



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 18-01128
)
 Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

06/07/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on January 23, 2017. On August 31, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The DOD CAF acted 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on September 19, 2018, and requested a hearing before an administrative judge. Applicant’s answer to the SOR included 16 pages

captioned as “self-reflection,” containing his introspective personal evaluation of the impact of alcohol consumption on his life, followed by favorable comments from several friends and former colleagues who read it.

Department Counsel was ready to proceed on March 7, 2019, and the case was assigned to me on April 4, 2019. On May 3, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 23, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, presented the testimony of five witnesses, and submitted Applicant’s Exhibits (AX) A through M, which were admitted without objection. DOHA received the transcript (Tr.) on June 5, 2019.

Findings of Fact¹

In Applicant’s answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.g. He did not specifically admit or deny the allegation in SOR ¶ 2.a, which cross-alleges the conduct in SOR ¶¶ 1.a, 1.c, and 1.f. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 29-year-old cybersecurity analyst employed by a defense contractor. He was a part-time bartender from August 2006 to May 2015, and he also worked part-time in construction and home-cleaning services from June 2006 to January 2013. He received an associate’s degree in May 2015. Shortly thereafter, he began working for a defense contractor as a help-desk technician. In October 2017, he began working in his current position. He has held a security clearance since December 2015.

Applicant has never married and has no children. He has lived with a cohabitant and her three children since June 2017. (Tr. 95-96.)

In January 2013, Applicant was stopped by a state trooper for speeding (60 miles per hour in a 45-mile-per-hour zone). Applicant had consumed three or four beers. He testified that a regular beer for him was a 22-ounce draft beer. (Tr. 98.) He failed a field sobriety test and a breathalyzer registered a blood-alcohol content (BAC) of 0.12. (Tr. 100.) He was arrested for driving under the influence of alcohol (DUI). On advice of his attorney, he attended an alcohol-education class before his court appearance. He could not remember receiving any diagnosis after the class, but he remembered that he was advised to modify his consumption. He followed that advice to the extent that he stopped drinking hard liquor and limited himself to beer. (Tr. 101-02.) He pleaded guilty and was sentenced to probation before judgment, confinement for 20 days (suspended), and a \$185 fine. He was placed on probation for three years, until June 2016. (GX 3 at 1-2.)

In October 2015, Applicant was stopped by a state trooper for crossing the white line on the edge of the road. He had consumed four or five beers. He was detained for

¹ Applicant’s personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

about an hour until he was released to his brother's custody. He remembered that a breathalyzer at the police station registered a BAC of 0.20. (Tr. 106.) The charges were dismissed pursuant to a plea agreement requiring him to make a \$5,000 charitable contribution, undergo a 28-day treatment program, and install an ignition interlock on his vehicle. (GX 2 at 8; Tr. 107.) His treatment consisted of 54 group sessions and 4 individual sessions. He was diagnosed with a severe alcohol-use disorder. He completed the program in November 2015. The treatment facility recommended that he abstain from alcohol, complete an intensive outpatient addiction-counseling program, attend Alcoholics Anonymous (AA) or equivalent meetings a minimum of three times a week, and obtain a male AA sponsor. Applicant abstained from alcohol for about two or three months, but he did not follow any of the other recommendations. (Tr. 110.)

In June 2018, Applicant was stopped by city police for driving without his headlights turned on. He had spent the day on a beach vacation with his cohabitant and her sisters, and had consumed several beers throughout the day. He was arrested for DUI. (GX 3 at 3-4.) His interim clearance was revoked on September 4, 2018. (SOR Answer at 16.) His trial was pending when the SOR was issued. In December 2018, he entered an "Alford plea," which does not admit guilt but admits that the prosecutor has sufficient evidence to prove guilt. (Tr. 113.) He was fined \$600 and sentenced to 11 days in jail. He served four days and received a work release. He is required to have an ignition interlock on his vehicle until July 3, 2019. (AX M at 2; Tr. 116-17.)

Applicant testified that after his arrest in June 2018, he went home, consumed half a beer, and decided to stop drinking. He testified that he has not consumed alcohol since June 22, 2018. (Tr. 115.)

In July 2018, Applicant entered a 12-week substance-abuse treatment program that included weekly breathalyzer tests and random urinalysis screening. As of September 24, 2018, his prognosis was "good." (AX E.) He completed the program in October 2018. (Tr. 124.)

Applicant began attending AA meetings on the day he was released from jail in June 2018. He attended meetings daily for 60 days. He then began attending meetings three times a week and calling his sponsor daily. He did not attend meetings or talk to his sponsor for about six weeks in February-March 2019, but he has resumed meetings and talks to his sponsor about once a week. (Tr. 118-22.) His sponsor submitted a letter expressing confidence in his continued sobriety and recovery. (AX F.)

Applicant's mother and stepfather submitted a joint statement, and his mother testified at the hearing. She testified that for many years they had little contact with Applicant, even though they are a large and socially active family and underwent several health emergencies. They witnessed his drinking binges and his hangovers. Since June 2018, Applicant has attended all family functions, he calls his mother daily, and his attitude and temperament has changed. He no longer is involved in the bar and restaurant business and no longer indulges in the heavy drinking after work that was common when he was working as a bartender. (Tr. 24-32; AX B.)

Applicant's cohabitant submitted a statement and testified. She and Applicant have known each other for about 13 years and both worked at the same bar and restaurant. They became friends and now live together. She has a security clearance and is the assistant facility security officer for a defense contractor. She testified that Applicant is a kind and generous person and a talented and dedicated employee. She has watched him attend AA meetings and listened to him talking to his sponsor. She believes he has a strong support system, including herself, his mother, stepfather, brother, colleagues, many friends, and his AA sponsor. She was present when Applicant returned from work after his most recent arrest and said, "I can't do this anymore. This is going to destroy my life." She testified that she has observed Applicant at events where alcohol was being served, and he has seemed comfortable limiting himself to non-alcoholic drinks. She believes that he has been abstinent since June 22, 2018. (AX D; Tr. 34-46.)

Applicant's aunt, a recently retired federal employee with 33 years of service, regards herself as his "favorite aunt." She testified that Applicant comes from a large, strong family that supports his decision to overcome his alcohol problems. She testified that the family gathers almost every month for a special occasion, and alcohol is served at these gatherings. Applicant has attended every gathering, and he has not consumed alcohol at any of them. (Tr. 58-66.)

Applicant's supervisor when the June 2018 incident occurred testified that he was notified when Applicant was arrested. His former supervisor changed jobs in August 2018, moving from being the contractor lead to being the government lead. He was impressed by Applicant when he was the contractor lead and continued to be impressed when he became the government lead. He and Applicant have become personal friends. They recently traveled to a job location, and most of the contractor employees and government employees went out for the evening after work, but Applicant asked to be dropped off for an AA meeting in the area. (Tr. 78-85.)

Applicant's supervisor since August 2018 testified and submitted a statement. She testified that she and Applicant work together daily, and she has had the opportunity to know him on a personal level. She testified that Applicant has been very open about his problem with alcohol and his steps to overcome it. Applicant is under consideration for promotion based on his technical skill, leadership, and overall performance. She admires him for his decision to seek help, complete treatment, and commit to sobriety. She believes Applicant is qualified for a security clearance. (AX A; Tr. 68-77.)

Three family members (his father, an uncle, and a cousin) submitted letters attesting to Applicant's good character and dedication to overcoming his alcohol problems, and one of them suggested that alcohol abuse was a family problem. (AX I, J, and K.) A former co-worker and a current co-worker regard him as hardworking, focused, and passionate about his job. (AX G and H.)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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.” 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline G, Alcohol Consumption

The SOR alleges that Applicant was arrested for DUI in January 2013 and was convicted (SOR ¶ 1.a); received treatment for alcohol abuse in February 2013 (SOR ¶ 1.b); was arrested for DUI in September 2015 (SOR ¶ 1.c); and received treatment in October 2015 for a diagnosis of a severe alcohol-use disorder (SOR ¶ 1.d). It also alleges that he continued to use alcohol from November 2015 to June 2018, contrary to treatment recommendations (SOR ¶ 1.e); was arrested for DUI in June 2018 (SOR ¶ 1.f); and was enrolled in a 12-week treatment program beginning in July 2018 (SOR ¶ 1.g).

The security 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 relevant disqualifying conditions are:

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;

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;

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;

AG ¶ 22(e): the failure to follow treatment advice once diagnosed; and

AG ¶ 22(f): alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

AG ¶¶ 22(a) and 22(c) are established by Applicant's arrests for DUI in January 2013, September 2015, and June 2018. AG ¶¶ 22(d), 22(e), and 22(f) are established by

his treatment in October 2015, a diagnosis of severe alcohol-use disorder in November 2015, and his continued alcohol consumption, contrary to a treatment recommendation that he abstain from alcohol.

The following mitigating conditions under this guideline are potentially applicable:

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;

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.

AG ¶ 23(a) is not established. Applicant's excessive alcohol consumption was recent, frequent, and did not occur under unusual circumstances making recurrence unlikely. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of all the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's deeply personal and introspective analysis of his conduct in his answer to the SOR, his testimony at the hearing, his continued and extensive participation in AA, and the testimonials from his AA sponsor, friends, co-workers, and family members show that Applicant's epiphany was in June 2018, when he recognized for the first time that he had a serious alcohol-abuse problem and began to address it. He also recognized that, for the first time in his life, he had a meaningful and rewarding job, and that he would lose it if he did not change his lifestyle. While the possibility of relapse cannot be excluded, the evidence indicates that he is serious about maintaining sobriety and has taken specific steps to change his behavior. However, insufficient time has passed since his last DUI to establish this mitigating condition.

AG ¶¶ 23(b) and 23(d) are not fully established. Applicant has acknowledged his excessive alcohol consumption, completed a 12-week substance-abuse treatment program in October 2018, participated aggressively in AA, maintained regular contact with his AA sponsor, and abstained from alcohol since June 2018. However, I am not

satisfied that sufficient time has elapsed since his last DUI to demonstrate a “clear and established pattern” of abstinence.

Guideline J, Criminal Conduct

The SOR cross-alleges the DUI arrests alleged in SOR ¶¶ 1.a, 1.c, and 1.f under this guideline. The concern raised by 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.”

Applicant’s DUI arrests and their legal consequences establish the following disqualifying conditions under this guideline:

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 (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

AG ¶ 31(c): individual is currently on parole or probation.²

The following mitigating conditions are relevant, but they are not established, for the reasons set out in the above discussion of Guideline G:

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.

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

² There is no evidence in the record showing that probation was specifically imposed, but the ignition interlock requirement is the functional equivalent of probation for the purposes of this guideline.

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 and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guidelines G and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was candid, remorseful, sincere, and credible at the hearing. He has taken significant steps to change his lifestyle. However, his abstinence since June 2018 is insufficient to overcome the security concerns raised by his multiple DUI incidents. I am bound by the mandate of the Supreme Court in *Egan, supra*, which requires that "[S]ecurity clearance determinations should err, if they must, on the side of denials."

If Applicant continues along his current path, he may well be able to qualify for a security clearance after more time has passed. See Directive E3.1.38 through E3.1.40 (reconsideration authorized after one year). However, after weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence currently before me in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his alcohol consumption and alcohol-related criminal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

³ The factors are: (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.

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge