



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



ISCR Case No. 24-00314

Appearances

For Government: Cassie L. Ford, Esquire, Department Counsel
For Applicant: *Pro se*

02/14/2025

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse, and criminal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On July 10, 2023, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On June 26, 2024, the Defense Counterintelligence and Security Agency (DCSA) Adjudication and Vetting Services (AVS) issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct), and detailed reasons why the

DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 3, 2024, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), including proposed Government Exhibits (GE), was mailed to him by the Defense Office of Hearings and Appeals (DOHA) on September 10, 2024, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on September 25, 2024. His response was due on October 25, 2024. As of November 9, 2024, no response had been received. The case was assigned to me on December 17, 2024, and there was still no response to the FORM.

Findings of Fact

In his Answer to the SOR, Applicant, admitted with comments, one of the two factual allegations pertaining to drug involvement and substance misuse (SOR ¶ 1.a.), and one of the two factual allegations pertaining to criminal conduct (SOR ¶ 2.b.). Applicant's admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Background

Applicant is a 35-year-old employee of a defense contractor. He has been serving as a customer service representative since August 2023. A 2015 high school graduate, he enlisted in the U.S. Army in January 2016, and served on active duty until September 2022, when, following a plea of guilty to an offense of wrongful use of cocaine in an Article 15, Uniform Code of Military Justice (UCMJ), he was reduced in grade from staff sergeant (E-6) to sergeant (E-5), and received additional sanctions. He subsequently received a General Discharge under Honorable Conditions. He was granted a security clearance in 2016. (Item 8 at 2) He was married in 2015. He has one child, born in 2017, and two stepchildren, born in 2008 and 2009.

Drug Involvement and Substance Misuse, and Criminal Conduct

On two separate occasions on January 26, 2022, and again on February 25, 2022, Applicant, at that time, while in a sensitive position, i.e., one requiring a security clearance as a tank commander with the U.S. Army, underwent urinalyses as part of unit sweeps. The test results for both tests were positive (107 ng/ML and 172 ng/ML, respectively with a cutoff level of 100 ng/ML) for cocaine. (Item 6 at 1-17)

During a U.S. Army Criminal Investigation Division (CID) interview in April 2022, Applicant stated that he was unaware that he had used cocaine at a neighbor's house

because he had consumed alcohol to the point of intoxication, claiming he was drunk. He indicated that he called his neighbor after the test results were revealed to him and his neighbor acknowledged that some of his neighbor's friends had spread cocaine on the table on both occasions. Although he claimed that he was too drunk to know that he was using cocaine, he acknowledged that he drove himself home both times. He initially agreed to undergo a polygraph examination, but one week later he changed his mind and declined to do so. (Item 6 at 6)

As a result of testing positive for illegal drugs, Applicant was command-directed to attend the Army Substance Use Disorder Clinical Care (SUDCC) Program from April 2022 until September 2022. The record is silent regarding his attendance at individual and outpatient group therapy sessions or if he underwent additional urinalyses. While he claimed that he complied with the treatment, there is nothing in the case file to verify his claim. (Item 10 at 9)

Applicant was charged with a violation of Article 112a, UCMJ (Wrongful Use of Cocaine – Detected By Urinalysis), and given non-judicial punishment under Article 15, UCMJ. He entered a plea of guilty to the charge, and on May 31, 2022, he was reduced in grade from E-6 to E-5, orally reprimanded, restricted, given extra duty, and ordered to forfeit money for two months (suspended for six months). (Item 7) He subsequently received a General Discharge under Honorable Conditions.

In his July 2023 SF 86, at Sec. 23 – Illegal Use of Drugs or Drug Activity, Applicant acknowledged that, during the last seven years, he had previously cocaine – a Schedule II Controlled Substance, one time in January 2022. He reported that the use of cocaine occurred when he had consumed too many drinks while with a new group of friends one night during a period when he did have a security clearance and he was not aware that he had used cocaine. He commented that he was simply at the wrong place. (Item 5 at 29-31; Item 10 at 6-7) He did not report that there was a second incident in February 2022.

Applicant denied that he tested positive for cocaine in March 2022 by stating that the only positive tests were in January 2022 and February 2022, with no subsequent positive urinalyses after that. (Item 4 at 2) As noted by Department Counsel, the confusion stems from the reporting that refers to tests in January and February 2022, but with the results being reported in February and March 2022.

As of the closing of the record, Applicant had not submitted 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.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in 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 several 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation, or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, “security clearance determinations should err, if they must, on the side of denials.” (*Egan*, at 531)

Clearance decisions must be “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, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse is set out 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.

The guideline notes several conditions under AG ¶ 25 that could raise security concerns in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

On two separate occasions in January 2022, and again in February 2022, while in a sensitive position, i.e., one requiring a security clearance, he underwent urinalyses as part of unit sweeps. The test results for both tests were positive for cocaine. During the CID investigation, he claimed he was unaware that he had used cocaine at a neighbor's house because he was too drunk to know that he was using cocaine, but he acknowledged that on both occasions, he was not too drunk to drive himself home. After the test results were revealed to him, he said he approached his neighbor and learned that some of his neighbor's friends had spread cocaine on the table on both occasions.

He accepted non-judicial punishment under Article 15, UCMJ, and was subsequently given a General Discharge under Honorable Conditions.

A significant issue requires further discussion. When a positive urinalysis is proven, an applicant has the burden to rebut, explain, extenuate, or mitigate the security concerns arising from that positive test, or in this instance, two positive tests. A person who ingests an illegal substance without knowing the substance being ingested is present has not committed an offense. This is known as innocent ingestion. At its core, the innocent ingestion is based on an applicant's credibility and the surrounding circumstances of the ingestion. The record must establish Applicant **knowingly** used cocaine for any disqualifying conditions to apply. When an applicant claims the positive drug tests were the result of innocent use or consumption, the key issue will likely be whether he presented sufficient evidence to prove that claim and thereby refute the pertinent SOR allegations. Such a determination may hinge on an assessment of an applicant's credibility. In this instance, Applicant reported to CID that, on both occasions, he was too drunk to know he was using cocaine, but not too drunk to drive himself home. It is unclear if he raised that issue during his Article 15 proceeding. In addition, when completing his SF 86, he minimized his cocaine use by reporting only one of the two incidents. Based on a paucity of supporting evidence from his command or other character references, his minimized reporting of cocaine use, his non-judicial punishment, and his discharge from the service, I concluded that he failed to establish innocent ingestion. AG ¶¶ 25(a) and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

- (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;
- (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; and
- (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.

AG ¶ 26(a) minimally applies, but neither of the other two mitigating conditions apply. Applicant's excessive consumption of alcohol combined with his use of cocaine resulted in two positive drug tests for cocaine in January 2022, and again in February

2022. While Applicant claimed that he had complied with the Army SUDCC Program, he offered no evidence of the satisfactory completion of the program. He has not submitted 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.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his history of drug use, the relatively brief period of purported abstinence is considered insufficient to conclude that the abstinence will continue. Applicant's use of cocaine while in a sensitive position and possessing a security clearance, continues to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

My discussions related to Appellant's drug involvement and substance misuse are adopted herein. As noted above, after twice testing positive for cocaine, Applicant was charged with a violation of Article 112a, UCMJ (Wrongful Use of Cocaine – Detected By Urinalysis), and given non-judicial punishment under Article 15, UCMJ. He entered a plea of guilty to the charge, and on May 31, 2022, he was reduced in grade from E-6 to E-5, orally reprimanded, restricted, given extra duty, and ordered to forfeit money for two months (suspended for six months). He did not receive an Honorable Discharge but did subsequently receive a General Discharge under Honorable Conditions – one step lower than an Honorable Discharge. AG ¶¶ 31(b) and 31(e) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from Criminal Conduct:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) minimally applies, as his ingestion or consumption of cocaine last occurred in late February 2022 – three years ago. That period is relatively recent and considering Appellant's apparent disinterest in submitting documentation in an effort to support mitigation, not enough time has passed to provide assurance that the criminal behavior will not recur. Moreover, in the absence of SUDCC records, there was no verifiable treatment or counseling to assess the actual psychological nature of the behavior.

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. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case considering the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

My comments associated with Applicant's drug involvement and substance misuse and criminal conduct are incorporated herein. Applicant, a staff sergeant serving as a tank commander with the U.S. Army in a sensitive position, i.e., one requiring a security clearance, underwent urinalyses as part of unit sweeps, when he tested positive for cocaine on two separate occasions in 2022. He was disciplined for his substance abuse and discharged with a General Discharge under Honorable Conditions – one step below an Honorable Discharge. While he reported one such positive drug test in his SF 86, he failed to list the second such test. Other than relying on the passage of time without recurrence of his substance abuse and criminal activity, Applicant offered no evidence to

support his abstinence, good employment record, constructive community involvement, or successful completion of drug counseling or therapy.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse, and criminal conduct. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

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. and 1.b.: Against Applicant

Paragraph 2, Guideline J: **AGAINST APPLICANT**

Subparagraphs 2.a. and 2.b.: 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.

ROBERT ROBINSON GALES
Administrative Judge