



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



In the matter of:

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ISCR Case No. 18-02792

Applicant for Security Clearance

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel

For Applicant: *Pro se*

02/06/2020

Decision

HARVEY, Mark, Administrative Judge:

Applicant mitigated Guideline G (alcohol consumption) security concerns. However, he failed to mitigate security concerns arising under Guidelines H (drug involvement and substance misuse) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On July 5, 2016, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On December 20, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guidelines H, G, and E. (HE 2) On January 22, 2019, Applicant responded to the SOR and requested a hearing. (HE 3)

On December 4, 2019, the case was assigned to me. On December 20, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 15, 2020. The hearing was held as scheduled using video teleconference.

During the hearing, Department Counsel offered eight exhibits; Applicant offered nine exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 16-20; GE 1-8; AE A-I) On January 24, 2020, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.d, 1.e, 2.a, and 2.b. (HE 3) He denied the other SOR allegations. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 34-year-old avionics equipment specialist working for a defense contractor for the past two years. (Tr. 7, 9; GE 1) In 2003, he graduated from high school, and he completed three years of college. (Tr. 7-8) He served in the Air Force from 2004 to 2008. (Tr. 8) When he was discharged from the Air Force, he was a senior airman, and he received an honorable discharge. (Tr. 8) His Air Force specialty was nuclear cruise missile maintenance technician. (Tr. 9) For most of his Air Force service, he had a top secret clearance with access to sensitive compartmented information (TS/SCI). (Tr. 9) He was married from 2006 to 2012, and he does not have any children. (Tr. 8)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges that from about 2003 until at least October 2014, Applicant used marijuana with varying frequency. SOR ¶ 1.b alleges that from about March 2005 until June 2008, Applicant used marijuana with varying frequency while holding a security clearance. SOR ¶ 1.c alleges that from about March 2012 until at least October 2014, Applicant used marijuana with varying frequency while employed in a position of public trust. Applicant denied SOR ¶¶ 1.a through 1.c explaining that his marijuana use was limited to June and July 2014. (HE 2)

SOR ¶ 1.d alleges that from about June 2014 to July 2014, Applicant purchased marijuana with varying frequency. SOR ¶ 1.e alleges that in about May 2014, Applicant was arrested and charged with possession of drug paraphernalia and possession of marijuana while operating a motor vehicle. (GE 8 at 1) In May 2014, Applicant had a drink of alcohol before he started driving home. (Tr. 24) A police officer said he crossed the

center line. (Tr. 24) He also had an open container of alcohol in his vehicle. (Tr. 24) The police officer searched Applicant and found marijuana in his possession. (Tr. 24; GE 1 at 33) He also had a small glass marijuana pipe in his vehicle. (Tr. 25) He was not charged with an alcohol offense. When he went to court, he received deferred adjudication for one year, and his record was expunged after one year. (GE 1) Applicant said he used marijuana three or four times in May 2014. (Tr. 23, 25-26) He insisted he did not use marijuana before May 2014. (Tr. 26) He clarified that he used marijuana 10 to 15 times or once or twice a week from May through July 2014. (Tr. 35) He held a public trust position when he possessed marijuana. (GE 1 at 33)

SOR ¶ 1.f alleges that in about October 2014, Applicant was diagnosed by a licensed addiction counselor (LAC) with a condition called Cannabis Abuse. The court adjudicating Applicant's July 2014 arrest required him to undergo a substance-abuse evaluation. (Tr. 30) On October 9, 2014, an LAC interviewed Applicant. (Tr. 30) According to the LAC's report (also dated October 9, 2014), Applicant told the evaluator:

[Applicant] reports first drinking at age 17 and smoked pot for the first time at age 18. States he got intoxicated for the first time at age 17 and has been a regular user since age 18. States he drank three times and smoked pot once in the last 30 days. States pot is his drug of choice, a bowl once or twice a day States the last time he drank was 10-04-14, last time he smoked pot was about a week and a half ago States he spends \$50.00 to \$100.00 a month on using States . . . pot relaxes him. Denies being preoccupied with the thought of using. [Applicant] states his using isn't a problem States he has four close friends and they all use States his mother and father are chemically dependent, they live in [a state where marijuana] is legal. (GE 5)

The LAC indicated in Axis I: 305.20 (Cannabis Abuse); and 305.00 (Alcohol Abuse). (GE 5) The LAC concluded Applicant was "not chemically dependent," and he should receive a 16-hour education program. (GE 5)

Applicant strenuously disputes the LAC's description of his marijuana use; however, he did not give a reason the evaluator would intentionally lie about the duration and frequency of Applicant's marijuana use. (Tr. 33) Applicant suggested the evaluator "got [his] notes mixed up." (Tr. 33) He said the LAC may have confused his description of his alcohol use with his description of his marijuana use. (Tr. 37) Applicant called the LAC and confronted him with his concerns about the accuracy of his notes. (Tr. 33) Applicant said the LAC mentioned his inability to remember what Applicant said during the interview; however, the LAC refused to disavow the accuracy of his notes. (Tr. 33) Applicant provided a letter from the LAC dated March 28, 2019, which states as follows:

[Applicant] called me on 03-19-19, concerning the alcohol and drug evaluation I did on him on 10-09-14. He was questioning the information in the evaluation of when he first used marijuana. At the time of the evaluation he reported first using at age 18. He went on stating in the report that he used pot in the thirty days prior to 10-09-14, but during the call he assured

me that he didn't use before 2014. When talking to [Applicant] on 03-19-19, he said he didn't know if he reported that information inaccurately or if I made a mistake in my documentation. I have no way of knowing if this is accurate other than looking at the information I received at the time of the evaluation. If he feels this is inaccurate, I have no other recommendation for him other than to get another evaluation. (AE C)

Applicant said that he could not have used marijuana when he was on active duty in the Air Force and held a TS/SCI-level clearance because of the frequency of the Air Force's urinalysis testing of those holding TS/SCI-level clearances with access to nuclear materials. (Tr. 40) He insisted the LAC's notes were not accurate. (Tr. 40-41)

There is no evidence Applicant tested positive on a urinalysis test for use of illegal drugs. Applicant denied that he currently possesses any marijuana or drug paraphernalia. (Tr. 38) He has friends that use marijuana; however, they do not use marijuana in his presence. (Tr. 39)

Alcohol Consumption

SOR ¶ 2.a alleges that Applicant was arrested in about July 2014, and charged with operating a vehicle while intoxicated. Applicant was sad or depressed about his situation after his marijuana-related arrest in May 2014, and he made a bad decision to drink excessive amounts of alcohol. (Tr. 26-27) In July 2014, he drank eight or nine beers over a six-hour period. (Tr. 39) The police stopped Applicant's vehicle for improper lane change and asked him if he drank any alcohol that day. (Tr. 26, 39; GE 3; GE 6) Applicant denied that he drank any alcohol to the police officer because he did not want to go to jail. (Tr. 39; GE 6) Applicant subsequently told the police officer that he only had two or three drinks. (Tr. 39; GE 6) The preliminary blood alcohol test indicated .129 BAC. (GE 6 at 2) A police officer found an open container of beer in Applicant's vehicle. (GE 6 at 1) Upon arrival at jail, the police found marijuana on Applicant's person. (GE 6 at 1-2) Two breath tests were administered at the jail with results of .10 and .11 BACs. (GE 6 at 2)

Applicant was not charged with possession of the marijuana found on his person in July 2014. (GE 3) Applicant pleaded guilty to operating while impaired (OWI), and he was sentenced to six months of probation, to pay a fine, to have a substance-abuse assessment, and to complete a 16-hour alcohol-treatment class. (GE 1 at 34; GE 6; GE 7) Applicant did not inform his supervisor or security officer of his arrests in May and July 2014. (Tr. 28) He said he did not inform the government of his arrests because of "fear of losing my job." (GE 4 at 18) About a year after his second arrest, the government conducted a background check of contractor employees because of a security breach unrelated to Applicant's conduct, and his employer discovered his two arrests in 2014. (Tr. 29) Applicant's contractor employer fired him. (Tr. 29)

SOR ¶ 2.b alleges that Applicant was diagnosed by an LAC with a condition called Alcohol Abuse. Applicant consumed alcohol since the age of 17. (Tr. 36) In 2014, he was drinking alcohol four or five times a week. (Tr. 36)

In Applicant's September 17, 2018 response to DOHA interrogatories, he said he consumed two to three drinks, two to three times a month. (GE 4 at 19) The most recent time he was intoxicated was on September 15, 2018. (GE 4 at 20) Applicant stated at his hearing that he has dramatically reduced his alcohol consumption to about once every two months. (Tr. 37) There is no evidence of alcohol-related incidents involving the police or the courts after July 2014.

Personal Conduct

The SOR cross-alleges in ¶ 3.a the same conduct as alleged in SOR ¶¶ 1.a through 1.e above. The SOR alleges that Applicant falsified material facts as follows:

SOR ¶ 3.b alleges Applicant stated that on or about July 5, 2016, he completed an SCA which asked in Section 23 about whether he used any controlled substance in the previous seven years. Applicant responded, yes, and said "I had never smoked marijuana before June 2014. I was introduced to it during a rough period in my life. I only smoked it a handful of times, and stopped all together in July of 2014." (GE 1 at 32) He said he "[e]xperimented with it, only smoked 10-15 times between the beginning of June 2014 and the end of July 2014." (*Id.*) After his arrests for possession of marijuana and OWI, he said he "decided it was time to get my life back on track. I was forced to resign my position due to the charge. My experimental use of marijuana did damage to my life as a whole, and I will never use it again." (*Id.*)

SOR ¶ 3.c alleges Applicant stated that on or about October 19, 2017, during an Office of Personnel Management (OPM) personal subject interview (PSI), he used marijuana 10 to 15 times between June and July 2014. (GE 3 at 4) He specifically denied any marijuana use prior to June 2014. (GE 3 at 4) He said he purchased marijuana once, and the other times he received marijuana without purchasing it. (GE 3 at 4-5)

SOR ¶ 3.d alleges Applicant responded to DOHA interrogatories on or about September 17, 2018, and he denied that he used marijuana except for 10 to 15 times between June and July 2014. (GE 4) He said in his DOHA interrogatories that from April 2014 to July 2014, he used marijuana two to four times a week. (GE 4 at 9) He also said he "bought small amounts of marijuana for personal use from April 2014 – July 2014." (GE 4 at 9) He concluded, "I only started smoking marijuana well after I was divorced. I smoked a handful of times over a few month period in 2014. I stopped because marijuana was not the way to deal with my problems." (GE 4 at 11)

Applicant failed to disclose or admit the full duration and frequency of his marijuana use as indicated in the October 9, 2014 substance-abuse evaluation in the drug involvement and substance misuse section of this decision, *supra*. Applicant told the LAC on October 9, 2014, he used marijuana "once in the last 30 days" or about 10 days before his interview. (GE 5)

Character Evidence

Six coworkers, colleagues, and/or friends as well as his former spouse provided character statements supporting reinstatement of Applicant's access to classified information. (AE B; AE D-I) His character evidence includes statements from persons who are honorably retired after many years of military service, senior noncommissioned officers on active duty, and highly trained technicians and managers. The general sense of their statements is that Applicant is diligent, knowledgeable, intelligent, meticulous, professional, generous, loyal, honest, a good leader, and trustworthy. (AE B; AE D-I) His hard work and professionalism made substantial contributions to mission accomplishment. (AE B; AE D-I) None of his character statements described any abuse of alcohol or use of illegal drugs by Applicant. (AE B-AE D-I) There is no evidence of security violations, improper disclosure of classified information, or that Applicant compromised national security.

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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 "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 it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). “[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

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

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.

AG ¶ 25 provides conditions that could raise a security concern and may be disqualifying in this case including: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance. . .”; “(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder”; and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.”

On October 9, 2014, the LAC addressed Applicant’s history of marijuana use as follows: (1) Applicant first used marijuana when he was 18 years old; (2) he used

marijuana in the previous 30 days, more specifically, about 10 days previously; (3) marijuana is Applicant's drug of choice; (4) he used marijuana regularly; and (5) he has four close friends who use marijuana. He diagnosed Applicant with Cannabis Abuse. Applicant's use of marijuana in 2014 occurred while he held a public trust position. He purchased marijuana on multiple occasions in June and July 2014. In May 2014, he was arrested for possession of marijuana.

Although the Federal Rules of Evidence (Fed. R. Evid.) are not directly applicable to security clearance hearings, I note that Fed. R. Evid. Rule 801(d)(2)(A) governs admissions against interest, and Rule 803(4) governs admissibility of statements made to obtain medical treatment. Such statements are more probative because of the circumstances when they were made. Statements to healthcare providers are more reliable and probative because a person is expected to be candid when seeking medical treatment. See generally *White v. Ill.*, 502 U.S. 346 (1992) (discussing admissibility of evidence provided by victims during medical treatment). The LAC knew he was providing a report that might be used in court and possibly used to support substance-abuse counseling, and therefore, there is an expectation that he would endeavor to be accurate. I found the LAC's October 9, 2014 report that Applicant said he used marijuana "once in the last 30 days" or about 10 days before his October 9, 2014 interview to be more credible than Applicant's claims of no marijuana use after July 2014.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

I have credited Applicant with refuting SOR ¶ 1.b. The LAC's October 9, 2014 report indicated Applicant first used marijuana when he was 18 years old, and he used marijuana "once in the last 30 days" or about 10 days before his interview. (GE 5) However, the LAC did not specifically describe marijuana use from March 2005 to June 2008. Most likely the LAC was focusing on Applicant's recent marijuana use in which he gave details showing it was regular. Applicant denied marijuana use during the period March 2005 to June 2008 while he had access to TS/SCI and was subject to frequent urinalysis tests. There is no evidence he tested positive on a urinalysis test for use of illegal drugs while he was on active duty. I conclude SOR ¶ 1.b is refuted.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

None of the mitigating conditions fully apply; however, Applicant provided some important mitigating information. He completed a 16-hour alcohol-related class. He ended his marijuana abuse in 2014. Marijuana users do not use marijuana in his presence.

The evidence against mitigation is more persuasive. Applicant's marijuana abuse occurred while he held a public trust position. The discovery of his marijuana abuse occurred as the result of an arrest. He was not honest about the duration and frequency of his marijuana abuse in his security documents. See Guideline E discussion, *infra*. The risk that Applicant may abuse marijuana in the future cannot be ruled out. Guideline H security concerns are not mitigated.

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "Excessive alcohol consumption often leads to the exercise of questionable judgment or

the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

AG ¶ 22 lists conditions that could raise a security concern and may be disqualifying in this case including:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder; and

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

AG ¶¶ 22(a), 22(c), and 22(d) apply. Applicant had one alcohol-related driving incidents involving the police and/or the courts in 2014 alleged in the SOR. For the July 2014 offense, the preliminary blood alcohol test indicated .129 BAC. A police officer found an open container of beer in Applicant's vehicle. Two breath tests were administered at the jail with results of .10 and .11 BACs. "Binge drinking is the most common pattern of excessive alcohol use in the United States." See the Center for Disease Control website, (stating "The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours."), <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>. There are other definitions of "binge alcohol consumption" that involve different alcohol-consumption amounts and patterns. He engaged in binge-alcohol consumption to the extent of impaired judgment. The LAC indicated in Axis I: 305.00 (Alcohol Abuse).

AG ¶ 23 details conditions that could mitigate security concerns including:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption or responsible alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). See *also* ISCR Case No. 08-04232 (App. Bd. Oct. 9, 2009) (affirming denial of security clearance for Applicant with alcohol-related criminal offenses for six years prior to hearing). For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge's grant of a clearance and noted, "That Applicant continued to drink even after his second alcohol-related arrest vitiates the Judge's application of MC 3."

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007) the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. See *also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (reversing grant of a security clearance where most recent alcohol-related incident was three years before hearing because of overall history of alcohol consumption).

In ISCR Case No. 18-02526 (App. Bd. Dec. 20, 2019) the applicant "drove vehicles on three occasions while impaired by alcohol between 2000 and 2017." *Id.* at 4. The applicant participated in alcohol-related therapy and counseling, and he abstained from alcohol consumption for two years. *Id.* at 2. The Appeal Board emphasized the lack of an established benchmark period of abstinence from alcohol consumption stating:

As we have previously stated, the Directive does not specify how much time must pass to mitigate the various types of misconduct identified in the adjudicative guidelines. Contrary to the Judge's conclusion, the Board has repeatedly declined to establish a "benchmark" or "bright-line" rule for evaluating the recency of misconduct. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole.

Id. at 3 (citing ISCR Case No. 18-01926 at 4 (App. Bd. Sept. 20, 2019) (reversing grant of security clearance for applicant with three alcohol-related driving incidents with most recent occurring in 2017)).

I have carefully considered the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption. He reduced his alcohol consumption. In 2014, he completed a 16-hour alcohol awareness course, and he did not engage in any alcohol-related incidents involving the police and courts after 2014. Enough time has elapsed since July 2014, when he was most recently involved with the police in an alcohol-related incident, to enable a reasonable predictive judgment that his maladaptive use of alcohol is safely in the past. Alcohol consumption security concerns are mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 lists "conditions that could raise a security concern and may be disqualifying includ[ing]":

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) 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 individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The October 9, 2014 LAC report said Applicant first used marijuana when he was 18 years old, and he last used marijuana around September 2014. His use of marijuana in 2014 occurred while he held a public trust position. He purchased marijuana on multiple occasions in June to July 2014. In May 2014, he was arrested for possession of marijuana. I found the LAC report of extensive marijuana use to be more credible than Applicant's claims of more limited marijuana use in his July 5, 2016 SCA, October 19, 2017 OPM PSI, and September 17, 2018 responses to DOHA interrogatories. I find his attempts to falsely minimize the duration and frequency of his marijuana use to be intentionally deceptive.

Applicant's pattern of marijuana use and his lying about the extent of his marijuana possession and use show questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules. Such conduct adversely affects his professional and community standing. AG ¶¶ 16(a), 16(b), and 16(e) are established. AG ¶¶ 16(c) and 16(d) are not established because his marijuana possession and use are covered under Guideline H, and marijuana involvement is sufficient for an adverse determination without recourse to Guideline E.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's SOR does not allege that he lied to the police about not consuming alcohol the day the police stopped his vehicle in July 2014, or that he failed to disclose his arrests in 2014 to the government or security officials because he was worried about being fired. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). The non-SOR allegations will not be considered except for the five purposes listed above.

None of the mitigating conditions fully apply to Applicant's conduct. Applicant's involvement with marijuana at age of 18 and then in 2014 until late September 2014 are not mitigated. His lack of candor about the extent of his marijuana use on his security documents shows a lack of rehabilitation. Future inappropriate behavior may occur. His behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

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 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), "[t]he 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. My comments under Guidelines H, G, and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 34-year-old avionics equipment specialist working for a defense contractor for the past two years. He completed three years of college. He honorably served in the Air Force from 2004 to 2008. His Air Force specialty was nuclear cruise missile maintenance technician. For most of his Air Force service, he had access to TS/SCI.

Six coworkers, colleagues, and/or friends as well as his former spouse provided character statements supporting reinstatement of Applicant's access to classified information. The general sense of their statements is that Applicant is diligent, knowledgeable, intelligent, meticulous, professional, generous, loyal, honest, a good leader, and trustworthy. His hard work and professionalism made substantial

contributions to mission accomplishment. None of his character statements described any abuse of alcohol or use of illegal drugs. There is no evidence of security violations, improper disclosure of classified information, or that Applicant compromised national security. See ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (noting admissibility of “good security record,” and commenting that security concerns may nevertheless not be mitigated).

The evidence against reinstatement of his access to classified information is more persuasive. Applicant failed to fully and frankly disclose the duration and frequency of his marijuana use in his July 5, 2016 SCA, October 19, 2017 OPM PSI, and September 17, 2018 responses to DOHA interrogatories. He falsely maintained in his SOR response and at his hearing that his statements in these document were accurate. In July 2014, he lied to a police officer about his alcohol consumption on the day he was arrested. He failed to disclose his arrests in May and July 2014 to the government because he was worried about being fired. His falsifications of his July 5, 2016 SCA, October 19, 2017 OPM PSI, and September 17, 2018 responses to DOHA interrogatories occurred in a security context, and they raise serious security concerns. The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant’s career. Applicant cannot be trusted to disclose potentially derogatory information about himself. He did not establish his reliability, trustworthiness, and ability to protect classified information.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)). I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated alcohol consumption security concerns; however, he failed to mitigate drug involvement and substance misuse and personal conduct security concerns.

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: | For Applicant |
| Subparagraphs 1.c through 1.f: | Against Applicant |
| Paragraph 2, Guideline G: | FOR APPLICANT |
| Subparagraphs 2.a and 2.b: | For Applicant |

Paragraph 3, Guideline E:

AGAINST APPLICANT

Subparagraphs 3.a through 3.d:

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 or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge