



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 13-00991
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/28/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement), G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on May 23, 2012. On October 1, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, G, J, and E. The DOD acted under Executive Order 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 DOD on September 1, 2006.

Applicant received the SOR on October 9, 2013; answered it on October 25, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 17, 2013, and the case was assigned to me on December 19, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a

notice of hearing on January 13, 2014, scheduling the hearing for February 19, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or documentary evidence. I kept the record open until February 28, 2014, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. Department Counsel's comments regarding AX A through C are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on February 27, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR, with explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old employee of a federal contractor. He works as a subject-matter expert on submarine tactical navigation systems. He has worked for his current employer since April 2012. He served on active duty in the U.S. Navy from August 1980 to August 1986 and received an honorable discharge. He worked as a project manager for another federal employer from February 1989 to November 2011, when he was fired after his urinalysis tested positive for marijuana. He was unemployed from November 2011 until he began his current job. He first received a security clearance in September 1980, while in the Navy, and he kept it until he was fired in November 2011.

Applicant married in April 1982 and divorced in May 2006. He reconciled with his former spouse and they began cohabiting in August 2008. They have two adult children, ages 25 and 28, who live with them. (Tr. 28.)

During a personal subject interview (PSI) in September 2012, Applicant disclosed that in approximately October 2002, he was driving after drinking with a friend and he collided with an oncoming car while making a left turn. He was arrested and spent two days in jail. He was required to complete an eight-week alcohol education course and his driver's license was suspended. (GX 5 at 10.)

In June 2011, Applicant consumed about six beers while helping a friend move. While driving home, Applicant drove into a ditch and hit a tree. He was charged with driving under the influence (second offense) resulting in an accident, a misdemeanor. He had a concealed weapon with him, and he was charged with a concealed-weapon violation because his permit did not allow him to possess a concealed weapon while intoxicated. In March 2012, he was convicted of DUI and the concealed-weapon violation, and he was sentenced to 90 days in jail, with 60 days suspended, fined \$500, his driver's license was restricted for three years, and he was required to complete a 24-week alcohol education course. (GX 2; GX 3; GX 5 at 9-10.) His concealed-weapon permit was revoked for five years. (Tr. 42.) He served his jail sentence on weekends. (Tr. 32.)

The restricted-license order was modified in July 2012, and Applicant was required to install an ignition interlock system on his car. The interlock system was installed in September 2012. As a result of an interlock violation in early 2013, Applicant was enrolled in an intensive outpatient treatment group, consisting of eight one-hour sessions, which he completed in July 2013. (GX 5 at 17-19.) He testified that his alcohol consumption is now down to a couple beers after work. (Tr. 34.)

On November 4, 2011, Applicant tested positive for marijuana. In his PSI and at the hearing, he stated that he was notified on a Friday that all employees would be tested for marijuana on the following Monday. On Saturday, Applicant's adult children held a party at his house. Applicant attended the party and consumed enough alcohol to feel "relaxed and silly." He testified that on Sunday, his daughter told him that someone had brought cookies laced with marijuana to the party. He had consumed about five of the cookies.

On Monday, Applicant took the marijuana test, which tested positive. After being informed of the positive test several days later, he wrote a letter to his employer, claiming innocent ingestion, but his employer terminated him. (GX 1 at 29; GX 4; GX 5 at 8.) After the hearing, Applicant's son submitted a statement attributing Applicant's positive urinalysis to a practical joke at the party, aimed at attendees other than Applicant. (AX A.)

Applicant testified that, when his daughter told him that he had been tricked into consuming marijuana, it did not occur to him to notify someone at work about his innocent ingestion, either before the urinalysis or before the results were received. He testified, "I just kind of hoped for the best." (Tr. 36-37.)

Applicant testified that he tried marijuana when he was 16 or 17, but he has never used marijuana since he enlisted in the Navy, except for the innocent ingestion at the party. His 25-year-old son has used marijuana in the past, but there is no marijuana in their household. (Tr. 28-29.)

At the time of Applicant's DUI in 2002, his normal alcohol consumption was about four beers every other night and six to eight on the weekend. (Tr. 30.) He drank more moderately after his DUI conviction for about three months, and then resumed his previous level of consumption. He has never been diagnosed as alcohol dependent. (Tr. 38.)

One of Applicant's subordinates, who has known and worked with him for 20 years, submitted a statement describing him as "a solid and trustworthy person. (AX C.) A Navy engineer, who has known Applicant since 1999 and for whom Applicant provides contractor support, submitted a statement describing Applicant's expertise, dedication, and dependability. (AX A.) He stated:

[Applicant] was and is the sort of person with whom I've worked easily and comfortably for years. I have and will continue to trust in his ability to

support me in the work that I do for the US Navy, supporting the systems that he knows uniquely and expertly. I trust him to do his best for his company, myself, and the US Navy we both serve.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

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 that 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 made “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. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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

Guideline H, Drug Involvement

The SOR alleges that, on or about November 4, 2011, Applicant tested positive for marijuana while holding a security clearance (SOR ¶ 1.a). 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).”

Applicant claims that his positive urinalysis was the result of innocent ingestion of marijuana. I found his explanation implausible and unpersuasive. His daughter told him about the marijuana cookies the day before the urinalysis, but he gave no cogent, plausible, or credible explanation for not telling his supervisors about the innocent ingestion before the urinalysis or before the results were received. His positive urinalysis establishes the following disqualifying conditions under this guideline:

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(b): testing positive for illegal drug use;

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.

The mitigating condition in AG ¶ 26(a) is potentially relevant: “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.” Applicant’s positive urinalysis was more than two years ago and it is the only instance of drug abuse in his record. However, it occurred shortly after his DUI arrest, and it was followed by his interlock violation.¹ These multiple instances of substance abuse, coupled with his implausible explanation for his positive urinalysis, cast doubt on his current reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 26(a) is not established. No other enumerated mitigating conditions are established.

Guideline G, Alcohol Consumption

The SOR alleges that Applicant was charged with DUI in June 2011 and convicted in March 2012 (SOR ¶ 2.a), and charged with and convicted of DUI in October 2002 (SOR ¶ 2.b). 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.”

Applicant’s two DUI convictions establish the following disqualifying conditions under this guideline:

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; and

AG ¶ 22(c): 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.

Applicant has never been diagnosed as an alcohol abuser or alcohol dependent. Therefore, no other disqualifying conditions are established.

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;

¹ The interlock violation was not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the interlock violation for these limited purposes.

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); 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.

The first prong of AG ¶ 23(a) (“so much time has passed”) focuses on whether the conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). Applicant’s arrest for DUI was almost three years ago, but it was followed by his positive urinalysis in November 2011 and an interlock violation in early 2013. His driver’s license will be restricted until March 2015. He did not complete the additional counseling as a result of his interlock violation until July 2013, less than a year ago. I conclude that Applicant’s conduct is recent. His DUI was arguably infrequent, because his previous DUI was at least nine years earlier. His most recent DUI did not occur “under such unusual circumstances that it is unlikely to recur.” I conclude that AG ¶ 23(a) is not established.

AG ¶ 23(b) is not fully established. Applicant has acknowledged that he has issues of alcohol abuse. He has completed all court-ordered education and counseling. He has reduced his alcohol consumption to a moderate level. However, for the reasons set out in the above discussion of AG ¶ 23(a), I am not convinced that sufficient time has passed to establish a pattern of responsible alcohol use.

AG ¶ 23(d) is not fully established. Applicant has completed all court-ordered counseling, education, and treatment, but he has not yet demonstrated a “clear and established pattern of modified consumption.” He has not received a favorable prognosis from a qualified medical professional or a licensed clinical social worker.

Guideline J, Criminal Conduct

The SOR cross-alleges the conduct under Guidelines H and G under this guideline (SOR ¶ 3.a), and it alleges that Applicant was arrested, charged, convicted,

and sentenced for a concealed-weapon offense (SOR ¶ 3.b). Applicant's second DUI and the concealed-weapon violation arose from the same incident. The concern raised by criminal conduct is set out in AG ¶ 30: "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."

Disqualifying conditions under this guideline include AG ¶ 31(a) ("a single serious crime or multiple lesser offenses") and AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted"). Applicant's DUI convictions and the concealed-weapon conviction establish these disqualifying conditions.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is 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.

Neither of these mitigating conditions is established. Applicant's DUI arrest was almost three years ago, but it was followed by his marijuana use in November 2011 and an interlock violation in early 2013. His driver's license will be restricted until March 2015. His substance abuse has not occurred "under such unusual circumstances that it is unlikely to recur." Insufficient time has passed to mitigate his record of substance abuse.

Guideline E, Personal Conduct

The SOR cross-alleges the allegations under Guidelines H, G, and J under this guideline. 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." The conduct alleged under Guidelines H, G, and J, which is supported by substantial evidence, establishes the following disqualifying conditions under this guideline:

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;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

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.

AG ¶ 17(c) is not established. Applicant's two DUI offenses resulted in collisions that could have inflicted serious injury. His concealed-weapon offense involved inherently dangerous conduct by combining possession of a firearm with intoxication. His use of marijuana while holding a security clearance was a serious breach of trust. His offenses are numerous, recent, and did not occur under unique circumstances.

AG ¶ 17(d) is not fully established. Applicant has acknowledged his DUIs and the concealed-weapon offense. He has not accepted responsibility for using marijuana. He has completed court-ordered alcohol education classes, but he has not voluntarily sought counseling or any other assistance in moderating his use of alcohol.

AG ¶ 17(e) is partially established. Applicant has been candid about his alcohol consumption, but he has not been candid about his marijuana use.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines H, G, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has held a clearance and served the Navy for many years. He is respected for his expertise and dedication. However, his most recent DUI, his interlock violation, his use of marijuana, and his implausible excuse for the positive urinalysis leave me with doubts about his reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines H, G, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement, alcohol consumption, criminal conduct, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Paragraph 2, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	Against Applicant
Paragraph 4, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge