



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



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| In the matter of: |) | |
| |) | |
| [REDACTED] |) | ISCR Case No. 17-03508 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Tod D. Stephens, Esq.

07/31/2019

Decision

HESS, Stephanie C., Administrative Judge:

Applicant mitigated the 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 May 11, 2016. On March 7, 2018, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). 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 on March 16, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on

June 20, 2018, and the case was assigned to me on January 30, 2019. On April 3, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 24, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted into evidence without objection. Applicant testified, called two witnesses, and offered Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on May 6, 2019.

Findings of Fact

Under Guideline G, the SOR alleges that Applicant was arrested and charged with public intoxication in 2004, and driving under the influence of alcohol (DUI) in 2008, twice in 2013, and in 2015. This conduct is cross-alleged under Guideline E. Applicant admits each of the allegations under Guideline G, but denies the allegations under Guideline E, stating that he does not think Guideline E is applicable. Applicant's admissions are incorporated in my findings of fact.

Applicant is a 40-year-old project manager employed by a defense contractor since May 2012. He received his bachelor's degree in 2012. He has held a security clearance since 2013. (GX 1.)

Applicant began drinking alcohol when he was 15 years old. In March 2004, Applicant was walking home in a college town when the police noticed that he was staggering and arrested him, charging him with public intoxication. He paid a \$2,000 fine and was released.

In December 2008, after attending several Christmas parties with his cousin, Applicant was pulled over and arrested and charged with DUI. His license was suspended for six months, he was fined, and he was required to take an alcohol education course.

In August 2013, Applicant was at a bachelor party in another town. He left the party to go purchase more beer, and was stopped for a broken tail light. The officer suspected that Applicant was driving under the influence of alcohol, but Applicant would not submit to a breathalyzer. Applicant was arrested under the suspicion of DUI. He pled guilty, served one year probation, and attended DUI awareness classes.

In November 2013, Applicant was driving to the airport at approximately 2:00 a.m. when he was stopped at an alcohol checkpoint. The officer claimed that he smelled alcohol on Applicant. Applicant told the officer that he had not been drinking and requested a field sobriety test. The officer refused, and upon discovering that Applicant was driving on a suspended license, the officer arrested Applicant. He was released approximately 90 minutes after the arrest. Applicant appeared in court and the DUI and driving on suspended charges were both dismissed.

In December 2015, after recently returning from working in Asia, Applicant attended a company party, where he consumed several beers. On his way home, Applicant took a wrong turn and ultimately ran out of gas. He fell asleep in his car, and

someone notified the police. The police arrived, awoke Applicant, who appeared disoriented, and required him to perform field sobriety tests. Applicant failed the tests and was arrested and charged with DUI. In June 2016, Applicant pled guilty, was sentenced to 48 hours in jail, his license was suspended, and he was required to install a vehicle interlock system. Applicant was also required to attend 12 hours of alcohol awareness training and was placed on one year probation.

Applicant timely reported the 2015 and 2013 charges to his facility security officer (FSO). Following his 2015 DUI arrest, Applicant became concerned about his use of alcohol and the resulting consequences. In July 2016, Applicant voluntarily sought an alcohol evaluation and treatment with a psychiatrist. Applicant reported to the psychiatrist that he began abusing drugs, including cocaine and Xanax, when he was 16 years old. In 2000, when Applicant was 21 years old, he awoke in the hospital following an apparent overdose. Applicant voluntarily entered an inpatient rehabilitation facility for three months and participated in outpatient treatment for nine months for cocaine and prescription drug addiction. Following his successful completion of treatment, Applicant was drug-free until 2002, when he relapsed for one night. He has not used any cocaine or other illegal drugs or misused any prescription drugs since that time. (AX A; GX 5; GX 1.)

The psychiatrist evaluated Applicant and determined that he had an alcohol use disorder with a history of stimulant and sedative dependence use disorder that was presently in remission. The psychiatrist's recommended treatment was for Applicant to refamiliarize himself with the treatment model he learned from his previous drug rehabilitation, limit his alcohol use, and use diversion techniques, such as exercise and dating. Additionally, the treatment plan requires Applicant to meet with the psychiatrist at least annually, and to maintain telephonic contact periodically. Further, Applicant was required to agree to permit the psychiatrist to maintain contact with Applicant's brother who reports his observations of Applicant's overall behavior and specifically alcohol use to the psychiatrist. (AX A.)

Applicant met with the psychiatrist in March 2018. As a result of that meeting, the psychiatrist produced a written report which includes a summary of Applicant's personal history, his drug rehabilitation treatment, his DUIs, and references their July 2016 and June 2017 sessions. The report states that Applicant acknowledges his previous pattern of maladaptive alcohol use, has taken positive actions to overcome his problem, and has complied with the requirements of his treatment. (AX A.) The psychiatrist testified that Applicant's alcohol use disorder has been in remission since 2016, and that his prognosis is good. (Tr. 85; Tr. 89.)

Applicant accepts full responsibility and is remorseful for his actions. He currently consumes one or two beers a few nights a week, and at a social event or on the weekend, he sometimes consumes 4 to 5 beers per occasion. He does not drink to the point of intoxication. (Tr. 46.) Following his 2016 DUI conviction, Applicant was required to have an interlock device installed on his vehicle for 12 months. He voluntarily maintained the interlock device for an additional six months. He does not ever drink alcohol then drive. (Tr. 48.) Applicant regularly travels for work outside the United States, and for his personal

safety and professional integrity, rarely consumes any alcohol. (GX 4; Tr. 37.) Applicant is dedicated to his job. In his free time, Applicant spends time with his brother and his family, exercises, socializes, and volunteers. (Answer.)

Applicant's current supervisor, who initially hired Applicant, was aware of Applicant's history of alcohol-related arrests. Applicant's supervisor testified that following the 2015 DUI arrest, he determined that Applicant must follow strict requirements and guidelines in order to maintain his employment with the company. Specifically, Applicant could not have any more alcohol-related incidents and he must participate in and comply with alcohol treatment. Applicant gave permission for his supervisor to independently consult with Applicant's psychiatrist regarding Applicant's treatment. Additionally, Applicant voluntarily discussed the details of his treatment program with his supervisor. Applicant has complied with these requirements. Applicant's supervisor states that Applicant accepts responsibility for his past, poor decisions, and that Applicant has made positive personal changes. Throughout Applicant's employment, his supervisor has never seen Applicant under the influence of alcohol while at work. Applicant's supervisor continues to support Applicant and highly recommends the continuation of his security clearance. Applicant's supervisor also states that Applicant is trustworthy, dependable, reliable, and responsible. (Tr. 105-106; AX B.)

Applicant's coworkers and friends, all of whom are aware of the allegations in the SOR, collectively state that Applicant is a dedicated professional with good character and integrity who is honest and trustworthy. They do not see any current signs of alcohol abuse. They highly recommend the continuance of Applicant's security clearance. (AX C through AX H.) Applicant's lifelong friend, who saw Applicant immediately following the 2015 DUI arrest, has observed Applicant's remorse and acceptance of responsibility for his past conduct, and has witnessed positive changes in Applicant's attitude and behavior. (AX D.)

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(c): the individual is participating in counseling or treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program.

Between 2004 and 2015, Applicant was arrested and charged for alcohol-related incidents. He was convicted for the 2004 public intoxication charge, and for the December 2008, August 2013, and December 2015 DUIs. Applicant appropriately reported his DUI arrests to his FSO. Following the 2015 DUI arrest, Applicant became concerned about his alcohol use and voluntarily consulted a psychiatrist for evaluation and treatment. The psychiatrist recommended a multi-faceted treatment program, which includes moderate consumption of alcohol, with which Applicant continues to comply. The psychiatrist states that Applicant's alcohol use disorder has been in remission since 2016, and that his prognosis is good. AG ¶¶ 23(b) and 23(c) apply.

Guideline E, Personal Conduct

Any potential personal conduct concerns are mitigated for the reasons set forth under the analysis of Guideline G.

Whole-Person Concept

Under AG ¶ 2(a), 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(d).

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

Applicant voluntarily sought treatment and is complying with the requirements of it. He is highly respected by his supervisor, coworkers, and friends. He accepts responsibility for his past conduct and has taken positive action to prevent its recurrence.

After weighing the disqualifying and mitigating conditions under Guidelines G and E, 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:

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| Paragraph 1, Guideline G (Alcohol Consumption): | FOR APPLICANT |
| Subparagraphs 1.a – 1.e: | For Applicant |
| Paragraph 2, Guideline E (Personal Conduct): | FOR APPLICANT |
| Subparagraph 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