



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



In the matter of:)
)
) ISCR Case No. 17-02668
)
Applicant for Security Clearance)

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: Aileen Xenakis, Esq.

12/13/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant was involved in alcohol-related criminal incidents in 2010, 2011, and was convicted of driving under the influence (DUI) in 2016. His last alcohol-related misconduct occurred two years ago. He has demonstrated a sufficient pattern of modified behavior for me to conclude that the questionable judgment associated with his alcohol-related incidents is behind him. I believe he will continue to consume alcohol responsibly to maintain his eligibility for a clearance. The alcohol consumption and criminal conduct security concerns are mitigated. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 3, 2016. (GE 1) He provided a statement during an interview with a government background investigator on March 20, 2017, and answered interrogatories on September 28, 2017. (GE 2) After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on October 4, 2017, alleging security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). Applicant answered the SOR on November 8, 2017, and requested a

hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on April 13, 2018, and issued a notice of hearing on June 8, 2018, setting the hearing for June 26, 2018. Applicant requested a delay to retain an attorney, and the hearing was rescheduled for July 10, 2018. At the hearing, the Government offered twelve exhibits (GE 1 through 12). Applicant testified, presented the testimony of an expert witness, and submitted eight exhibits (AE 1 through 8). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on August 7, 2018.

Findings of Fact

In his SOR answer, Applicant denied SOR ¶¶ 1.a and 1.b, and admitted SOR ¶ 1.c. He submitted comments in mitigation and explanation. Because SOR ¶ 2.a cross alleges the same facts alleged in SOR ¶ 1, he submitted the same answers for both SOR paragraphs. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is 53 years old. He graduated from high school in 1983, and shortly thereafter, he enlisted in the U.S. Navy. He honorably served on active duty until his discharge in 1989. (AE 5) He possessed a clearance while in the service. He married in 1991 and divorced in 1998. He has an adult son of this marriage.

Applicant has been working for federal contractors since 2001. He has received good evaluations and is well-regarded by his employers. (AE 4) He noted that of the 160 employees working for his employer in 2006-2007, only he and 12 other employees have been continued to present. Applicant has been promoted twice, and has possessed a clearance since 1993. His clearance was upgraded to top-secret in 1996, which has been continued to present. He seeks the continuation of his clearance which is required for his work with his current employer.

In response to Section 22 (Police Record) of his 2016 SCA, Applicant disclosed he was involved in an alcohol-related conviction for malicious bodily injuring (a felony) in April 2010. He arrived at a bar at about 7:30 p.m. to watch a couple of hockey games, and left the bar at about 1:45 a.m. He testified that he only drank four beers during the six-hour period. Applicant claimed that on his way home he was threatened by a man who was also at the bar watching the games. He assaulted the man. Applicant was found guilty at a jury trial of malicious bodily injuring, and required to make restitution of \$1,250. Applicant claimed he was not intoxicated, and that he was the victim to a bad investigation.

In April 2011, Applicant arrived at a bar for dinner and to watch some games. He claimed that he only consumed four beers over a six to seven-hour period. At about 2 a.m., when the bar closed, Applicant went to a restaurant to eat. After a couple of hours at the restaurant, he was involved in an altercation with three police officers. Alcohol

use was noted in the police report. He was charged with resisting arrest, obstructing a police officer, and disorderly conduct. The charges were later dismissed due to the police officers' failure to appear. Applicant repeatedly claimed he was not drunk and that he was the victim of police misconduct.

During his March 2017 interview with a government investigator, Applicant disclosed that he was convicted of driving under the influence (DUI) of alcohol in 2016. Applicant and coworkers went to a bar to eat and celebrate the completion of a job. They arrived at the bar at about 8:00 p.m., and stayed until the bar closed at 2 a.m. Applicant claimed he consumed four beers and two shots of scotch. He was arrested while weaving on the road. He pleaded guilty to DUI and was sentenced to one-year probation; fined \$2,000; driver's license was suspended for one year, with driving privileges for work; breathalyzer in the car, and to attend VA ASAP classes. He has complied with all the terms of his sentence. (AE 7)

Applicant reported all the above incidents to his facility security officer and in his SCA. He has continued to consume alcoholic beverages, but averred he drinks once a week, three to four beers per occasion. Applicant denied having a drinking problem. There is no evidence to show that he has been diagnosed with any alcohol use disorder. He credibly testified that he has learned a valuable lesson as a result of his DUI conviction. He no longer drives after consuming alcohol. He now uses the services of taxis, a designated driver, or ride-sharing companies to avoid drinking and driving.

Applicant submitted five favorable reference statements. (AE 8) He is considered to be responsible, dependable, hardworking, diligent, honest, and trustworthy. His references lauded his work ethic, performance, knowledge, and specialized skills. They recommended his eligibility for a clearance. His supervisor noted that Applicant follows security rules and procedures.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AGs list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

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.

Applicant's alcohol-related incidents in 2010, 2011, and his 2016 DUI, where he excessively consumed alcohol to the point of impaired judgment, establish 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 under 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;

(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

(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 acknowledged that he exercised extremely poor judgment by driving a vehicle after having consumed alcohol to the point of intoxication in 2016. There is no evidence of any further alcohol-related misconduct after his 2016 DUI. Although Appellant continues to consume alcohol, he 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 two years since his DUI, he has demonstrated a sufficient pattern of modified behavior for me to conclude that the questionable judgment associated with his alcohol consumption 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 2010 and 2011 alcohol-related incidents, and his 2016 DUI conviction establish the following disqualifying conditions under 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

(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 under 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

(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.

Incorporating my comments under Guideline G, AG ¶¶ 32(a) and 32(d) are established to mitigate the DUI conviction given the evidence of Applicant's modified behavior and responsible consumption of alcohol. Applicant has demonstrated a sufficient pattern of modified behavior for me to conclude that the questionable judgment associated with his alcohol-related incidents, and 2016 DUI conviction are behind him.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an appellant's security eligibility by considering the totality of an appellant's conduct and all relevant circumstances. The 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration

of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines G and J in my whole-person analysis.

Applicant, 53, served six years in the Navy, and has been working for federal contractors since 2001. He has possessed a clearance during most of his service and period working for federal contractors. There is no evidence of any other security concerns aside from those alleged in the SOR.

Applicant's criminal conduct concerns are primarily the result of his alcohol use. His last alcohol-related misconduct occurred two years ago. Applicant has demonstrated a sufficient pattern of modified behavior for me to conclude that the questionable judgment associated with his 2010 and 2011 alcohol-related incidents, and his 2016 DUI conviction are behind him. Applicant promised to continue to consume alcohol responsibly to maintain his eligibility for a clearance. The alcohol consumption and criminal conduct security concerns are mitigated.

Formal Findings

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

Paragraph 1, Guideline G:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is granted.

JUAN J. RIVERA
Administrative Judge