



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



In the matter of:)
)
-----) ISCR Case No. 08-05541
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Applicant's Father

February 6, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant had an extensive history of drug abuse. He ended his drug abuse in November 2005. He had two alcohol-related incidents, the most recent was on January 26, 2008. Applicant mitigated drug involvement security concerns; however, he failed to mitigate security concerns arising from his alcohol consumption because insufficient time has elapsed since his most recent incident. Eligibility for access to classified information is denied at this time.

Statement of the Case

On April 23, 2007, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (2007 SF 86) (Government Exhibit (GE 1)). On October 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guidelines G (Drug Involvement) and H (Alcohol Consumption). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On November 20, 2008, Applicant signed his SOR response, and he requested a hearing (GE 7). Department Counsel was ready to proceed on December 23, 2008, and the case was assigned to me that same day. At the hearing held on January 26, 2009, Department Counsel offered four exhibits (GEs 1-4) (Transcript (Tr.) 18-19), and Applicant offered three exhibits (Applicant's Exhibit (AE A-C) (Tr. 68, 125-126). There were no objections, and I admitted GEs 1-4 and AEs A-C (Tr. 19-20, 68, 126). Additionally, after the hearing Applicant provided one more exhibit, which was admitted without objection (AE D). I also admitted the hearing notice (GE 5), the SOR (GE 6), and Applicant's SOR response (GE 7). I received the transcript on January 29, 2009.

Findings of Fact¹

In his response to the SOR, Applicant admitted the two alcohol-related arrests in SOR ¶¶ 1.b and 1.c, but contested some of the SOR information in SOR ¶ 1.a about his history of alcohol consumption (GE 7). He also admitted all of the drug-related SOR allegations (SOR ¶¶ 2.a to 2.e), and disclosed some mitigating information about his illegal drug use.² His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 25 years old and has worked for a government contractor since March 2007 as an electrical engineer (Tr. 98, 119, 120).³ He graduated from high school in June 2001 (Tr. 26, 119). He attended a state university from 2001 to December 2006, and did not live at home (Tr. 27-30, 119-120). He received a bachelor of science with a major in electrical engineering (Tr. 121). In February or March 2007, he returned home to live with his parents (Tr. 30, 37). He moved into an apartment in June 2008 and currently lives with a roommate (Tr. 30-31). He has never been married and does not have any children.

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. His response to SOR (GE 7) is the source for the facts in this section unless stated otherwise.

²Department counsel made a motion to amend SOR ¶ 2.b to conform with Applicant's SOR response, as to the date Applicant's drug use terminated. Applicant did not object, and I granted the motion (Tr. 15-16). I made the change to SOR ¶ 2.b and initialed the change (GE 6).

³Applicant's 2007 SF 86 (GE 1) is the source for the facts in this paragraph, unless stated otherwise.

Illegal Drug Use⁴

Applicant used marijuana about 25 times from about May 2000 to November 2005 (Tr. 135, 137-138; SOR ¶ 1.a), cocaine about five times from about March 2004 to August 2005 (Tr. 136, 138-139; SOR ¶ 1.b), opium twice from about July 2003 to fall of 2004 (Tr. 136, 139; SOR ¶ 1.c), methylenedioxymethamphetamine (ecstasy) once in about October 2002 (Tr. 137, 139; SOR ¶ 1.d), and psilocybin (mushrooms) once in December 2001 (Tr. 137, 139; SOR ¶ 1.e). He used illegal drugs primarily because he was curious about the effects of the drugs (Tr. 143-144). Most of the times when he used illegal drugs, he did not consume alcohol in combination with the illegal drugs (Tr. 144-145).

Applicant disclosed his illegal drug use on his security clearance application (Tr. 99). He has not used any illegal drugs since November 2005 (Tr. 99, 152). He continues to associate with his friends who used illegal drugs in college (Tr. 140). In May of 2008, many of his drug-using friends and Applicant attended a wedding (Tr. 141). Applicant was unable to provide the frequency or recency of his contacts with his drug-using friends from college (Tr. 143). The person who gave Applicant the mushrooms is currently located in the same city where Applicant currently lives, and Applicant continues to associate with him (Tr. 156). He has never received counseling for drug abuse (Tr. 145). He does not intend to ever use illegal drugs again (Tr. 152). After the government contractor hired Applicant, he has not been tested for illegal drug use (Tr. 156).

Applicant signed a statement, agreeing that his clearance could be automatically revoked for any illegal drug use, and reiterated that he will not use any illegal drugs in the future (AE D).

Alcohol Consumption

Applicant had two alcohol-related incidents (Tr. 131). The first was in February 2007 and the later one was in January 2008. He last consumed alcohol on March 11, 2008 (Tr. 131). He did not remember passing out from excessive alcohol consumption (Tr. 132). On multiple occasions, he consumed so much alcohol that he had a blackout and could not recall what occurred while he was drinking alcohol (Tr. 132).

In February 2007, while Applicant was at university, he damaged the parking machine that accepts tokens (Tr. 32, 123-124). The campus police arrested Applicant and held him overnight (Tr. 32). The court required him to perform eight hours of community service and placed him on unsupervised probation for one year (Tr. 121). He had to inform authorities if he left the state, or had another incident (Tr. 124). He paid \$1,300 in restitution for the property damage (Tr. 121). He was released from probation in November or December 2007 (Tr. 124). After this incident, he decreased his alcohol consumption, and stopped drinking alcohol during the week (Tr. 114). However, on the

⁴ The sources for the facts in this section are the SOR (GE 6) and Applicant's SOR response (GE 7), unless otherwise stated.

weekends, every once in awhile, he would “cut loose” (Tr. 115). On June 4, 2007, an Office of Personnel Management (OPM) investigator interviewed Applicant (GE 3 at 4-8). Applicant described his outpatient alcohol counseling to the OPM investigator that he received after the February 2007 incident (GE 3 at 7). Applicant advised the OPM investigator, “Since subject’s treatment, subject has minimal use of alcohol, limiting it to one glass of beer/wine with dinner, one time per week” GE 3 at 7).

On January 26, 2008, Applicant was arrested for driving while intoxicated by alcohol (Dul) first offense and refusal to submit to a blood or breath-alcohol test (GE 7). He left a bar about 2:00 am, and arrived at his vehicle at about 3:45 am (Tr. 155). He refused the breath-alcohol test the police offered because he wanted to consult an attorney before submission to the test (Tr. 154). He did not think he was drunk when the police pulled him over (Tr. 155). He pleaded guilty to Dul first offense and his refusal to submit to a blood or breath-alcohol test was nolle prosequi (Tr. 122; GE 2 at 2; GE 7). The court sentenced him to 30 days incarceration (suspended), one year suspended license and a \$300 fine (Tr. 102; GE 2 at 1; GE 7). His lawyer cost \$2,500 (Tr. 113). The license suspension was converted to a restricted license (GE 2 at 1). The restrictions remain in effect from June 18, 2008, until March 9, 2009 (Tr. 123; GE 2 at 1).

The court ordered Applicant to attend 10 weeks of alcohol and safety action program (ASAP) (Tr. 102). The ASAP cost \$400 or \$450 (Tr. 102, 113). ASAP involves classes with about 30 other persons, most also have Duls (Tr. 103). Each ASAP meeting included a breathalyzer test to determine whether there was any detectible alcohol use (Tr. 132-133). Applicant did not test positive for alcohol consumption on any of the ASAP breathalyzer tests (Tr. 134). He learned about the adverse effects of alcohol on the body and mind, as well as the legal and employment problems that result from alcohol abuse (Tr. 104). He learned about the terrible effects of drunk driving on defendants and victims and their families (Tr. 104-105). He signed ASAP’s agreement, which required him to abstain from alcohol consumption for one year (Tr. 103).

The court required Applicant to attend one Alcoholics Anonymous (AA) meeting per week for 16 weeks (Tr. 103, 109). After completing the AA sessions, he did not want to continue with the AA meetings because he thought some AA attendees became emotionally or socially dependent on AA (Tr. 109). He did not make it to the first step of the 12-step AA program (Tr. 154). Some AA attendees focus their social lives on AA meetings, and he did not need AA to resist alcohol consumption (Tr. 110). He preferred to attend classes or hear lecturers discuss the problems from alcohol consumption and to attend group counseling sessions (Tr. 111).

Applicant is required to attend group counseling with an outside medical professional for 16 weeks (Tr. 103, 109). He attends group counseling, which involves discussion between about nine people who have had similar experiences with alcohol (Tr. 108). Applicant is required to pay the cost for a licensed professional counselor (H) with a M.S. degree. H provided three, one-on-one counseling sessions to date (Tr. 103, 129-130). These sessions with H cost over \$100 per hour (Tr. 128). He meets with H once a month, and most recently met with him in January 2009 (Tr. 129). H did not use

a breathalyzer test to check for alcohol use (Tr. 133). H evaluated Applicant and determined he met the criteria for "Alcohol Abuse, 305.00, according [to] the Diagnostic and Statistical Manual of the American Psychiatric Association, version IV-TR (DSM-IV-TR)" (AE C). H noted the February 2007 and January 2008, alcohol-related incidents, and described Applicant's therapeutic efforts; however, he concluded Applicant's past drug use was not relevant and did not mention Applicant's alcohol consumption to the degree to cause blackouts (AE C). H concluded Applicant had a good prognosis and did not "present a safety risk for a security clearance" (AE C).

Applicant recognized that consumption of even a small amount of alcohol can have adverse effects on a person's driving (Tr. 105). Applicant found that abstaining from alcohol consumption was not difficult for him (Tr. 106). After March 2008, he oriented himself towards a more healthy lifestyle (Tr. 113). He runs and lifts weights and can now run 10 miles with no problem (Tr. 114). He feels fantastic (Tr. 114). He is more goal oriented, and ambitious (Tr. 115-116). He wants to continue his education and make other mental and educational self-improvements (Tr. 116-117).

Applicant was very upset and sorry about the 2008 Dul arrest (Tr. 100). He knew his parents were very disappointed about his conduct (Tr. 100). The day after the police released him, he informed his supervisor and then his security officer of the 2008 Dul (Tr. 101). Because his family and employer are aware of his Dul, there is no possibility of extortion (Tr. 117). He described himself as honest, loyal, candid, trustworthy, and reliable (Tr. 117-119). He believed he has learned from his mistakes and would make correct decisions in the future (Tr. 118). After his probation ends in March 2009, he plans to engage in limited, responsible consumption of alcohol (Tr. 157). He would not drink any alcohol before driving (Tr. 157). If the choice was between alcohol consumption and his employment, he would permanently abstain from alcohol consumption (Tr. 158).

Evidence of Lifestyle and Character

Applicant's roommate has known Applicant since they were freshman together in high school (Tr. 85). They did not attend the same college (Tr. 94). He is Applicant's closest friend (Tr. 85). They have shared an apartment since June 14, 2008 (Tr. 85). He has alcohol in their apartment (Tr. 95). Prior to March 2008, he worried about Applicant's excessive alcohol consumption (Tr. 86). He has observed Applicant intoxicated by alcohol, most recently around December 2006 (Tr. 90). In 2008, he and Applicant were at locations where alcohol was served or present and Applicant abstained from all alcohol consumption (Tr. 86, 91). Since December 2006, he has not seen Applicant consume illegal drugs (Tr. 86). After March 2008, Applicant has had a healthier lifestyle and extensively exercised and watched his diet (Tr. 87). Applicant is very disappointed in himself about the adverse effects of his alcohol abuse, and he recognized the necessity for lifestyle changes (Tr. 93-94). Applicant is the most trustworthy person he knows and should have a security clearance (Tr. 88).

Applicant's father (F) has two bachelors degrees, and is employed by the Department of Defense (DoD) (Tr. 25). F has 29 years of federal employment (Tr. 25). F

supervises a significant number of DoD employees with sensitive duties involving classified materials (Tr. 48-49, 53-54). Over his years of federal employment, F has held secret and top secret clearances (Tr. 25). Applicant told F about both incidents involving alcohol. In January 2008, Applicant called F from jail, when he was arrested for Dul (Tr. 32-33). F thought Applicant drank too much alcohol on about six occasions before January 2008 (Tr. 33-36). F attended tailgate parties at Applicant's state university after football games and observed many students consume excessive alcohol (Tr. 33-34). Applicant reduced his alcohol consumption after he began to work for the contractor because of the increased responsibility and the necessity to get up early in the morning for work (Tr. 37-38). F was not aware of Applicant's illegal drug use until 2008, when it became an issue for Applicant's security clearance (Tr. 38-40). Applicant has been around others consuming alcohol at weddings and at his parents' residence when alcohol was available (Tr. 45-48). Despite the availability of alcohol, Applicant did not consume any alcohol (Tr. 45-48). F was adamant that Applicant's alcohol consumption stopped on March 12, 2008 (Tr. 45-48). Applicant has changed since January 2008 (Tr. 47-48). Applicant has lost 50 pounds and is in great physical shape (Tr. 48). F is well aware of the requirements for holding a security clearance and believes Applicant is sufficiently trustworthy and reliable to hold a clearance (Tr. 50-51). Applicant understands the consequences of future alcohol or drug-related problems and he is confident Applicant will not have future problems (Tr. 51-53).

A senior engineering manager (M) was Applicant's original hiring manager in March 2007, and supervised him for the next two years (Tr. 56-57, 75). Applicant told M about his 2007 alcohol-related arrest, and in January 2008 Applicant told M about his Dul almost immediately after the police arrested him (Tr. 58, 65). Applicant's on-duty work performance was not affected by Applicant's consumption of alcohol (Tr. 67). Applicant demonstrated initiative, ambition and drive, establishing himself as an exceptional employee (Tr. 61, 68, 69; AE A, B). For example, he made several impressive design reviews for customers that were superior to presentations made by much more senior employees (Tr. 73). As a result of Applicant's diligence, he received a larger-than-average pay raise of six percent, and a promotion (Tr. 63, 69, 70). Applicant made valuable contributions to the Air Force and his employer (Tr. 63-64, 66-67). After the January 2008 Dul, Applicant went on a health and physical fitness program (Tr. 68). M discussed Applicant's situation and performance with higher management and security, and they determined that Applicant should receive the company's support (Tr. 71-72). M considered Applicant to be honest, loyal, trustworthy and dedicated to the United States (Tr. 60, 65, 73). Applicant has learned from his mistakes and can be trusted with a security clearance (Tr. 74, 82-83). If his clearance is revoked, it will affect the scope of duties; however, the company does not intend to immediately terminate his employment (Tr. 81-83).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 Applicant’s 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 and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, 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 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No.

02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guidelines G (Drug Involvement) and H (Alcohol Consumption) with respect to the allegations set forth in the SOR.

Alcohol Consumption

AG ¶ 21 articulates the Government’s concern about alcohol consumption, “[e]xcessive 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.”

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

- (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;
- (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;
- (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;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
- (e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b), 22(d), 22(e), 22(f) and 22(g) do not apply. He did not consume alcohol at work or have any alcohol-related incidents at work. Applicant's alcohol consumption problem was not diagnosed or evaluated by a qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) or by a licensed clinical social worker. (The government did not establish that Mr. H is a licensed clinical social worker, or other explicitly listed medical professional.) Although he received alcohol counseling in 2007, he did not receive the benefits of a significant alcohol treatment program. The alcohol counseling he received in 2007 was too superficial to apply AG ¶ 22(f). He did not violate any court orders.

Applicant had two alcohol-related incidents. In February 2007, he damaged college property while intoxicated, and in January 2008, he drove while intoxicated by alcohol. AG ¶ 22(a) applies. Currently, he does not habitually consume or engage in binge-alcohol consumption to the extent of impaired judgment. However, when he was in college he did consume sufficient alcohol to have a blackout. Such behavior in college does constitute binge-alcohol consumption. AG ¶ 22(c) applies.

“Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.” ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (citing *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)). Because the government has met its initial burden concerning alcohol consumption security concerns, the burden now shifts to Applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-(d) 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;

(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);

(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

(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.

AG ¶ 23(a) does not fully apply. On January 26, 2008, the police arrested Applicant for Dul first offense (SOR ¶ 1.a). On March 10, 2008, the court found Applicant guilty of Dul first Offense. This Dul is recent. It is his second alcohol-related arrest in two years. These two events are relatively frequent and recent. He stopped his alcohol consumption as required by his ASAP, and accordingly, he receives some credit because future alcohol-related offenses are less likely to recur. However, AG ¶ 23(a) cannot be fully applied because he continued to consume alcohol up until March 12, 2008. He has abstained from alcohol consumption for less than a year, which is not a sufficient period of time under all the facts and circumstances.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree and timing of the alcohol abuse and rehabilitation show many different permutations. The Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption.⁵

AG ¶¶ 23(b) to 23(d) do not fully apply. Applicant did not fully acknowledge or completely describe his history of alcohol consumption. He was very reluctant or unable to estimate the number of times he became so intoxicated in college that he had blackouts. Although he was not diagnosed as being alcohol dependent or being an alcoholic, a clearer, a more forthright description of his past alcohol use would have helped to erase lingering concerns. He may be minimizing his alcohol consumption problem, refusing to fully acknowledge the extent of his alcohol consumption “problem.” SOR ¶ 1.a generally describes his history of alcohol use; however, I specifically find Applicant’s clarifications of his history of alcohol use in his SOR response (GE 7) to be accurate. Although he completed an alcohol abuse treatment program after his 2008 Dul, he stopped attending AA meetings. His history of alcohol problems, his failure to fully recognize and acknowledge his history of alcohol abuse, his most recent Dul, and his status as being on probation for his 2008 Dul until March 2009 exclude providing full mitigating credit under AG ¶ 23 at this time.

Applicant’s current alcohol-related therapy is a positive development, showing that he continues to recognize an issue with overcoming his alcohol problems. However, after carefully consideration of the Appeal Board’s jurisprudence on alcohol consumption,⁶ I conclude his two alcohol-related incidents in the last two years, and his

⁵See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007).

⁶For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge’s grant of a clearance and noted, “That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge’s application of MC 3.” In ISCR Case No.

Dul seven months after advising an OPM investigator that his alcohol consumption is minimal and he limits himself “to one glass of beer/wine with dinner, one time per week” GE 3 at 7) are significant factors against mitigating alcohol consumption concerns. His prediction that he will return to responsible alcohol consumption, when his probation ends in March 2009 also raises lesser security concerns in light of the diagnosis of alcohol abuse (as opposed to alcohol dependence).

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

AG ¶ 25 describes eight drug⁷ involvement-related conditions that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this particular case: “any drug abuse,”⁸ and “illegal drug possession.”

05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge’s grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB’s most recent DUI was in 2000, six years before an administrative judge decided AB’s case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB’s continued alcohol consumption was not responsible, and the grant of AB’s clearance was arbitrary and capricious. *See also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge’s grant of a clearance).

⁷AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

(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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and ecstasy or 3,4 methylenedioxymethamphetamine are Schedule (Sch.) I controlled substances. *See* Sch. I (c)(9) and I(c)(10), respectively. *See also* *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8th Cir. 2006) (ecstasy). Mushrooms are the street name for psilocybin or psilocin, which is a Schedule I Controlled Substance. *See* *United States v. Hussein*, 351 F.3d 9, 16 (1st Cir. 2003) (mushrooms are a plant which may contain the Schedule I(c)(15) and I(c)(16) controlled substance psilocybin or psilocyn). Cocaine is a Schedule II Controlled Substance. *See* Sch. II(a)(4) (cocaine). Opium is covered under Schedules I, II, III, and V as a controlled substance. *See* Sch. I(b) (listing opium derivatives); Sch. II(a)(1)-(3); Sch. III(d)(1), III(d)(3) and III(d)(7); Sch. V(5). *See also* National Institute on Drug Abuse, “Commonly Abused Drugs”, available at www.drugabuse.gov/DrugPages/DrugsofAbuse.html (GE 4).

⁸AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

AG ¶¶ 25(a) and 25(c) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used marijuana about 25 times from about May 2000 to November 2005, cocaine about five times from about March 2004 to August 2005, opium twice from about July 2003 to the fall of 2004, methylenedioxymethamphetamine (ecstasy) once in about October 2002, and mushrooms (psilocybin) once in about December 2001. He used illegal drugs primarily because he was curious about the effects of the drugs. He possessed these illegal drugs before he used them.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

(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;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(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.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. 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 record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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.”⁹

Applicant’s last drug use was on November 2005, about 50 months prior to his hearing. AG ¶ 26(a) fully applies. His overall illegal drug use lasted approximately five years (2000 to 2005), and involved numerous uses of illegal drugs such as marijuana, ecstasy, mushrooms, opium and cocaine. AG ¶ 26(a) applies because his past drug use does not cast doubt on his **current** reliability, trustworthiness, or good judgment.¹⁰ He has abstained from drug use for about 50 months, and he recognizes the adverse impact on his life of drug abuse. These actions create a reasonable certitude that he will continue to abstain from drug use. I am reasonably confident his illegal drug possession and use will not recur. Because he will not use illegal drugs in the future and is subject to drug testing at his employment, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has somewhat disassociated from his drug-using associates and contacts because most of them remain in the state where he attended university. He continues to associate with some drug users. He has broken his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for about 50 months. He provided “a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b) applies.

⁹ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

¹⁰In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs. The marijuana, cocaine, opium, mushrooms, and ecstasy were never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program, including rehabilitation and aftercare requirements.

In conclusion, Applicant ended his drug abuse in November 2005, about 50 months ago. The motivations to stop using illegal drugs are evident. He understands the adverse results from drug abuse.¹¹ He has shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

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

There is some evidence supporting approval of Applicant's clearance. Applicant was relatively young and immature when he used illegal drugs from 2000 to 2005. He stopped using illegal drugs in 2005. In 2007, he frankly and candidly admitted his extensive history of drug use and his 2007 alcohol-related incident on his security clearance application. He subsequently admitted his drug use and 2007 alcohol-related incident to an OPM investigator. He was candid concerning all derogatory information in his response to DOHA interrogatories and his SOR response. He knows the consequences of drug abuse and excessive alcohol consumption. He completed ASAP, attended AA meetings and received one-on-one expert counseling, providing important mitigation of alcohol consumption concerns. Applicant significantly contributes to his company, the Air Force and the Department of Defense. There is no evidence at work

¹¹Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show substantial responsibility, rehabilitation and mitigation. His company supports his continued access to classified information. I am satisfied that if he continues to abstain from alcohol and drug use, and avoids future offenses, he will have future potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a problem with drug abuse for five years. He has not received drug counseling or treatment. However, if his only problem had been his drug abuse, security concerns under the drug involvement guideline would be mitigated by his abstinence from drug abuse for more than 50 months because of the passage of time and other mitigating conditions. His two alcohol-related incidents in 2007 and January 2008 cannot be mitigated at this time. His decisions to consume excessive amounts of alcohol were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. These two offenses show a lack of judgment and a failure to abide by the law in the context of security requirements. Such conduct raises a serious security concern, and a security clearance is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to alcohol consumption. Drug involvement is mitigated because it is not recent.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information. However, I recommend reinstatement of his clearance in one year if he continues to abstain from alcohol consumption, illegal drug use, and other criminal conduct.

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: Subparagraphs 1.a to 1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline H: Subparagraphs 2.a to 2.e:	FOR APPLICANT For Applicant

¹²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 at this time. Eligibility for access to classified information is denied.

Mark W. Harvey
Administrative Judge