



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



In the matter of:)
)
 ---) ISCR Case No. 18-00300
)
 Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esquire, Department Counsel
For Applicant: *Pro se*

12/13/2018

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding alcohol consumption and criminal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On September 17, 2013, and again on December 14, 2016, Applicant applied for a security clearance and submitted Electronic Questionnaires for Investigations Processing (e-QIP) versions of a Security Clearance Application. On an unspecified date in 2018, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a set of interrogatories. She responded to those interrogatories on February 20, 2018. On May 17, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), (December 10, 2016), *National Security Adjudicative Guidelines* (AG) for all covered individuals who require initial or continued

eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guidelines G (Alcohol Consumption) and J (Criminal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on June 4, 2018. In a sworn statement, dated June 13, 2018, Applicant responded to the SOR and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by DOHA on September 11, 2018, and she was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to her case. Applicant received the FORM on September 18, 2018. Applicant's response was due on November 2, 2018. Applicant timely submitted one document in response to the FORM, and it was admitted as an Applicant exhibit, without objection. The case was assigned to me on September 6, 2018.

Findings of Fact

In her Answer to the SOR, Applicant admitted with comments all of the factual allegations in the SOR pertaining to alcohol consumption (SOR ¶¶ 1.a. through 1.d.). She failed to address the factual allegations pertaining to the criminal conduct issues. Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 28-year-old employee of a defense contractor. She has been serving as a systems administrator with her current employer since January 2016. A 2009 high school graduate, Applicant earned a number of college credits, but no degree. She enlisted in the U.S. Marine Corps (USMC) in September 2009, and served on active duty until September 2013, when she was honorably discharged. She completed her military service commitment in the Individual Ready Reserve (IRR) in August 2017. She was granted a secret clearance in November 2010. Applicant was married in December 2013, and separated in May 2016. She has two sons, born in October 2012, and sometime in 2018.

Alcohol Consumption and Criminal Conduct

Applicant is an alcohol abuser whose consumption of alcohol has led to at least three incidents over a five-year period that resulted in actions taken by police and court authorities:

•In November 2011, when she was on active duty, after being out drinking an unspecified quantity of beer at a bar with friends, Applicant drove onto her military facility while under the influence of alcohol and emitting the odor of alcohol, and she was apprehended at the gate by the military police. She was administered a breathalyzer and field-sobriety test. In December 2011, the traffic court on base assessed her 10 points to her driving record on base, and she was ordered to attend a one-day alcohol education program. She was eventually administratively counseled by her command with a write-up under what is called a page 11 entry, declared ineligible for promotion for three months, and issued a reprimand.¹

•In March 2012, when she was on active duty, after being out drinking one shot of liquor, a mixed drink, and up to two beers at a bar with her sister, she decided to return to the military facility by taxi. While riding in the taxi, she passed out. The gate guards could not awaken her, so she was transported to the base hospital. She was subsequently ordered to undergo an alcohol screening. Based on the alcohol screening, Applicant was advised to participate in outpatient treatment, but because she was pregnant, she requested inpatient treatment. She was in the hospital treatment program from March 27, 2012, until April 24, 2012, during which she participated in group counseling, was given a smokers patch, and administered Melatonin to treat insomnia. No diagnosis was reported. She purportedly successfully completed the program “by mutual decision,” and was discharged. The U.S. Navy medical office guided her through an outpatient follow-up from May 2012 until August 2012, during which she participated in individual therapy and individual therapy. There was no diagnosis. She purportedly successfully completed that program “by mutual decision,” and was discharged.²

•On July 2, 2016, at about 1 a.m., after being out drinking two beers and what she described as a “trashcan”³ at a café with a friend, blaming the anniversary of her father’s passing and the absence of her husband for her frame of mind, Applicant drove to her residence. On the way there, Applicant’s vehicle struck a tow truck stopped at a traffic signal in a traffic lane, sideswiping it coming from the opposite direction. As a result of the impact, a trail of debris, including the front left tire, most of the front bumper, and the license plate were left behind. Applicant drove away without exchanging any information with the tow truck driver. He followed her at a fast rate of speed and called the police. The police arrived just as Applicant and her companion were attempting to enter her house. Her damaged vehicle was out front. Applicant was questioned and acknowledged that she had been drinking, and that she fled because she was scared. There was a strong odor of alcohol coming from her breath and person. She was administered field sobriety

¹ Item 5 (Personal Subject Interview, dated January 3, 2014), at 3, 5; Item 5 (Personal Subject Interview, dated August 1, 2017), at 5; Item 2 (Applicant’s Answer to the SOR, dated June 13, 2018), at 1.

² Item 5 (January 2014 Personal Subject Interview), *supra* note 1, at 5-6; Item 5 (August 2017 Personal Subject Interview), *supra* note 1, at 5. It should be noted that although the medical records were requested from the hospital, and Applicant authorized the release of those records, there are no such medical or treatment records in the case file, and the specifics of the treatment remain unreported.

³ The ingredients of a typical trashcan drink are: 1/2 ounce gin, 1/2 ounce vodka, 1/2 ounce triple sec, 1/2 ounce light rum, 1/2 ounce peach schnapps, 1/2 ounce blue curacao, and 1 full can Red Bull.

tests and arrested for driving under the influence of alcohol (DUI). She was later administered an intoxilizer test. Applicant was charged with driving while intoxicated (DWI), first offense, with a blood alcohol reading of between .15 and .20 percent, a misdemeanor; and failing to stop at an accident, a misdemeanor. On September 15, 2016, she was found guilty of the DWI, and was sentenced to 90 days in jail, 85 days of which were suspended, ordered to attend an area alcohol safety program (ASAP), placed on unsupervised probation for three years, fined, her operator's license was restricted, and an ignition interlock restriction was required. The remaining charge was dismissed *nolle prosequi*.⁴

Applicant claimed that she enrolled in the ASAP and attended weekly group therapy meetings for 16 weeks, as well as a 4-week program, not otherwise described, ending in March 2017. She also contends that she voluntarily attends Alcoholics Anonymous (AA) meetings when she feels the need to do so.⁵

In January 2014, Applicant acknowledged to an investigator from the U.S. Office of Personnel Management (OPM) that she began consuming alcohol when she was approximately 18 years of age while attending high school parties. There were times when she would drink two to three beers on three or four occasions per week, and periods when she did not drink at all. Describing intoxication as being "fuzzy headed" and slurring words, she acknowledged becoming intoxicated after consuming seven or eight beers, something she did weekly on average. She also acknowledged that she has become intoxicated after only three beers. Applicant drinks sometimes to deal with stress, and sometimes just to be social.⁶ In August 2017, she claimed to another OPM investigator that she had no future intent to consume alcohol nor would she ever operate a vehicle while intoxicated. She denied that her drinking and driving incidents constituted a pattern, and contended that her 2016 incident was an "isolated" incident.⁷ In her Answer to the SOR, Applicant claims that she has attempted to turn her life around by avoiding being in situations where alcohol is involved, by changing the friends with whom she associates, and by no longer drinking.⁸ In her Response to the FORM, Applicant reiterated her position regarding alcohol.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing,

⁴ Item 5 (August 2017 Personal Subject Interview), *supra* note 1, at 3-5; Item 6 (Sheriff's Incident Report, dated July 2, 2016); Item 7 (Court Traffic/Criminal Case Details, dated September 15, 2016).

⁵ Item 5 (August 2017 Personal Subject Interview), *supra* note 1, at 5.

⁶ Item 5 (January 2014 Personal Subject Interview), *supra* note 1, at 6.

⁷ Item 5 (August 2017 Personal Subject Interview), *supra* note 1, at 5.

⁸ Item 2, *supra* note 1, at 1-2.

“no one has a ‘right’ to a security clearance.”⁹ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”¹⁰

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”¹¹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.¹²

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 and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified

⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁰ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

¹¹ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

¹² See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”¹³

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”¹⁴ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set forth 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 guideline notes several conditions that could raise security concerns under 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;

- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

- (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;

¹³ *Egan*, 484 U.S. at 531.

¹⁴ See Exec. Or. 10865 § 7.

- (e) the failure to follow treatment advice once diagnosed;
- (f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder; and
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant consumed alcohol at times to excess and to the point of intoxication on at least three occasions during the period November 2011 until July 2016, and that use of alcohol has led to a number of incidents that resulted in actions taken by police and court authorities. As a result of her alcohol consumption, she has been administratively reprimanded while in the USMC and convicted of DWI after her vehicle struck another vehicle and she drove away without exchanging any information. She has been ordered to attend a one-day alcohol education program, directed to participate in a hospital rehabilitation program, an outpatient aftercare program, and ASAP. While her consumption of alcohol appears to be repetitive in nature, there is insufficient evidence to conclude that such consumption constituted binge drinking status. Appellant purportedly successfully completed the command-mandated and court-ordered programs and the requirements of those programs. AG ¶ 22(a) has been established, but none of the other conditions have been established.

The guideline also includes several examples of conditions under AG ¶ 23 that could mitigate security concerns:

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

AG ¶ 23(b) partially applies, but none of the remaining conditions apply. Because of its relative recency, Applicant's 2016 alcohol-related incident – the one involving a DWI and a hit and run – is the most significant, as far as her security clearance review is

concerned. Applicant's behavior, stemming from her association with alcohol, has not been infrequent, and the circumstances developed do not appear to be unusual. She had admitted to repeated periods of intoxication over the years. While Applicant now acknowledges her pattern of maladaptive alcohol use, for far too long she seemingly gave lip-service to it. She abstained briefly at times, but eventually returned to excessive alcohol use. She continued to abstain for longer periods when required to do so, like during periods of treatment, but relapses continued to occur. Moreover, it is troubling that for her most recent incident, Applicant seems to blame the anniversary of her father's passing and the absence of her husband for her DWI and hit and run incident. While Applicant now claims to be abstinent, she has failed to demonstrate a clear and established pattern of modified consumption or abstinence. Even crediting her with her purported period of abstinence, which would be since July 2016, that period equates to only two and one-half years, after nearly a decade of alcohol consumption and abuse.

Applicant successfully completed the series of alcohol-related programs that were either command-mandated or court-mandated. Despite her acknowledgement that AA is a good program for her, she only attends meetings on an irregular basis, when she thinks she needs to do so. Because of her history of maladaptive alcohol use, her relatively brief unsubstantiated period of abstinence, and her irregular attendance at AA, there remain significant questions as to whether such maladaptive alcohol use will recur. Nevertheless, Applicant should be encouraged to remain abstinent for a much longer period. She has failed to demonstrate a clear and established pattern of modified consumption or abstinence, and under the circumstances, there remain doubts on her reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct 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 guideline notes three conditions under AG ¶ 31 that could raise security concerns:

- (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;
- (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; and
- (c) individual is currently on parole or probation.

My discussion related to Applicant's Alcohol Consumption is adopted herein. In addition, Applicant's court-mandated probation – a result of her July 2016 arrest and September 2016 DWI conviction – is still in place, and does not expire until mid or late 2019. Accordingly, based on the actions described above, AG ¶¶ 31(a), 31(b), and 31(c) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from criminal conduct. They include:

(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.

AG ¶ 32(d) partially applies. AG ¶ 32(a) does not apply. Applicant has a multiple-incident history of criminal conduct, commencing in November 2011 and continuing periodically until at least July 2016. She was arrested, and charged with a variety of crimes, been reprimanded, spent time in jail, was fined, placed on probation, lost her driver's license, and required to attend several treatment and educational programs. Over that period, nothing seemed to work. She continued to blame a variety of situations or individuals for her criminal involvement. There is limited unverified evidence of the successful completion of various command-mandated or court-mandated programs.

While there is evidence that one particular charge was dismissed or otherwise not prosecuted, that dismissal and non-prosecution does not, without substantially more, necessarily reflect that Applicant did not commit the individual offense charged. Generally, the passage of time without recurrence of additional criminal activity can be construed as some evidence of successful rehabilitation. However, in this instance, the most recent criminal activity was committed two and one-half years ago. While a person should not be held forever accountable for misconduct from the past, in this instance the past is relatively recent, and the concerns about future criminal conduct are continuing. Applicant's past history of criminal conduct, under the circumstances, continues to cast doubt on her reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.¹⁵

There is very little evidence mitigating Applicant's conduct. Applicant is a 28-year-old employee of a defense contractor. She has been serving as a systems administrator with her current employer since January 2016. She enlisted in the USMC in September 2009, and served on active duty until September 2013, when she was honorably discharged. She completed her military service commitment in the IRR in August 2017. She was granted a secret clearance in November 2010.

The disqualifying evidence under the whole-person concept is more substantial. Applicant has consumed alcohol to intoxication on various occasions. She consumed alcohol at times to excess and to the point of intoxication on at least three occasions during the period November 2011 until July 2016, and that use of alcohol has led to a number of incidents that resulted in actions taken by police and court authorities. As a result of her alcohol consumption, she has been administratively reprimanded while in the USMC and convicted of DWI after her vehicle struck another vehicle and she drove away without exchanging any information. She has been sentenced to jail, ordered to attend various alcohol-related programs, placed on unsupervised probation for three years, fined, her operator's license was restricted. She remains on probation.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from her alcohol consumption and criminal conduct concerns. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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:

¹⁵ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a. 1.b.:	Against Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge