



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



In the matter of:)
)
) ISCR Case No. 10-01471
)
Applicant for Security Clearance)

Appearances

For Government: Caroline Jeffreys, Esq., Department Counsel
For Applicant: Robert M. Melendez, Esq.

May 16, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant consumed alcohol, sometimes to the point of intoxication, until April 2009. His use resulted in a November 2004 public intoxication arrest and a September 2008 driving while intoxicated (DWI) conviction. He also used marijuana from October 2001 to October 2008. Applicant has rebutted or mitigated the security concerns about his alcohol consumption and drug involvement. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Statement of Reasons (SOR) on July 19, 2010, detailing security concerns under Guideline G, alcohol consumption and Guideline H, drug involvement.

On August 11, 2010, Applicant answered the SOR and requested a hearing. On November 15, 2010, I was assigned the case. On January 26, 2011, DOHA issued a Notice of Hearing for the hearing held on February 10, 2011.

The Government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through F, which were admitted into evidence without objection. Applicant's father also testified. On February 18, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations in ¶ 1.a of the SOR and admitted the remaining factual allegations, with explanations. He also provided additional information to support his request for a security clearance. I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact.

Applicant is a 27-year-old simulation engineer and trainer who has worked for a defense contractor since October 2010. (Tr. 46) He seeks to obtain a security clearance. Applicant's coworkers, manager, supervisor, and friends state: he is a trusted and valuable asset, a solid worker, a pleasure to work with, and eager for new challenges. He displays a positive attitude, has integrity, sincerity, has great work ethics, is extremely reliable, and dependable. (Tr. 28-34, Ex. A, B, C, D, and E) The training manager rates him in the top 3 of the 25 trainers. (Tr. 30) Applicant's father has seen an "amazing turnaround" of his son. (Tr. 112)

Applicant started using marijuana as a college freshman. (Ex. 3) He used it the six years he was in college and approximately one and a half years after leaving college. (Tr. 90) His use in college was sporadic. In May 2007, at age 24, he graduated from college and did not use marijuana again until October 2007. At that time, he and his girlfriend used it approximately every weekend for approximately one year. In October 2008, he decided to stop using marijuana. (Ex. 2) While in college, and from October 2007 to October 2008, he would sometimes buy \$20 worth of marijuana. He has disassociated himself from those with whom he used marijuana. (Tr. 90)

In 2001, at age 19, Applicant became a social drinker in college. From the spring of 2004 to the spring of 2009, his consumption of alcohol became more frequent. He has come to the realization that alcohol is not for him and in April 2009 stopped drinking.

In October 2002, still age 19, Applicant attended a party, got drunk, and tried cocaine. This was the only time he ever used cocaine. Later that evening, his friend was

driving when an automobile accident occurred. Applicant was ejected from the vehicle, cracked his skull, and was in a coma for 14 hours. It took over a year for him to be rehabilitated from his injuries. His brain injury has affected his memory. (Ex. 2) Following the accident, he did not drink alcohol again until the spring of 2003.

In the spring of 2004, Applicant's drinking increased to once a week. He became intoxicated frequently. (Ex. 2) He believes he increased drinking because he was depressed. (Tr. 78, Ex. 2) In November 2004, Applicant – then age 21 – was arrested for public intoxication. He, his aunt, uncle, and friends had gone to a bar to watch a basketball game. He had been at the bar six or seven hours and believes he was intoxicated. (Tr. 82) Even though he was at the bar with his girlfriend, Applicant had been flirting with the bartender and when he asked for the bartender's telephone number, her boyfriend, a bouncer, became upset. The bouncer threw him to the ground. The events of the rest of the evening are hazy. (Tr. 2) The arrest occurred at approximately 1 a.m. (Tr. 81) He pled no contest to the charge of public intoxication and was sentenced to six months unsupervised probation. Final adjudication was deferred for six months, after which the case was dismissed.

Following college graduation in May 2007, Applicant started drinking three to four days a week and on weekends. (Ex. 2) In September 2008, Applicant was arrested and charged with DWI. He had been drinking at a birthday party, stopped drinking at 11 p.m., and went to bed. At 2 a.m., a call from his brother woke him up. His brother asked if Applicant would drive to his brother's place to take care of his brother's dog. (Tr. 85) On the way to let the dog out, he stopped to get gas and was stopped by the police. He refused to take a breathalyzer test, but was arrested after failing a field sobriety test. (Ex. 2) Applicant has viewed the videotape taken that morning and agrees his speech was slurred, he looked disheveled, and should not have been driving. (Tr. 86)

Following his arrest, Applicant's drinking continued as before. He sometimes would drink to the point of intoxication. In April 2009, he stopped drinking alcohol. (Tr. 79) He also stopped smoking cigarettes and drinking soft drinks. He started eating healthier and exercising² more. He uses exercise to deal with stress. (Tr. 58) He weighed almost 300 pounds and has lost 100 pounds during the last two years. (Tr. 59, Ex. 2) He realizes alcohol consumption impairs judgment, provides bad calories, and slows down his metabolism. (Tr. 101) His abstinence from alcohol helps him manage his weight. (Tr. 101) Without alcohol, he is now in control of himself at all times. (Tr. 102) His memory is better, he is focused, and is moving forward with his life. (Tr. 102) He loves being healthy and living a clean and sober life. (Tr. 103) He has no desire to drink. (Tr. 104)

In September 2009, Applicant pled *nolo contendere* to the DWI. He was sentenced to nine months probation. He also paid a \$600 fine, court costs of \$448, and \$450 in probation fees. (Ex. 3) He believes he spent \$5,000 to \$6,000 for attorney fees, court fees, probation fees, and other costs. (Tr. 106) He completed the state DWI education program and all court requirements. (Ex. 3) During the DWI education course,

² He does four hours of Pilates a week and runs six miles six days a week. (Tr. 58)

Applicant learned about the negative effects of alcohol and driving. (Tr. 99) He learned that impairment occurs prior to reaching the DWI limit.

Applicant was living with his parents at the time of his 2004 and 2008 arrests. (Tr. 67) In December 2010, he left his parent's home and moved to another state. (Tr. 67)

In October or November 2008, Applicant was in an automobile accident not involving alcohol. His face and arm were injured, but he did not want to go to the hospital due to lack of insurance. He was in considerable pain when he went to his girlfriend's home. His girlfriend's sister gave him some pain medicine. While there he drank alcohol to the point of intoxication. When he passed out, his girlfriend took him to the hospital. The following day, he learned the pills were Xanax, for which he had no prescription. (Ex. 2) In February 2009, Applicant stopped dating this girlfriend. (Tr. 91)

In June 2009, when Applicant completed his Electronic Questionnaires for Investigations Processing (e-QIP), he listed and explained his September 2008 DWI arrest and listed his November 2004 public intoxication arrest. He also listed his October 2002 cocaine use, his October 2008 Xanax use, and his marijuana use from October 2001 to October 2008. (Ex. 1)

In response to the SOR, Applicant submitted a statement of intent indicating he would not use illegal drugs in the future and acknowledged his clearance would automatically be revoked should he do so. (Ex. F) He made a similar statement of intent regarding alcohol.

Applicant acknowledged he had been irresponsible with his drinking. (Tr. 75) When asked if he ever had questionable judgment when drinking, he replied:

I think drinking always makes people have questionable judgment in some fashion, so I would say probably. I definitely did some stupid things while I was drinking that I regret, so I think the case in point is the DWI and public intoxication. I look at those as definitely acts of questionable judgment that I wouldn't have done if I [had] been sober. (Tr. 72)

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 must be considered 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.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

Alcohol Consumption

AG ¶ 21 expresses the security concern for 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 two conditions that could raise a security concern and may be disqualifying:

- (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

(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.

AG ¶ 22 (a) applies due to alcohol-related incidents away from work including: his 2004 public intoxication arrest and conviction and his 2008 DWI arrest and conviction. AG ¶ 22 (c) applies due to his admissions that, at times, he drank to the point of intoxication.

AG ¶ 23 provides two conditions that could mitigate alcohol consumption security concerns:

(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, and

(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).

Applicant's alcohol-related arrests were infrequent, but the times he became intoxicated can not be considered infrequent. In 2004, his plea of no contest ultimately resulted in the case being dismissed. Four years later, in 2008, he was at his girlfriend's place drinking, the next morning arrested for DWI while driving to his brother's place. Six months later, he came to the realization that drinking alcohol was bad for him and made the decision to abstain from drinking. He realizes alcohol consumption impairs judgment, provides bad calories, and slows down his metabolism. In September 2009, Applicant pled *nolo contendere* to the DWI. His arrest and conviction cost him \$5,000 to \$6,000. The mitigating condition in AG ¶ 23 (a) applies.

The mitigating condition in AG ¶ 23 (b) applies, because Applicant acknowledged he had problems with alcohol. He realized alcohol was not good for him and impairs judgment. Even though abstinence is required only for those who are alcohol dependent, he has established a pattern of abstinence of almost two years. The last alcohol-related incident occurred approximately two and one-half years ago.

Applicant provided a statement of intent stating should he be involved in any violation involving alcohol, his clearance would be automatically revoked. He is committed to maintaining a healthy lifestyle. Not only has he stopped drinking alcohol, he has stopped smoking cigarettes, drinking soft drinks, he eats healthier, and

exercises more. During the last two years, the changes in his lifestyle have resulted in him losing 100 pounds.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern for 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.

AG ¶ 25 describes two conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse (see above definition; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

In October 2002, 19-years-old and in college, Applicant went to a party and tried cocaine. This was the first and last use of cocaine. In November 2008, he was involved in a vehicle accident. His girlfriend gave him a pill to relieve the pain before he went to the hospital. He later learned he had been given Xanax. This was the first and last time he used Xanax.

As a college freshman, Applicant started using marijuana and continued to use it sporadically. He used it the six years he was in college and approximately a year and a half after college. In May 2007, he graduated from college and did not use marijuana again until October 2007. For approximately a year, until October 2008, he and his girlfriend used it approximately every weekend. While in college and thereafter, he would sometimes buy \$20 worth of marijuana. AG ¶ 25(a) drug use and AG ¶ 25(c) purchase apply.

AG ¶ 26 provides two conditions that could mitigate security concerns:

- (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; and
- (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.

Applicant did not attempt to hide his illegal usage. He listed it on his June 2009 e-QIP and during his August 2009 subject interview. Applicant's one-time use of cocaine in 2002 and one-time use Xanax in 2008 are infrequent. The mitigating condition listed in AG ¶ 26 applies to the use of these two drugs. However, his use of marijuana was not infrequent. From October 2007 to October 2008, he and his girlfriend used it every weekend. However, his last use occurred more than two year ago.

There is no "bright line" rule 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. August 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."³

³ 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 change 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) which IRCR 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.

Applicant's last drug use was October 2008, more than two years before his hearing, which I find not to be recent. I find the mitigating condition in AG ¶ 26 applies to his marijuana use.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. The period of abstinence has already been discussed. He has disassociated himself from those whom he had used marijuana. He has signed a statement of intent indicating his clearance would be automatically revoked for any illegal drug use. Applicant recognizes the adverse impact on his life that drug abuse could cause. He acknowledged that future drug abuse is incompatible with his new lifestyle. He no longer drinks alcohol, drinks soft drinks, smokes cigarettes, or smokes marijuana. He exercises routinely and has lost significant weight. With his stated desire never to use again coupled with his lifestyle changes, there is reasonable certitude that he will continue to abstain from drug use. AG ¶ 26(a) applies to his illegal drug use.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is motivated to refrain from all use of alcohol and illegal drugs. He has come to believe drinking and illegal drug usage impairs judgment and believes it is better to abstain from both. He greatly altered his lifestyle and has resolved to remain alcohol and drug free. He knows the consequences should he again smoke marijuana or abuse alcohol.

Applicant disclosed his arrests and illegal drug use when he completed his June 2009 e-QIP, during his August 2009 interview, and at his hearing. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision and expects all applicants to provide full, frank, and

complete disclosure of adverse information. The Government relies on applicants to disclose this information in a timely fashion, not when they perceive disclosure to be prudent or convenient. An applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant deserves some credit under the "whole person" concept for providing accurate information on his e-QIP, throughout the investigation, and at his hearing.

I am satisfied that Applicant's current judgment, reliability, trustworthiness, and his current ability or willingness to comply with laws, rules and regulations are valid reasons to grant access to classified information. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to alcohol consumption and drug involvement.

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, Alcohol Consumption:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Drug Involvement:	FOR APPLICANT
Subparagraphs 2.a – 2.d:	For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge