



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-01496
)	
Applicant for Security Clearance)	

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

12/26/2018

Decision

HESS, Stephanie C., Administrative Judge:

Applicant mitigated the Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) security concerns raised by his history of alcohol consumption and alcohol-related charges and arrests. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on March 11, 2016. On June 19, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines G and J. The DOD acted under Executive Order (Ex. 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 DOD on June 8, 2017.

Applicant submitted his Answer to the SOR, with attached evidentiary exhibits referenced herein collectively as "Answer," on August 1, 2017, and requested a hearing

before an administrative judge. Department Counsel was ready to proceed on November 1, 2017, and the case was assigned to me on March 20, 2018. On May 21, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 5, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted into evidence without objection. Applicant testified and Applicant's Exhibit (AX) A was admitted without objection. DOHA received the transcript (Tr.) on June 13, 2018.

Findings of Fact

Under Guideline G, the SOR alleges that Applicant consumed alcohol to the point of intoxication from about 1991/1992 to at least January 2016, and that this excessive consumption resulted in five arrests for driving under the influence of alcohol (DUI), two of which resulted in 12 months' probation, and that Applicant received alcohol-related treatment for a condition diagnosed as alcohol-use disorder. Applicant denies the characterization of his alcohol consumption. He admits the DUI arrests, but denies that he was intoxicated during the incidents. Applicant also denies that he was sentenced to probation as a result of his December 2015 DUI arrest. However, he admits that he was sentenced to 12 months' probation following his February 2016 DUI arrest. He admits that he successfully underwent alcohol-related treatment. The SOR cross-alleges under Guideline J, the alcohol-related arrests. Applicant's admissions are incorporated in my findings of fact.

Applicant is a 48-year-old avionics supervisor employed by a defense contractor since May 2014, and previously employed by another defense contractor beginning in December 2009. He served on active duty in the U.S. Navy from February 1989 until he retired in August 2010. He deployed to a combat zone during Operation Desert Storm. He has held a security clearance since approximately 1990. Applicant has a teenage daughter. (GX 1; GX 2; Tr. 26.)

Applicant began drinking alcohol in 1991 while assigned to an aircraft carrier, but did not drink to the point of intoxication or have any alcohol-related issues during the 1990s. In February 2006, Applicant had been drinking and was pulled over for speeding. (Tr. 40.) At the stop, Applicant refused to perform field sobriety tests or take a breathalyzer at the officer's direction, but instead requested a blood test. He was arrested for DUI, speeding, no insurance, and no seatbelt. The DUI charge was reduced to reckless driving and ultimately dismissed.

In December 2010, Applicant was pulled over for speeding. The officer asked Applicant if he had been drinking, Applicant denied that he had been, and refused a breathalyzer. He was arrested and charged with DUI and speeding. Ultimately, the DUI charge was dismissed, the related court costs were waived, and Applicant paid a fine for speeding.

In January 2015, Applicant was pulled over on an Army base for speeding. The officer stated in his report that Applicant smelled strongly of alcohol. However, Applicant

has consistently stated that he had not been drinking. (Answer; Tr. 31; Tr. 41; Tr. 46.) Applicant refused a breathalyzer, and was arrested for DUI and speeding. He was detained for approximately 14 hours, then released. The DUI charge was later dismissed and Applicant paid a \$10 fine for speeding. (GX 5; Answer.) Applicant testified that he had several run-ins with arresting officer of the incident on the Army base. He reported the officer's conduct to the commanding officer, but ultimately Applicant decided to move off base to avoid future issues. Applicant believes that the officer was confusing Applicant with someone else. (Tr. 45-46.)

In December 2015, Applicant was pulled over for speeding while on the way to the hospital to visit his girlfriend. After the stop, the officer stated that he had seen Applicant throw drugs from the vehicle. Applicant denied this and demanded to see the footage from the officer's dashboard mounted camera. The officer refused. Applicant was arrested and charged with DUI, speeding, illegal lane change, no insurance, and no registration. Applicant denies that he consumed any alcohol prior to the arrest. At Applicant's fourth court appearance, the officer was not present and Applicant's attorney stated that all charges would be suspended and later dismissed if Applicant pled guilty and completed a pre-trial diversion program and paid a \$3,600 fine. Applicant did not enter the agreement, but instead, requested a jury trial. At the pretrial conference, all charges except for the speeding were dismissed. (Answer.)

In February 2016, Applicant was in a rental car in a friend's driveway. He had been drinking the night before and there was an empty cup in the car which had contained a non-alcoholic daiquiri. His friend noticed the vehicle, which she did not recognize, and called the police. The police arrived, and after speaking with Applicant and noting the apparent open container, asked Applicant to take a breathalyzer. Applicant refused and was arrested for DUI. Applicant pled no contest to reckless driving and was sentenced to 12 months' probation, which required Applicant to abstain from alcohol use, attend alcohol awareness classes with random urinalysis, and complete 50 hours of community service. Applicant successfully completed the requirements and was released from probation in June 2017. (Answer.)

Three days after his last DUI arrest in February 2016, Applicant self-referred to the Army Substance Abuse Program (ASAP). He was evaluated by a counselor who stated that Applicant met the criteria for Alcohol Use Disorder (Moderate). He was assessed as not needing medical detoxification or inpatient treatment. Applicant entered outpatient treatment and counseling and "met his treatment goal of establishing and maintaining abstinence while increasing his knowledge about the disease of addiction in the process of recovery." He successfully completed the treatment requirements which included attending Alcohol Anonymous (AA) meetings, and, in May 2016, received a fair to good prognosis. (Answer.)

Applicant has abstained from alcohol consumption since February 2016, four months before beginning probation. Despite his denials that he had been drinking prior to several of his DUI arrests, Applicant admits that he had been drinking before the 2006 and 2016 arrests, and that consuming alcohol has created problems in his life. (Tr. 40-

43; Answer.) Applicant has no other criminal history. He strives to continually set an example for his teenage daughter through his actions. (Tr. 23-24; 39.) He is active in his church, and coaches Little League basketball and football. (Tr. 36.) He is working towards his bachelor's degree, regularly works out at a gym, and continues to attend AA meetings two to three times a week. (Tr. 37-38; AX A.) He has no intention of drinking alcohol in the future. (Tr. 38.)

Applicant accepts full responsibility for his actions. He is dedicated to his job. Applicant's two fellow service members and friends since 1991, and a current coworker since 2011 attest to Applicant's strength of character, integrity, and trustworthiness, and highly recommend him for a continued security clearance. (AX A.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's 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 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.

The following disqualifying conditions apply:

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(d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 23(d): the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant began drinking in 1991, but did not have any alcohol-related issues until his first DUI arrest in 2006. Between 2006 and 2016, Applicant was arrested five times for DUI, and admits that he had been drinking on two of those occasions. Immediately following his last DUI arrest in February 2016, Applicant quit drinking and self-referred to ASAP, which he successfully completed with a fair to good prognosis in May 2016. He recognizes that his alcohol use was problematic. He remains abstinent, attends AA meetings two to three times a week, and does not intend to drink in the future. AG ¶¶ 23(b) and 23(d) apply.

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.

The following disqualifying conditions apply:

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 . . . of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The following mitigating conditions are potentially applicable:

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; 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.

Applicant's DUI arrests occurred during a period of time when he was actively using alcohol. He has not had any arrests or charges since achieving sobriety in February 2016. He self-referred to ASAP, successfully completed probation, and continues to voluntarily participate in AA. He is dedicated to his job, and is pursuing his bachelor's degree. He continually strives to be a role model for his daughter, and is active in his church and community. His past conduct does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶¶ 32(a) and 32(d) apply.

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).

I have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Applicant served in the Navy for over 21 years, including a combat deployment. He has held a security clearance for more than 27 years. Applicant has taken positive steps, including cessation of alcohol use since February 2016. He has sought ongoing support for his sobriety by attending AA. He has clearly demonstrated his commitment to reform and rehabilitation. He is respected and trusted by his long-time friends and coworkers. He is pursuing a bachelor's degree. He accepts responsibility of his past conduct, and is committed to his sobriety, his family, and his job.

After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his 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 continued access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraphs 1.a – 1.g: For Applicant

Paragraph 2, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraphs 2.a: For Applicant

Conclusion

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

Stephanie C. Hess
Administrative Judge