



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



In the matter of:)
)
) ISCR Case No. 12-08141
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/28/2016

Decision

CERVI, Gregg A., Administrative Judge:

Applicant has not mitigated the alcohol consumption, drug involvement, and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on March 27, 2012. On December 4, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR)² to Applicant detailing security concerns under the Guidelines G: Alcohol Consumption; H: Drug Involvement; and E: Personal Conduct.³

¹ Also known as a Security Clearance Application (SCA).

² Item 1. (SOR)

³ The action was taken 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) implemented by the DoD on September 1, 2006.

Applicant responded to the SOR on December 31, 2014,⁴ and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on May 7, 2015.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit documentary material to refute, extenuate, mitigate or explain the security concerns. Applicant received the FORM on May 28, 2015. He did not submit a response to the FORM, nor did he assert any objections to the Government's evidence.

The case was assigned to me on March 1, 2016. The Government's exhibits included in the FORM (Items 1 to 4) are admitted into evidence.

Findings of Fact

The SOR alleges five alcohol-related arrests and one arrest involving drug possession; two incidents of suspension from work due to alcohol use; three opportunities for alcohol and/or drug treatment resulting in diagnoses of alcohol abuser and alcohol dependent; use of marijuana over a period of many years, most recently between 2012 and 2014 while holding a security clearance; and failure to report recent alcohol-related arrests to his facility security officer.

Applicant admitted all of the SOR allegations except for SOR ¶ 2.a, which alleged use of marijuana with varying frequency from about 1970 to about 1995. He denied the allegation, however his denial contradicts a sworn statement he made in 2001 wherein he stated "I smoke (sic) marijuana from about 1970 to Feb 1995."⁵ The SOR allegations are supported by Applicant's SCA, summaries of interviews (PSIs), sworn statement, and his responses to the Government's interrogatories.⁶ Under Guideline E, Applicant failed to answer the cross-alleged allegation, listed as SOR ¶ 3.a, but admitted the underlying allegation related to use of marijuana while possessing a security clearance – alleged in SOR 2.d.⁷

No documentary evidence was submitted with Applicant's Answer or in response to the SOR or this FORM, although he supplied several documents with his response to Government interrogatories to include some police and court records, and records related to his alcohol and drug counseling.⁸ Since Applicant and Department Counsel

⁴ Item 1. (Answer)

⁵ Item 4.

⁶ Items 2–4.

⁷ Item 1.

⁸ Item 3.

elected to proceed with a decision without a hearing, I was unable to evaluate Applicant's credibility and demeanor, or to make further inquiry into his drug and alcohol history, and his current status.

Applicant is a 60-year-old pipe welder for a defense contractor since 1974. He has not served in the military but has held a security clearance since at least 2002. He earned his GED degree in 2000 and is unmarried.⁹

The record reflects that Applicant has a long history of alcohol-related arrests, from 1985 to 2013. He has undergone alcohol-related treatment from 1995 to 2014 in various forms including inpatient, outpatient, court-ordered counseling, and employer-provided treatment. Applicant was twice suspended by his employer after reporting to work while under the influence of alcohol. In 2000, he was ordered to undergo alcohol treatment in lieu of termination.¹⁰ Applicant checked into a treatment center for a 30-day detox program, but left on his own without completing the program because he believed he had achieved all the benefits he needed.¹¹ As a result of inpatient treatment, Applicant was diagnosed an alcohol abuser in 1995, and alcohol dependent in 2000. Up until 2000, Applicant believed he had a significant drinking problem that affected his relationships and work performance.¹² Despite this, he resumed drinking in 2010.¹³

Most recently, he was arrested for driving under the Influence (DUI) in 2011 and 2013. He admitted that he did not disclose these arrests to his facility security officer (FSO) as required by DoD personnel security regulations,¹⁴ however he indicated that he was unaware of this requirement.¹⁵

⁹ Items 2 and 3.

¹⁰ Item 1.

¹¹ Item 3 (May 8, 2012 PSI).

¹² Item 3. In an interview summarized by an OPM investigator, Applicant acknowledged that he was too busy drinking to work on relationships. He would be hung-over at work and call in sick. He would not save any money but spend it at the bars.

¹³ Item 3 (May 8, 2012 PSI).

¹⁴ Personnel Security Program, DoD 5200.2-R, ¶ C9.1.4–C9.1.4.2.2 (“Individuals must familiarize themselves with pertinent security regulations that pertain to their assigned duties. Further, individuals must be aware of the standards of conduct required of persons holding positions of trust in this connection, individuals must recognize and avoid the kind of personal behavior that would result in rendering one ineligible for continued assignment in a position of trust. In the final analysis, the ultimate responsibility for maintaining continued eligibility for a position of trust rests with the individual. . . . Moreover, individuals having access to classified information must report promptly to their security office: . . . Any information of the type referred to in paragraph C2.2.1. or Appendix 8.”)

¹⁵ Item 3. No evidence has been offered to show that he knew or should have known of the reporting requirement.

His last arrest for DUI in August 2013, resulted in a conviction and sentence to include the mandatory use of an ignition interlock device along with alcohol counseling. In his response to interrogatories, he stated that he stopped drinking in December 2013 as a result of this DUI arrest. In April 2014, Applicant checked into outpatient alcohol and drug dependence treatment. At the initiation of treatment in January 2014, he was tested for drugs and alcohol.¹⁶ This test reported a positive result for THC.¹⁷ Throughout the remainder of his treatment, he tested negative for alcohol and illegal substances, and successfully completed the program in April 2014.

The record indicates that Applicant also has a long history of marijuana use. He stated that he used marijuana from about 1970 to February 1995.¹⁸ He was arrested and charged with possession of marijuana in 1984.¹⁹ Applicant used marijuana occasionally on weekends from the late 1980s to the late 1990s.²⁰ He stopped use from 2000 to 2012. He again began using in November 2012 to December 2012 to help him sleep.²¹ Most recently, he admitted to use from 2012 to January 2014.²² During this period of renewed drug use, he held a DoD security clearance. Applicant began this additional period of marijuana use just eight months after completing his current SCA and only six months after being interviewed by an OPM investigator for his clearance renewal.²³

Applicant now claims that he has no intention of using alcohol or marijuana again and is attending Alcoholics Anonymous meetings.²⁴

¹⁶ The SOR did not allege a concern for testing positive for illegal drug use. I am only considering this non-alleged conduct, as with all such information, in assessing Applicants mitigation case, credibility and whole-person factors.

¹⁷ THC is an abbreviation for tetrahydrocannabinol: the active ingredient in cannabis, giving it its narcotic and psychoactive effects. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/thc> (accessed: March 11, 2016).

¹⁸ Item 4.

¹⁹ Items 1-4.

²⁰ Item 3.

²¹ Item 3.

²² Item 1.

²³ Items 2-3. Applicant completed his SCA on March 27, 2012, and was interviewed by an OPM investigator in May, 2012. The SCA and interview included inquiries into illegal drug use.

²⁴ Item 3 (response to drug interrogatories).

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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 clearance decision.²⁵ In *Department of Navy v. Egan*²⁶, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁷

The protection of the 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." It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.²⁸

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive and classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or

²⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan.27, 1995).

²⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²⁷ *Egan*, 484 U.S. at 531.

²⁸ *Egan*, 484 U.S. at 531.

inadvertently fail to safeguard sensitive or classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive or 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 concern under this guideline 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. Based on the evidence, I find that the following disqualifying conditions apply:

AG ¶ 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(b): alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and

AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

Applicant has a long history of alcohol-related incidents, including five arrests and two suspensions by his employer after reporting to work while under the influence of alcohol. He has undergone alcohol-related treatments to include inpatient, outpatient, court-ordered counseling, and employer-provided treatment. Applicant was diagnosed an alcohol abuser in 1995 and alcohol dependent in 2000. Most recently, he was arrested for DUI in 2011 and 2013.

The following mitigating conditions are potentially relevant:

AG ¶ 23(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 good judgment;

AG ¶ 23(b): the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

AG ¶ 23(c): the individual 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; and

AG ¶ 23(d): 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.

Although Applicant has been offered several alcohol-treatment opportunities,²⁹ he has a history of returning to alcohol abuse despite diagnoses of alcohol abuser and alcohol dependence. In addition, he failed to complete employer-sponsored treatment in 2000, returned to drinking in 2010, and was again arrested for DUI in 2011 and 2013. Applicant has provided little documentary evidence of the likelihood of successfully conquering his alcohol abuse problems, establishing a pattern of abstinence, and eliminating relapses. Although this may be difficult to prove in the abstract, his past behavior weighs heavily against current promises to abstain from drinking and to continue participation in an alcohol treatment program.

Based on the evidence presented, I find Applicant's long history of treatment and relapse, combined with numerous DUI arrests and two suspensions from work, leave me with significant doubts about Applicant's overall ability or willingness to face his alcohol dependence problems and remain free from future alcohol-related incidents. No mitigating condition has been fully satisfied.

²⁹ Attending alcohol and drug treatment alone does not suggest a security concern. E.g., SOR ¶ 1.j.

Guideline H: Drug Involvement

The concern under this guideline is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Drugs are defined in AG ¶ 24(a)(1) as "[d]rugs, 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).

The guideline notes several conditions that could raise security concerns. Based on the evidence, I find that the following disqualifying conditions apply:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction";

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

Applicant has a long history of marijuana use to include an arrest for possession of marijuana and testing positive for THC. More recently, he admitted to using marijuana from November 2012 to January 2014 while holding a security clearance.

The following mitigating conditions are potentially relevant:

AG ¶ 26(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;

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (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; and

AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare

requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Based on the record evidence, no mitigating conditions are applicable. Applicant has a long history of marijuana use, to include periods of abstinence and relapse. I am unable to make a determination as to his current circumstances with regard to substance abuse. Although Applicant claims that he stopped using marijuana after completion of his most recent substance abuse treatment program and purportedly attends Alcoholics Anonymous, his long history of substance abuse and relatively recent drug use, including while holding a security clearance, outweigh his claim of abstinence.

Guideline E (Personal Conduct)

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Based on the evidence, I find that the following disqualifying condition applies:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant admitted the underlying allegation related to SOR ¶ 3.a (Use of marijuana while possessing a security clearance – listed as SOR 2.d). The remaining Guideline E allegation relates to his failure to report his two most recent DUI arrests to his facility security officer as required by DoD security regulations for cleared personnel. Although Applicant admitted the allegation, he denied knowledge of the reporting requirement. No evidence has been offered that Applicant had knowledge of the requirement to report.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(b): the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

As a long-standing holder of a security clearance, Applicant is expected to have general knowledge of the rules and regulations surrounding his clearance, to include recognition of behaviors and incidents that have the potential to impact that clearance. These behaviors and incidents are typically the subject of inquiry when applying or renewing one's clearance. The totality of the Applicant's conduct indicates poor judgment, unreliability, and untrustworthiness. AG ¶¶ 17(d) and (e) have limited applicability to Applicant's situation in that he has recently completed an alcohol and drug counseling program and claims to be abstaining from further drug use. However, little information has been provided to show the extent of Applicant's efforts to change his lifestyle, to live and work without the use of illegal drugs and alcohol, and the current results of those efforts. Without more evidence, full mitigation credit is not appropriate.

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(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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 all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated the evidence, my findings of fact and comments under Guidelines G, H, and E in this whole-person analysis.

Because of the broad scope and serious nature of the Applicant's conduct over a period of years, I conclude that Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's concerns. His behavior casts doubts on his current reliability, trustworthiness, and good judgment. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the Government's security concerns.

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.i:	Against Applicant
Subparagraph 1.j:	For Applicant
Paragraph 2, Guideline H:	Against Applicant
Subparagraphs 2.a - 2.d:	Against Applicant

Paragraph 3, Guideline E: Against Applicant

 Subparagraph 3.a: Against Applicant

 Subparagraph 3.b: 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.

Gregg A. Cervi
Administrative Judge