



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



In the matter of:)
)
) ISCR Case No. 22-00474
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Christopher Snowden, Esq.

08/30/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns under Guideline H (drug involvement and substance misuse), but he did not mitigate the security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On July 20, 2022, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines G and J. Applicant responded to the SOR on October 10, 2022, and requested a hearing before an administrative judge.

On December 22, 2022, Department Counsel amended the SOR by adding allegations under Guidelines H and J. Applicant responded to the amended SOR on January 19, 2023. The case was assigned to me on April 6, 2023. The hearing convened as scheduled on July 19, 2023.

Evidence

Government Exhibits (GE) 1 through 9 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through P (AE A through H were attached to Applicant's response to the SOR), which were admitted without objection.

Department Counsel requested that I take administrative notice of information contained in a press release from the U.S. military on an official website of the U.S. Government. Without objection, I have taken administrative notice of the requested information. (Hearing Exhibit (HE) I)

Findings of Fact

Applicant is a 35-year-old employee of a defense contractor. He has worked for his current employer since October 2020. He served on active duty in the U.S. military from 2007 to 2011. He seeks to retain a security clearance, which he has held since he was in the military. He earned a bachelor's degree in 2019 and a master's degree in 2022. He has never married, and he has no children. (Transcript (Tr.) at 17, 49; GE 1, 9; AE B, E, F)

Applicant has a history of substance abuse, alcohol-related incidents, and criminal conduct. On several occasions between about July 2010 and January 2011, he used synthetic marijuana, commonly known as "spice." It appears that the substance was not on the schedule of controlled substances at the time, but the military prohibited the use of any substance, other than alcohol or tobacco, for the purpose of altering mood or function. He received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) in March 2011 for violating Article 92 of the UCMJ, in that he was "derelict in the performance of [his] duties in that [he] willfully failed to refrain from using the substance commonly known as 'spice.'" He was reduced one pay grade, ordered to perform extra duty for 30 days, and forfeited \$300. The forfeiture was suspended. In May 2011, he was discharged for misconduct (drug abuse) with a general under honorable conditions discharge. (Tr. at 24-29, 49-50; Applicant's response to SOR; GE 1, 8, 9; AE F)

Applicant testified that he consulted with an attorney before his Article 15 punishment and discharge. He stated that he "was under the impression that had [he] elected to talk to an attorney that it would have went down to a court. And [he] would not have been able to get the general discharge." When he was informed that he initialed the record of nonjudicial punishment proceedings indicating that he had consulted with a lawyer, he stated that he did not recall seeing a judge advocate. (Tr. at 28-29; GE 8)

Applicant was arrested in State A in December 2013 and charged with driving under the influence (DUI). The police report indicates that Applicant was drinking in a bar/restaurant, when he was refused further alcohol service because he was intoxicated. The business called a taxi, but he did not accept the taxi. The manager told Applicant that if he attempted to drive, the manager would call the police. Applicant

drove away anyway and was stopped not long after when the police noticed his erratic driving. The officer noted a strong odor of alcohol and other indicators that Applicant was intoxicated. He stumbled as he got out of his car, and his zipper was down. He refused to participate in a field sobriety test, and he refused to provide a breath or blood sample. (Tr. at 30-32, 51; Applicant's response to SOR; GE 7)

Applicant pleaded guilty or no contest. He may have received deferred sentencing in which he paid a fine and court costs, and he was on unsupervised probation for a year. He testified that he did not have a good memory of what led to his arrest, and he did not recall if he was intoxicated when he left the bar. (Tr. at 30-33, 51-53; Applicant's response to SOR; GE 7, 9)

Applicant was arrested in March 2014 in State B and charged with public drunkenness. He pleaded guilty and paid a fine of about \$500. He does not remember many details of what occurred other than it was outside his home. (Tr. at 33-36, 55-58; Applicant's response to SOR; GE 6, 9)

Applicant was drinking at a bar/restaurant in State C in March 2016. The staff offered him options for a safe ride home, but he refused. The staff called the police and reported that Applicant left the establishment, was possibly intoxicated, and intended to drive home. The police arrived, and the staff pointed out Applicant, who was not far from his car. The police officer noted clear signs that Applicant was intoxicated, and he was shoeless with mud around his legs up to his knees. There is a lake near the restaurant, and the officer deduced that Applicant walked into the lake despite the temperature being about 44 degrees. Applicant told the officer he was walking home, but he was walking in the wrong direction. He stated that he did not have his car keys, but they were found in his pocket. (Tr. at 37-40, 59-61; Applicant's response to SOR; GE 5, 9)

Applicant was arrested for the above incident and charged with public intoxication. He pleaded no contest or guilty to the charge and paid a fine of about \$500. (Tr. at 37-39, 59-61; Applicant's response to SOR; GE 5, 9)

Applicant provided inconsistent testimony about the incident. He initially testified:

I went to another bar late at night alone, by myself. And I drank too much, to excess. And I didn't want to drive home because I knew I had too much to drink so I attempted to walk home.

This is when the officer, officer stopped me when I was walking home. He performed a field sobriety test and determined I was intoxicated in public. (Tr. at 37)

Two questions later, he answered that he could not recall if he was intoxicated when he left the restaurant. He also stated that he could not recall if he walked in the lake. (Tr. at 37, 60)

Applicant was drinking at a bar (not same bar as above 2016 incident) in State C in January 2017. The waitress cut him off and tried to take his keys. At least one person called the police at about 0210 and reported that a car hit a curb, and the driver (Applicant) was standing in the middle of the street and appeared to be intoxicated. Applicant was extremely intoxicated. His blood alcohol concentration (BAC) was measured at .279%. (Tr. at 40-41, 61-64; Applicant's response to SOR; GE 3, 9)

Applicant was arrested and charged with driving while intoxicated (DWI) with a blood alcohol concentration (BAC) of .15% or greater. In February 2017, he pleaded guilty to the lesser charge of DWI. He was sentenced to fines and court fees of \$1,600, confinement in the county jail for 180 days (suspended for 180 days), and probation for one year. Applicant stated that he thought it was a deferred adjudication, but there is nothing in the court records to corroborate that assertion. (Tr. at 40-41, 61-63; Applicant's response to SOR; GE 3, 4, 9)

In January 2020, police responded to a report that two individuals were fighting in the parking lot of a bar in State C at about 2346. Applicant was found on the ground. The other individual (described by Applicant as an acquaintance) forcibly stopped Applicant from driving home. Applicant admitted to the police officer that he had "a lot" to drink, he was intoxicated, and he planned to drive home until he was stopped by the other individual. Applicant admitted in his response to the SOR that he was drinking that night, but he "was not binge drinking or drinking to excess." (Tr. at 42-44, 65-67; Applicant's response to SOR; GE 2, 9)

Applicant was arrested for the above incident and charged with public intoxication. He pleaded no contest or guilty to the charge and paid a fine of about \$350. He has little memory of the incident. (Tr. at 42-44, 65-67; Applicant's response to SOR; GE 2, 9)

Applicant admitted that he had drinking issues, but he does not believe he is an alcoholic, and he does not believe that he currently has a drinking problem. He stated that, except for his use of spice in the military, he has never used illegal drugs. In his response to the SOR, he indicated that "it was in his best interest to refrain from alcohol consumption entirely." He signed a statement of intent in August 2022 stating that he discontinued drinking, and that he intended "to abstain from alcohol use in the future." He has maintained his "sobriety," which he described as not drinking to intoxication, for more than a year. The last time he had anything to drink was in May 2023 when he had three beers with his father at a baseball game. He is fitness oriented and goes to the gym about five times a week. He is attending graduate school in pursuit of another master's degree. (Tr. at 18-21, 27, 46-51, 69-73; Applicant's response to SOR; AE A, I, J, L-P)

I did not find Applicant credible. I find that the reports into his conduct are more reliable than Applicant, and that he committed the conduct alleged in the reports.

Applicant submitted documents and letters attesting to his excellent job performance and strong moral character. (AE C, K)

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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 security 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

Guideline G, Alcohol Consumption

The security concern for alcohol consumption 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

(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; and

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

Applicant was arrested for DUI or DWI in 2013 and 2017. He was arrested or cited for public drunkenness or public intoxication in 2014, 2016, and February 2020. AG ¶¶ 22(a) and 22(c) are applicable.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

(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; 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.

Applicant has a troubled history with alcohol. He has two alcohol-related driving offenses. He refused assistance from his friend and the staff at the bar on two other occasions, and apparently would have driven if not arrested by the police. In his response to the SOR, he indicated that “it was in his best interest to refrain from alcohol consumption entirely.” He signed a statement of intent in August 2022 stating that he discontinued drinking, and that he intended “to abstain from alcohol use in the future.” He testified that he has maintained his “sobriety,” which he described as not drinking to intoxication, for more than a year. The last time he had anything to drink was in May 2023 when he had three beers with his father at a baseball game. Applicant’s alcohol-related misconduct is serious. It would be difficult to find it mitigated even if I believed him. I do not.

I have concerns about Applicant’s drinking and the extremely poor judgment he exhibited while drinking. None of the mitigating conditions are sufficiently applicable to overcome concerns about Applicant’s alcohol use, reliability, trustworthiness, judgment, and honesty.

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

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

Applicant used synthetic marijuana, commonly known as “spice,” in about 2010. It appears that the substance was not on the schedule of controlled substances at the

time, but the military prohibited the use of any substance, other than alcohol or tobacco. AG ¶¶ 25(a) and 25(c) are applicable.

Applicant held a security clearance at the time, but I do not find substantial evidence that the use was while granted access to classified information. AG ¶ 25(g) is not applicable. See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022) for a discussion on the distinction between holding a security clearance and having access to classified information.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

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

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

This was Applicant's only drug involvement and it occurred more than 12 years ago. I find that he has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

SOR ¶ 2.a cross-alleges Applicant's alcohol-related arrests. SOR ¶ 2.b alleges that he was separated from the military "for misconduct (drug abuse)," and his "service was characterized as General, Under Honorable Conditions." His discharge does not raise any criminal conduct disqualifying conditions, but his illegal drug abuse does. AG ¶ 31(b) is applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

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

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

The analysis under alcohol consumption applies equally here. While I found his drug abuse mitigated under Guideline H because I do not believe he will use illegal drugs again, it falls into his pattern of substance abuse and disregard for the law. Additionally, I do not believe his testimony. Applicant's criminal conduct, including his illegal drug abuse, continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns.

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 relevant 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), 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. I have incorporated my comments under Guidelines G, H, and J in my whole-person analysis. I also considered Applicant's military service and his favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns under Guideline H, but he did not mitigate the security concerns under Guidelines G and J.

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 G:	Against Applicant
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a and 2.b:	Against Applicant
Paragraph 3, Guideline H:	For Applicant
Subparagraph 3.a:	For Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge