



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



In the matter of:)
)
-----) ISCR Case No. 23--01611
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*

06/14/2024

Decision

WESLEY, ROGER C. Administrative Judge

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

Statement of the Case

On August 9, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the criminal conduct, drug involvement, and alcohol consumption 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*, Department of Defense (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 October 11, 2023, and requested a hearing. The case was assigned to me on February 20, 2024. A hearing was scheduled for April 9, 2024, and heard on the date as scheduled. At the hearing, the Government's case consisted of five exhibits (GEs 1-5), which were admitted without objection. Applicant relied on one witness (himself) and seven exhibits (AEs A-G), which were admitted without objection. The transcript (TR.) was received on April 19, 2024.

Procedural Issues

Before the close of the hearing, the Government moved to amend subparagraph 2.a of the SOR - to read as follows: "From about September 2018 to about August 2021, you used cocaine with varying frequency while in a sensitive position, i.e., one requiring a security clearance." (Tr. 37-38) For good cause shown, and without objection the Government's amendment was granted. (Tr. 38-40)

Summary of Pleadings

Under Guideline J, Applicant allegedly was arrested and charged with possession of narcotics, possession of drug paraphernalia, driving under the influence (Dul) of alcohol, and driving under the influence (Dul) of drugs, for which he was found guilty of Dul-Alcohol and sentenced to 10 days in jail and assessed a fine and costs. Allegedly, Applicant entered an adult diversion program for the drug charges.

Under Guideline H, Applicant allegedly (a) used cocaine with varying frequency from about September 2018 to about August 2021 and (b) LSD, MDMA (molly), and marijuana in June 2016.

Under Guideline G, Applicant allegedly was arrested and charged with, Dul, *inter alia*, as set forth in sub-paragraph 1.a of Guideline J. These allegations are incorporated under Guideline J.

In Applicant's response to the SOR, he admitted all of the allegations pertaining to his drug and alcohol abuse with explanations. He claimed he completed the adult diversion program, and the drug charges were dismissed with prejudice.

Findings of Fact

Applicant is a 38-year-old systems engineer for 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 never married and has no children. (GE 1; Tr. 33) He attended college classes between August 2005 and December 2011 and earned an associate degree in December 2011. (GE 1; Tr. 21) He is currently attending college classes in pursuit of another associate degree. (Tr. 21) Applicant reported no military service.

Since September 2019, Applicant has been employed by his current employer as a multi-media specialist. (GE 1; Tr. 21-22) He worked for another DoD contractor between March 2005 and September 2019 as a multimedia specialist and stayed on with his current employer after his previous employer lost its government contract. (GE 1; Tr. 22) Applicant has held a security clearance continuously since February 2006. (GE 1; Tr. 22-23, 36, and 39)

Applicant's alcohol history

Applicant was introduced to alcohol at the age of 20. (GE 2) With friends, he would consume alcohol occasionally in social and celebratory situations. Typically, he consumed alcohol three or four times a month and seldom to excess before 2021. (GE 2) He has never been diagnosed with an alcohol abuse disorder or told by a ;licensed substance abuse counselor to cease drinking. (GE 2)

Applicant's drug history

Applicant was introduced to LSD, MDMA (molly), and marijuana by a friend in 2016. (GEs 1- 2; Tr. 23-24) He used these drugs on just one occasion after he had been offered them by his friend. (GE 2) While he understood that these drugs were illegal, he never reported his use of the drugs to his security office. (Tr. 24)

Applicant was furnished cocaine by a friend in February 2018 and used the drug bi-monthly when hanging out with friends. (GE 2; Tr. 26-27) Twice in 2018, he purchased the drug from the friend, and he continued his cocaine purchases from his friend (mostly free of charge) in 2019 (three to four times) and in 2021 (estimated twice), all while holding a security clearance. (Tr. 25-27, 43) His cocaine purchases cost him roughly \$200 a month. (Tr. 27) He has not used illegal drugs or been involved in any kind of illegal drug activity since August 2021. (Tr. .25-27)

In August 2021, Applicant was arrested in his state of residence and charged with possession of narcotics, possession of drug paraphernalia, driving under the influence (Dul) of alcohol and driving under the influence (Dul) of drugs, possession of 2.9 grams of cocaine. (GEs 1-5; Tr. 27-28, 34) Appearing in court on the charges in July 2022, he pled guilty to the charges and was sentenced to 10 days in jail and assessed a fine and court costs.

With the court's approval, Applicant was accepted into a 13-week adult diversion program for the drug charges. (GE 2; Tr. 29) Sentencing, in turn, was stayed pending the reported outcome of Applicant's diversion program.

Terms of Applicant's diversion program admission included a restitution charge of \$70 and his acceptance of drug counseling with a certified substance abuse counselor. (AE E; Tr. 29-30) Applicant's diversion program requirements also included Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings, as well as volunteer community service. (AEs F-G) Applicant's AA attendance documented 37 bi-

weekly attendance meetings between September 2021 and June 2022. (AE G) His drug counseling attendance records confirmed 16 bi-weekly meetings between April 2023 and August 2023. (Tr. 30-31) His community service attendance list documented 20 meetings attended by Applicant between January 2022 and June 2022. (AE F; Tr. 30)

Applicant's court-approved diversion program also required his monthly submission of a form to his assigned probation officer confirming his satisfaction of his restitution and counseling conditions. (Tr. 29-30) Applicant has since ceased his AA and NA attendance and relies on his weekly church service attendance and competitive bike racing to help him maintain his abstinence from both drug and alcohol abuse. (Tr. 20, 30-31)

Upon documentation of successful completion of Applicant's diversion program's terms and conditions, the local county attorney's office moved to dismiss the stayed charges with prejudice. (AE A) An order of dismissal was entered on September 7, 2023. (AE A) Since completing the court's alcohol and drug counseling conditions, Applicant has abstained from drugs and alcohol and ceased his AA and NA attendance. (Tr. 30).

To ensure his continued abstinence from both alcohol and drug abuse, Applicant relies on his weekly church service attendance and competitive bike racing to help him maintain his abstinence from both drug and alcohol abuse. (Tr. 20, 30-32, 36) And, he has disassociated from friends who supplied him with illegal drugs. (Tr. 32-33)

Endorsements and Awards

Applicant is well-regarded by his program manager and supervisors. (AEs B-C) Both consider him to be reliable, hardworking, and trustworthy. However, neither his program manager nor direct supervisor were made fully aware by Applicant of the details of his illegal drug issues. (Tr. 34-35) Applicant is credited with making strong contributions to his employer. His recognized efforts merited excellent performance evaluations in every rated category. (AE D)

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:

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.

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.

Alcohol Consumption

The Concern: 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 y classified or sensitive information. AG ¶ 21.

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 multiple abuses of illegal drugs over a five-year period, and continuing after he was granted a security clearance in 2006. Considered together, Applicant’s involvement with illegal drugs and to a lesser extent alcohol abuse after he was granted a security clearance raise security concerns over whether Applicant’s actions reflect drug and alcohol abuse incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information.

Drug involvement concerns

Applicant’s admissions to multiple use of illegal drugs (inclusive of three years of recent use of cocaine) raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant’s situation: DC ¶¶ 25(a), “any substance misuse”; 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia”; and 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

To his credit, Applicant has successfully completed the requirements of his diversion program requirements and has credibly abstained from all illegal drugs since August 2021. He relies on his church for guidance and competitive biking to maintain his health and fitness. Whether this is enough to maintain his abstinence from illegal drugs is uncertain.

For over two years, he has credibly remained abstinent from illegal drugs (inclusive of cocaine) and exhibits no visible signs or indications of succumbing to any risks or pressures he might encounter to return to illegal drug use in the foreseeable future. Without his engagement of a licensed drug counselor, however, he lacks the needed professional resources to update his progress in avoiding illegal drugs.

Applicant’s assurances of sustained abstinence from illegal drugs (inclusive of cocaine) are encouraging. And, his efforts warrant partial application of two mitigating conditions (MCs) of the drug involvement guideline: MC ¶¶ 26(a), “the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment”; and 26(b),

the individual acknowledges his or her drug involvement, 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) “the individual acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Still, with the combination of his still recent cocaine use (with a reported last use in August 2021) and the seriousness of his August 2021 offense, it is too soon to absolve Applicant of risks of recurrence. Without evidence of satisfactory completion of a prescribed drug treatment program with a favorable prognosis by a duly qualified medical professional and more time in sustained abstinence from the use of illegal drugs, none of the mitigating conditions are fully available to Applicant at this time.

Cross-alleged under Guideline J is Applicant’s August 2021 arrest and charges emanating from his cited possession of narcotics (cocaine) and drug paraphernalia. Applicable under the criminal conduct guideline is: 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.”

With only two-plus years of demonstrated abstinence from cocaine usage, more time in abstinence with corroborating evidentiary sources to support his continued abstinence is needed to facilitate safe predictions that he is no longer a recurrence risk. Applicant’s references, while highly supportive of Applicant’s character and demonstrated judgment, reliability and trustworthiness, did not manifest any detailed awareness of Applicant’s past problems with illegal drugs.

Alcohol consumption concerns

Security concerns are also directed at Applicant’s cited abuse of alcohol associated with his 2021 arrest and charge for, *inter alia*, DuI, for which he was found guilty of DuI-alcohol. Applicable to the facts of Applicant’s situation is DC ¶ 22(a), “alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder.”

Before his 2021 DuI incident, Applicant never incurred any alcohol-related incidents of record. He credibly described his past drinking as light to moderate without any reported instances of abusive drinking. He has never been diagnosed with an alcohol abuse disorder, and he is credited with completing his court-approved diversion program.

Considering all of the facts and circumstances associated with Applicant’s drinking history, fully applicable to Applicant’s situation is MC ¶ 23(b), “the individual

acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.” Applicant’s commitments to abstinence, even without continued AA support, are well supported and corroborated by his strong endorsements and work credits.

Whole-person assessment

From a whole-person perspective, Applicant has failed to establish enough independent probative evidence of enough time in his rehabilitative efforts to overcome his past abuse of multiple illegal drugs (especially cocaine) to satisfy the eligibility requirements for holding a security clearance or sensitive position. While he is entitled to considerable credit for his contributions to his employer and the defense industry, he lacks enough positive reinforcements and time in abstinence from active use of illegal drugs to facilitate safe predictions he is at no risk of recurrence.

Considering the record as a whole at this time and granting due weight to the positive steps Applicant has taken to sustain his commitments to abstinence from illegal drug use, there is insufficient probative evidence of sustainable mitigation in the record to make safe predictable judgments about Applicant’s ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s drug activities over a five-year period with only two-plus years of sustained abstinence, he does not mitigate security concerns with respect to the allegations covered by SOR ¶¶ 1.a and 2.a-2.b. Mitigation is available to Applicant with respect to the allegations covered by SOR ¶ 3.a.

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 criminal conduct and drug involvement security concerns are not mitigated. Allegations pertaining to alcohol consumption are 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 J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
GUIDELINE G (ALCOHOL CONSUMPTION):	FOR APPLICANT

Subparagraph 3.a:

For 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. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge