



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



In the matter of:)	
)	
)	ISCR Case No. 06-20892
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

January 28, 2008

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant has failed to rebut or mitigate the Government’s security concerns under the Criminal Conduct, Alcohol Consumption, and Drug Involvement adjudicative guidelines. His eligibility for a security clearance is denied.

Applicant submitted his Security Clearance Application (SF 86), on June 13, 2005. On March 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline H (Drug Involvement). DOHA’s action was taken pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 13, 2007 and July 11, 2007. In his answer, Applicant requested that his case be determined on the record in lieu of a

hearing. The Government compiled its File of Relevant Material (FORM) on October 24, 2007. The FORM contained documents identified as Items 1 through 10. A copy of the FORM was provided to Applicant on October 29, 2007, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on November 7, 2007. He did not file any additional information within the required time period. On January 15, 2007, the case was assigned to me for a decision.

Findings of Fact

The SOR contains three allegations of disqualifying conduct under Guideline J, Criminal Conduct, two allegations of disqualifying conduct under Guideline G, Alcohol Consumption, and three allegations under Guideline H, Drug Involvement. (Item 1.) Applicant admitted all allegations in the SOR, with explanations. He also provided additional information to support his request for a security clearance. (Items 3 and 4.) His admissions are incorporated herein as findings of fact.

Applicant is 30 years old, single, and employed as an applications engineer by a Federal contractor. He served on active duty in the U.S. Marine Corps from 1996 to 2000. He received an honorable discharge. From January 2000 to February 2003, he served in the Marine Corps Reserve. He has worked for the same employer since February 2001.

Applicant completed a security clearance application (SF-86) on June 13, 2005. In response to Question 31 on the SF-86, Applicant stated he was granted a secret level security clearance in April 2001. In response to Question 27 on the SF-86, Applicant admitted illegal use of marijuana approximately four times between January 1, 2001 and January 1, 2004. The record does not specify whether Applicant held an active security clearance at the time he completed his SF-86 in June 2005. Applicant used marijuana approximately two times in March 2006 to relieve pain from knee surgery. Although a physician had prescribed pain medication, he elected not to use it and to self-medicate with marijuana instead. (Items 5 and 7; SOR ¶¶ 3.a., 3.b., and 3.c.)

On about December 11, 2003, Applicant was arrested and charged with (1) DUI of Alcohol and/or Drugs with Allegation of Willfully Refusing Police Officer's Request to Submit to a Chemical Test to determine Alcohol Content, (2) Driving While Having 0.08 Percent or More of Alcohol in Blood with Allegation of Willfully Refusing A Police Officer's Request to Submit to a Chemical Test to Determine Alcohol Content, and (3) Possession of less than 10 ounces of marijuana. On April 24, 2004, Applicant pled guilty to DUI of Alcohol and/or Drugs with Allegation of Willfully Refusing Police Officer's Request to Submit to a Chemical Test to Determine Alcohol Content. The other charges were dismissed. Applicant was sentenced to serve 180 days in custody, suspended for five years, required to pay a fine of \$1,760, to abstain from driving with any measurable amount of alcohol in his system, and to submit to any alcohol/drug test request of a police officer. He was also required to attend a three-month first conviction alcohol counseling program and to attend a Mothers Against Drunk Driving program. His driver's license was restricted. (Items 6, 7, 8; SOR ¶¶ 1.c. and 2.a.)

On about June 18, 2005, Applicant was arrested and charged with Disorderly Conduct; Drunk in Public. (Item 7; SOR ¶¶ 1.b. and 2.a.)

On about January 15, 2006, Applicant was arrested and charged with Driving Under the Influence (DUI) of Alcohol. He stated he was sick on or about January 15, 2006 and had consumed NyQuil before the arrest. He was found guilty and sentenced to four days in jail, a fine of \$2,400, and a Mothers Against Drunk Driving session. He was also ordered by the court to attend a three-month alcohol counseling program, which he completed. (Items 8 and 9; SOR ¶¶ 1.a., 2.a., 2.b.)

In notarized responses to interrogatories from DOHA, Applicant stated, in December 2006, that he drank alcohol, but not to intoxication. He stated he intended to drink alcohol in the future. He stated he had stopped using illegal drugs. He also stated: "I never took illegal drugs enough to affect my lifestyle." (Item 7 at 9.)

Applicant sought mental health counseling from a licensed clinical social worker for anxiety and stress in about June 2006. His counselor sent him to a physician for a diagnosis. The physician determined that Applicant suffered from depression, and he prescribed an anti-depressant. Applicant met with the physician and the counselor from July to December 2006. In January 2007, the counselor provided a letter for the record in which he reported that Applicant had resolved the issues for which he sought treatment. The counselor concluded: "I do not believe [Applicant] is currently suffering from any condition known by me at this time which is impairing his judgment or reliability." (Items 3, 7, 8.) Applicant's treatment did not include diagnoses for alcohol or drug dependence or abuse.

In response to the SOR, Applicant stated that in March 2007 he had voluntarily enrolled in an 18-month alcohol/drug counseling program that included weekly attendance at Alcoholics Anonymous meetings. (Item 3, Item 4.)

Applicant provided a copy of his performance evaluation for the review period beginning in February 2006 and ending in February 2007. Applicant's supervisor praised his technical expertise and stated: "When focused, [Applicant] consistently achieves high standards for himself and members of his team. [Applicant] is a valuable member of [the company's] team." (Item 3 at 9.)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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 national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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 J, Criminal Conduct

The Government’s concern under the Criminal Conduct revised adjudicative guideline is that a history or pattern of criminal activity creates doubt about an individual’s judgment, reliability, and trustworthiness. Criminal conduct also raises doubts about a person’s ability or willingness to comply with laws, rules, and regulations. Guideline J, ¶ 30.

Two conditions could raise a security concern and may be disqualifying: Disqualifying Condition (DC) 31(a): *a single serious crime or multiple lesser offenses* and DC 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*. The record in this case

shows that Applicant was arrested in 2003, 2005, and 2006 for alcohol-related offenses. In 2003, he was arrested and charged with DUI. He received a sentence of four days in jail and a fine of \$2,400. He was also required to attend a Mothers Against Drunk Driving session, and he was ordered to attend a three-month alcohol counseling program. In 2005, he was arrested and charged with Disorderly Conduct; Drunk in Public. In December 2006, he was again arrested and charged with DUI and again ordered to attend a three-month alcohol counseling program. Applicant's admitted criminal activity raises security concerns under Disqualifying Conditions (DC) 31(a) and 31(d)¹ of Guideline J.

Two mitigating conditions under Guideline J might apply to the facts of Applicant's case. Applicant's admitted criminal conduct might be mitigated under Mitigating Condition (MC) 32(a) if he provided credible evidence to show that *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.* Applicant's admitted criminal activity, however, is recent and raises concerns about his reliability, trustworthiness, and good judgment. He provided no credible evidence to substantiate a conclusion that the conduct is unlikely to recur. Accordingly, I conclude MC 32(a) is inapplicable.

Applicant's admitted criminal conduct might be mitigated under MC 32(d) if he provided *evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.* Applicant failed, however, to show that sufficient time had passed to reasonably conclude his criminal activity had ceased and would not be repeated in the future. While he presented a good performance evaluation for the period beginning in February 2006 and ending in February 2007, he also admitted illegal use of marijuana and during that time. Accordingly, I conclude the evidence fails to show successful rehabilitation and MC 32(d) does not apply.

Guideline G, Alcohol Consumption

Excessive alcohol consumption raises security concerns because it often leads to the exercise of questionable judgment or the failure to control impulses, thus raising questions about an individual's reliability and trustworthiness. Guideline G, ¶ 21.

The record evidence and Applicant's admissions show he was arrested three times between 2003 and 2006 and charged with alcohol-related offenses. After his 2003 and 2006 arrests, he was directed by the court to enroll in three-month alcohol counseling programs. He provided evidence he had completed the 2006 program, and he claimed he no longer consumed alcohol to excess. He provided evidence he had enrolled in March 2007 in an 18-month alcohol and drug counseling program. However, he provided no credible evidence to corroborate his claim of temperate consumption of alcohol.

¹DC 31(a) reads: "a single serious crime or multiple lesser offenses." DC 31(d) reads: "individual is currently on parole or probation."

The alcohol-related conduct alleged in the SOR and admitted by Applicant raises concerns under Disqualifying Condition (DC) 22(a) and (DC) 22(c).² His three alcohol arrests away from work raise concerns under DC 22(a). His admitted consumption of alcohol to excess and sometimes to the point of intoxication raises concerns under DC 22(c).

Under Guideline G, there are four mitigating conditions that could apply to Applicant's disqualifying conduct. An applicant might mitigate disqualifying conduct under Mitigating Condition (MC) 23(a) of Guideline G if he provided credible evidence to show that *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 good judgment.* An applicant might also mitigate disqualifying conduct under MC 23(b) by acknowledging *his or her alcoholism or issues of alcohol abuse, provid[ing] evidence of actions taken to overcome this problem, and. . . establish[ing] a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).*

If an applicant *is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress,* he might be able to provide evidence of mitigation under MC 23 (c). Finally, MC 23(d) might apply if *the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.*

Applicant's admitted excessive use of alcohol resulted in three alcohol-related arrests: in 2003, 2005, and 2006. Thus, his disqualifying behavior was not infrequent, and his most recent arrest occurred approximately two years ago. Applicant failed to provide credible evidence that the conduct was not habitual, unlikely to recur, and does not lead to concerns about his current reliability, trustworthiness, and good judgment. While he provided evidence he had completed a three-month alcohol counseling program, as ordered by the court, and he had voluntarily enrolled in an 18-month alcohol/drug counseling program in March 2007, he failed to provide credible evidence of an established pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser). Accordingly, I conclude that MC 23(a) and MC 23(b) are inapplicable.

Additionally, while Applicant is currently participating in an alcohol/drug counseling program, he failed to provide evidence to show he had no previous treatment for alcohol dependence or abuse and had no history of relapse. While he provided evidence he

²DC 22(a) reads: "alcohol-related incidents away from work, such as driving while under the influence, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent." DC 22(c) reads: "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent."

had successfully completed a court-ordered alcohol counseling program, he failed to provide evidence of a demonstrated pattern of modified consumption or abstinence in accord with treatment recommendations. Additionally, he failed to show participation in a recommended program of aftercare or to provide evidence of a favorable prognosis. Accordingly, I conclude MC 23(c) and MC 23(d) are inapplicable. No other MCs apply.

Guideline H, Drug Involvement

An individual's use of an illegal drug or misuse of a prescription drug raises questions of reliability and trustworthiness because drug use or misuse can impair judgment and raise questions about the person's ability or willingness to comply with laws, rules, and regulations. Guideline H, ¶ 24. Guideline H defines drugs as *mood and behavior altering substances*. . . . Drugs include: (1) *Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances*. Guideline H, ¶ 24(a)(1) and ¶ 24(a)(2). The Guideline further defines drug abuse as *the illegal use of drug or use of a legal drug in a manner that deviates from approved medical direction*. Guideline H, ¶ 24(b).

Applicant admitted using marijuana, an illegal drug, with varying frequency, from about January 2001 to about January 2004, and in 2006. He was charged with possession of marijuana in 2003, and he used marijuana after being granted a security clearance in 2001 and after submitting his application for a security clearance in 2005.

Applicant's conduct raises security concerns under Disqualifying Condition (DC) 25(a), (DC) 25(c), and (DC) 25(g) of Guideline H.

Several Mitigating Conditions (MC) under Guideline H might be applicable to Applicant's case. If the drug abuse 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*, then MC 26(a) might apply. If Applicant intended not to abuse drugs in the future and demonstrated that intent in one of the four ways specified in the Guideline, then MC 26 (b) might apply.³ Additionally, drug abuse that is of security concern can be mitigated under MC 26(d) by *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*.

The record shows that Applicant's marijuana abuse began in about 2001 and continued intermittently to 2006. Thus, his drug abuse is recent, and Applicant provided no credible evidence to corroborate his assertion that he no longer uses drugs and has

³Specific examples of demonstrated intent that might apply under MC26(b) are as follows: (1) *disassociation from drug-using associates and contacts*; (2) *changing or avoiding the environment where drugs were used*; (3) *an appropriate period of abstinence*; and (4) *a signed statement of intent with automatic revocation of clearance for any violation*.

no intent to use them in the future.⁴ Applicant failed to provide evidence he had satisfactorily completed a prescribed drug treatment program. None of the Guideline H MCs apply to Applicant's use of marijuana.

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) 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's admissions and the record evidence establish recent criminal activity, excessive use of alcohol, and illegal drug involvement. While he presented a positive performance evaluation for the period of 2006 and 2007, the record shows he was also using marijuana during part of that time. Applicant's use of marijuana in 2006 occurred when he elected not to use medication prescribed by his physician and decided to self-medicate with marijuana instead. When he was sick in January 2006, he had elected to consume NyQuil, which he stated led to his arrest for DUI.

Applicant's tendency to self-medicate raises unresolved security concerns about his ability to avoid illegal drugs and to use alcohol responsibly. It also raises concerns about his judgment, reliability, and trustworthiness.

Applicant's abuse of alcohol and illegal drugs is recent. Insufficient time has passed for him to demonstrate credible rehabilitation and resolve to avoid excessive use of alcohol and avoidance of illegal drugs. However, he is to be commended for voluntarily undertaking an 18-month DUIP program, which began in March 2007 and will be completed in September 2008. With the passage of time and consistent good faith rehabilitative efforts, he might establish in the future that he is reliable, trustworthy, and merits a security clearance. At the present time, however, Applicant has failed to demonstrate that he is not a security risk.

⁴Applicant provided credible evidence from his therapist that he no longer suffered from stress anxiety and depression.

In ISCR Case No. 98-0761 at 3 (Dec.27, 1999), DOHA's Appeal Board states that an administrative judge, in deciding an Applicant's security worthiness, "must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*." I have considered the record as a whole and have evaluated Applicant's conduct under the whole person concept of the Directive. I conclude that he has failed to demonstrate that it is clearly consistent with the national interest to grant him a security clearance.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Paragraph 2, Guideline G	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	Against Applicant
Paragraph 3, Guideline H	AGAINST APPLICANT
Subparagraph 3.a.:	Against Applicant
Subparagraph 3.b.:	Against Applicant
Subparagraph 3.c.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JOAN CATON ANTHONY
Administrative Judge