



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-02160
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

07/24/2018

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 26, 2015 (SCA). On June 29, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F, G, J, and E. The DOD CAF acted under Executive Order (EO) 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 DOD on June 8, 2017.

Applicant answered the SOR on August 14, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 28, 2017, and the case was assigned to me on March 15, 2018. On April 12, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 17, 2018. I convened the hearing as scheduled.

Government Exhibit (GE) 1 was admitted into evidence, without objection. Applicant's objection to GE 2 was sustained on the grounds that it was not authenticated.¹ I appended to the record a letter the Government sent to Applicant as Hearing Exhibit (HE) I, and the Government's exhibit list as HE II. At the hearing, Applicant testified and submitted Applicant's Exhibits (AE) A through L, which were admitted into evidence, without objection. DOHA received the transcript (Tr.) on June 5, 2018.

Findings of Fact²

Applicant, age 28, has never been married nor does he have any children. He received his high school diploma in 2009. He took college courses between 2010 and 2011, and has earned four job-related certifications. Applicant has maintained a DOD security clearance without incident since July 2010, when he began working for a defense contractor, by whom he remained employed until September 2017, when he began working for his current defense-contractor employer. He has served the same U.S. military contract since June 2013. His job duties require him to maintain a security clearance.³

In October 2010, Applicant was in a vehicle with a friend who was in possession of marijuana. A police officer had cause to stop and search the vehicle and charged both occupants with possession of marijuana. On that occasion, Applicant was not, himself, in possession of marijuana. In December 2010, the charge was *nolle prosequi* after his friend plead guilty.⁴

Between October 2010 and June 2011, Applicant smoked marijuana approximately 15 to 20 times. On each occasion, he was either hanging out with friends or at a party. Applicant consumed psilocybin mushrooms,⁵ just to experiment with them, on only one occasion during a party in May 2011. He stopped using marijuana once he fully realized the negative impact it would have on his career.⁶

Because Applicant held a security clearance and worked for a defense contractor at the time, he knew that his marijuana and mushroom use were "stupid" things to do and "wrong." Applicant has no intent to use marijuana, mushrooms, or other illegal

¹ Tr. at 10-12. Even though GE 2 (a summary of Applicant's security clearance background interview) was not admitted into the record, a copy remains in the record file since it was marked and not withdrawn by the Government. I did not review nor consider it in rendering my decision.

² Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR Answer and his SCA (GE 1).

³ AE C and E; Tr. at 14-16, 20, 34-35.

⁴ AE J; Tr. at 24-26.

⁵ The parties stipulated that the "mushrooms" alleged in the SOR refer to illegal "psilocybin" mushrooms. Tr. at 8-9.

⁶ Tr. at 23-24, 30-36.

drugs in the future. In July 2017, he consented to the automatic revocation of his security clearance should he do so. He no longer associates with the friends involved with his drug use and possession charge.⁷ Upon the advice of counsel, he submitted to two drug screens, in July and August 2017, which were both negative. He passed a pre-hire drug test in September 2017.⁸

In November 2014, Applicant consumed alcohol to the point of intoxication while at a house party. He did not realize how intoxicated he had become by the time he left the party and drove his vehicle, until he lost control and crashed into several parked cars. Police officers arrived at the scene, arrested Applicant, and charged him with driving while intoxicated (DWI), 1st. His blood alcohol content (BAC) was .17%. In August 2015, Applicant pled guilty. The court sentenced him to 12 days in jail (suspended) and 12 months unsupervised probation, restricted his driver's license through August 2016, and required him to install an ignition interlock device (IID) on his vehicle.⁹

Although the record does not specify that Applicant successfully completed his probation, it suggests that he did. In April 2016, the Court granted Applicant's motion to remove the IID. Further, in August 2016, Applicant successfully completed an Alcohol Safety Action Program, which included four weeks of substance abuse education and 16-weeks of alcohol counseling. As of the hearing, he maintained a valid driver's license with no restrictions.¹⁰

While Applicant continues to consume alcohol (approximately two to three beers on the weekends or during special occasions), he has not consumed alcohol to the point of intoxication, nor driven a vehicle after consuming any amount of alcohol, since November 2014. Applicant has either designated a sober driver or used a ride-sharing service to avoid driving if he has consumed any amount of alcohol. In a July 2017 statement, Applicant consented to the automatic revocation of his security clearance should he ever "abuse" alcohol again. At the hearing, Applicant defined that "abuse" as becoming intoxicated to a point where he does not have "full control" over himself. He understood that consenting to an automatic revocation for alcohol abuse is not a mitigating condition under Guideline G nor otherwise required by the AG, but he believed that it was "worth it" for him to sign and abide by that statement.¹¹ He was not diagnosed with an alcohol use disorder by a counselor evaluating him for such in August 2017.¹²

⁷ AE F; Tr. at 24-25.

⁸ AE H; Tr. at 23-24, 25, 28, 35, 38.

⁹ AE B, D, E, I, and K; Tr. at 26-30.

¹⁰ AE B, D, E, I, and K; Tr. at 20, 26-30.

¹¹ AE E and G; Tr. at 21-23, 26-27; 29-30, 35-40.

¹² AE E; Tr. at 21, 22.

Applicant reported his DWI charge to his employer's security officer at the time the incident occurred. Applicant reported his marijuana and mushroom use, and marijuana and DWI charges on his June 2015 SCA and discussed them in his answer to the SOR and during his hearing. Applicant was candid, sincere, and credible at the hearing. He acknowledged and accepted full responsibility for his actions. He has matured, become successful in his career, and better understands the negative repercussions of any future such conduct.¹³

Applicant's work performance and character were highly regarded by the 13 references (friends, colleagues, and superiors) who wrote letters of support. Each of his references were aware of one or more the SOR allegations. They corroborated that Applicant has matured and learned from his mistakes, and is deserving of a second chance. A graduate of the U.S. Naval Academy who has known Applicant since he was a boy has "never been anything but impressed by his character, trustworthiness, and dependability." Applicant's "sterling" work ethic, honesty, and trustworthiness were unanimously praised by six individuals with whom he is currently employed by or with, including the Director and Deputy Director of the organization. The Senior Program Director of Applicant's former employer described his personal and professional experience with Applicant as "exceptional."¹⁴

Policies

"[N]o one has a 'right' to a security clearance."¹⁵ 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."¹⁶ 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."¹⁷

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.

¹³ AE H; SCA at 25; Tr. at 24, 28, 33, 35, 36-38.

¹⁴ AE A and L; Tr. at 17-20.

¹⁵ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁶ *Egan* at 527.

¹⁷ EO 10865 § 2.

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.”¹⁸ 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.¹⁹ “Substantial evidence” is “more than a scintilla but less than a preponderance.”²⁰ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.²¹ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.²² An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.²³

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”²⁴ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”²⁵

¹⁸ EO 10865 § 7.

¹⁹ See *Egan*, 484 U.S. at 531.

²⁰ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

²¹ See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

²² Directive ¶ E3.1.15.

²³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁴ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

²⁵ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

Analysis

Guideline H (Drug Involvement and Substance Misuse)

The concern under this guideline is set out in AG ¶ 24: “The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.”

Because Applicant was not in possession of marijuana, I find that no disqualifying conditions under this guideline apply to that 2010 charge. However, his use of marijuana 15 to 20 times and one-time use of psilocybin mushrooms, between October 2010 and June 2011, while in possession of security clearance, does establish two disqualifying conditions under this guideline, as follows:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

The security concerns raised under this guideline have been mitigated by the following applicable factors:

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): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Any illegal drug use is troubling in the context of evaluating security worthiness, but is particularly egregious when it occurs while in possession of a security clearance. However, Applicant has fully mitigated the concern. He has not used any illegal drugs in over seven years and has no intent to use any illegal drugs in the future. Moreover, he not only acknowledged the incompatibility of any illegal drug use with his maintenance

of a security clearance, but also agreed that it would be automatically revoked should he use illegal drugs again. Based on the record evidence and Applicant's sincere, candid, and credible hearing testimony, I conclude that Applicant's illegal drug use, especially while in possession of a security clearance, is not likely to recur, and no longer casts doubt on his reliability, trustworthiness, and good judgment.

Guideline G (Alcohol Consumption)

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.

Applicant's 2015 DWI conviction, involving a 2014 incident where Applicant excessively consumed alcohol to the point of impaired judgment, establishes the following disqualifying conditions under this guideline:

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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The security concerns raised under this guideline have been mitigated by the following applicable factors:

AG ¶ 23(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 judgment; and

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant's 2015 DWI conviction resulted from circumstances not likely to recur. In November 2014, Applicant exercised extremely poor judgment by driving a vehicle after having consumed alcohol to the point of intoxication with a BAC of .17%. Since then, Applicant has demonstrated a pattern of responsible consumption of alcohol. He has also taken the necessary precautions, by designating a sober driver or using a ride-sharing service, to avoid driving a vehicle on any occasion that he has consumed any

amount of alcohol. In nearly four years, he has neither consumed alcohol to the point of intoxication or impaired judgment, nor driven a vehicle after consuming alcohol. Accordingly, Applicant has demonstrated a sufficient pattern of modified behavior for me to conclude that the questionable judgment associated with his 2015 DWI conviction is behind him.

Guideline J (Criminal Conduct)

The concern under this guideline is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Applicant's 2015 DWI conviction and 2010 possession of marijuana charge establish the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The security concerns raised under this guideline have been mitigated by the following applicable factors:

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): no reliable evidence to support that the individual committed the offence; and

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

AG ¶ 32 (c) is established to mitigate the possession of marijuana charge. Incorporating my comments under Guideline G, AG ¶¶ 32(a) and 32(d) are established to mitigate the DWI conviction given the evidence of Applicant's successful rehabilitation.

Guideline E (Personal Conduct)

The concern under this guideline, as set out in AG ¶ 15, includes:

“Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.”

Applicant's drug use while in possession of a security clearance establishes the general concerns involving questionable judgment and unwillingness to comply with rules and regulations. It also establishes the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

AG ¶ 16(f): violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

The security concerns raised under this guideline have been mitigated by the following applicable factor:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Incorporating my comments under Guideline H, I conclude that Applicant's past drug use while in possession of a security no longer casts doubt on his reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 F, H, J, and G in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H, G, J, and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has mitigated the security concerns raised by his drug use and driving while intoxicated conviction. Accordingly, Applicant 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 and Substance Misuse): FOR APPLICANT

Subparagraphs 1.a – 1.d: For Applicant

Paragraph 2, Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 3.a: For Applicant

Paragraph 4, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 4.a: For Applicant

Conclusion

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

Gina L. Marine
Administrative Judge