



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



In the matter of:)	
)	
)	ISCR Case No. 14-02478
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: Greg Howard Bell, Esquire

05/27/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on March 25, 2013. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on September 17, 2014, detailing security concerns under Guideline J, Criminal Conduct; Guideline H, Drug Involvement; Guideline G, Alcohol Consumption; and Guideline E, Personal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Trustworthiness determination Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR. Through counsel, he submitted a notarized, written response to the SOR allegations dated October 15, 2014, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on March 9, 2015. Applicant received the FORM on March 20, 2015. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a response dated April 14, 2015. DOHA assigned this case to me, which I received on May 4, 2015. The Government submitted six exhibits, which have been marked as Items 1-6 and admitted into the record. Applicant's response to the SOR has been marked as Item 2, and the SOR has been marked as Item 1. His written response to the FORM is admitted into the record as Applicant Exhibit A (AE A).

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 2.a¹ of the SOR. His admissions are incorporated herein as findings of fact. Hssumed denied the factual allegations in ¶¶ 1.b, 3.a, and 4.a of the SOR.² He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 32 years old, works as an engineer tester for a DOD contractor. Applicant began his current employment in December 2008. Applicant provided copies of his yearly performance evaluations from January 1, 2011 through December 31, 2014. His evaluations reflect acceptable or better performance and an improvement each year up to his recent evaluation of consistently exceeds expectations. His manager praised his work skills, team efforts, and his knowledge. He is well-regarded in the workplace. Applicant also provided letters of recommendation from his supervisor and another manager in his office, who describe Applicant as a hard worker, a trustworthy person dedicated to the mission, and a person of good judgment. They

¹In his response, Applicant admits all the facts in the allegation, including using marijuana while holding a security clearance. While he discusses his 2103 marijuana case and his truthfulness, he does not make any specific reference to the time frame for holding his Air Force security clearance or a subsequent security clearance. It is assumed that he held a valid security clearance when he completed his e-QIP.

²When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

recommend Applicant for a security clearance as Applicant can be trusted to protect the secrets of the United States. They believe the “lapses” he has had do not reflect his true character and trustworthiness. With his response to the FORM, Applicant provided an additional letter of recommendation from a co-worker, who is aware of the incidents raised in the SOR. He also praises Applicant’s work skills and ethics, and he advised that Applicant received counseling about drug use. Applicant stated the same in his response, but he did not provide a report from the psychiatrist.³

Applicant graduated from high school in June 2002. He enlisted and served on active duty in the United States Air Force from June 2003 until December 2008 and in the inactive reserves from December 2008 until June 2011. He received an honorable discharge from the Air Force. Applicant married in 2010. The record does not indicate that he has children.⁴

Over the 2008 July 4th weekend, Applicant and coworkers decided to go out to dinner and later to bars. He consumed too much beer during the course of the evening. Despite being too drunk to drive, Applicant decided to drive. The police stopped him for failure to maintain lane. The police conducted field sobriety tests, which Applicant failed. The police also administered a breathalyzer test (results unknown), then arrested Applicant and charged him with Driving Under the Influence (DUI), a misdemeanor first offense. Applicant later appeared in court, and the court convicted him of DUI. The court sentenced him to community service; fined him between \$2,000 and \$4,000 he estimates; assessed fees; placed him on probation for one year; directed the installation of an interlocking device on his car; and directed he attend a Mother’s Against Drunk Driving meeting. Applicant paid the fines and fees, and he complied with the terms of his sentence. Applicant listed this arrest on his e-QIP.⁵

In January 2013, Applicant drove to a friend’s house. When he left, his friend gave him a small amount of marijuana to use. On his way home, the police stopped him for speeding. When asked about the consumption of alcohol, Applicant admitted to the police that he had consumed some beers, but denied being intoxicated. Applicant also admitted to the police that he possessed a small amount of marijuana. The police arrested and charged him with possession of less than one ounce of marijuana, driving under the influence of alcohol, speeding, and driving without a valid license, all misdemeanor offenses. The record does not contain the police report, and it is unknown if the police conducted field sobriety and breathalyzer tests. Applicant appeared in court in May 2013 with his attorney. Applicant pled guilty to occupying a seat while under the influence,⁶ a violation of a city ordinance, and to possession of less than one ounce of

³Item 2; Item 3; AE A.

⁴Item 3.

⁵Item 3; Item 4; Item 5.

⁶Applicant believes that the reason for this count is that he was under the legal limit for a DUI. Item 4.

marijuana. The court fined him \$1,350 on the alcohol count and \$952 on the marijuana possession, then placed him on 12 months probation for both counts. The court gave Applicant a warning about speeding and dismissed the driving while unlicensed or with expired license count. The court also dismissed the marijuana count. Applicant listed this arrest on his e-QIP.⁷

When he completed his e-QIP, Applicant also acknowledged using marijuana occasionally between June 2009 and January 2013. In his answer, he stated that he used marijuana less than once a year and described his use as experimental. In his answer to the SOR, Applicant submitted a notarized statement stating that he no longer associates with drug users, that he has taken the necessary steps to avoid all environments where drug use occurs; and that he is practicing complete and total abstinence from drug use. He also agreed to testing or monitoring, if deemed necessary, and to the automatic revocation of his clearance, if any violation occurred. Applicant acknowledged that he received a secret level security clearance while on active duty. It is unknown if his Air Force clearance remained active upon his discharge from the service. The investigator noted that the information in his personal subject interview was consistent with his e-QIP information.⁸

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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(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 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

⁷Item 2; Item 3; Item 4; Item 6.

⁸Item 2; Item 3; Item 4.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for 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 an 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

AG ¶ 30 expresses the security concern pertaining to Criminal Conduct, “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 ¶ 31 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and

- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged with and convicted of DUI and pled guilty to occupying a seat in a car under the influence of alcohol. He also pled guilty to possession of less than one ounce of marijuana, an illegal drug, in 2013, and he admitted to the occasional use of marijuana between 2009 and 2013. A security concern has been established under AG ¶¶ 31(a) and 31(c).

The Criminal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 32(a) through ¶ 32(d), and the following are potentially applicable:

(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

(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.

Applicant's last involvement with the police occurred in January 2013, almost two and one-half years ago. Both incidents relate to his use of alcohol and driving, which showed a lack of judgment. Applicant has not been convicted of DUI in seven years, and he is now seven years older. Even so, he did drive after consuming alcohol in 2013, which resulted in a plea to a local ordinance for an alcohol-related driving incident. His decision to drive showed poor judgment. Likewise, his occasional use of marijuana, an illegal drug, showed a lack of judgment. With knowing about his "lapses", his managers opine that he is trustworthy and a person of good judgment as shown by his work ethic. Applicant has a good employment record. In weighing all this evidence, I find that Applicant has mitigated the security concerns under AG ¶ 32(a) as these incidents do not reflect on his current reliability, trustworthiness, and good judgment.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to Drug Involvement:

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.

(a) Drugs are defined as mood and behavior altering substances, and 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) any drug abuse (see above definition);
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

Applicant acknowledged using marijuana on a few occasions between June 2009 and January 2013, when he was arrested for possessing less than one ounce of marijuana. He also admitted that he used marijuana while holding a security clearance. To use marijuana, one must possess it. A security concern has been established under AG ¶¶ 25(a) and 25(c).

The Drug Involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d), and the following are potentially applicable:

- (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;
- (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;
- (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.

Applicant submitted a sworn affidavit indicating that he is abstaining from using marijuana or other illegal drugs, disassociating with drug-using contacts, and agreeing

to an automatic revocation of his clearance for any violation. He also agreed to random testing, but it is beyond the authority of this decision to order random testing. Applicant indicated seeking counseling about drug use, which was verified by his supervisor. The record lacks any evidence of a diagnosis of drug abuse or drug dependence. The fact that Applicant sought counseling is not evidence of either problem, but it does reflect that Applicant was acting responsibly by seeking, at a minimum, an understanding of his behavior. Applicant has not indicated any involvement with drugs since his arrest and plea in 2013. Throughout the clearance application process, Applicant has been forthright about his drug use and his arrests. His signed affidavit that he has been abstinent is credible. Applicant has mitigated security concerns about his drug use under AG ¶¶ 26(a) and 26(b).

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to Alcohol Consumption, “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.”

AG ¶ 22 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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.

Applicant was arrested and charged with DUI in 2008 and 2013 during off duty hours. A security concern is established under AG ¶ 22(a).

The Alcohol Consumption guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 23(a) through ¶ 23(d), and the following are potentially applicable:

(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.

Applicant's first DUI occurred almost seven years ago. Since then, he has been involved in only one alcohol-related incident that occurred almost two and one-half years ago. Although the police arrested Applicant for DUI, he pled guilty to an ordinance violation for occupying a car seat under the influence of alcohol, a much lesser offense. The record lacks any evidence that Applicant is an alcohol abuser, alcohol dependent, or in need of treatment for alcoholism. Applicant is not required to abstain from the

consumption of alcohol to hold a security clearance. However, he must exercise reasonable judgment in his use of alcohol. In the seven years since his first DUI arrest, the record evidence reflects that Applicant exercised better judgment about the use of alcohol. His decision in January 2013 to drive after consuming some alcohol showed a lapse in judgment, a factor to be considered in reaching a decision. Overall, the record reflects his use of alcohol is not excessive, and he does not have a problem with excessive alcohol use. His lapse of judgment in January 2013 does not cast doubt on his current reliability, trustworthiness, or good judgment. Security concerns about Applicant's alcohol consumption are mitigated.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to Personal Conduct:

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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's arrests for speeding and DUI reflect a violation of the rules of motor vehicle laws. His use of marijuana also shows a violation of laws. A security concern is raised under AG ¶ 16(d).

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through AG ¶ 17(g), and the following are potentially applicable:

- (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;
- (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
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Throughout this security clearance process, Applicant has been forthright about his use of marijuana and about his DUI arrests. He made a decision to abstain from drug use and stay away from his drug-using friends, which shows maturity and responsibility. He is well-respected at work for his work ethic and skills. His management considers him trustworthy. His honesty in this process reflects that he can be counted upon to protect classified information. His past conduct cannot be a source of exploitation, manipulation, and duress. He has mitigated the security concerns under AG ¶¶ 17(c) and 17(e). Applicant indicated he sought drug counseling, a fact verified by a coworker. Since he did not provide a report from the counselor or physician, AG ¶ 16(d) is only partially applicable.

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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant knowingly drove his car after drinking too much beer in 2008. The police charged him with DUI, and he accepted responsibility for his conduct by pleading guilty. While he again drove after drinking and admitted his conduct to the police, he pled guilty to violation of a city ordinance, not a DUI. This implies that his level of alcohol consumption did not rise to the level of drunk under the law, and some level of responsible drinking and driving. Applicant chose to use marijuana with friend occasionally. Both his marijuana use and his driving after consuming alcohol raise questions about his judgment.

As already stated, Applicant has been forthright and honest about his conduct during the security clearance application process. The investigator noted that his interview statements were consistent with the information provided on his e-QIP. His managers also find him to be honest. Although Applicant did not testify, the record evidence shows that he is an honest and straight forward individual, who has accepted responsibility for his past conduct and has taken steps to improve himself. He is a responsible individual, who is unlikely to betray the secrets of the United States.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct, alcohol use, marijuana use, and personal conduct under Guidelines J, H, G, and E.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4, Guideline E:	FOR APPLICANT
Subparagraph 4.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is granted.

MARY E. HENRY
Administrative Judge