



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 20-03591
)
 Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

06/02/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption), H (Drug Involvement and Substance Misuse), and E (Personal Conduct). Applicant mitigated the security concerns under Guideline G but did not mitigate the security concerns under Guidelines H and E. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 8, 2020. On July 15, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G, H, and E. The CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on August 6, 2021, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on January 11, 2022. On January 19, 2022, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on January 25, 2022, and did not respond. The case was assigned to me on May 13, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 28-year-old welder-training specialist employed by defense contractors since March 2015. He married in May 2019 and has three children, ages 17, 16, and 2. He received a security clearance in April 2015. (FORM Item 8.)

Applicant used marijuana with varying frequency from 2008 to June 2017. When he submitted an SCA in April 2015, he answered "No" to a question asking if he had illegally used any drugs or controlled substances during the last seven years, and did not disclose his marijuana use. (FORM Item 4 at 27.) He received a security clearance on a date not reflected in the record, but before July 15, 2015, when he signed a nondisclosure agreement. (FORM Item 8.) He continued to use marijuana, as well as heroin and cocaine, while holding a security clearance.

In 2016, Applicant began using heroin, in addition to using cocaine regularly and marijuana occasionally. In February 2017, Applicant self-admitted to a drug-treatment facility and received inpatient treatment for alcohol and cocaine dependence. He was released in March 2017. The treatment recommendations upon discharge included avoiding activities that involve alcohol or other drugs. He began attending Alcoholics Anonymous (AA) meetings in early 2017.

In June 2017 Applicant intentionally overdosed on his prescribed Trazadone. After being treated in an emergency room for the overdose, he was readmitted into the drug-treatment facility. In June and July 2017, he received inpatient treatment for cocaine dependence, cannabis abuse, and opioid abuse.

In July 2017, Applicant was charged with misdemeanor driving while intoxicated (DWI) and refusing a blood or breath test. In accordance with a plea agreement, he pleaded guilty to refusing a blood or breath test, and the DWI charge was dismissed. He was sentenced to a fine, and his driver's license was suspended for one year. From July 2017 to September 2017, he received outpatient treatment for "alcohol use disorder (severe, dependence)." Based on his arrest for DWI, his security clearance was suspended in September 2017.

The DWI charge triggered an interview by a security investigator in March 2018. During the interview, Applicant told the investigator that he had not illegally used any drugs or controlled substances during the past seven years. He denied misusing prescription drugs. He also told the investigator that he had not sought or been ordered to receive counseling or treatment for using drugs or controlled substances. (FORM Item 5 at 6.) In his answer to the SOR, he admitted that his statements to the investigator were false. (FORM Item 2 at 2.)

Applicant was fired by a defense contractor in January 2019 for coming to work under the influence of alcohol and cocaine. He was hired by another defense contractor with no significant period of unemployment.

In Applicant's response to DOHA interrogatories, he stated that he has been sober since he was fired in January 2019. (FORM Item 5 at 14.) In his most recent SCA, he stated that he now attends AA meetings regularly and has a sponsor who has been sober for 32 years. (FORM Item 3 at 37, 47.)

Policies

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

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, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant

has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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

Analysis

Guideline G (Alcohol Consumption)

The SOR alleges that Applicant was fired in January 2019 for coming to work under the influence of alcohol and cocaine (SOR ¶ 1.a); that he received outpatient treatment for “alcohol abuse disorder (severe, dependence)” from July 2017 to September 2017 (SOR ¶ 1.b); that he was charged with DWI and refusing a blood or breath test in July 2017, pleaded guilty to the test refusal, and was sentenced to a fine and suspension of his driver’s license for one year (SOR ¶ 1.c); that he received inpatient treatment for alcohol dependence from June to July 2017 (SOR ¶ 1.d); and that he received inpatient treatment from February to March 2017 for conditions including alcohol dependence (SOR ¶ 1.e).

The concern under this guideline is set out in AG ¶ 21: “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.” Applicant’s admissions and the evidence in the FORM establish the following disqualifying conditions under this guideline:

AG ¶ 22(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;

AG ¶ 22(b): alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;

AG ¶ 22(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.

AG ¶ 22(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.

The following disqualifying conditions are also established by the evidence, but they were not alleged in the SOR:

AG ¶ 22(e): the failure to follow treatment advice once diagnosed; and

AG ¶ 22(f): alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

Because Applicant's use of alcohol after a diagnosis of an alcohol use disorder was not alleged, it may not be an independent basis for denying Applicant a security clearance, but it may be considered to consider his credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether Applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered this unalleged conduct for these limited purposes.

The following mitigating conditions are potentially applicable:

AG ¶ 23(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;

AG ¶ 23(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; and

AG ¶ 23(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.

All three mitigating conditions are established. Applicant had only two alcohol incidents, but they did not occur under such unusual circumstances that it is not likely to recur. The first prong of AG ¶ 23(a) (“so much time has passed”) focuses on whether the conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s first alcohol-related incident was in July 2017, and the last was in January 2019, when he was fired for coming to work drunk. Two years and five months have passed, which is a “significant period of time.” He completed outpatient treatment for an alcohol use disorder in September 2017, and he was diagnosed as alcohol dependent. He maintained his sobriety until he relapsed in January 2019. He has been attending AA meetings regularly since 2017 and has a sponsor. His sobriety since January 2019, supported by regular AA participation, reflects an established pattern of abstinence from alcohol.

Guideline G, Drug Involvement and Substance Misuse

The SOR cross-alleges the conduct alleged in SOR ¶ 1.a (SOR ¶ 2.a). It also alleges that Applicant used cocaine from January 2017 to January 2019, while having access to classified information (SOR ¶ 2.b); used marijuana from about 2007 to June 2017 (SOR ¶ 2.c); used marijuana from about July 2015 to June 2017, while having access to classified information (SOR ¶ 2.d); used heroin from about 2016 to June 2017, while having access to classified information (SOR ¶ 2.e); received treatment from about June to July 2017 for cocaine dependence, cannabis abuse, and opioid abuse (SOR ¶ 2.f), and received treatment from February to March 2017 for cocaine dependence (SOR ¶ 2.g).

The concern under this guideline 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.

Applicant's admissions and the evidence in the FORM raised the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

AG ¶ 25(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

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The following mitigating conditions are potentially applicable:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 26(b): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

AG ¶ 26(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) is not established. Applicant has illegally used controlled substances since June 2008. He intentionally overdosed a prescription drug in June 2007. His last drug involvement was in January 2019, when he came to work under the influence of cocaine. Although his abstinence from drugs since January 2019 is a significant period of time, it is not long enough to overcome security concerns raised by his 11 years of repeated drug abuse.

AG ¶ 26(b) is not established. Applicant produced no evidence of disassociation from his drug-using associates and contacts, no evidence of a change of environment, and no statement of intent to abstain from drug involvement.

AG ¶ 26(d) is not established. Applicant completed a drug-treatment program in March 2017, but he submitted no evidence of a favorable prognosis. His drug involvement recurred in January 2019.

Guideline E, Personal Conduct

The security concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

Applicant's intentional failure to disclose his marijuana use in his April 2015 SCA and his false statements to a security investigator about his illegal drug involvement and treatment for drug involvement raise the following disqualifying conditions:

AG ¶16(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; and

AG ¶16(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.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. There is no evidence that Applicant attempted to correct his SCA. He lied to an investigator in March 2018 and took no action to correct his lies until he submitted his answer to the SOR in August 2021.

AG ¶ 17(c) is not established. Applicant's false statements were arguably "infrequent," but they were not "minor," because such statements strike at the heart of the security clearance process. See ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) An intentionally false statement to a security investigator is a felony under 18 U.S.C. § 1001. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002). Applicant's false statements were recent because they involved the current adjudication of his application for a security clearance.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines G, H, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350

at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines G, H, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his alcohol consumption, but he has not mitigated the concerns raised by his drug involvement and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 2.a-2.c:	For Applicant
Paragraph 2, Guideline H (Drugs)	AGAINST APPLICANT
Subparagraphs 2.a-2.g:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge