014, more than four years ago, Applicant tested positive for morphine. He adamantly and consistently denies having used any opiate or any other illegal or illicit substance. He does not have an explanation for what he deems was a false positive result. His voluntarily drug screening in June 2018 was negative. He successfully completed the deferral program. He does not have a social circle that includes people who use illegal substances.

Applicant recognizes that his decision to use cocaine was a mistake, accepts responsibility for his actions, and has provided a written statement in which he acknowledges the use, states his intent of no future use of any illegal drugs, and recognizes that any such use will result in the loss of his security clearance.

Applicant's single use of cocaine in 2012 and his 2014 positive drug screening are not recent. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). He will not use any illegal substance in the future. AG ¶¶ 26(a) and 26(b) apply.

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The following disqualifying condition applies:

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

The following mitigating conditions are potentially applicable:

AG ¶ 20(a): the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant failed to timely file and pay his 2010 state taxes because he thought his 2010 to 2011 deployment made him exempt from being required to file and pay. Upon learning of his error, Applicant filed his 2010 state tax return when he timely filed his 2011 return. However, Applicant did not pay the past-due taxes of approximately \$250 at that time. The state withheld Applicant's refunds for several years, then Applicant paid the remaining balance prior to September 2017. Applicant's failure to timely file and pay his state taxes was due to a misunderstanding of the tax requirements, not a willful disregard for rules or regulations. AG ¶¶ 20(a) and 20(g) apply.

Guideline E, Personal Conduct

Any potential personal conduct concerns are mitigated for the reasons set forth under the analyses of Guidelines H and F.

Whole-Person Concept

Under AG ¶ 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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines H, E, and F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but I have also considered the following:

Applicant is highly regarded and trusted by his supervisors and site and program leads. Applicant's one-time use of cocaine while holding a security clearance places a heavy burden on Applicant to establish mitigation. After considering the record as a whole, specifically, the circumstances surrounding Applicant's age and the circumstances of his one-time use of cocaine, the length of time that is passed since that single use, and Applicant's remorse for his actions, I conclude that applicant has met his heavy burden of proof and persuasion. Applicant's cocaine happened under circumstances that are unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant's testimony was credible and sincere.

After weighing the disqualifying and mitigating conditions under Guidelines H, E, and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his past conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline F, (Financial Considerations):	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge

