DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 17-03298
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

08/17/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate security concerns raised by a 2016 drunk driving conviction. However, he did not present sufficient evidence to mitigate security concerns raised by his history of illegal drug use, including while holding a security clearance. Clearance is denied.

Statement of the Case

On October 20, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline G (alcohol consumption) and Guideline H (drug involvement and substance abuse). Applicant answered the SOR and requested a hearing.

On June 21, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant, his expert witness, and several character references testified at the hearing. Government Exhibits 1 – 5 and 7, as well as Applicant's Exhibits A – O were admitted into the administrative record without objection. (Applicant's objection to Government

Exhibit 6 is discussed under the *Evidentiary Ruling* section.) The transcript of the proceeding (Tr.) was received on June 29, 2018, and the record closed on July 13, 2018.[1]

Evidentiary Ruling

DOHA proceedings are designed to allow the parties to present a full, fair, and accurate record of an applicant's security clearance eligibility. In order to achieve these goals, DoD Directive 5220.6 (Directive) ¶ E3.1.19, states that the federal rules of evidence "shall serve as a guide." Furthermore, the DOHA Appeal Board has stated that administrative judges should liberally apply the "technical rules of evidence," and err on the side of admitting all relevant and reliable evidence.[2]

The Directive, however, does contain one major exception to this (liberal) evidentiary rule of inclusion. Specifically, pursuant to ¶ E3.1.20, a DoD personnel background report of investigation, including a summary of a person's security clearance interview, is generally inadmissible.[3] The danger posed by admitting an unauthenticated interview summary is obvious. Namely, an investigator due to inattention, forgetfulness, or for other reason may incorrectly summarize the interview or portions of the interview. (At present, security clearance interviews are not digitally recorded and saved for later review.) Notwithstanding the proceeding, a summary of a security clearance interview is admissible in a DOHA proceeding if an applicant: (1) waives objection to its admission,[4] (2) adopts the summary as an accurate recitation of what they said during the interview,[5] or (3) submits a portion of the ROI or interview.[6]

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[1] Applicant's revised index and post-hearing correspondence were marked and are attached to the record as Appellate Exhibits IV and V, respectively. Appellate Exhibits I – III are identified in the transcript.

[2] ISCR Case No 03-21434 at 5 (App. Bd. Feb. 20, 2007) ("the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider . . . what, if any, weight to give to that evidence."); ISCR Case No. 14-06011 (App. Bd. Dec. 9, 2015) ("The weight that a Judge assigns to evidence is a matter within his or her discretion.").

[3] *See also* Executive Order 10865, § 5 (prohibiting "investigative reports" without an authenticating witness); ISCR Case No. 14-00974 (A.J. Foreman Oct. 17, 2014) ("Authentication within the meaning of the Directive ¶ E3.1.210 means producing 'evidence sufficient to support a finding that the matter in question is what its proponent claims'.") (citing Fed. R. Evid. 901(a)).

[4] *See generally* ADP Case No. 15-07979 at 3 (App. Bd. Apr. 19, 2017) ("In the absence of any objection to [the summary] or indication that it contained inaccurate information, the Judge did not err by admitting and considering that document."). *See also* ADP Case No. 17-03252 (App. Bd. Aug. 13, 2018) (by failing to raise objection below, applicant waived challenge to admissibility of unauthenticated interview summary).

[5] *See generally* ISCR Case No. 15-01807 at 3 (App. Bd. Apr. 19, 2017) ("By adopting the summary of the interview at the hearing, Applicant eliminated the need for the Government to call a witness to authenticate that document . . .").

[6] *See generally* ISCR Case No. 15-07979 at 3 (App. Bd. Apr. 19, 2017) (extending Fed. R. Evid. 106's rule of completeness to DOHA proceedings) ("Here, Applicant submitted a partial copy of an ROI for consideration by the Administrative Judge. However, no party has the right to insist that only portions of a document the party submits be considered by a Judge. When a party submits a partial copy of a document, that party assumes the risk that the other party will ask that a complete copy of the document be submitted for consideration by the Judge. The principle of fairness underlying FRE 106 is a very important one that benefits all parties in these proceedings, including the Government.").

Here, Applicant objected to that portion of Exhibit 6, consisting of the summary of his security clearance interview. Department Counsel conceded that the summary was not admissible as the Government could not authenticate the document. Applicant, however, requested that I admit and consider the remainder of the exhibit, which consists of Applicant's edits of select portions of the interview summary. Department Counsel, apparently agreeing with Applicant that consideration of only these select portions of the interview summary would not be misleading nor prejudice the Government, conceded to the admissibility of this portion of the exhibit. Accordingly, the portion of Exhibit 6 consisting of the interview summary was not admitted into the record, but the remainder of the exhibit was admitted. *See* Appellate Exhibit II; Tr. 11-13.

Findings of Fact

Applicant, 35, is employed as a federal contractor and has held a security clearance since 2009 or 2010. He graduated from college in 2005, and earned a master's degree in 2016. He works in the trade compliance field, and his performance appraisals reflect favorably on his work. He has received prestigious awards for his work. Supervisors, co-workers, and friends provided their favorable opinions of Applicant's professional competence, strong work ethic, honesty, reliability, and trustworthiness.[7]

From 2002 to March 2016, Applicant used marijuana, cocaine, and ecstasy. He used marijuana after being hired by his current employer, a large defense contractor, in 2007. He continued to use marijuana after being granted a security clearance in 2009. Applicant's marijuana use between 2009 and 2012 occurred while he was employed as a logistics manager on a contract supporting a DoD counter-narcotics program.[8]

Applicant has worked for his current employer for about eight years (September 2007 to January 2012, and from December 2014 to the present). Presently, he occupies a management position and serves as a corporate representative with current and prospective U.S. Government clients.[9] When asked about his employer's workplace drug policy, Applicant testified that he was not familiar with it.[10] Nonetheless, Applicant agreed with his counsel's assertion that he (Applicant) was aware that his use of marijuana was inconsistent with his responsibilities and obligations as a cleared federal contractor.[11]

[7] Tr. 15-52; Exhibits 1; Exhibits A – D; Exhibits K – M; Exhibit O.

[8] Tr. 55-61; Exhibit 1; Exhibit 2; Exhibit A at 2.

[9] Exhibit 1; Exhibit 2; Exhibits A.

[10] Tr. 74 ("Judge" You currently work for [large defense contractor]? Applicant: I do. Judge: All right. And at the time that you were using marijuana, you were working for [large defense contractor]? Applicant: Correct. Judge: What is their drug policy today? Applicant: I am not familiar with the drug policy. . . . So you were never told that you can't use illegal drugs as part of your employment with [large defense contractor]? Applicant: I don't know the specifics of the policy. It may say that.")

[11] Tr. 58-59 ("Mr. Zaid: Were you aware, once you had your security clearance, that you were not allowed to use any type of unlawful narcotics? Applicant: Yes. Mr. Zaid: So let's deal with the elephant in the room. Why was it that you used marijuana once you obtained your security clearance? Applicant: It was never really my intention to continue to use marijuana after I was granted my security clearance. I don't know that I have a great reason for continuing to smoke marijuana past that point. Again, I can say that it wasn't a

In March 2016, Applicant was arrested for driving while impaired (DWI) and possession of marijuana. He consumed several drinks before his arrest, and his blood alcohol content (BAC) was measured at a .13. As part of a plea agreement, Applicant entered a plea of *nolo contendere* to the DWI charge and the prosecution dropped the marijuana possession charge. Applicant was convicted of the DWI charge and sentenced to 180-days in jail (suspended). He was placed on probation and his license was restricted for a year. He was also required to place an interlock device on his car.

Applicant testified that he was ordered not to consume alcohol while on probation. Applicant further testified that he twice violated the terms of his probation. He claims the first violation occurred when he consumed alcohol the night before an early morning teleconference with an overseas client and, when he drove to work the next day, the interlock device on his car detected the presence of alcohol in his system. He claims that the second violation involving the interlock device was the result of mouthwash. He states that, other than these two instances, he did not violate the terms of his probation. He took an additional six weeks of alcohol counseling to avoid having the interlock device mandate extended. He completed the terms of his probation in about May 2017.

Applicant states that he has not used marijuana since the March 2016 arrest, and promises not to use marijuana or any other illegal drugs in the future subject to automatic revocation of his clearance. Applicant submitted drug screens that he voluntary took from October 2017 to June 2018. The drug screens were all negative for the presence of illegal substances. Applicant also attended narcotics anonymous meetings to further demonstrate his willingness and ability not to engage in similar conduct in the future. He was evaluated by a psychologist for the purposes of the security clearance hearing. The psychologist opined that Applicant does not have an alcohol or drug abuse problem.[12]

Applicant self-reported his use of illegal drugs on his security clearance applications.[13] He also reported the March 2016 arrest to his former supervisor when it occurred. Applicant did so because he understands that as a cleared federal contractor he is required to report adverse information. Applicant's former supervisor advised Applicant to inform company security about the incident, including that he was charged with possessing marijuana. Applicant testified that he then reported the arrest to his security manager, including the fact that he had been using marijuana.[14]

The incident report filed by corporate security notes that Applicant self-reported the DUI arrest, charge, and conviction. The report goes on to note that the incident raised concerns under the alcohol consumption guideline. The report, however, contains no indication that Applicant self-reported his marijuana use or the marijuana possession

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very frequent occurrence. I made a number of extremely terrible decisions to smoke marijuana sporadically in that time frame. This wasn't to deal with any personal issues. It wasn't to deal with a medical issue. It wasn't to deal with any personal trauma. It was merely recreational.")

[12] Tr. 61-68, 71-74; Exhibits 1 – 4; Exhibit E; Exhibit F; Exhibit I.

[13] Exhibit 1; Exhibit 2.

[14] Tr. 70-75; Exhibit 5; Exhibit K at 56.

charge.[15] Applicant did report his marijuana use while holding a clearance and the March 2016 marijuana possession charge on his 2017 security clearance application.[16]

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information "upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

The Directive sets forth an administrative judge's authority, responsibilities, and obligations. A judge must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

[15] *Compare*, Tr. 70 ("Sure. Well, I must admit, I made mistakes. Those are on the record. Those are mistakes that I immediately reported to DoD. I knew my responsibilities as a clearance holder were to report any adverse information, and the very next day, after my arrest, I did report that, and submit an adverse information report. I endeavor to always be extremely open and honest with DoD during my security clearance investigations. . . . Judge: Now, before the 2017 security clearance application, did you ever report to your security manager that you were using marijuana [while holding a clearance]? Applicant: I reported the incident of my arrest. Judge: When you reported the incident of your arrest, did you inform them that you had been using marijuana? Applicant: Yes."), *with*, Exhibit 5, JPAS Incident Report and Exhibit M (security manager's statement).

[16] Exhibit 2 at 42-47.

In evaluating the evidence, a judge applies a "substantial evidence" standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive, ¶ E3.1.32.1. *See also* ISCR Case No. 16-03712 at 3 (App. Bd. May 17, 2018).[17]

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). *See also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an 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.[18]

Analysis

Guideline G (Alcohol Consumption)

Applicant's 2016 DWI raises the alcohol consumption security concern, which is explained at 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.

In assessing Applicant's case, I considered the disqualifying and mitigating conditions listed under Guideline G, including:

[17] However, a judge's mere disbelief of an applicant's testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct or issue. ISCR Case No. 17-02952 (App. Bd. Aug. 3, 2018); ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct or issue raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

[18] *See generally* ISCR Case No. 11-13626 (App. Bd. November 7, 2013) (discussing predictive nature of security clearance adjudications). *See also Palmieri v. United States*, 2018 U.S. App. LEXIS 20477, * 8 (D.C. Cir. July 24, 2018) ("*Egan* holds that 'the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.' . . . The idea is that 'an outside non-expert body,' including a court, is institutionally ill suited to second-guess the agency's '[p]redictive judgment' about the security risk posed by a specific person.") (citing to and quoting from *Egan*, 484 U.S. 527, 529).

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, . . . regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment . . .;

AG ¶ 23(a): so much time has passed, or the behavior . . . 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 . . . .

Security clearance assessments about a person require a judge to closely examine the person's conduct and circumstances, both past and present. Applicant provided sufficient evidence to mitigate the security concerns raised by this isolated incident over two years ago. He received counseling, has not engaged in similar conduct, and submitted a favorable evaluation from a psychologist. Notwithstanding the two probation violations, it appears unlikely Applicant will repeat similar conduct in the future. AG ¶¶ 23(a) and 23(b) apply.

Guideline H, Drug Involvement and Substance Misuse

Illegal drug involvement can raise questions about a person's judgement, reliability, and ability and willingness to comply with laws, rules, and regulations. *See generally* AG ¶ 24. In assessing Applicant's conduct, I considered the disqualifying and mitigating conditions under Guideline H, including:

AG ¶ 25(a): any substance misuse;

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

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

AG ¶ 26(a): the behavior happened so long ago . . . 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 . . .

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.

Applicant's history of illegal drug use and the marijuana possession arrest establish the disqualifying conditions in AG ¶¶ 25(a), 25(c), and 25(f). Once disqualifying conditions are established, the burden shifts to an applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision.[19] Illegal drug involvement after being granted a security clearance raises heightened concerns about a person's clearance suitability and requires a judge to closely scrutinize any claim of reform and rehabilitation.[20]

Applicant failed to meet his burden of proof and persuasion. Although he has not used ecstasy or cocaine in over 10 years, his last involvement with marijuana was a little over two years ago. In light of Applicant's 15 years of illegal drug use, including using marijuana while holding a security clearance, an insufficient amount of time has passed to safely conclude he will not engage in similar security-significant conduct in the future.[21]

In reaching this adverse conclusion, I considered Applicant's statement of intent, the favorable psychological evaluation, and the other record evidence suggesting reform. However, the weight I can give this evidence is undercut by Applicant's failure to abide by his probation. His failure to comply with the probationary terms is consistent with his repeated failure to abide by his employer's drug-free workplace policy.[22] Thus, unlike the alcohol consumption security concern raised by the 2016 DUI, the concern raised by Applicant's illegal drug use was not limited to an isolated incident, nor did it occur under unique circumstances. Instead, Applicant's illicit drug use and the probation violations reflect a long history of rules violations and, at present, the heightened security concerns raised by this aggravating evidence is not outweighed by the favorable record evidence.

[19] ISCR Case No. 15-01208 at 4 (App. Bd. Aug. 26, 2016) (citing Directive ¶ E3.1.15). *See also* ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when AGs were last revised, Board held that its prior decisions remained valid when they were "not dependent on the language of any specific guideline," or "where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent.")

[20] ISCR Case No. 16-03451 (App. Bd. Dec. 26, 2017) ("The purpose of a clearance adjudication is to evaluate an applicant's judgment and reliability. An applicant who has demonstrated an unwillingness to abide by rules and regulations regarding illegal drugs may be similarly unwilling to follow rules governing the protection of classified information."); ISCR Case No. 16-02005 at 3 (App. Bd. June 2, 2017) ("an applicant's use of illegal drugs after having completed a security clearance application raises substantial questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations.")

[21] *See generally* ISCR Case No. 15-06277 (App. Bd. July 19, 2017) (passage of five years since applicant last used marijuana insufficient to mitigate concerns raised by drug use over extended period of time and after granted a security clearance). *See also* ISCR Case No. 11-12165 (App. Bd. Jan. 29, 2014) (passage of three years since applicant last used marijuana and other favorable record evidence of reform insufficient to mitigate concerns raised by marijuana use after granted a security clearance).

[22] ISCR Case No. 16-00578 at 2 (App. Bd. Sep. 26, 2017) (judge properly considered the fact major defense contractors are expected to follow and implement policies consistent with the Drug-Free Workplace Act).

Additionally, considering the length of time Applicant has worked for his employer and his past and present positions with the company, his testimony that he was unsure of his employer's drug-free workplace policy was not credible. Furthermore, the documentary evidence, notably, the JPAS incident report, does not corroborate Applicant's hearing testimony that he self-reported his marijuana use to his security manager. This evidence further detracts from the mitigating value that can be extended to the evidence suggesting reform. Guideline H security concerns remain.

Whole-Person Concept

In addition to the specific adjudicative guidelines, a judge must also take into account factors that are applicable in all cases. These factors are grouped together under the all-encompassing umbrella of the whole-person concept.[23] I hereby incorporate my above analysis and highlight some additional whole-person matters.

Applicant is a top performer who is well respected by his supervisors and peers. He self-reported his past illegal drug involvement on his 2009 and 2017 security clearance applications, and reported the 2016 DWI arrest and conviction to his security manager. However, this and the other favorable record evidence are insufficient to mitigate the security concerns raised by Applicant's history of illegal drug use, including while holding a security clearance. Overall, the record evidence leaves me with doubts about Applicant's present eligibility for continued access to classified information.[24]

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

[23] *See* AG ¶ 2. *See also* SEAD-4, ¶ E.4; Directive, ¶ 6.3.

[24] I considered the exceptions listed in SEAD 4, Appendix C, but none are warranted. Arguably, the imposition of random drug screens, an objective, easily verifiable condition, would tend to mitigate the security concern at issue. However, after considering and weighing the record evidence, including the fact that Applicant was able to hide his marijuana use while holding a clearance for years without detection, I decline to exercise the discretionary authority to grant a conditional clearance. Compare and contrast with other cases where I have granted a conditional clearance, ISCR Case No. 17-01775 (Aug. 13, 2018); ISCR Case No. 17-00218 (June 15, 2018); ISCR Case No. 17-00572 (Jan. 19, 2018).

Conclusion

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez
Administrative Judge