



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 23-02175
)
Applicant for Security Clearance)

Appearances

For Government: John C. Lynch, Esq., Department Counsel
For Applicant: John V. Berry, Esq.

01/24/2025

Decision

MASON, Paul J., Administrative Judge:

Applicant's evidence in mitigation is insufficient to overcome the security concerns arising from Guideline H (Drug Involvement and Substance Misuse). Eligibility for a security clearance is denied.

Statement of Case

On February 16, 2023, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, GE 1) to obtain a security clearance required for employment with a defense contractor. He signed his first e-QIP for a security clearance position in December 2017. (GE 2) He certified an e-QIP for a public trust position on January 10, 2022 (GE 5). On March 21, 2023 (GE 2 at 3), and April 18, 2023 (GE 2 at 10), Applicant provided personal subject interviews (PSIs) to an investigator from the Office Personnel Management (OPM). The second interview was by telephone/fax. The topics of discussion in that interview were Applicant's mother's citizenship status and his prior employers. The PSIs are paginated in the lower right-hand corner of each page. After examining the background investigation, the Defense

Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) could not make the affirmative findings necessary to issue a security clearance. On November 13, 2023, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns under drug involvement and substance misuse (Guideline H). The action was taken pursuant to 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 Security Executive Agent Directive 4, establishing in Appendix A the National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AGs), made effective in the DOD on June 8, 2017.

On December 5, 2023, Applicant furnished a response to the SOR. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 5, 2024, for a Teams hearing on September 17, 2024. The hearing was held as scheduled. The Government's six exhibits and Applicant's 11 exhibits (identified at page 9 of Applicant's December 2023 response to the November 2023 SOR) were admitted into the record without objection. (Tr. 8-9) The transcript (Tr.) was received on September 27, 2024.

Rulings on Evidence

On September 16, 2024, Applicant's counsel advised Department Counsel and the Administrative Judge that his December 2023 response (AE A) to the SOR contained incorrect statements at pages 4 and 5. Those statements claimed that he had never used any other drug besides a one-time use of cocaine. (AE B; Tr. 5) As Applicant's counsel explained, these assertions were inaccurate because he reported in his February 2022 personal subject interview (PSI, GE 6) and his February 2023 e-QIP (GE 1) that he used marijuana in 2014, 2017, and 2018. Following Applicant's PSIs on March 21 and April 18, 2023, he provided responses to interrogatories in October 2023. (GE 3) He indicated the two PSIs were accurate and made no changes to either PSI. (GE 3 at 2-14) He noted that his engagement to his current wife in November 2022 improved his health and reduced his work-related stress. (GE 3 at 15-21)

Findings of Fact

Applicant admitted that he used cocaine on one occasion in 2000 while holding a sensitive position which was a security clearance. (SOR ¶ 1.a; AE A at 4; Tr. 49, 84)

Applicant is 28 years old. He has been married since June 2023, following a three-year dating relationship. (Tr. 25) He has owned his home since January 2019. He received his high school diploma in May 2014 and his bachelor's degree (computer science) in May 2018. He has been a Hadoop engineer (an engineer who codes and programs large amounts of data) since October 2022. From October 2021 to October 2022, he was an infrastructure engineer. He was previously employed as a software

engineer for three years, preceded by a junior analytics position during college. He has no military background. (GE 1 at 9-15; AE 5 at 20)

Applicant began his testimony discussing his resume describing his professional background, including performance awards he received over the years. (AE A at 8; AE A5 at 18-19; AE A6 at 20-32). He received the awards from his supervisors for contributions to various projects which provided effective input in redesigning procedures to improve software programs and applications. (Tr. 38-44) His first and second-line supervisors praised his honesty, dependability, and professionalism in carrying out his work assignments. (AE 7 at 33; AE 8 at 34)

At the hearing, Applicant read the November 2023 SOR (AE 2 at 13) and acknowledged that he used cocaine one time in 2020 while holding a sensitive position, a security clearance. As will be discussed below, he did not report the cocaine use immediately in the security clearance/public trust documents because he believed the substance was flour and not cocaine. He held a security clearance while working for a defense contractor from August 2018 to September 2021. (GE 1 at 12; GE 4; Tr. 37-38) He added that he used marijuana on three occasions in 2013, 2014, and 2018. (Tr. 46; GE 1 at 37; GE 3 at 7-8) He noted that he discussed his marijuana use and one-time cocaine use in the summer of 2020 with an OPM investigator in his March 2023 PSI. (Tr. 47, 48; GE 3 at 7-9)

Applicant delayed his voluntary disclosure of his purchase and one-time use of cocaine from the summer of 2020 until his March 2023 PSI because of a prolonged mental belief of “pure ignorance,” that the drug was not cocaine but rather flour. (Tr. 50) He did not disclose the cocaine use in his January 2022 e-QIP or the subsequent PSI in February 2022, because he still believed the substance was flour. In October or late 2022, he convinced himself that he would disclose his cocaine use the next time he had to prepare an e-QIP and provide a PSI. (Tr. 50, 74) “Rob” and coworkers persuaded him to report the substance as cocaine, since it was better to disclose than not disclose. (Tr. 49-50) See AE A8 at 34.

Applicant contends that he made a mistake by not disclosing the cocaine incident right away when it happened in the summer of 2020. He was naïve and immature at 24 years of age and was associating with impulsive friends in an unstable environment that he really did not like, although he conceded that he shared that volatility and unruliness during the period. He was also embarrassed, deciding that it would be better to not report the 2020 incident, notwithstanding the torment he would undergo for not reporting it sooner. He did not realize the seriousness of not disclosing the incident and indicated his sorrow and again stressed his regret for the mistake. (Tr. 50, 53)

Applicant described the circumstances surrounding his purchase of the cocaine in 2020. He was with a few friends at a club. He talked to his then-girlfriend on the phone several times during the night of the incident to placate his feelings of loneliness. He walked to another club but discovered the club was closed. Being heavily under the

influence of alcohol, he decided to flag a taxi and go home. While attempting to depart the location, three unknown individuals appeared and one of them offered him some white powder which he sniffed in a secluded area. Applicant surmised that the powder was probably cocaine. (Tr. 63-64, 81) This same individual indicated that the cost for sniffing the substance would be ten dollars, and Applicant paid him. The individual asked him whether he wanted to purchase the remainder of the suspected drug and Applicant twice declined. The individual grabbed him by his head, but the two other individuals (who were previously with the individual selling the cocaine) stopped the altercation from escalating. Applicant called his then-girlfriend about the confrontation and told her that he believed he had ingested cocaine. (Tr. 52) Though in his December 2023 response to the SOR, he recalled that one of the three individuals described the substance as cocaine (AE A at 4), at the hearing Applicant did not think they identified the substance as cocaine. (Tr. 52-53) While Applicant was intoxicated when he sniffed the cocaine, he indicated the substance had no effect on him. (Tr. 53)

Subsequent to the 2020 incident, Applicant decided to lead a healthier lifestyle while elevating his awareness of his environment. He testified that he has used no illegal drugs since 2020. He adjusted his social life by not intermingling and drinking at bars, instead socializing mostly at his home. If he were to use illegal drugs in the future, he would report the use to his facility security officer (FSO) and his manager. As of October 11, 2023, he had not advised his employer about his one-time purchase and use of cocaine in 2020. (GE 3 at 19) He would tell other coworkers who use illegal drugs to report that use notwithstanding the adverse consequences. Applicant signed a statement of intent to forego all illegal drug use in the future or face revocation of his security clearance eligibility. (Tr. 55-60; AE A at 17)

To avoid omitting important information from security documents in the future, Applicant will probably use a third party to verify his entries on security documents. The government would have never uncovered his one-time use of cocaine in the summer of 2020 had he not revealed the use in his March 2023 PSI. (Tr. 88-89)

Applicant was asked about other government security clearance and public trust documents that did not contain required information about his drug use. On December 22, 2017, he signed and certified his first e-QIP. Though he used marijuana in 2014 and 2017, he answered “no” to having used illegal drugs in the last seven years. (GE 2 at 26) He considered his negative answer to the drug question as a mistake caused by forgetting those incidents. Furthermore, he noted he was still in college and under immense stress at the time, though he was on a winter break when he certified the December 2017 e-QIP. (Tr. 50, 76) Applicant received his security clearance in about May 8, 2018, and, to celebrate his graduation from college and the beginning of a new job, he used marijuana a third time later the same month. (GE 4; Tr. 75-77, 94)

Next, Applicant was asked questions about drug information that was missing from his January 2022 e-QIP. (GE 2) He was asked why he did not disclose his use of marijuana on that public trust application. His answer was that he blamed himself.

Because of laziness and neglect, he did not disclose his marijuana or cocaine use on that form. He should have updated all parts of his January 2022 application rather than selective parts like his bachelor's degree and his additional employment. (Tr. 77-80)

Applicant was next queried about his PSI on February 23, 2022. (GE 6) He acknowledged that this was the first time he admitted his marijuana use on three occasions in either an e-QIP or a PSI. But he did not disclose his single cocaine use from the summer of 2020, again referring to the omission as a mistake on his part. (Tr. 81-82)

Applicant indicated that he even took notes from the February 2022 interview (GE 6) "to make a note that he should update the drug use, yes." (Tr. 82) He described his use of marijuana three times in his February 2023 e-QIP (GE 1 at 37), his first disclosure of his marijuana involvement in a security clearance application. Though Applicant indicated in the February 2023 e-QIP that he did not have a security clearance (GE 1 at 37), he claims that he did not know he had a clearance when he used the marijuana. (Tr. 82-84) See GE 3 at 9.

On page 38 of Applicant's February 2023 e-QIP (GE 1), he answered "no" to whether he had used any other drug. Then, further down the page, he answered "no" to ever illegally using an illegal drug while possessing a security clearance. He agreed that the answer to both questions should have been "yes." When he was asked why he did not report the cocaine use, he was ruminating over how best to report the cocaine use, because he wanted to talk with someone to present his side of the story, he disclosed the cocaine purchase and use in the follow-up March 2023 PSI. (GE 3 at 8-9; Tr. 84-86)

Character Evidence

Mr. A, a software engineer employed by a bank, has known Applicant since 2015, when they were both enrolled at the same university. In their close relationship, they see one-another once to twice a month. Mr. A believes Applicant is honest and reliable. Though he is aware of Applicant's cocaine use, Mr. A never saw him use drugs. In Mr. A's opinion, Applicant warrants a security clearance because his drug use occurred a long time ago, and Mr. A is unaware of any other untoward behavior by Applicant. (Tr. 9-14; AE 11 at 39)

Mr. B, the director of client relations for a national computer company, provided a character statement and testimony. He has been Applicant's second-line supervisor since February 2023. Mr. B considers Applicant to be diligent in carrying his job responsibilities. If he had a security clearance, he could increase his effectiveness at his position. Mr. B is aware of Applicant's cocaine use, as Applicant told him that after leaving a party alone, he was offered and -took the drug before realizing what the drug was. Mr B opined that Applicant merits a second chance for security clearance eligibility. (Tr. 15-22; AE 8 at 34)

In a character statement, Ms. C, a colleague of Applicant's, commended his diligence and ethical conduct at work. Ms. C has observed Applicant's team player attitude in completing tasks correctly and in a timely manner. His professionalism justifies granting his security clearance application. (AE 9 at 35)

Mr. D a former classmate of Applicant's in 2016, believes Applicant warrants a security clearance based on his honesty and his trustworthiness. (A11 at 37) Mr. E has known Applicant for about two years and has found him to be a team player who accomplishes intricate tasks in an efficient manner. He recommends Applicant for a security clearance. (A11 at 38)

Applicant's wife, employed at a public school, provided a character statement (AE A, Encl. 3 at 15-16) and testimony. (Tr. 23-31) She indicated that she met Applicant in 2020 and married him in 2023. She acknowledged that he may have used cocaine once in 2020 after he had been drinking, but he has used no illegal drugs since then. He has matured dramatically. They do not go out as much since their marriage in 2023, choosing to entertain friends primarily at their home. The wife's father, who has struggled with alcohol and drug troubles, has sensitized Applicant to the problems a drug abuser can create for his other family members. His wife does not use marijuana though it is legal in the state where they live. Applicant's wife recommends Applicant for security clearance eligibility. (Tr. 23-31)

There appears to be some uncertainty in the transcript about whether Applicant held a sensitive position (a security clearance) in 2017, but the record clearly shows that he had a security clearance in the summer of 2020 when he used cocaine on one occasion. Applicant's failure to report his marijuana and cocaine use in the period when he used the drugs, will not be applied for disqualification purposes, but will be considered in assessing Applicant's credibility, the relevance of a mitigating condition, and in a discussion of the whole person concept.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines, which should be applied with common sense and the general factors of the whole-person concept. All available and reliable information about the person, past and present, favorable and unfavorable, should be carefully reviewed before rendering a decision. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other kinds of character evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

Analysis

Drug Involvement and Substance Misuse

The security concern under the Drug Involvement/Substance Abuse Guideline is set forth 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.

In my analysis of this case, I have taken administrative notice of Executive Order (E.O.) 12564 signed by the then-President of the United States on September 15, 1986. The primary positions articulated in the E.O. are: (1) federal employees cannot use illegal drugs; (2) illegal drug use by federal employees, on or off duty, is contrary to the efficiency of the service; and (3) persons who use illegal drugs are not suitable for federal employment.

I have also taken administrative notice of the Director of National Intelligence Memorandum, "Adherence of Federal Laws Prohibiting Marijuana Use," (October 25, 2014), which clearly states that state laws do not authorize persons to violate federal law, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule 1 controlled drug.

Changes in state laws or the District of Columbia, pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4 (SEAD 4), effective June 8, 2017). An individual's disregard of the federal law pertaining to marijuana involvement remains adjudicatively relevant in national security determinations.

On December 21, 2021, the Director of National Intelligence signed the memorandum, "Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for access to Classified Information or Eligibility to Hold a Sensitive Position." Agencies are required to employ the "whole person concept" stated under SEAD 4, to determine if an applicant's behavior raises a security concern that has not been mitigated.

AG ¶ 25. Conditions that could raise a security concern and may be disqualifying include:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana in 2014, 2015, and 2018, and he purchased and used cocaine one time in the summer of 2020 while in possession of a security clearance. As noted in the factual findings, the record does not clearly show that Applicant had a security clearance when he used marijuana in 2017 and 2018. He clearly admitted that he had a security clearance from April 2018 to 2021.

Although Applicant used cocaine one time in the summer of 2020, his use of marijuana in 2014, 2017, and 2018 is contextually relevant in assessing his credibility because he did not report his marijuana and cocaine use in his security documents until several years later.

In his December 2017 e-QIP (GE 2), Applicant denied illegal drug use. In his January 2022 e-QIP (GE 5), he again denied all illegal drug use. He blamed negligence and laziness for not reporting the drug information, and instead, simply transferred information from his December 2017 e-QIP (GE 2), even though in this January 2022 e-QIP, he reported updates to his educational record, his travel, and his job. Having observed Applicant's demeanor and conduct during the hearing, I find his negligence and laziness explanations not credible.

The first time Applicant admitted using marijuana was in his February 23, 2022, PSI. (GE 6) Delaying disclosure of his marijuana use for more than four years represents poor judgment, unreliability, and untrustworthiness that is aggravated by the poor judgment Applicant demonstrated in not disclosing his cocaine use for about three years.

At the hearing, Applicant described his purported watershed moment in October 2022 when he decided to disclose all illegal drug use on a future e-QIP or a PSI. However, when he filled out his February 2023 e-QIP, he admitted illegally using marijuana in the last seven years but as indicated later in this paragraph, he denied using cocaine. As noted earlier, his denial of marijuana use while possessing a security clearance has not been established. He denied using any other illegal drug (cocaine) while possessing a security clearance. His explanation for not disclosing his cocaine use before talking with coworkers and management, contradicts his earlier testimony

when he supposedly convinced himself in October 2022 to make a full disclosure of his illegal drug use in a future e-QIP or PSI. His eventual disclosure of his cocaine use in March 2023 does not excuse the poor judgment and untrustworthiness he exhibited for about three years.

The disqualifying conditions AG ¶¶ 25(a), 25(c), and 25(f) apply to the circumstances in this case. The ultimate evidentiary burden of persuasion shifts to Applicant to establish mitigation.

AG ¶ 26. Conditions that could mitigate security concerns include:

(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; and

(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;

Although the record indicates that Applicant's last use of illegal drugs occurred in the summer of 2020, his poor credibility and illegal drug use continue to raise doubts regarding his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not fully apply. AG ¶ 26(b) does not fully apply because Applicant's poor credibility inflicts a substantially negative impact on the potency of his statement of intent to abstain from all illegal drugs in the future.

Whole-Person Concept

I have examined the evidence under the guideline for drug involvement/substance misuse in the context of the nine general factors of the whole-person concept 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Judging the totality of the evidence, I considered the disqualifying and mitigating conditions, the whole-person factors, along with the favorable character evidence and testimony from Applicant's work references, his wife, and his friend. On the other hand, he provided an array of rationalizations for not being forthright on his security forms over the years. The excuses of ignorance, embarrassment, youth and naivete, mistake, not realizing the seriousness of not disclosing the illegal drug information, initially choosing not to report illegal drug information, stress, neglect and laziness, seriously undermine his overall credibility and cast continuing doubt on his reliability, trustworthiness, and judgment. Having weighed and balanced all the evidence, Applicant has failed to meet his ultimate burden of persuasion under the drug involvement guideline.

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge

