



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



In the matter of:)
)
-----) ISCR Case No. 18-02586
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2019

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. The evidence is not sufficient to mitigate Applicant’s five alcohol-related incidents of criminal conduct over a five-year period during 2012-2017. It is too soon to tell if he will continue responsible use of alcohol and avoid further incidents resulting in citation, arrest, charge, or conviction. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, on November 26, 2017. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on November 19, 2018, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified

information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline G for alcohol consumption and Guideline J for criminal conduct. The sole allegation under Guideline J is simply a cross-allegation to the matters under Guideline G.

Applicant answered the SOR on January 18, 2019. He admitted the SOR allegations and provided explanations in a seven-page memorandum. He also requested a decision based on the written record in lieu of a hearing. Department Counsel received the case on February 11, 2019, and made a timely request for a hearing on February 15, 2019. (Appellate Exhibit I; Tr. 13-15)

The case was assigned to me on April 16, 2019. The hearing took place as scheduled on June 12, 2019. Applicant appeared without counsel. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Exhibits 1, 4, 5, 6, 7, 8, and A-H, respectively. Exhibits 2 and 3 were ruled inadmissible, and I did not consider them in reaching this decision. (Tr. 22-29) Other than Applicant, no witnesses testified.

Findings of Fact

Applicant is a 26-year-old employee who is seeking to obtain a security clearance for the first time. He is seeking eligibility for access to classified information for his job as a program analyst for a large company in the defense industry. His formal education includes a bachelor's degree awarded in 2015, and he is currently pursuing an MBA degree. (Exhibit H) He has never married and has no children.

The SOR alleges, and Applicant admits, five alcohol-related incidents that resulted in citation, arrest, charge, or conviction over a five-year period during 2012-2017. (Exhibits 1, 4-8, and Exhibits A and B) He also described the facts and circumstances surrounding each incident in his hearing testimony. These matters are discussed briefly below.

The first two incidents, essentially underage drinking, occurred in 2012 when he was a 19-year-old college student. In April 2012 he was cited by university police for criminal damage and minor with alcohol in body after an incident where he seriously cut his wrist on broken glass from his dorm-room window. (Exhibit 6) He pleaded guilty, was placed on a diversion program, and was required to attend an alcohol-education class. About seven months later in December 2012, while still age 19, he drank alcohol at a party and was subsequently one of several passengers in a car that was stopped by the police. The police officer smelled alcohol and required everyone, since they were minors, to take a breathalyzer test. He received a citation for minor with alcohol in the body. He pleaded guilty, paid a small fine, and was required to attend another alcohol-education class.

The third incident occurred about two years later in August 2014 when he was a 21-year-old college student. He spent the night in jail after he was arrested for the offenses of public nuisance-obstruction of property and failure to obey a police officer.

The incident occurred when he was walking home under the influence of alcohol after attending a social gathering at a bar with fellow interns who were celebrating the end of their internships at a large, well-known financial services firm. He was represented by a public defender, he pleaded guilty to the public nuisance offense, and he was ordered to pay a \$250 fine.

The fourth incident occurred less than a year later in April 2015, shortly before he graduated from college at age 22. He was arrested and charged with the felony offense of aggravated assault of a peace officer (non-serious injury) based on spitting in the officer's face. (Exhibit 7) This incident stems from an evening at a restaurant with his then girlfriend and other friends. He and his girlfriend returned to her apartment where they had a noisy disagreement that caused someone to call the police. He was initially detained by the police while walking home to his nearby apartment.

The police report described Applicant as quite intoxicated; his speech was slurred; the odor of alcohol was strong; the effects of alcohol were obvious; his attitude was combative; and he was wearing blue jeans without a shirt. (Exhibit 7) The police report further described him as failing to follow instructions to remain seated on the curb; demanding to know what he was being charged with; cursing and insulting the police officer; and then spitting in the officer's face striking the officer on the right cheek bone below the eye. At the hearing, Applicant stated that he spat in the direction of the officer. (Tr. 48) In his November 2017 security clearance application, he explained that he "accidentally spat in the direction of another person with no foul intentions." (Exhibit 1) At the hearing, he explained his characterization of the spitting incident as "accidental" was due to oversight, an explanation I find to be not credible. (Tr. 75-78)

With assistance of counsel, Applicant pleaded guilty to attempted assault. The court sentenced him to serve probation for 18 months and attend alcohol-education classes. In September 2016, the state court terminated his probation after 12 months and ordered that the case be designated a misdemeanor. (Exhibit A)

The fifth incident occurred in June 2017 when he was 24 years old and had been working for his current employer for about a year. He was arrested for driving under the influence of alcohol (DUI) and criminal damage after crashing his car into a cinder-block wall near his home. (Exhibit 8) After failing a series of field sobriety tests, he refused to take a preliminary breath test. He did submit to a blood alcohol test at the police station. The police report described, among other things, that Applicant initially ignored the commands of and walked away from a police officer, resulting in the officer grabbing him "by the arm and neck area and escort[ing] him to the ground by pulling him downwards" and handcuffing him behind his back. (Exhibit 8, page 13 of 16)

Applicant reported the incident to his employer's facility security officer (FSO). (Exhibit 5) The final adverse information report indicates he was charged with failure to notify owner or person in charge of striking a fixture; DUI based on liquor, drugs, or vapors; criminal damage; DUI liquor BAC .08 or more; and DUI extreme BAC .15 - .19. With assistance of counsel, he pleaded guilty to a DUI offense to the slightest degree at or around .08 BAC. The court imposed a fine and sentenced him to serve 30 days in jail

with 28 days suspended. He served 48 hours in a short-term holding facility. The court also imposed probation for 12 months and required an alcohol/substance abuse evaluation. He attended and completed 16-hours of level-two DUI education in October 2017. (Exhibit E) He attended and completed a MADD victim-impact panel in November 2017. (Exhibit D) He attended and completed a traffic-survival school in December 2017. (Exhibit C) He did not recall if he had received any type of diagnosis regarding his use of alcohol. (Tr. 55-56) In May 2018, less than a year from his DUI arrest, the court granted Applicant's application and motion to set aside the judgment and conviction for DUI. (Exhibit B; Tr. 55)

At the hearing, Applicant took full responsibility for his alcohol-related offenses and acknowledged a serious lack of judgment. (Tr. 38) He expressed remorse for his misconduct and a desire to learn from those experiences so they do not recur. (Tr. 38-39) He stated that the last 24 months were a "transformational period" in his life, as he is working to develop good judgment and sound decision-making skills. (Tr. 39) His ultimate goal is to abstain from alcohol given the difficulties it has caused him. (Tr. 58) He stated his recent use of alcohol as occurring on May 23, 2018, May 5, 2018, and the end of March 2018, noting that he can count on one hand how many times he had used alcohol in the past six months. (Tr. 56) He has a strategy or plan to avoid situations where alcohol is served, and also strictly limiting himself to no more than one alcoholic drink. (Tr. 56) And he will not consume any alcohol if he is driving an automobile. (Tr. 56-57)

Applicant has a good employment record. (Exhibits F, G, and H) For example, his current supervisor described him as conscientious, diligent, motivated, self-driven, honest, forthright, dependable, and mature. (Exhibit H) Applicant is an active participant in community activities as a volunteer. (Exhibit H) He also submitted several highly favorable letters of recommendation on his behalf. (Exhibits F and H)

Law and Policies

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

It is well-established law that no one has a right to a security clearance.¹ As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."² Under *Egan*, Executive Order 10865, and the Directive, any doubt

¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

² 484 U.S. at 531.

about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.³ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁵ Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted; (2) an applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁶

Discussion

The alcohol consumption and criminal conduct security concerns are discussed together, because they are based on the same five alcohol-related incidents. Under Guideline G for alcohol consumption, the suitability of an applicant may be questioned or put into doubt because, as set forth in AG ¶ 21, excessive alcohol consumption often lead to the exercise of questionable judgment or the failure to control impulses, and it can raise questions about a person reliability and trustworthiness. Likewise, under Guideline J for criminal conduct, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of involvement with criminal conduct. The overall concern as set forth in AG ¶ 30 is aptly put: "By its very nature, [criminal conduct] calls into question a person's ability or willingness to comply with laws, rules, and regulations."

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

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;

³ 484 U.S. at 531.

⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁶ Directive, Enclosure 3, ¶¶ E3.1.14 and E3.1.15.

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 ¶ 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;

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;

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.

The key facts here are not in dispute. Applicant was involved in five alcohol-related incidents of criminal conduct over a five-year period. The last incident, the DUI offense, was adjudicated in 2017 and concluded with the court setting aside the DUI conviction in May 2018, about 13 months before the hearing in this case. All the incidents involved alcohol, the last of which resulted in damage to private property, his and others. Three of the incidents involved behavior where Applicant was belligerent, disobedient, or disrespectful (or all three) when interacting with police officers. In the 2015 incident, in which he was quite intoxicated, Applicant spat in the face of the police officer, which I find to be despicable behavior. The disqualifying conditions noted above apply.

Applicant presented a decent case in mitigation. I took into consideration all the evidence in mitigation, including his explanations for the five alcohol-related incidents as well as the evidence of rehabilitation. The evidence of reform and rehabilitation includes higher education (the current MBA program), his good employment record, his favorable references, his self-report of the 2017 DUI, and the passage of time since the June 2017 DUI incident without recurrence of criminal activity. He also reduced and modified his consumption of alcohol with the ultimate goal to abstain. And he demonstrated some insight and self-reflection concerning his circumstances.

Nevertheless, the frequency and seriousness of Applicant's alcohol-related incidents weigh heavily against him. Multiple incidents of alcohol-related criminal

conduct over a five-year period are obviously problematic because they demonstrate a pattern of behavior, suggesting another alcohol-related incident is likely to recur. In addition, his last two alcohol-related incidents, in 2015 and 2017, were neither minor nor trivial matters. His disrespectful attitude toward police officers is troubling and speaks volumes. Taken together, the evidence of Applicant's alcohol-related criminal conduct calls into question his current ability or willingness to comply with laws, rules, and regulations. It also calls into question his reliability, trustworthiness, and good judgment. Simply stated, it is too soon to tell if he will continue responsible use of alcohol and conduct himself as a law-abiding person.

Following *Egan* and the clearly consistent standard, I have doubts and concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. I conclude that he has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline G:	Against Applicant
Subparagraphs 1.a -- 1.e:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility denied.

Michael H. Leonard
Administrative Judge