



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 18-02322

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

03/29/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and file exhibits, I conclude that Applicant mitigated the security concerns regarding his alcohol consumption. Eligibility for access to classified information is granted.

History of Case

On December 8, 2018, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865 (Exec. Or. 10865), *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* the Security Executive Agent, Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), effective June 8, 2017.

Applicant responded to the SOR on December 28, 2018, and requested a hearing. The case was assigned to me on January 30, 2019, and scheduled for hearing on February 14, 2019. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of four exhibits (GEs 1-4). Applicant relied on two witnesses (including himself) and no exhibits. The Government's exhibits were admitted without objection. The transcript was received on February 26, 2019.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with awards, decorations, and endorsements and early release from probation. For good cause shown, Applicant was granted 45 days to supplement the record. Department Counsel was afforded three days to respond. Applicant did not supplement the record.

Summary of Pleadings

Under Guidelines G and J, Applicant allegedly was twice arrested and charged with alcohol-related incidents: once in October 2011 for driving under the influence (DUI), and again in March 2016, in which he pled guilty, was fined \$1,500, and was placed on probation until May 2019.

In his response to the SOR, Applicant admitted each of the two alcohol-related allegations with explanations. He claimed the 2011 DUI arrest and charges were reduced to a lesser offense of wet and reckless through plea bargaining because his blood-alcohol content (BAC) was less than .08%. He claimed he has abided by all requirements of the court set in connection with both his 2011 and 2016 charges. Further, he claimed he has taken the two alcohol-related incidents very seriously and will never drink again if he intends to drive. And, he claimed he seldom drinks anymore unless it is a glass of wine with dinner, and will never drink during any work-related activities.

Findings of Fact

Applicant is a 63-year-old program analyst for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant was born and raised on a farm in a Midwestern state and his agrarian roots have helped to instill in him a strong work ethic. (Tr. 32-33, 40) Applicant married in March 1980 and has three children from this marriage. (GEs 1-2; Tr. 30) He earned an associate's degree in May 1980. (GE 1; Tr. 42) Applicant enlisted in the Marine Corps in January 1974 after graduating from high school and served two years of active

duty. (GE 1-2; Tr. 40-41 He received an honorable discharge from the Marine Corps in February 1976. (GE 1-2)

Since March 2018, Applicant has been employed by his current contractor as a programmer. (GEs 1-2; Tr. 45) He has held a security clearance for over 34 years. (GEs 1-2; Tr. 43) Previously, he worked for a defense contractor for over 33 years before his retirement in March 2017. (GEs 1-2; Tr. 45) During his years of employment with his previous employer, Applicant consistently received outstanding reviews. (Tr. 37) He enjoys his work and maintains his finances in stable order. (Tr. 38)

Alcohol-history

Between October 2011 and March 2016, Applicant was involved in two alcohol-related incidents. His most recent incident occurred in March 2016. (GEs 1-4; Tr. 30) In March 2016, he was arrested by county police after registering a .13 % BAC and charged with DUI. (GEs 3-4; Tr. 55-56) In court, Applicant pled guilty to the charges, was fined \$3,500, jailed for four days, and placed on probation until March 2019. (GEs 1-5; Tr. 50-51, 55-56) Additionally, the court directed him to enroll in an 18-month alcohol substance abuse program (ASAP) and complete the program. (GEs 2-4; Tr. 52-53) Applicant is credited with successfully completing the program. Applicant's probation expired in March 2019 without any raised issues.

In October 2011, Applicant was arrested and charged with DUI after returning from a dinner party. (GEs 1-4; Tr. 30-33). Despite registering .08% in an administered Breathalyzer, the court reduced the charges to a wet and reckless offense, fined him \$1,500, and placed him on probation for 36 months. (GEs 1-4; Tr. 54) Applicant completed his probation without reported incidents.

Since his 2016 DUI incident, Applicant seldom drinks and never drinks when he is planning to drive. (GE 2; Tr. 31) Applicant's claims of light drinking are corroborated by his wife. (Tr. 32-35)

Policies

The AGs list guidelines to be used administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns."

The AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(d) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Alcohol consumption

The Concern: 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.

Criminal Conduct

The Concern: 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.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that

the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant incurred two alcohol-related incidents between 2011 and 2016. Principal security issues raised in this case center on Applicant’s two alcohol-related offenses covered by Guideline G and incorporated under Guideline J.

Alcohol consumption concerns

Applicant’s two alcohol-related incidents over a five-year period (2011-2016) raise concerns over his risk of future alcohol abuse. On the strength of the evidence presented, two disqualifying conditions (DCs) of the AGs for alcohol consumption (AG ¶ 21) may be applied: DC ¶¶ 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 abuse disorder,” and 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.”

Based on the court findings relative to Applicant’s 2011 and 2016 alcohol-related incidents and his proactive efforts since his March 2016 offense, he may take full advantage of the following Guideline G mitigating conditions: MC ¶¶ 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,” and 32(d) “the individual has successfully completed a treatment program along with required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.”

Applicant’s circumstances and subsequent actions following his last alcohol-related incident in March 2016 are sufficient to facilitate safe predictions that he will avoid any abusive drinking in the foreseeable future. Besides his own commitments to

maintaining responsible drinking in the future, he benefits from a strong family network of support. His wife has been very vocal about her own efforts to reinforce Applicant's expressed commitments to avoid drinking when he thinks he will be driving.

Criminal conduct concerns

Security concerns are also raised with respect to Applicant's alcohol-related incidents under the overlapping coverage of Guideline J. Disqualifying conditions applicable to Applicant's alcohol-related offenses under Guideline J (criminal conduct) are twofold: DC ¶¶ 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 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." Each of these two cited DUI offenses are cross-referenced under Guideline G and are considered to be alcohol-related for purposes of Guideline J analysis.

Applicable mitigating conditions covering Applicant's alcohol-related offenses under Guideline J are as follows: MC ¶¶ 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 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." Passage of time since Applicant's last alcohol-related offense in March 2016 exceeds two years and provides enough time to mitigate these alcohol-related offenses under Guideline J as well.

Whole-person assessment

Applicant's lengthy 35-year career of civilian service with DoD contractors, following his honorable service with the Marine Corps, is much appreciated and respected. His excellent performance reviews from his prior employer of 33 years provide strong reinforcement of his claims of dedicated service with this prior employer. Considering the record as a whole, safe predictions can be made at this time about Applicant's ability to avoid alcohol-related incidents in the foreseeable future. Alcohol concerns are fully mitigated and enable favorable conclusions to be made in connection with the allegations covered by Guidelines G and J.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE G (ALCOHOL CONSUMPTION): FOR APPLICANT

Subparagraphs 1.a -1.b: For Applicant

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Subparagraph 2.a : For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

