



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



In the matter of:)
)
-----) ISCR Case No. 22-01517
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

03/04/2024

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug or criminal conduct concerns. Eligibility for access to classified information or to hold a sensitive national security position is denied.

Statement of the Case

On December 14, 2022 the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudicated Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement and substance misuse and criminal conduct guidelines the DCSA CAS could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on February 2, 2023, and requested a hearing. The case was assigned to me on July 11, 2023. A hearing was scheduled for September 18, 2023, and initially heard on the date as scheduled. At the scheduled hearing, the Government's case consisted of 13 exhibits (GEs 1-13) that were admitted without objection. Applicant relied on four witnesses (including himself) and 19 exhibits (AEs A-Q) that were admitted without objection. The transcript (Tr.) was received on September 28, 2023.

Summary of Pleadings

Under Guideline H, Applicant allegedly (a) tested positive in December 2020 for cocaine on a urinalysis test; (b) tested positive in January 2021 for cocaine on a urinalysis test; and (c) used cocaine from December 2021 to January 2021, while granted a security clearance.

Under Guideline J, the allegations covered by Guideline H were cross-alleged under subparagraph 2.a of Guideline J. Additional allegations covered by Guideline J are as follows: Applicant allegedly (b) received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) in January 2021 based on his first failed urinalysis test for wrongful use of a schedule II controlled substance; and (c) was charged with a violation of the UCMJ, Article 121 (wrongful use of cocaine) in January 2021 based on a second failed urinalysis, for which Applicant sought and received a discharge under other than honorable conditions

In Applicant's response to the SOR, he admitted the allegations covered by Guidelines H and J with explanations. He claimed that he has recently undergone substance abuse counseling and evaluation and was diagnosed to be free of any drug abuse issues. He further claimed to be free of any addictions and motivated to remain stable and drug-free. He claimed, too, to have taken several on-line courses, inclusive of behavior and drug and alcohol awareness to bolster his knowledge about the negative impacts that drugs can have and the importance of avoiding recurrences.

Applicant also claimed the mitigating benefits of negative drug tests in 2021 and 2022, a positive substance abuse diagnosis for alcohol and drug use (citing only a mild alcohol use disorder) and favorable prognosis, and statement of intent. pledging to abstain from use of illegal drugs in the future.

Addressing his two positive drug tests of 2021, Applicant denied any intentional ingestion of cocaine prior to testing positive for cocaine in 2021. He attached enclosures, and renewed his pledge to avoid illegal drugs in the future.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never entered into a civil marriage or legally recognized civil union, and he has no children. (GE 1; Tr. 66) He earned a high school diploma in May 2011 and completed aircraft leadership school classes. (GE 1 and AE G; Tr. 64) Applicant enlisted in the Air Force (AF) in October 2011 and served 10 years of active duty. (GE 1; Tr. 66-67) During his AF career, Applicant excelled in his aircraft maintenance specialty and earned numerous promotions. (AEs J-K) As a certified and experienced aircraft crew chief and non-commissioned officer (NCO), he was recognized with numerous designations and awards. (AEs E-F and J-K)

In June 2021, Applicant received a discharge from the Air Force under other than honorable conditions, attributable to his testing positive for cocaine in two randomized drug tests: one in December 2020 and the other in January 2021. (GEs 1-6; Tr. 66) In his first administered randomized drug test in December 2020, he produced a confirmed cocaine level in his system of 772 ng/ml, well above the cutoff level of 100 ng/mL (GE 3) Applicant held a security clearance between June 2011 and March 2021. (GEs 1 and 7).

After testing positive for the second time in January 2021, Applicant was afforded an opportunity to provide a written reply to his AF commander's notification of his intended suspension of his security clearance. (GE 7) Without a written response from Applicant within the time permitted, Applicant's AF commander suspended Applicant's access to classified information in March 2021. See GE 7 and Applicant's contrasting hearing statements. (Tr. 67, 112-113)

Prior to testing positive for cocaine on December 4, 2020, Applicant and an AF coworker friend repaired to a local bar in England. (GE 2 and AE L; Tr. 71-72) Once in the bar, Applicant consumed four to five beers and two to three shots within a two-hour time span and became intoxicated (by both his own and friend's accounts). (GE 2 and AE L; Tr. 72) Seated at a nearby table was a group of local patrons who were watching a soccer game and in a festive mood. (Tr. 72) Feeling tipsy himself from heavy drinking and smoking, he "purchased some shots for some of the patrons there." (Tr. 72)

Inebriated and in need of a cigarette, Applicant asked one of the local bar patrons for a cigarette. (GE 2 and AE L; Tr. 73-74) After asking the bar patron for a cigarette, one of the recipients of the shots he provided gave him three pre-rolled cigarettes that impressed Applicant at the time with being normal tobacco-laden cigarettes. (Tr. 73, 113-114) Although, from his AF friend's vantage, the three dispensed cigarettes he could see were "all white-looking joints/cigarettes" on the table "with one being noticeably burnt at the end." (AE L) When his AF friend pointed out the burnt cigarette to him, he laughed off the comment with the remark that in England, Brits typically roll their cigarettes. (AE L)

After finishing the first cigarette he received from a member of the local bar patron group, Applicant returned to the bar (according to his friend's account) and asked the group for another cigarette. (AE L) At this time, one of the local patrons of the group

gave Applicant two additional pre-rolled cigarettes, one of which he smoked outside the bar, and the other of which he retained for future use. (AE L)

What impressed the friend at this inflection moment was how sick Applicant looked receiving the second cigarette and how the locals were laughing at Applicant as he shuffled out of the bar. (AE L) Asked about the cigarette exchange at hearing, Applicant confirmed only that he was given three pre-rolled cigarettes without elaborating on the sequence of the cigarettes he received. (AE L; Tr. 73) Inebriation and memory loss provide the best explanations for their slightly different sequential accounts of how and when the three pre-rolled cigarettes were furnished to Applicant. Overall, though, the friend's account of events that transpired in the evening of December 2, 2020 essentially corroborates Applicant's version furnished the OPM investigator in his August 2021 PSI.

From the laughter emanating from the bar patrons that Applicant's friend witnessed as Applicant exited the bar with a second self-rolled cigarette, they were certain he was oblivious as to what he was about to smoke. And, while none of the furnished cocaine-laced cigarettes alone could realistically be expected to produce a 772-ng/mL confirmed reading in a positive drug test two days later (i.e., December 4, 2020), two such cigarettes smoked sequentially within a short period of time could quite possibly produce such an outsized number when aggregated.

Applicant's version of the events that transpired in the English bar essentially covered the same sequence of events that his friend reported in his statement of account. In Applicant's PSI, he told the OPM investigator that in early December 2020, while drinking with a co-worker in an English bar, he unknowingly smoked a single cocaine-laced cigarette from among the three cigarettes given to him by an unknown patron of the bar. (GE 2) According to Applicant's account, he smoked a single cigarette outside of the bar (implicitly leaving him with two other cigarettes) that did not make him feel the effects of cocaine, possibly due to his heavy drinking at the time. (GE 2)

Pressed for more details by the interviewing OPM investigator, Applicant elaborated on his account and told the investigator about what his friend told him (i.e., that he "looked white and sic."). (GE 2) Applicant could not recall if he smoked another cigarette before leaving the bar. (GE 2) Several weeks later, according to Applicant's account, he was snacking at home with another coworker and intoxicated from drinking when he realized he still had a cigarette left from the batch of three cigarettes given to him earlier by the English bar patron. (GE 2) With this third cigarette, he went outside to smoke it.

Considered together, the respective accounts of Applicant in his August 2021 PSI and his AF friend's account are reconcilable in most material respects. If left standing alone unaffected by Applicant's contrasting and conflicting statement covering the same December 2, 2020 bar events that he furnished earlier to his commanding officer, his PSI account of the bar events quite possibly could have supported a favorable credibility assessment of his claims of unknowing cocaine ingestion.

Several weeks after testing positive for cocaine in his first test (and before he learned of the results of his first positive drug test), Applicant tested positive once again for cocaine ingestion. (GEs 4 and 11) Summarized results of the Navy's lab testing of Applicant's furnished urine specimen following his second positive drug test produced an initial screening reading of 150 ng/mL and a confirming reading of 354 ng/mL (GEs 4 and 11) For reasons not fully explained by Applicant, he did not report the bar incident to AF investigators, who would have likely been positioned to investigate his bar encounter and hopefully verify his account. (Tr.101)

As the result of his first failed drug test, Applicant received non-judicial punishment (NJP) under Article 15 of the UCMJ for wrongful use of a Schedule II controlled substance. (GEs 5-6) In hopes of receiving a lighter punishment from his AF commanding officer, Applicant penned a more appealing account of the incident that trimmed the kind and number of cigarettes he received from the local bar patrons in the evening of December 2, 2020. (AE L) In his earlier January 14, 2021 memorandum covering his account of the December 2, 2020 bar events (attached to his NJP record), he assured his AF commander that while "already buzzed from heavy drinking at home" and from the five or six beers he consumed at the bar, he was inebriated and bought the whole bar some 15 to 17 shots. (GE 7)

Elaborating further on his experiences in the English bar in his January 14, 2021 memorandum to his commander, Applicant cited his feelings of wanting to smoke after so much drinking. Looking for someone in the bar with a cigarette to give, he approached a local bar group seated outside of the bar with a request "to bum a cigarette." (GE 7) At this point (according to Applicant's earlier January 14 account), one of the bar patrons gave him a couple of normal cigarettes from a pack typically purchased in a store "and a self-rolled cigarette" to thank him "for the shot." (GE 7)

After smoking the one self-rolled cigarette that did not smell like marijuana or anything illegal (according to Applicant in his memorandum), Applicant went back into the bar, tipped the waitress, and left the bar with his friend. (GE 7) At no point in this earlier account did he acknowledge smoking a second or third self-rolled cigarette. (GE 7) Aside from describing his bar experience, he stressed his NCO deployment awards and achievements and acknowledged responsibility for his poor decision-making. (GE 7)

With his acceptance of non-judicial punishment from his AF commander (augmented by a contrasting and conflicting version of the events of December 2, 2020), Applicant avoided potentially more serious charges. (GE 7) Asked why he was not more forthcoming about the events of December 2, 2020 in his January 14 memorandum to his commanding officer, Applicant responded that he was trying to impress his commanding officer with his sincerity and honesty (after pleading not guilty) and was less concerned about trying to remember the truthful details of the December 2 events. (Tr. 107) Pressed further at hearing, Applicant placed his drunken status in the bar as his justification for not being more truthful about the events. (Tr. 107-108) For clarity purposes, he acknowledged that his January 14, 2021 account "sounded better," and he was "just trying to save my career." (Tr. 114)

Following confirmation of his second failed urinalysis on January 20, 2021, Applicant was charged with violating Article 112a of the UCMJ (wrongful use of cocaine). (GE 6) In lieu of trial by U.S. court martial, Applicant requested and accepted a discharge under other than honorable conditions. (GEs 8-9) Both of Applicant's positive drug tests occurred while he was granted access to classified information. (GEs 1-5) And, in March 2021, Applicant's access to classified information was suspended. (GE 7)

While Applicant never challenged his positive drug tests in a convened court martial, or otherwise appealed the results of his drug tests, he has continued to deny his intentional ingestion of cocaine preceding his positive drug tests. (GE 2) Never feeling any adverse effects of cocaine ingestion, he has consistently claimed that he unknowingly accepted three cigarettes laced with cocaine from unknown sources in an English bar. (GEs 2 and AE L)

For some historical background on cocaine use, urine testing is common for monitoring cocaine users in drug treatment and parole programs. (GE 13) Understanding cocaine metabolism and excretion is essential for the interpretation of cocaine urine test results. Scholarly studies confirm that cocaine dissipates rather quickly and typically for smoked doses in the 20 to 40mg range and is detectable in drug testing up to 80 hours after ingestion. (GE 13, at 7)

For smoked doses of cocaine in the 10 to 20ng.mL range, detection times typically do not run past a day. (id.) Published detection windows for cocaine ingestion at or below DoD screening and confirming targets typically run no longer than three days. (GE 11) Tested subjects ingested with cocaine in the 200 ng/mL range show traces of cocaine in their system for up to 480 minutes (or 80 hours). (GE 12, at 35)

After the test results were returned days later with a positive reading for cocaine, Applicant was referred to his unit's office of special investigations for another randomized drug test. (GE 2) Like his first test, this follow-up randomized drug test returned positive test results as well for cocaine.

Under questioning at hearing, Applicant acknowledged that he likely smoked two cocaine-laced cigarettes of the three given to him by the patrons of the English bar he and his friend visited in December 2020. (Tr. 105, 113) His revised PSI and hearing accounts both reconcile with his AF friend's version of the events that transpired at the English bar. Both accounts contrast and conflict with Applicant's January 14, 2021 memorandum version of events.

Weighing the respective accounts of Applicant that he disclosed to the OPM agent who interviewed him in August 2021 and his friend's account of the events in the English bar in the evening of December 2, 2020, Applicant's claims of receiving three cocaine-free cigarettes sequentially from a local patron of the bar they visited are reconcilable and, unless otherwise challenged, are worthy of a favorable credibility assessment. What prevents these corroborating accounts from achieving overall credibility assessments is Applicant's earlier contrasting and conflicting January 14,

2021 version he provided his AF commander in hopes of enlisting lighter punishment from his commander.

As with administered oaths in federal and state trial proceedings, witnesses in DOHA administrative proceedings to covered material events and incidents are expected to fully disclose the truth, the whole truth, and nothing but the truth, as best they can with the information available to them. Accounts of material events (as here) cannot be parsed, piecemealed, or cherry-picked to appeal to individual fact finders and decision makers in disparate circumstances without violating their witness oaths.

Using an accepted DOHA blend of personal subjective knowledge and manifest intention accounts of the applicant assessed along with all of the surrounding circumstances, Applicant's overall credibility cannot be reconciled with his competing accounts of the events of December 2, 2020. Applicant's offered proofs of innocence of any knowing use of cocaine in 2020 and 2021, respectively, are insufficient based on a careful reading of all of the evidence produced in the record to clear him of any imputed knowledge of his pre-testing use of cocaine-laced cigarettes on not just one, but two separate occasions.

Looking forward to a drug-free future, Applicant has abstained from any use or involvement with illegal drugs since his second positive drug test in January 2021. To reinforce his commitment to future avoidance of illegal drugs, he has taken several on-line courses, inclusive of behavior and drug and alcohol awareness classes, to bolster his knowledge about the negative impacts that drugs can have and the importance of avoiding recurrences. (AEs O-P) Additionally, he completed two favorable randomized negative drug tests in 2021 and 2022, respectively, through his current employer, received a positive substance abuse diagnosis for alcohol and drug use (citing only a mild alcohol use disorder) and favorable prognosis, and documented his personal pledge to abstain from use of illegal drugs in the future. (AEs M, N, and Q)

Endorsements

Applicant's AF chain of command and current supervisors and coworkers hold Applicant in high esteem and confidence. (AEs C-D) AF members who served with Applicant in deployments credit him with strong character and work ethic beyond reproach. (AE C; Tr. 33-53) His current supervisor and staff co-workers credit Applicant with a strong work ethic, honesty, and trustworthiness in his work as an aircraft training mentor. (AE D; Tr. 51-56) His supervisor expressed knowledge of his positive drug tests and the circumstances surrounding the tests. (Tr. 57-58)

Applicant earned excellent performance evaluations during his military and civilian careers and received numerous certificates, decorations, and awards recognizing his AF and civilian achievements and contributions. (AEs F and H-K)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a

security clearance.” 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. Eligibility for access to classified information may only be granted “upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of 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 ¶ 24.

Criminal Conduct

The Concern: Criminal activity creates doubt about a person'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 ¶ 30.

Burdens of Proof

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. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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

Security concerns are raised over Applicant’s (a) testing positive for cocaine in urinalyses conducted in December 2020 and January 2021, respectively. Additional security concerns are raised over Applicant’s receipt of non-judicial punishment under Article 15 of the UCMJ in January 2021 for wrongful use of a controlled substance and (b) charges of violating Article 112a (wrongful use of cocaine) and his ensuing acceptance of a discharge under other than honorable conditions in lieu of court martial.

Drug involvement concerns

Applicant’s randomized positive tests for cocaine in 2020 and 2021, respectively, warrant the application of four disqualifying conditions (DCs) of the AGs for drug involvement. Applicable DCs are DC ¶¶ 25(a), “any substance misuse”; 25(b) “testing positive for an illegal drug”; 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase sale, or distribution; or possession of drug paraphernalia,” and 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

Applicable federal law on the use of controlled substances

Under federal law, to prove a violation of the Controlled Substance Act (21 U.S.C. § 829(a)), the Government must establish an applicant’s “knowing and intentional” violation of the Act. (CSA) While proof standards for demonstrating knowledge and intention to use cocaine-laced products in DOHA proceedings are not totally limited to an applicant’s subjective personal account, they do require consideration of circumstances surrounding the individual’s use of the product that take into account the person’s experience with the product (if any), visible signs or scents that the product might contain a controlled substance, the reliability of the source, inconsistent accounts of events where the controlled substance (cocaine in this case) was obtained, and other indicators that could be expected to arouse the person’s suspicions. See ISCR Case No. 22-01176 at 5, n. 2 (App. Bd. Oct. 2023)

While use of a reasonable, good-faith belief standard (a recognized civil standard of proof) might be used as an aid in evaluating an applicant’s claimed unknowing and unintended use of a banned product like cocaine, it may not be used as a substitute for a subjective intent test that takes account of the applicant’s personal claims of innocence, the quality and consistency of his claims and explanations, and the surrounding circumstances in making an overall credibility assessment. Credible assessments require truthful accounts at every stage of investigations and proceedings that implicitly preclude parsing of contrasting and conflicting accounts to achieve overall

favorable credibility results. Favorable credibility assessments require at minimum that statements from applicants be truthful, consistent, and complete in every material respect in official statements made to DoD commands and official investigators.

Evidentiary sufficiency of Applicant's knowledge denials

To be sure, any inferences to be drawn of unlawful use or possession of an illegal substance (e.g., cocaine) must be the result of a knowing and intentional use or possession of a banned controlled substance. This requirement holds for not only criminal and civil court cases, but ISCR cases as well where all that is required to meet the Government's initial burden is the making of a *prima facie* case. See *Ruan v. United States*, 142 Sup. Ct. 2370, 2378 (2023) Plausible explanations for Applicant's positive drug test results for cocaine in January 2021 are quite limited based on the evidence in the record. What is at issue is the state of Applicant's knowledge and intentions when he accepted three self-rolled cigarettes from strangers in an English bar in December 2020.

Application of a blended subjective intent standard in Applicant's case in making a credibility assessment of his innocence still requires consideration of all of the surrounding circumstances before assigning any inferred acceptance of his corroborated PSI account of his unknowing receipt of three cocaine-laced cigarettes from strangers in a local bar in December 2020. Because his PSI account provides a factual narrative that contradicts key facts told to his AF commander pertaining to the cigarettes given to him by bar patrons in the evening of December 2020, his whole story becomes subject to credibility challenges. Without reconciliation of his August 2021 PSI account with the earlier account he provided his AF commander in January 2021, his claims and explanations of innocent ingestion of cocaine become open to meritorious challenges from the Government.

Considering all of Applicant's claims and explanations of innocent ingestion of cocaine, his claims of not knowing or intending to smoke cocaine-laced cigarettes given to him by a stranger in an English bar cannot be accepted and incorporated without either a reconciled overall credible account from Applicant, or alternatively from favorable credibility accounts drawn from an administrative record from any AF proceeding convened to consider Applicant's claims of innocence. From the evidence produced in this record, Applicant's tested credibility cannot be accepted as an overall truthful accounting of the events that transpired in the English bar in the evening of December 2, 2020. Applicant's claimed innocence of knowing and intentional ingestion of a banned controlled substance (cocaine) is not established.

Mitigating credit is not available to Applicant. His insufficiently explained positive drug tests are still too recent to entitle him to findings that he is absolved of any risks of recurrence. Despite an otherwise unblemished record of abstinence from illegal drug use and a rich glossary of reassurances of reliability and trustworthiness from his AF and civilian supervisors and colleagues, it still remains too soon to make safe predictions of his ability to avoid misuse of illegal drugs when opportunities present

themselves in social situations. Mitigating conditions are not available to applicant at this time based on a consideration of the evidence in the record.

Criminal conduct concerns

Cross-alleged under Guideline J are security concerns raised over the allegations covered by Guideline H. Additional security concerns are raised over the resulting punishment received from his AF command after twice testing positive for cocaine. Applicable DCs covered by Guideline J are: DC ¶¶ 31(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” and 31(e), “discharge or dismissal from the Armed forces for reasons other than “honorable.” By treating Applicant’s positive tests of cocaine to be both recent and subject to risks of recurrence, none of the potentially available mitigating conditions can be applied to applicant’s situation.

Whole-person assessment

Whole-person assessment of Applicant’s clearance eligibility requires consideration of whether his positive drug tests while holding a security clearance and resulting discharge under other than honorable conditions is fully compatible with minimum standards for holding a security clearance. Taking into account Applicant’s credited military and civilian defense contributions and his unblemished record of drug avoidance (both before and after his positive 2020 and 2021 drug tests) and the strong character references, performance evaluations, and decorations and awards he has received while in the Air Force and in his current civilian employment, he is credited with making an encouraging showing of good judgment, reliability, and trustworthiness. Still, the Government’s drug and criminal conduct concerns in this case are too strong to safely overcome without more time of avoidance of illegal substances than the two-plus years credited to him to satisfy minimum requirements of trust, reliability, and judgment for holding a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude that drug involvement and criminal concerns are not mitigated. Eligibility for access to classified information is denied.

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:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant

GUIDELINE J (CRIMINAL CONDUCT):

AGAINST APPLICANT

Subparagraphs 2.a-2-c:

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 Applicant eligibility for a security clearance or holding a sensitive position. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge