



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-00332
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: Jacob T. Ranish, Esq.

08/15/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 16, 2014. On August 22, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, G, and J. The DOD CAF acted under Exec. Or. 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on September 18, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March

15, 2016. Scheduling of the hearing was delayed because Applicant was deployed and unable to attend a hearing until late April 2016. The case was assigned to me on April 13, 2016. On April 22, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 9, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1, 3, and 4 were admitted in evidence without objection. Applicant objected to GX 2, an unauthenticated summary of a personal subject interview included in the Office of Personnel Management Report of Investigation, and it was not admitted. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on May 23, 2016.

Findings of Fact¹

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.b, 2.a-2.b, and 3.a,² but he denied the excessive alcohol consumption alleged in SOR ¶ 2. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 36-year-old aircraft maintenance technician employed by a defense contractor since October 2014. He served on active duty in the U.S. Air Force from October 2003 to September 2009 and received an honorable discharge. He was a staff sergeant (pay grade E-5) when he was discharged. He received a security clearance in July 2004.

Applicant married in March 2011. He and his wife have a newborn daughter. (Tr. 40.) He attended college from 1998 to around 2001, but he did not receive a degree. (Tr. 66-67.)

Applicant was a full-time employee of a defense contractor from November 2009 to April 2011. He was a part-time employee of the Air National Guard (ANG) from September 2009 to April 2011. From April 2011 to February 2012, he was a full-time employee of the ANG. He was a full-time employee of a defense contractor from February 2012 to July 2013. He voluntarily left his job in July 2013 to attend school and begin flight training. He found that flight training was not available within a reasonable time. He was unemployed from July 2013 until he was hired by a defense contractor in April 2014. The record does not reflect whether his security clearance was administratively terminated after he left his job in July 2013. He worked for another defense contractor from April to October 2014, when he began his current job. At the time of the hearing, he was deployed to Iraq, but he had taken leave to return to the United States for the birth of his daughter. (Tr. 22, 87.)

While on active duty, Applicant received an Air Force Achievement Medal, an Iraq Campaign Medal, and a Certificate of Appreciation. (AX D.) His evaluation report

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

² The Guideline J concerns are incorrectly numbered in the SOR as paragraph 2 instead of paragraph 3.

for service in Iraq rated him as “truly among the best.” (AX E.) A co-worker who served with Applicant during his recent deployment to Iraq as a contractor describes him as a dependable friend, trusted confidant, and a person of exemplary character and high integrity. (AX F.) Another co-worker who has known Applicant for several years describes him as a dedicated and responsible, and one who “exemplified the Air Force core values of integrity first, service before self, and excellence in all we do.” (AX H.) An Air Force lieutenant, who supervised Applicant while deployed, commended him for his “integrity, professionalism, and sense of purpose.” (AX G.)

In September 2003, before Applicant entered on active duty, he was interviewed by a security investigator. He admitted using marijuana on one occasion while he was in college. (GX 3; Tr. 28.)

In January 2014, Applicant was charged with driving under the influence (DUI). His blood-alcohol level reflected no alcohol, but it tested positive for marijuana and two kinds of tranquilizers. He pleaded guilty to driving while impaired (DWI). He was sentenced to 180 days in jail, which was suspended, and fined \$1,040. His driver’s license was suspended for three months. He was placed on unsupervised probation for two years, and the terms of his probation required him to attend alcohol awareness classes and victim impact classes. (GX 1 at 30-31; GX 4; Tr. 56-57.) He successfully completed the requirements of his probation. (AX B.)

Applicant testified that his marijuana and drug use in January 2014 occurred after he was contacted by an old friend from junior high school, whom he had not seen for more than ten years. His friend was attending a business convention and staying in a hotel. Applicant invited his friend to stay at his home. They spent the evening reminiscing, drinking alcohol, smoking marijuana, and consuming prescription tranquilizers. Applicant’s wife was home but asleep. (Tr. 30-31.)

Applicant testified that he consumed three or four alcoholic drinks, after which he and his friend smoked a marijuana cigarette and consumed two or three pills. His friend told him that the pills were Valium. Neither Applicant nor his friend had a prescription for Valium. Applicant testified he would not have invited his friend into his home or associated with him if he had known that his friend had drugs with him. (Tr. 30-35.)

Applicant testified that he did not feel that he was under the influence of alcohol or any drugs when he drove his vehicle during the late afternoon of the next day to conduct business with a title company. The police stopped him shortly after he drove away from the title company. The police administered a breathalyzer test, which registered negative for alcohol. However, based on Applicant’s difficulty with a field sobriety test, the police arrested him and drew blood for a blood-alcohol test, which tested positive for marijuana and tranquilizers. (Tr. 30-35, 47-55.)

In his SCA, Applicant stated that he was unsure whether his clearance had expired when he smoked marijuana and consumed prescription tranquilizers with his friend. (GX 1 at 33.) At the hearing, he testified that he thought it had expired, but that

he was not thinking about the repercussions on his security clearance when he decided to use illegal drugs. (Tr. 31, 73.)

In April 2014 before Applicant was sentenced, he underwent a court-ordered assessment at a substance abuse treatment facility. (AX A.) The assessment was supervised and approved by a certified mental health counselor and certified substance abuse therapist. The assessment noted that Applicant lacked insight and judgment in that he “ate some pills, consumed alcohol, and smoked marijuana with a friend with whom he had not had contact for a number of years.” The assessment recited that Applicant began drinking alcohol in the 11th grade, would consume five or six drinks with friends every other weekend, and currently consumes four or five alcoholic beverages on occasional weekends.

The assessment also stated that Applicant started smoking marijuana in college in 1998 and that he uses marijuana once every five years. Applicant denied making those admissions during the assessment. The assessment also noted that Applicant was frustrated with the legal system, believing that he was “profiled” by a title company employee who observed his conduct just before he began driving and treated unfairly by the police. (AX A at 2; Tr. 36-37.)

Applicant’s substance abuse evaluation included the following diagnosis under DSM IV-TR:³

Axis I ⁴ :	291.9 Unspecified alcohol-related disorder ⁵
Axis II:	799.9 Deferred
Axis III:	No reported medical conditions
Axis IV:	Problems with legal system
Axis V:	GAF 70 ⁶

At the hearing, Applicant testified that his use of marijuana and prescription tranquilizers was “one of the stupidest things [he had] ever done,” “the blunder of [his] life,” and totally incompatible with his employment as an aircraft maintenance technician. (Tr. 47, 77.) He testified that he is “passionate” about his work. He was embarrassed and remorseful. He occasionally “sees” his friend on social networking sites, but he does not attempt to make personal contact with him. (Tr. 41.) He submitted a statement of intent to refrain from using of any illegal controlled substance and agreed

³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed., Text Revision, 2000 (DSM-IV-TR).

⁴ DSM-IV Multiaxial evaluation consists of Axis I (Clinical Disorders and Other Conditions That May Be a Focus of Clinical Attention), Axis II (Personality Disorders and Mental Retardation), Axis III (General Medical Conditions), Axis IV (Psychosocial and Environmental Problems), and Axis V (Global Assessment of Functioning (GAF)).

⁵ This diagnosis applies to disorders that are not classifiable as alcohol dependence or alcohol abuse. DSM-IV-TR at 223.

⁶ A GAF of 70 indicates some mild symptoms or some difficulty in social or occupational functioning.

to random drug testing and immediate revocation of his security clearance in the event of any future positive drug test. (AX C.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges that Applicant used marijuana and Valium, a prescription drug for which he did not have a prescription, after being granted a security clearance (SOR ¶¶ 1.a-1.b). The concern under this guideline is set out in AG ¶ 24: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.”

Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).” Applicant’s admissions in his answer to the SOR, his testimony at the hearing, and the documentary evidence establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”;

AG ¶ 25(b): testing positive for illegal drug use;

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

AG ¶ 25(g) is not limited to persons holding an active clearance. At the time Applicant illegally used marijuana and prescription drugs, he had resigned from his job as a contractor employee and had been unemployed for more than six months. Under normal circumstances, his clearance would have been administratively terminated when

his employment ended. However, he remained eligible for a security clearance without reinvestigation until July 2014, and he was actively seeking employment that required a clearance. Under these circumstances, he breached the trust placed in him when he was determined to be eligible for access to classified information. His breach of trust while still eligible for access to classified information and while seeking employment requiring a security clearance is sufficient to establish AG ¶ 25(g).

The following mitigating conditions are potentially relevant:

AG ¶ 26(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

AG ¶ 26(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.

The first element of AG ¶ 26(a) ("so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). This element is established. More than two and a half years have passed since Applicant's drug involvement. He is no longer unemployed. He has been hired by a defense contractor and deployed to a combat zone. He has had no further contact with his drug-using friend. He is highly regarded by his co-workers. He is a new father with greater responsibilities.

The other elements of AG 26(a) also are established. Applicant refrained from drug involvement throughout his service on active duty in the Air Force, the ANG, and his employment by defense contractors. His drug involvement in January 2014 was an isolated event, which he regrets. He has minimal contact with the friend with whom he used drugs. He is passionate about his job and enthusiastic about his new family responsibilities.

AG ¶ 26(b) is established. Applicant does not associate with drug users. He does not live or work in a drug-tolerant environment, and he has submitted a statement of intent to refrain from illegal drug use and has agreed to automatic revocation of his clearance for any recurrence.

Guideline G, Alcohol Consumption

The SOR alleges that Applicant was charged with DUI in January 2014 and pleaded guilty to DWI (SOR ¶¶ 2.-2.b). The concern under this guideline is set out in AG ¶ 21: “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.” The following disqualifying conditions under this guideline are potentially relevant:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

AG ¶ 22(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.

AG ¶ 22(a) is not established. Although the police suspected Applicant of being under the influence of alcohol, the evidence negated their suspicions.

AG ¶ 22(c) was not alleged in the SOR and may not be an independent basis for denial of Applicant's application. Furthermore, it is not established by the evidence. The National Institute on Alcohol Abuse and Alcoholism defines binge drinking “as a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 percent or above.” The BAC level typically occurs when a man has five or more drinks or a woman has four or more drinks within a two-hour period.⁷ The evidence reflects that Applicant consumes four or five alcoholic beverages on occasional weekends, but there is no evidence that he has consumed five or more drinks within a two-hour period.

AG ¶ 22(e) is not established. The diagnosis of an “unspecified alcohol-related disorder” falls short of a diagnosis of alcohol abuse or alcohol dependence.

Guideline J, Criminal Conduct

The SOR cross-alleges the conduct in SOR ¶¶ 2.a and 2.b under this guideline. The SOR does not cross-allege the drug-related conduct alleged in SOR ¶ 1.and 1.b. The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it

⁷ Centers for Disease Control and Prevention, *Fact Sheets – Binge Drinking*, www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm.

calls into question a person's ability or willingness to comply with laws, rules and regulations.”

Applicant’s arrest for DUI is sufficient to raise the disqualifying condition in AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”). The following mitigating conditions are potentially relevant:

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

AG ¶ 32(c): evidence that the person did not commit the offense; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and (d) are established, for the reasons set out in the above discussion of Guideline H. AG ¶ 32(c) is established for the alcohol-related conduct alleged in SOR ¶ 2, because the evidence conclusively shows that Applicant was not under the influence of alcohol when he was arrested. The drug-related conduct was not cross-alleged under this guideline and may not be an independent basis for denying a clearance. However, I have considered the criminal nature of Applicant’s drug involvement for the limited purposes of assessing his credibility; evaluating evidence of extenuation, mitigation, or changed circumstances; considering whether he has demonstrated successful rehabilitation; and as part of my whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of

rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines H, G, 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.

Applicant was candid, sincere, remorseful, and credible at the hearing. Like many college students, he experimented with marijuana in college. After using marijuana once in college, he refrained from any drug use through a successful career in the Air Force, ANG, and several jobs with defense contractors. He held a security clearance for almost ten years, apparently without incident. He is intensively proud of his work. He was resentful when he was arrested in January 2014, and his assessment by a drug abuse counselor in April 2014 reflected that resentment. However, he displayed a completely different attitude and demeanor at the hearing. His arrest in January 2014 and its consequences made a lasting impression on him, and I am confident that his drug involvement will not recur.

After weighing the disqualifying and mitigating conditions under Guidelines H, G, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegations of excessive alcohol consumption and mitigated the security concerns raised by his drug involvement and criminal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge