DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 10-11132
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

06/14/2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant engaged in binge consumption of alcohol resulting in blackouts. Upon return from deployment in early May 2012, he resumed alcohol consumption. He only used marijuana once in the last 10 years, and that was in December 2009. Drug involvement concerns are mitigated; however, alcohol consumption concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 17, 2010, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF-86). (GE 1) On September 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines G (alcohol consumption) and H (drug involvement). The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security

clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On January 3, 2012, Applicant responded to the SOR. On January 27, 2012, Department Counsel requested a hearing in Applicant's case. (Tr. 11) On March 14, 2012, Department Counsel indicated she was ready to proceed on Applicant's case. On March 28, 2012, Applicant's case was assigned to me. On April 17, 2012, DOHA issued a hearing notice, setting the hearing for May 15, 2012. Applicant's hearing was held as scheduled. Applicant said he had sufficient time to prepare for the hearing. (Tr. 8) Department Counsel offered 10 exhibits, and Applicant offered five exhibits. (Tr. 14-16, 17-19; GE 1-10; AE A-E) Applicant objected to consideration of his medical records (GE 7), arguing they were privileged under the doctor-patient privilege, and that they were not relevant. (Tr. 15-16) I overruled his objections and admitted GE 1-10 and AE A-E. (Tr. 16, 19) I advised Applicant that he is permitted to challenge the accuracy of the medical records. (Tr. 16) The record was held open until May 22, 2012. (Tr. 97-98) Two post-hearing documents were admitted without objection. (AE F-G) On May 23, 2012, I received the transcript.

Findings of Fact[1]

Applicant admitted the conduct alleged in SOR ¶¶ 1.a and 2.b, and he provided some extenuating and mitigating information. He also provided explanations, addressing the other two SOR allegations. His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 32-year-old employee of a defense contractor, who works as an electronics technician. (Tr. 20, 23) He worked for the same employer since July 2010, and he has served at an overseas combat zone since October 2011. (Tr. 23-24) He earned a graduate equivalency diploma (GED) in 2003. (Tr. 26) He has earned about 48 college credits. (Tr. 27) He completed numerous Army schools, including airborne training. (Tr. 28) He married in 2006, and he does not have any children. (Tr. 29)

Applicant joined the Army in 2006. (Tr. 29) His military occupational specialty (MOS) was signals support systems specialist (25U). (Tr. 32) He received two Army Commendation Medals (ARCOM), one Army Achievement Medal (AAM), one National Defense Service Medal (NDSM), one Army Good Conduct Medal (AGCM), one Global War on Terrorism Service Medal (GWOTSM), one Iraq Campaign Medal with Campaign Star, one Army Service Ribbon (ASR), one Overseas Service Ribbon (OSR), and one parachute badge. (GE 8) His highest rank held was sergeant (E-5). (Tr. 29) He was a specialist four (E-4) when he was discharged with a general discharge under honorable

[1]The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

conditions. (Tr. 29-30)[2] He was deployed to Iraq twice; however, he said he had a bad memory and could not give the months and years of the deployments without resorting to his records or his spouse for information. (Tr. 32) His spouse advised that Applicant was deployed to Iraq from June 2007 to October 2007 and from December 2008 to November 2009. (Tr. 32-33) He did not consume alcohol when he was in Iraq. (Tr. 48) After his second deployment, Applicant experienced night terrors and felt detached from events. (Tr. 46) He was not eating or sleeping. (Tr. 47) He resumed his alcohol consumption. (Tr. 48) He consumed about a half gallon of rum or maybe sake. (Tr. 49) He said he had at least four blackouts from excessive alcohol consumption. (Tr. 49)

In December 2009, Applicant provided a urine sample for drug testing. (Tr. 37) Later in December 2009, he sought medical help for post traumatic stress disorder (PTSD). (Tr. 37) In January 2010, he learned he had tested positive for the presence of the marijuana metabolite in his urine. (Tr. 34, 37) He said he was shocked about the urinalysis test results. (Tr. 66) He offered to submit to a retest; however, it was not provided. (Tr. 66) In January 2010, he was placed on medication to help him sleep. (Tr. 38) He was placed on a profile, and he was taken off being qualified for parachuting. (Tr. 38) Nevertheless, he was ordered to parachute. (Tr. 38) He suffered a severe concussion or traumatic brain injury (TBI). (Tr. 38) He had several previous undiagnosed concussions from parachuting and IED explosions. (Tr. 38-39) He contended he was discharged because of his PTSD and TBI, and they wanted to sweep him under the rug. (Tr. 41-42) His supervisors received their dream assignments and were not punished for violating Applicant's profile. (Tr. 42)

Applicant said he had no memory of using marijuana. (Tr. 34, 67) He was using alcohol to excess. (Tr. 34) He suggested that he may not remember his marijuana use because of having blacked out from alcohol consumption. (Tr. 35) He received a general discharge under honorable conditions for misconduct due to his drug test result, indicating marijuana use. (Tr. 35-36; GE 8)

Applicant did not disclose his positive urinalysis test for marijuana on his SF-86 in response to the question about ever using illegal drugs while holding a security clearance or using illegal drugs in the last seven years. (Tr. 43; GE 1 at 45) He said he would not knowingly indicate, "No"; however, he told an Office of Personnel Management (OPM) investigator that he marked, "No" because he did not remember using marijuana. (Tr. 43) Applicant noted that he was not notified on his SOR that his false answers on his SF-86 about marijuana use raised a security concern. (Tr. 44) He said he could not remember filling out his SF-86 or the reasons why he answered the questions the way he answered them. (Tr. 45)

[2]When Applicant completed section 15 of his August 17, 2010 SF-86, he indicated he received a general discharge under honorable conditions. (GE 1 at 30) He explained, "It was all about politics and I did not feel that the Army should be that way. That is not why I signed up. I felt that it was time to start making what I should have been making while I was in the Army." (GE 1 at 30) He noted that he received nonjudicial punishment in February 2010 for misconduct. (GE 1 at 31) He did not mention the positive urinalysis test for marijuana anywhere on his August 17, 2010 SF-86.

Applicant first used marijuana when he was in high school at the age of 14 or 15. (Tr. 51-53) He was arrested in 1999 for marijuana possession, when he was 20 years old. (Tr. 53) He remembered the arrest; however, he denied that he remembered the outcome in court. (Tr. 54)[3] He has not knowingly used marijuana since he was a teenager. (Tr. 54) He did not remember whether he used marijuana and alcohol together, and he indicated his memory was poor. (Tr. 55) He denied any knowledge of marijuana being in his residence; however, he noted that during alcohol consumption he could have found his spouse's marijuana, used it, and then forgotten about it, due to a blackout. (Tr. 52, 56) He said his physician misinterpreted his statement about using marijuana four times, and he actually said that he had four alcohol-related blackouts. (Tr. 51; at GE 7 at 129) He was adamant that he would not knowingly use marijuana while on active duty or holding a security clearance. (Tr. 56)

On February 10, 2010, Applicant's commander imposed nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ) for Applicant's marijuana use between November 11, 2009 and December 11, 2010. (GE 8, 9) He received a reduction from sergeant (E-5) to specialist (E-4), forfeiture of $1,047 pay per month for two months (suspended), restriction for 45 days, and extra duty for 45 days. (GE 9) Applicant did not appeal. (GE 8, 9)

Applicant received command-directed drug and alcohol counseling and mental health counseling from January 2010 to April 2010, as a result of his positive urinalysis test result, PTSD, and TBI. (Tr. 57-59; GE 7) He received a certificate of completion for the drug and alcohol counseling program. (GE 3 at 3) He did not provide evidence of a diagnosis or a positive prognosis from his drug and alcohol counseling program. He denied being advised or ordered to receive or that he received alcohol and drug treatment on his August 17, 2010 SF-86 because he did not think it was relevant. (Tr. 62; GE 1 at 43, 46) He did not consider the counseling sessions to be sufficiently in-depth to merit mentioning. (Tr. 62)

Applicant's March 2010 mental status evaluation indicated he was fully alert, fully oriented, depressed, with clear thinking process, normal thought content, good memory, mentally responsible, and he meets retention requirements. (GE 10) Under Axis I the findings indicated Cannabis Abuse and Mood Disorder not otherwise specified (NOS). (GE 10)

SOR ¶ 1.b alleges that Applicant was diagnosed as alcohol dependent in February 2010. (HE 2) Applicant said he did not know or remember the diagnosis. (Tr. 60) The apparent source of this alleged "diagnosis" is a chronological record of medical care under the care of a psychiatrist. (GE 7) It indicates in the "Problems" column for February 19, 2010, "ALCOHOL DEPENDENCE (ALCOHOLISM)." (GE 7) The medical record on January 26, 2010 states, "Alcohol: He has intermittently been a heavy drinker

[3]Applicant's August 17, 2010 SF-86 indicates a person with marijuana in their vehicle gave Applicant a ride. The police stopped the vehicle and found marijuana. He paid a $400 fine, indicating there was an adverse finding from the court. (GE 1 at 45) He told the OPM investigator that he paid a $350 fine. (GE 3 at 5)

before age 21, around 24 for about 6 months, and this previous November-January-1/2 gallon of Saki/Rum/week. He last drank 3 weeks ago. He blacked out about 6-7 times in the last few months. No DUIs, no withdrawal tremor."

His medical record indicates that his diagnosis on March 2, 2010, under Axis I, rules out Alcohol Abuse. (GE 7) On March 18, 2010, under Axis I it states, "Anxiety Disorder NOS, Cannabis Abuse." (GE 7) Applicant denied that he was alcohol dependent. (Tr. 61) He resumed alcohol consumption after he left the Army, probably in July 2010. (Tr. 62-63) He was able to refrain from any alcohol consumption during his October 2011 to May 2012 deployment. (Tr. 61, 67-68) He drank a beer or two a few nights before his hearing. (Tr. 61) He currently limits his alcohol consumption to two drinks. (Tr. 68; GE 2) He has not gone to Alcoholics Anonymous (AA) meetings because he does not need it. (Tr. 69) He has a good family support system. (Tr. 69) Applicant and his spouse have alcohol in their home. (Tr. 71)

Applicant's spouse said his alcohol consumption caused a lot of fights or conflict in their home. (Tr. 77)[4] His spouse was not aware that he was diagnosed as alcohol dependent, and she did not believe Applicant had a problem with excessive alcohol consumption. (Tr. 78-79) She said that Applicant drank a flask of alcohol three or four times a day, and he had lots of blackouts. (Tr. 80) He would pass out, wake up, and have no memory. (Tr. 80) Sometimes he passed out on the toilet, sometimes on the bathroom floor, and sometimes on the couch. (Tr. 81) She did not believe he should terminate his alcohol consumption because she believed he was not alcohol dependent. (Tr. 83)

Applicant denied that he and his spouse have illegal drugs in their home; however, his spouse said she uses marijuana for medical reasons. (Tr. 71, 75) She cannot work outside their home due to medical problems. (Tr. 81) She believed Applicant was unaware of the marijuana's location. (Tr. 77, 82) She did not have marijuana in her residence at the time of the hearing. (Tr. 77) She believed he used marijuana at a barbecue at a friend's house. (Tr. 76) She did not observe him using marijuana; however, she knew there was marijuana at the barbecue because she used it herself. (Tr. 76, 82)

The Department of Veterans Affairs (VA) determined that Applicant should receive 30 percent disability for PTSD, effective May 21, 2010. (AE F) He also received 40 percent disability for TBI, effective May 21, 2010. (AE F) The VA determined both illnesses were service-connected. (AE F)

Recommendations

Applicant's father-in-law, his friends, a manager in his company, and a site lead at his employment described Applicant as a valuable member of the firm with a solid

[4]Applicant denied that his alcohol consumption had a negative impact on his professional or personal relationships in the last seven years on his August 17, 2010 SF-86. (GE 1 at 46)

work ethic.[5] The describe him as professional, dependable, honest, considerate, and trustworthy. He is loyal to his family, friends, company, and country.

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 that, "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 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 meeting the criteria contained in the 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 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. Adverse clearance decisions are made "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. Nothing in this decision should be construed to suggest that I 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

[5]The sources for the facts in this paragraph are the character statements Applicant provided. (AE A-E)

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 or her] 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

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. Applicant did not have any alcohol-related incidents at work, did not violate any court orders, and did not have a diagnosis of alcohol abuse or dependence. Generally, a psychiatrist will indicate such a diagnosis under Axis I and Applicant's psychiatrist made no such diagnosis. Applicant did not receive an evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. He did not suffer a relapse.[6]

Applicant habitually consumed and engaged in binge-alcohol consumption to the extent of impaired judgment.[7] His excessive alcohol consumption and passing out in various locations in his home resulted in some conflict with his spouse. He received alcohol and drug consumption counseling from the Army after his positive urinalysis; however, he did not attend AA meetings. AG ¶ 22(a) and 22(c) apply.

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

[6]The term, "relapse" is not defined in the Directive.

[7]Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. This definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. *See* U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf. Applicant engaged in binge alcohol drinking as recently as December 2009, when he had a blackout and had no recollection of using marijuana. There is no evidence of binge consumption of alcohol in the last seven or eight months.

> (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) applies in part because Applicant has not engaged in any binge alcohol consumption in the last seven or eight months. He did not consume alcohol while deployed and after his return from his deployment in May 2012, he limited his alcohol consumption. He also receives some credit because, "it happened under such unusual circumstances," as he is no longer on active duty in an Army airborne unit, and the stress of employment in the civilian sector is less. AG ¶ 23(a) is not fully applied because of his history of binge alcohol consumption, and not enough time has elapsed when alcohol has been readily available to him to establish his alcohol consumption is under control. There is still a significant possibility that alcohol-related problems are likely to recur, and it continues to cast doubt on Applicant's "current reliability, trustworthiness, or good judgment."

AG ¶¶ 23(b) to 23(d) do not fully apply. Although he completed an alcohol abuse counseling program in 2010, he did not attend AA meetings, and he does not currently attend any other alcohol treatment or counseling program. He does not fully recognize that his alcohol problem raises security concerns.

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 DOHA Appeal Board has determined in cases of more substantial alcohol abuse than Applicant's that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. *See* 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). For 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. 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).

After careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude Applicant's multiple instances of binge consumption of alcohol in 2009, his continued alcohol consumption in May 2012, his denial of an alcohol problem, the absence of a credible evaluation or diagnosis of his alcohol consumption, the absence of a credible prognosis relating to his alcohol consumption by a medical or psychiatric authority, and the absence of any ongoing counseling or therapy cause lingering doubts about Applicant's alcohol consumption security concerns.

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.

Three drug involvement disqualifying conditions in AG ¶¶ 25(a), 25(b), and 25(c) could raise a security concern and may be disqualifying in this case: "any drug abuse,"[8] "testing positive for illegal drug use," and "illegal drug possession." These three disqualifying conditions apply because Applicant used and possessed marijuana in about December 2009 while on active duty and while holding a security clearance.[9] He admitted he tested positive on a urinalysis test, and he claimed that he did not remember using marijuana. He concluded that he must have used marijuana while under the influence of alcohol and then had a blackout. Marijuana possession and use while intoxicated by alcohol is not a defense to these offenses. AG ¶¶ 25(a), 25(b), and 25(c) apply.

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

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[8]AG ¶ 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."

[9]AG ¶ 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 is a Schedule (Sch.) I controlled substance. *See* Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

(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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such 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."[10]

[10]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

SOR ¶¶ 2.a and 2.b both allege that Applicant used marijuana in about November or December 2009 and are essentially duplications of each other. He abstained from marijuana use for 29 months. He recognized the adverse impact of drug abuse in connection with access to classified information. He also understands that possession of marijuana violates federal law. I accept Applicant's statement that he will continue to abstain from drug possession and use. AG ¶ 26(a) applies to his marijuana-related conduct.[11]

AG ¶¶ 26(b), 26(c), and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. Marijuana was never lawfully prescribed for him under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional. He associates with his spouse, who is a marijuana user, and she has had marijuana in their residence.

In conclusion, Applicant ended his drug abuse in December 2009, about 29 months ago. The motivations to stop using illegal drugs are evident. He understands the adverse consequences from marijuana use.[12] 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. Drug involvement concerns are mitigated.

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):

> 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, affirmed the administrative judge's decision to revoke an applicant's security clearance after considering 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.

[11]In 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.

[12]Approval 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.

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

There is considerable evidence supporting approval of Applicant's clearance. He has avoided alcohol-related criminal offenses since December 2009. He completed an alcohol and drug counseling program in 2010. Applicant is a valued employee with supportive character witnesses. There is no evidence at his current employment of any disciplinary problems. He served three overseas tours in combat zones. The VA determined he was a disabled veteran who suffers from PTSD and TBI, among other medical problems. There is no evidence of disloyalty or that he would intentionally violate national security. He was awarded two ARCOMs, one AAM, one NDSM, one AGCM, one GWOTSM, one Iraq Campaign Medal with Campaign Star, one ASR, one OSR, and one parachute badge. His highest rank held was sergeant. His Army service shows some responsibility, rehabilitation, and mitigation. His character statements support approval of his clearance.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a serious problem with alcohol in 2009. He passed out on several occasions at his residence, and admitted that he had four to six blackouts. His excessive alcohol consumption caused stress in his marriage. His medical record on January 26, 2010 states, "this previous November-January-1/2 gallon of Saki/ Rum/week. He last drank 3 weeks ago. He blacked out about 6-7 times in the last few months." He resumed alcohol consumption in May 2012 after returning from a deployment. His decision to return to alcohol consumption was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Applicant did not disclose his positive urinalysis test for marijuana or that he received alcohol and drug treatment on his August 17, 2010 SF-86. His dishonesty on his SF-86 adversely affects his credibility and is an indication he is not rehabilitated.[13]

[13]Applicant's SOR does not allege that he intentionally failed to provide required information on his August 17, 2010 SF-86. The facts describe several other inconsistent statements or claims of memory loss. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

Excessive alcohol consumption shows a lack of judgment and/or impulse control. His problems with alcohol cannot be fully mitigated at this time. Such conduct raises a serious security concern, and a security clearance is not warranted at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has mitigated the security concerns pertaining to drug involvement; however, alcohol consumption concerns are not fully mitigated at this time.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

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

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ROBERT J. TUIDER
Administrative Judge

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). Consideration non-SOR allegations outlined in this decision is strictly limited in this case to these five circumstances.