



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



In the matter of:)
)
) ISCR Case No. 18-01736
)
Applicant for Security Clearance)

Appearances

For Government: Liam Apostol and Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

05/29/2019

Decision

HARVEY, Mark, Administrative Judge:

The statement of reasons (SOR) alleges, and Applicant admits he had eight misdemeanor-level, alcohol-related arrests from 2000 to 2017. He made some positive steps towards rehabilitation; however, security concerns under Guideline G (alcohol consumption) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On September 30, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On September 10, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. The SOR set forth security concerns arising under Guideline G. (Hearing Exhibit (HE) 2)

On October 12, 2018, Applicant provided a response to the SOR, and he requested a hearing. (HE 3) On January 9, 2019, Department Counsel was ready to proceed. On January 25, 2019, the case was assigned to me. On March 11, 2019, the

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 25, 2019. (HE 1) The hearing was held as scheduled; however, Applicant objected because he did not have 15 days of notice of the date, time, and location of the hearing. The hearing was terminated, and a new hearing was scheduled. On March 29, 2019, the hearing was scheduled for May 2, 2019. The second hearing was held as scheduled using video teleconference.

During the hearing, Department Counsel offered four exhibits; Applicant offered five exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 11-14, 69; GE 1-4; Applicant Exhibit (AE) A-E) On May 15, 2019, DOHA received a copy of the hearing transcript. The record closed on May 16, 2019. (Tr. 71-72, 77; AE F)

Findings of Fact¹

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a, 1.d, 1.e, and 1.f through 1.i. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 36-year-old employee of a defense contractor who has been employed as an engineering analyst for his current employer since 2015.² (Tr. 67) He has been employed in the aerospace industry for 16 years. (Tr. 73; AE A) His annual salary is \$85,000. (Tr. 74) In 2018, he received several awards from his employer. (AE D) In 2018, he received a U.S. patent. (AE E) He completed numerous work-related training courses. (AE A) In 2000, he received a General Education Diploma, and he has not attended college. (Tr. 7) In 2003, he married, and he has two children ages 6 and 13. (Tr. 8-9) He has not served in the military. (Tr. 67)

Alcohol Consumption

The SOR alleges the following conduct of security significance.

SOR ¶ 1.a alleges and Applicant admitted that he consumed alcohol at times in excess and to the point of intoxication from about 2000 to at least July 2018. (SOR response)

SOR ¶ 1.b alleges in about February 2017, Applicant was charged with Battery and Disorderly Conduct, and he was consuming alcohol at the time of his arrest. Applicant and some friends were at a bar drinking alcohol. (Tr. 42) Applicant drank six or seven drinks, and he was intoxicated. (Tr. 42, 45) One of Applicant's friends got into a fight. (Tr. 42-43) The bouncer told Applicant and his friends to leave the bar; a bouncer put his hand on Applicant's chest; and Applicant pushed the bouncer's hand away. (Tr. 42-44)

¹ Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

² Unless stated otherwise, the sources for the information in this paragraph are Applicant's Questionnaire for National Security Positions (SF 86) or security clearance application (SCA) and his resume. (Government Exhibit (GE) 1; AE A)

Applicant and his friends went to another bar where the police arrested Applicant for pushing the bouncer's hand when they were leaving the bar. (Tr. 43-44) The charge was dismissed. (Tr. 46) Applicant conceded that he showed poor judgment. (Tr. 47-48) Applicant was not convicted of any crime for his conduct in about February 2017.

SOR ¶ 1.c alleges in about January 2015, Applicant was charged with Disturbing the Peace, and he was consuming alcohol around the time of his arrest. Applicant was at a casino, and he drank four or five beers. (Tr. 39) He was gambling, and he got into an argument with another gambler. (Tr. 31-38; GE 1 at 47; GE 2 at 6) Security guards escorted Applicant, his spouse, and another patron from the gambling area. The security guards transferred them to the police. (Tr. 38) Applicant posted \$1,150 bail, and he was released from jail. (Tr. 41) Applicant went to court, and a judge dismissed the charge of Disturbing the Peace because the casino representative did not appear at his hearing. (Tr. 38-40) Applicant's bail was refunded. (Tr. 41)

SOR ¶ 1.d alleges in about February 2010, Applicant was charged with Disorderly Conduct and Intoxication. Applicant drank 6 to 10 drinks at home with a friend, and he and the friend got into an argument. (Tr. 47-50) A neighbor called the police, and Applicant was intoxicated and disrespectful to the police. (Tr. 47-50) The police arrested Applicant for Disorderly Conduct and Intoxication. (Tr. 47-50) He pleaded guilty to Disorderly Conduct and Intoxication, and he received 30 days in jail (suspended), a fine, and probation before judgment for 18 months. (Tr. 50) He successfully completed probation, and he does not have a conviction for this offense. (Tr. 50)

SOR ¶ 1.e alleges in about October 2008, Applicant was charged with Intoxication and Interfering with Arrest. Applicant and some friends were drinking at a barbecue at Applicant's residence. (Tr. 50-53) Applicant drank 8 to 10 beers. (Tr. 53) A neighbor called the police, and Applicant was disrespectful to the police. (Tr. 52) He was found guilty of Interfering with Arrest, and the Intoxication charge was dismissed. (Tr. 53) He paid a \$300 fine. (Tr. 53)

SOR ¶ 1.f alleges in about January 2004, Applicant was charged with Assault and Disorderly Conduct, and Applicant consumed alcohol before his arrest. Applicant was at a party consuming alcohol, and he allowed someone to borrow his car. (Tr. 54) An accident involving Applicant's vehicle occurred within Applicant's view, and he went to the location of the accident. (Tr. 54-55) The police arrived, and Applicant was arrested. (Tr. 54-55) Applicant could not remember what he did or why he was arrested. (Tr. 54-55)

SOR ¶ 1.g alleges in about December 2003, Applicant was charged with Intoxication and Disorderly Conduct. Applicant drank 8 to 12 beers, and he was intoxicated. (Tr. 55-56) He argued with someone at his house, and the police were called. (Tr. 55-56) Applicant argued with the police, and he was arrested for Intoxication and Disorderly Conduct. (Tr. 57) He was found guilty of public intoxication, and he received a \$430 fine and 18 months of probation. (Tr. 57)

SOR ¶ 1.h alleges in about July 2002, Applicant was charged with Minor in Possession of Alcohol, Possession of Paraphernalia, and Interfering with a Public

Servant. Applicant was intoxicated, and he engaged in an altercation with the police. (Tr. 58) Applicant accidentally kicked an officer in the face. (Tr. 58) Applicant pleaded guilty to Minor in Possession of Alcohol and Possession of Paraphernalia. (Tr. 59)³ The charge of Interfering with a Public Servant was dismissed. (Tr. 59)

SOR ¶ 1.i alleges in about August 2000, Applicant was charged with Minor in Possession of Alcohol. Applicant admitted he was arrested for and committed this offense. (Tr. 59-60; SOR response)

In 2004, Applicant received an alcohol assessment. (Tr. 64) He did not receive a diagnosis of an alcohol-use disorder or alcohol dependence. (Tr. 64) There was no recommendation that he receive alcohol-related counseling or therapy. (Tr. 62-63)

Applicant has not been inside of a bar since 2017. (Tr. 60) The only time he consumed alcohol after he received the SOR was when he and his spouse split a bottle of wine on December 31, 2018. (Tr. 62-63)

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, “no 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 applicant’s 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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation

³ In 2002, Applicant’s security clearance was denied because he failed to disclose his arrest for possession of drug paraphernalia on his security clearance application. (Tr. 65, 73) He has never held a security clearance. No adverse inference is made because of the denial of his security clearance 16 years ago.

about potential, rather than actual, risk of compromise of classified information. 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.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the applicant’s personal or professional history that may disqualify the applicant for eligibility 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005). “[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

Alcohol Consumption

AG ¶ 21 articulates the Government’s concern about alcohol consumption, “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.”

AG ¶ 22 lists conditions under the alcohol consumption guideline that could raise a security concern and may be disqualifying including:

- (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;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the

welfare and safety of others, regardless of whether the individual is 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;

(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.

AG ¶¶ 22(a) and 22(c) apply. The police arrested Applicant eight times from August 2000 to February 2017 for behavior related to his alcohol consumption. On several occasions, he consumed more than five beers. The record establishes that he engaged in binge-alcohol consumption to the extent of impaired judgment.⁴

AG ¶ 23 details conditions that could mitigate security concerns including:

(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

⁴ "Binge drinking is the most common pattern of excessive alcohol use in the United States." See the Center for Disease Control website, (stating "The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours."), <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>. There are other definitions of "binge alcohol consumption" that involve different alcohol-consumption amounts and patterns.

(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.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). See *also* ISCR Case No. 08-04232 (App. Bd. Oct. 9, 2009) (affirming denial of security clearance for Applicant with alcohol-related criminal offenses for six years prior to hearing). For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge's grant of a clearance and noted, "That Applicant continued to drink even after his second alcohol-related arrest vitiates the Judge's application of MC 3."

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. See *also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge's grant of a clearance).

Applicant presented evidence supporting mitigation of alcohol-consumption concerns. Applicant has never been diagnosed with an alcohol-use disorder or alcohol dependence. He ended his alcohol consumption when he received the SOR on September 10, 2018, except for drinking part of a bottle of wine with his wife on December 31, 2018. He does not intend to drink alcohol in the future. He has never been arrested for an alcohol-relating driving offense.

The evidence against mitigation is more persuasive. The police arrested Applicant eight times from August 2000 to February 2017 for behavior related to his alcohol consumption. He engaged in binge-alcohol consumption on several occasions that led to his arrest for being disrespectful to police. He abstained from alcohol consumption for less than six months. I have carefully considered the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption. I have lingering doubts and concerns about Applicant's current reliability, trustworthiness, and good judgment pertaining to his history of alcohol consumption. Alcohol consumption security concerns are not mitigated.

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 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), "[t]he 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. "In evaluating an applicant's case, a Judge must carefully consider the record as a whole. This includes not only considering the extent to which an applicant's circumstances raise concerns about his or her reliability but also giving fair consideration of the applicant's mitigating evidence." ISCR Case No. 12-09900 at 3 (App. Bd. Dec. 7, 2016) (citing ISCR Case No. 15-00424 at 2-3 (App. Bd. Apr. 20, 2016)). My comments under Guideline G are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 36-year-old employee of a defense contractor who has been employed as an engineering analyst for his current employer since 2015. He has been employed in the aerospace industry for 16 years. His annual salary is \$85,000. In 2018, he received several awards from his employer. In 2018, he received a U.S. patent. He completed numerous work-related training courses.

The police arrested Applicant eight times from August 2000 to February 2017 for behavior related to his alcohol consumption. His current abstinence from alcohol consumption is for less than six months before his hearing. Based on these factors, I have lingering doubts and concerns about Applicant's current reliability, trustworthiness, and good judgment. A significant probability of alcohol-related judgment errors in the future continues to exist, and this possibility of future judgment errors raises ongoing questions about his reliability and trustworthiness. See AG ¶ 21.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that Guideline G security concerns are not mitigated at this time. More time without an alcohol-related incident

involving the police or binge-alcohol consumption must elapse before security concerns will be alleviated.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.i:	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.

MARK HARVEY
Administrative Judge