



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



In the matter of:)
)
) ISCR Case No. 21-00149
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Shirin Asgari, Esq.

November 28, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline F (financial considerations); however, he failed to mitigate security concerns under Guideline H (drug involvement and substance misuse). Clearance is denied.

Statement of the Case

On June 8, 2020, Applicant submitted a Questionnaire for National Security Positions (SF-86). On April 30, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F and H. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On June 18, 2021, Applicant submitted his Answer to the SOR through counsel.

On September 21, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On September 21, 2021, DOHA issued a notice of hearing scheduling the hearing for October 15, 2021. On October 14, 2021, DOHA issued a

notice of cancellation for the October 15, 2021 hearing. On November 23, 2021, DOHA issued a notice of hearing rescheduling the hearing for December 15, 2021. On December 2, 2021, DOHA issued an amended notice of hearing rescheduling the hearing for December 16, 2021.

I convened the hearing as rescheduled. I admitted Government Exhibits (GE) 1 through 8 without objection, and admitted Applicant Exhibits (AE) A through G without objection. Applicant testified and did not call any witnesses. I held the record open until January 31, 2022, to afford Applicant an opportunity to submit additional evidence. (Tr. 78-80, 86-88) Applicant, through counsel, timely submitted AE I through S, which I admitted without objection. On December 28, 2021, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 39-year-old customer engineer who has been employed by a defense contractor since June 2018. He seeks to retain his Top Secret security clearance, which is a requirement of his continued employment. He has successfully held a clearance with several Government agencies for approximately the last ten years. He is familiar with the requirements to hold a clearance. (Tr. 16-18, 22-23, 54-55; GE 1; AE G)

Applicant graduated from high school in June 2001. He was awarded a Bachelor of Arts degree in sport and fitness in August 2006. (Tr. 18-20; GE 1; AE H) He married in May 2012. He and his wife do not have any children. (Tr. 20-21; GE 1) His wife is employed by the Government as a visual arts specialist (GS-12). (Tr. 75-76)

Financial Considerations

The 16 financial allegations in the SOR are established by Applicant's June 8, 2020 SF-86; his background interview; his SOR Answer; his DOHA interrogatory responses; the credit reports in the record; and his hearing testimony. (GE 1, 2, 4 - 8; SOR Answer) In his SOR Answer, Applicant admitted in part and denied in part all of the 16 financial allegations. (SOR Answer)

Applicant stated that he incurred the debts "during a difficult time in my life when several personal events took place that resulted in an inability to meet my basic living expenses." He explained that in 2013, his wife became very ill and was hospitalized several times in an attempt to determine the cause of her illness. Her illness persisted over the next several years requiring multiple surgeries until 2018 or 2019. Applicant's wife returned to work after she recovered from her surgeries. (Tr. 59-61, 72-74; SOR Answer)

Because of her medical issues, Applicant's wife was unable to work for significant periods. He stated that with his income alone, there "was barely enough to

cover our mortgage and the cost of food.” To add further to their financial stress, Applicant unexpectedly lost his job in 2018. Although he received unemployment for several months, he did not receive enough income to pay their basic expenses or their personal bills. He stated the SOR debts listed “are the result of this difficult time period in our lives and the culmination of multiple events that led to us falling behind on bills and going into debt.” (SOR Answer)

Applicant was unemployed from March 2018 to June 2018. (Tr. 55-59, 72, 77; GE 1) His wife had health insurance, but she still was responsible for a number of out-of-pocket co-pays. She used all of her sick leave and was required to go into a non-pay status. Applicant did not know how much sick leave she had at that point. (Tr. 76-78)

The following is a summary of Applicant’s six SOR allegations and their status:

SOR ¶ 1.a – Collection credit union account for vehicle in the amount of \$27,406 after it was totaled in 2016. At his hearing, Applicant stated that his “gap insurance” did not cover the balance owed after this vehicle was totaled. Applicant stated that this account was paid in full and he would provide a document showing payment post-hearing. Post-hearing, he submitted court documentation stating that the judgment for this account was satisfied on July 6, 2021. (Tr. 24-27; AE I) **DEBT RESOLVED.**

SOR ¶ 1.b – Collection credit card account in the amount of \$683. At his hearing, Applicant stated that this account was paid in full and he would provide documentation showing payment post-hearing. Post-hearing, Applicant submitted a summary of a telephone conversation with the creditor in sufficient detail indicating that this account was paid in full on July 12, 2019. (Tr. 27-29; AE R) **DEBT RESOLVED.**

SOR ¶ 1.c – Collection cell phone bill in the amount of \$280. At his hearing, Applicant stated that he has had an account with this cell service for the “last ten years,” and that his account with this creditor was in good standing. Post-hearing, Applicant submitted a summary of a telephone conversation with the creditor. He also provided a recent statement from this creditor indicating that his account was in good standing. He stated the creditor would provide him with a letter stating the amounts alleged in this allegation as well as the amount of \$466 alleged in SOR ¶ 1.f, *infra*, are incorrect. (Tr. 29-32; AE P, AE R) **DEBT RESOLVED.**

SOR ¶ 1.d – Charged-off credit card account in the amount of \$1,340. At his hearing, Applicant stated he believed this account was his father’s account as he and his father have the same name, with Applicant being a junior. Post-hearing, Applicant submitted a summary of a telephone conversation with the creditor. He then learned that the account was his, and that it was being automatically billed to a credit card account that was “charged off 4-5 years ago.” He had changed his debit card account and telephone numbers and he forgot to update the creditor. He made an initial payment of \$466 in January 2022, and was to make final payments in February 2022. (Tr. 32-33, 66; AE N, AE R) **DEBT RESOLVED.**

SOR ¶ 1.e – **Collection personal loan account in the amount of \$733.** Applicant submitted documentation from the creditor that he satisfied this account by settling it for a lesser amount, and he made his final payment on June 15, 2021. (Tr. 33-34; AE A) **DEBT RESOLVED.**

SOR ¶ 1.f – **Collection cell phone account in the amount \$466.** This is the same creditor in SOR ¶ 1.c, *supra*. Same SOR ¶ 1.c comments apply here. (Tr. 34-35; AE P, AE R) **DEBT RESOLVED.**

SOR ¶ 1.g – **Past-due at least 150 days student loan in amount of \$1,157, with a total balance of \$27,036.** At his hearing, Applicant stated he was unable to make payments because he lost his job. He contacted the loan servicer to make a payment, and he was informed they were not accepting payments. In September 2021, his loan servicer informed him by letters that his account was placed on a “Collections Pause” and transferred to the Department of Education (DoEd) as a result of the COVID-19 pandemic forbearance program. His loan servicer further advised him that a DoEd loan servicer would contact him about repayment after his loan had been transferred. Applicant stated that he would resume payments as soon as he received guidance from the DoEd loan servicer. (Tr. 35-37; AE K) **DEBT BEING RESOLVED.**

SOR ¶ 1.h – **Charged-off credit union account for vehicle in the amount of \$23,831 after it was totaled in 2016.** Applicant’s “gap insurance” did not cover the balance owed after vehicle was totaled. This debt is a duplicate of the debt alleged in SOR ¶ 1.a. (Tr. 37-38) **DEBT RESOLVED.**

SOR ¶ 1.i – **Charged-off credit card in the amount of \$732.** At his hearing, Applicant stated that he was making payments on this account. Post-hearing, Applicant submitted documentation that this debt was satisfied and resolved for less than the amount owed. (Tr. 38-39; AE Q) **DEBT RESOLVED.**

SOR ¶ 1.j – **Charged-off furniture company account in the amount of \$2,812.** At his hearing, Applicant stated that he was making payments on this account. Post-hearing, he submitted documentation that he was making payments on this account. (Tr. 39-40; AE L) **DEBT BEING RESOLVED.**

SOR ¶ 1.k – **Charged-off automobile loan in the amount of \$7,694.** At his hearing, Applicant stated that he had contacted the creditor to set up a payment plan. Post-hearing, Applicant submitted a summary of a telephone conversation he had with the creditor in order to set up a payment plan. He owed a balance of \$3,847, and agreed to pay off that amount in four monthly installments beginning in January 2022 and ending in April 2022. He provided documentation showing he was making payments. (Tr. 40-41, 66-67; AE O, AE R) **DEBT RESOLVED.**

SOR ¶ 1.l – **Charged-off personal loan in the amount \$11,327.** At his hearing, Applicant provided documentation that he was making \$350 monthly payments on this account. (Tr. 41-43; AE B, AE C) **DEBT BEING RESOLVED.**

SOR ¶ 1.m – **Charged-off automobile loan in the amount of \$8,103.** Duplicate of debt alleged in SOR ¶ 1.k. (Tr. 43-45, 66-67) **DEBT RESOLVED.**

SOR ¶ 1.n – **Collection furniture company account in the amount of \$2,085.** At his hearing, Applicant stated this account was paid in full. Post-hearing, Applicant submitted documentation from his local Circuit Court dated May 28, 2021, reflecting that this account had been “paid or discharged and is satisfied in whole.” (Tr.45-46; AE J) **DEBT RESOLVED.**

SOR ¶ 1.o – **Collection credit card account in the amount of \$969.** At his hearing, Applicant stated that this account was paid in full. Applicant submitted documentation from his local Circuit Court dated May 28, 2021, reflecting that this account had been “paid or charged and is satisfied in whole.” Note – this debt has the same creditor in interest as in SOR ¶ 1.n. (Tr. 46-47; AE D) **DEBT RESOLVED.**

SOR ¶ 1.p – **Charged-off credit card account in the amount of \$912.** Duplicate of debt alleged in SOR ¶ 1.o. (Tr. 47-48) **DEBT RESOLVED.**

Department Counsel, referring to Applicant’s September 2020 Office of Personnel Management (OPM) interview, questioned him about a payment plan he had established with the IRS for back taxes owed for 2018 and 2019. His “ballpark” estimate is that he and his wife owe the IRS about \$20,000. He stated that his monthly payments to the IRS are on time. Applicant opined the reason he owed taxes is because his withholdings were not in accord with an increase in income. He started paying down the majority of his debts in 2020 during COVID while he was working from home. (Tr. 61-63; GE 2) He “had to reach into [his] 401k” to pay off his debt listed in SOR ¶¶ 1.k and 1.m after the creditor filed suit against him, which triggered a tax penalty for an early 401k withdrawal. The creditors listed in SOR ¶¶ 1.a, 1.h (duplicate), 1.k, 1.m (duplicate), 1.n, and 1.o sued Applicant to recover money owed to them. (Tr. 64-65) Applicant stated that he did not have any other open judgments. (Tr. 66)

Applicant completed credit counseling offered through a debt consolidation company (DCC). He had retained their services from approximately January 2020 to September 2020, before his SOR was issued in April 2021. (Tr. 48-51) Applicant stated that his annual salary was \$109,000 and his wife’s annual salary as a GS-12 was \$92,000, with their joint annual income totaling \$201,000. Applicant and his wife own their home, which is valued at \$515,000. They owe \$398,000 on their mortgage. At his hearing, he stated that he had approximately \$1,400 in his checking account and \$2,000 in his savings account. They have a joint checking account to cover household expenses. They had “[m]aybe 2,000” in their joint checking account with the amount fluctuating as all of the household expenses are paid from that account. (Tr. 81-84)

Applicant stated that he and his wife had created a budget. Post-hearing, he submitted a comprehensive budget reflecting that he and his wife are leading a modest lifestyle and living within their means, which included line items paying down their debts. Their joint monthly income was \$10,680, and their net monthly remainder is \$4,224. They manage their family budget jointly. (Tr. 51, 85, 78; AE S)

Drug Involvement and Substance Misuse

SOR ¶ 2.a – Alleges in April 2018 Applicant tested positive for cocaine on a urinalysis administered by local area alcohol safety action program.

This allegation is established by Applicant's local Alcohol Safety Action Program (ASAP) drug test administered on April 11, 2018. (GE 3) Applicant denied any drug use in his June 2020 SF-86, in his September 2020 background interview, in his February 2021 DOHA interrogatory responses, and in his June 2021 SOR Answer. (GE 1, 2)

On August 8, 2017, Applicant was convicted of reckless driving and placed on probation. His offense date was February 22, 2017. As part of his sentence, he was required to complete ASAP. As noted, Applicant participated in a mandatory drug test administered by ASAP, on which he tested positive for cocaine. On April 12, 2018, the laboratory received Applicant's sample. On April 17, 2018, the laboratory reported his urinalysis test results, having detected 447 ng/mL of benzoylecgonine (cocaine metabolite) utilizing sophisticated testing methods. The ng/mL cutoff for a positive test result was 100 ng/mL. (Tr. 52-53, 89; GE 2) [Note – I have not considered Applicant's 2017 reckless driving conviction in determining his security clearance eligibility, since it was not alleged in the SOR.]

After Applicant's probation officer (PO) informed him that he had tested positive for cocaine, Applicant requested a retest. His PO warned him that if he failed the urinalysis test again, he would be required to go to court and possibly be sentenced to jail. Applicant stated he "was afraid of this, so she (PO) told me just to wait till next week" to take a urinalysis retest. He stated that he retook the urinalysis test the following week and passed it. (Tr. 53-54, 92-94)

In Applicant's SOR Answer, he denied this allegation stating, "I have never used cocaine, and I do not take illegal drugs. It is my belief that this test result was a false positive, as I was told immediately after the test that I did not pass, and I was asked to retake the test. I retook the test the following week and passed without issue. I have no idea why I would have a false positive test result, but I am completely confident and certain in the statement that I do not, and have not, used illegal drugs, including cocaine." (SOR Answer) In Applicant's June 2020 SF-86, he also denied any use of illegal drugs in the past seven years and answered "no" to all questions relating to drugs. (GE 1) Similarly, he denied any use of illegal drugs in his February 2021 DOHA Interrogatories. (GE 2)

During Department Counsel's cross-examination, Applicant stated that the April 2018 ASAP drug test was the first drug test he took while on probation with ASAP. He has no explanation as to how cocaine could have gotten into his system. He does not associate with people who use cocaine. (Tr. 67-69, 89-91) Applicant's PO informed him that he might go back to jail if his drug test came back positive a second time. He opined that [his PO] was, "more than likely was just trying to scare me" His PO then advised him, "to take it again next week." (Tr. 69) The following question and answer followed between Department Counsel and Applicant:

MS. DRISKILL: So that whatever – if there was something in your system, it was out of your system by then?

APPLICANT: I guess that's what she said that for. I just – I didn't really know what – you know, what to think of whatnot. I wanted to take it again.

MS. DRISKILL: Uh-huh.

APPLICANT: But, you know, I just – I didn't – I didn't want to risk having to go to jail for something that I didn't know, you know, what a false positive or what that was. (Tr. 69-70)

Applicant was unemployed in April 2018 when he took the ASAP urinalysis. (Tr. 71-72) He did not report this positive urinalysis to an employer because he was not working at the time. (Tr. 74-75)

Character Evidence

Applicant submitted five reference letters, three from close friends, and two from colleagues. The collective sense of these references conveys that Applicant is honest, trustworthy, dependable, family oriented, and an asset to any organization. (Tr. 88; AE E) He played semi-professional basketball overseas, was player of the year and male athlete of the year in 2004, and was recruited by a professional basketball team. (AE G)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) 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 evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts;” and “(c) a history of not meeting financial obligations.” The evidence of record establishes security concerns under AG ¶¶ 19(a) and 19(c). Further review is necessary.

AG ¶ 20 lists five potentially applicable mitigating conditions:

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

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The 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 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013).

Applicant's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt remains a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

AG ¶ 20(e) is not applicable. Although Applicant stated the debt is SOR ¶ 1.d belonged to his father as he and his father have similar names, Applicant later conceded post-hearing that the debt was his and paid it off.

AG ¶¶ 20(b) and 20(d) are partially applicable, and AG ¶ 20(c) is fully applicable. Applicant's financial situation deteriorated when his wife experienced serious medical issues beginning in 2013 that continued to at least 2018. She was unable to work and was on medical leave or in a non-pay status. Applicant's financial situation deteriorated further when he lost his job in 2018 and was unemployed from March to June 2018. Applicant received financial counseling in 2020 through his DCC before his April 2021 SOR was issued.

Applicant does not receive full credit under AG ¶¶ 20(b) and 20(d) because he did not take affirmative action to repay several of his creditors until they sued him. That said, Applicant resolved all but three of his 16 alleged debts. Two of the alleged debts are duplicate accounts that were sold to successor creditors. Three of the 16 debts are in the process of being resolved. Applicant is making payments on two of those accounts. The remaining student loan account is on a "Collections Pause" as a result of COVID, and he is awaiting further guidance from DoEd. Applicant provided the vast majority of his mitigating documentation under this concern post-hearing.

Applicant recognized that his finances were out of control and retained a DCC in 2020. He participated in the DCC's financial counseling and utilized their services until he was able to move forward on his own. Several of his creditors sued him to recover money owed to them, prompting Applicant to cash out a portion of his 401k account to repay them. It would have been preferable for Applicant to have remained in contact with those creditors and sought a resolution short of litigation. With that said, he has learned a valuable lesson and come a long way in regaining financial responsibility. With ten years of clearance history, he knew regaining control of his finances was essential to qualify for a security clearance and took reasonable steps to resolve his debts.

With regard to the debts he did not completely satisfy, he set up payment plans to satisfy his creditors. The Appeal Board has established the following basic guidance for adjudications in cases such as this:

An applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial

situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payments of such debts one at a time.

ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotations omitted).

When considering where Applicant was when this process began, I note that he has made considerable progress in addressing his debts. When he regained his financial foothold, Applicant took reasonable corrective action. He liquidated a portion of his 401k account to pay off his larger creditors. He paid or resolved the majority of his debts before his hearing, and is well on the way to regaining financial responsibility.

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern concerning drug involvement and substance misuse:

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 provided two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) any substance misuse (see above definition);" and "(b) testing positive for an illegal drug." The evidence of record establishes security concerns under AG ¶¶ 25(a) and 25(b). Further review is necessary.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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 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.

Applicant claimed at his hearing that he never used cocaine and that the April 2018 positive test result was a false positive. Furthermore, he said he had no idea how cocaine could have gotten in his system, if it did. To review, Applicant was required to participate in a random drug test administered by his local county ASAP as a condition of his probation following his 2017 conviction for reckless driving. He provided a urine sample on April 11, 2018, the testing laboratory received the sample on April 12, 2018, and the laboratory reported that his sample was positive for Benzoylcegonine (Cocaine Metabolite) with a 447 ng/mL level. The cutoff level was 100 ng/mL. He did not submit any evidence that the test itself or testing facility procedures were flawed or unreliable. Nor did he request that his sample be retested. Rather, after discussing the positive test results with his PO, he stated that he waited to take a retest a week later and his results were negative. There is no evidence in the record that addresses the length of time cocaine remains in one's system, or confirms that his second test was negative.

Applicant did not provide a convincing explanation for testing positive for cocaine on his April 2018 urinalysis that would refute his unlawful use of it.

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. April 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)). I limited my consideration of Applicant's false denials of cocaine use in 2018 to the five purposes listed above.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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).

In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) *with* ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") .

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge's decision to revoke an applicant's security clearance after considering the judge's recency analysis, stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal

purchase of marijuana and the use of marijuana while holding a security clearance.

See *also* ISCR Case No. 02-10454 (App. Bd. Nov. 23, 2004) (sustaining denial of security clearance for Applicant who used marijuana five times while holding a security clearance with four years between most recent marijuana use and hearing).

The passage of time after ending drug use is not considered in isolation. Applicant's subsequent denials of drug use in his June 2020 SF-86, his September 2020 background interview, his February 2021 DOHA interrogatory responses, his June 2021 SOR Answer, and his hearing testimony are indicative of his poor rehabilitative potential. See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (marijuana use after completing an SF-86 "undercuts" favorable application of the drug involvement recency mitigating condition).

Applicant held a clearance for ten years and was therefore familiar with the requirements of maintaining a clearance. Although he was not employed at the time he tested positive for cocaine, his knowledge and experience of the clearance process should have heightened his awareness that any drug use raised serious security concerns, particularly while on probation. His subsequent denials of illegal drug use, in an apparent attempt to undermine the system, raise serious doubts about his credibility and rehabilitative potential. Otherwise, a three-year-old single use of cocaine with documented favorable mitigating evidence might well have resulted in a more favorable outcome. When an applicant is unwilling or unable to accept responsibility for his own actions, such a failure is evidence that detracts from a finding of reform and rehabilitation. See, *e.g.*, ISCR Case 21-00321 at 3 (App. Bd. Sep. 8, 2022). None of the mitigating conditions were established.

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(a):

- (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.

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. AG ¶ 2(c). The discussion in the Analysis

section under Guidelines F and H are incorporated in this whole-person section. However, further comments are warranted.

To review, Applicant is a 39-year-old customer engineer employed by a defense contractor since June 2018. He seeks to retain his Top Secret security clearance, which is a requirement of his continued employment. He has successfully held a clearance with several Government agencies for approximately ten years, and is familiar with the requirements to hold a clearance. He has accumulated experience in the defense industry and is well regarded by his colleagues and friends.

Applicant's wife encountered significant medical issues that required extensive medical care and resulted in her not being able to work. Added to that, Applicant was unemployed for four months in 2018. Unable to remain current on his financial obligations, he fell into debt. He began his financial recovery in 2020 when he retained the services of a DCC. He then completed financial counseling, liquidated a portion of his 401k to repay creditors, and paid as many creditors as he could or set up payment plans. Although the documentation submitted at his hearing fell short, he corrected that shortfall with his post-hearing submissions. Applicant clearly recognizes the importance of regaining financial responsibility and he understands what he needs to do to maintain financial responsibility. His efforts at debt resolution have established a "meaningful track record" of debt repayment.

However, Applicant's insufficient attempt to justify testing positive for cocaine in 2018 does not establish mitigation of security concerns caused by his cocaine use in 2018. An applicant at his age, and with his education and experience, is expected to know better. His explanations for testing positive for cocaine were not convincing or plausible, and are not accepted as credible. To his credit, he mitigated financial considerations concerns; however, the same cannot be said for drug involvement and substance misuse concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

Formal Findings

The formal findings on the SOR are as follows:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a – 1.p:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. National security eligibility is denied.

ROBERT TUIDER
Administrative Judge