



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



In the matter of:)
)
 ---) ISCR Case No. 19-00733
)
 Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esquire, Department Counsel
For Applicant: *Pro se*

09/26/2019

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On April 10, 2017, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application. On March 11, 2019, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a set of interrogatories. He responded to those interrogatories on April 12, 2019. On April 29, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, 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), *National Security Adjudicative Guidelines* (AG) (December 10, 2016), 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 Guideline G (Alcohol Consumption) 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.

In a sworn statement, dated June 3, 2019, Applicant responded to the SOR and elected to have his 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 July 1, 2019, and he was afforded an opportunity 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 his case. Applicant received the FORM on July 23, 2019. Applicant responded to the FORM by timely submitting a statement and associated documents, all of which were accepted without objection. The case was assigned to me on September 16, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to alcohol consumption (SOR ¶¶ 1.a. through 1.c.). Applicant's admissions 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 29-year-old employee of a defense contractor. He has been serving as a general maintenance worker with his current employer since April 2017. He previously served in a number of sales positions with other employers. Although he was home schooled by an unaccredited source, Applicant earned his high school diploma through the General Educational Development (GED) program in 2008. He has never served in the U.S. military. He has never held a security clearance. Applicant has never married. He has been cohabiting since 2014. Applicant has one child, born in 2016.

Alcohol Consumption

Applicant commenced consuming alcohol after the age of 21, initially starting with beer, but eventually graduated to mixed drinks with whiskey. The frequency of his alcohol consumption commenced monthly at parties, but soon transitioned into two times per week during the week and weekends at parties. Applicant acknowledged that he drank to intoxication at every party. He also acknowledged that he has gone to work hung over on many occasions. Consuming alcohol to intoxication made him tired, sluggish, and emotional. He does not recall how much alcohol it takes to become intoxicated. (Item 6, at 7-8) Applicant has a substantial history of maladaptive alcohol use that has resulted in three incidents described below.

On April 20, 2012, when he was about 22-years-old, Applicant attended several different parties, consuming an unknown quantity of beer at each party. He left the last party at about 2 a.m. While searching for friends, he dozed off while driving and rear-

ended a private security patrol car which was stopped at a stop light. It was estimated by the authorities that he was traveling at about 50 miles per hour upon impact. He was charged with driving under the influence (DUI), arrested, and jailed overnight. He entered a plea of guilty to DUI, a misdemeanor, and was sentenced to time served; ordered to attend nine months of First Offender Traffic School classes, six Alcoholics Anonymous (AA) meetings; required to complete two weeks of community service; placed on 36 months of probation; and directed to pay restitution as well as about \$2,000 in fines and fees. Applicant estimated that the total amount of costs eventually totaled between \$8,000 and \$9,000. He reportedly complied with the court mandates. (Item 6, at 6-7; Item 7)

On July 12, 2014 (as opposed to June 2014, as stated by Applicant and as alleged in the SOR), Applicant consumed two whiskey and cokes while at home. At about 10 p.m., he decided to drive to a store to obtain items for the following day's lunch. He was stopped by the local deputy sheriff for a faulty license plate light. The deputy inquired if Applicant had been drinking, and Applicant admitted that he had. Applicant was administered a blood alcohol content test (BAC) and the result registered 0.08 percent. Applicant was charged with prohibited license plate lights; possession of alcohol beverages in motor vehicle; and operating a vehicle while intoxicated (DWI). (Item 7, at 2; Item 6, at 6) He was arrested and jailed overnight. He entered a plea of guilty to DWI, a misdemeanor, and was sentenced to time served; ordered to attend nine months of First Offender Traffic School classes, and view a number of traffic videos; required to complete an unspecified period of community service; placed on six months to a year of probation; and directed to pay an unspecified amount in fines and fees. Applicant estimated that the total amount of costs eventually totaled between \$4,000 and \$5,000. He reportedly complied with the court mandates. (Item 6, at 6-7)

In May 2017, during an interview conducted by an investigator from the U.S. Office of Personnel Management (OPM), Applicant denied that he had a problem with alcohol, or that alcohol has had any impact on his work, home life, school, or current friendships. (Item 6, at 8)

On January 21, 2019, after apparently consuming an unspecified quantity of alcohol, Applicant was stopped by the local police authorities and charged with DUI, a misdemeanor; and DUI alcohol with a BAC of 0.8 percent. (Item 5; Item 8) He was arrested and jailed overnight. He entered a plea of *nolo contendere* to DUI alcohol, a misdemeanor, and the DUI was dismissed in the furtherance of justice. Applicant was sentenced to ten days in jail, with credit for the one day served; entered into a 9-day work release program; ordered to attend a Traffic and Alcohol Awareness School (TAASK) for its multiple offender 18-month program; placed on summary probation for five years - served without supervision by a probation officer; required to have an ignition interlock device installed on any vehicle he may drive for a period of three years; subjected to random search for alcohol; and directed to pay \$2,018 in fines and fees. (Item 5; Item 8) Applicant complied with the interlock requirement on July 18, 2019. (Verification, attached to the Response to the FORM) As of July 29, 2019, he had completed a portion of the required TAASK sessions. (Progress Report, attached to the Response to the FORM) As of August 6, 2019, he had paid \$60 of his total fine (Statement, attached to the Response to the FORM)

Applicant now claims that he has learned his lesson and, effective January 21, 2019, he decided to become completely sober, and he stopped drinking any kind of alcohol. With regard to the most recent incident (the one in January 2019), Applicant stated that he was “going through a very stressful and emotional situation at the time,” not otherwise specified, and he “decided to use alcohol to numb the pain.” He claimed that he is “not normally a heavy drinker.” (Statement, attached to the Response to the FORM)

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

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.” “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))

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

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 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." (*Egan*, 484 U.S. at 531)

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 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 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 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;

(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; and

(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(a), 22(b), and 22(c) have all been established. AG ¶ 22(d) has not been established as there is no evidence of any alcohol-related diagnosis. Applicant commenced consuming alcohol, starting with beer, but eventually graduated to mixed drinks with whiskey. By his own admission, he consumed alcohol two times per week during the week and weekends at parties, and he drank to intoxication at every party. He also acknowledged that he has gone to work hung over on many occasions. Applicant has a substantial history of maladaptive alcohol use that has resulted in three alcohol-related arrests and convictions, with the most recent incident occurring in January 2019.

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.

None of the mitigating conditions apply. Despite two arrests and convictions for DUI (in 2012) and DWI (in 2014), accompanied by a variety of sentences, including minimal overnight stays in jail, fines, attendance of First Offender Traffic School classes, AA meetings; community service; and periods of probation, Applicant learned little if anything regarding drinking and driving. Rather than learning from the alcohol classes

and considering the negative impact of his continuing alcohol-related conduct, he returned to his pattern of alcohol consumption. As recently as May 2017, Applicant denied that he had a problem with alcohol, or that alcohol has had any impact on his work, home life, school, or current friendships. In doing so, Applicant minimized the negative impact his alcohol consumption had on him.

The result was Applicant's third DUI/DWI in seven years, the January 2019 arrest and conviction. This time, Applicant was sentenced to ten days in jail, with credit for the one day served; entered into a work release program; ordered to attend TAASK for its multiple offender 18-month program; placed on summary probation for five years – a period that has only recently begun; required to have an ignition interlock device installed on his vehicle(s) for a period of three years; subjected to random search for alcohol; and directed to pay fines and fees. Applicant has complied with the interlock requirement, but as of July 29, 2019, he had only completed a portion of the required TAASK sessions; and as of August 6, 2019, he had paid only \$60 of his total fine.

Applicant now claims that he has learned his lesson, decided to become completely sober, and allegedly stopped drinking any kind of alcohol. That purported intention and abstinence occurred only within the last eight months, after a period of over seven years of maladaptive alcohol use and repeated attendance at alcohol classes. It is significant that the court was concerned following the January 2019 DUI because of the continuing restrictions it placed on him. While Applicant's newly-declared intention is to remain abstinent, and such a plan is to be encouraged, that declaration is simply too recent to be given too much weight in light of the duration of his maladaptive alcohol use and the three alcohol-related incidents. Appellant has failed to demonstrate a clear and established pattern of modified consumption or abstinence, and under the circumstances, there remain doubts on his 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. (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))

There is some evidence in favor of mitigating Applicant's alcohol consumption concerns. Applicant is a 29-year-old employee of a defense contractor. He has been serving as a general maintenance worker with his current employer since April 2017. He previously served in a number of sales positions with other employers. Although he was home schooled by an unaccredited source, Applicant earned his high school diploma through the GED program in 2008. He claims that he has been abstinent since his most recent arrest in January 2019, and that he intends not to consume alcohol in the future.

The disqualifying evidence under the whole-person concept is simply more substantial. By his own admission, Applicant consumed alcohol two times per week during the week and weekends at parties, and he drank to intoxication at every party. He also acknowledged that he has gone to work hung over on many occasions. Applicant has a substantial history of maladaptive alcohol use that has resulted in three alcohol-related arrests and convictions, with the most recent incident occurring in January 2019. He has been repeatedly jailed, fined, placed on probation, and ordered to take alcohol training. He had to attend AA meetings. Now he is required to have the ignition interlock device installed on his vehicle(s) for a period of three years; subjected to random search for alcohol; and he will be on probation for approximately four more years. Applicant offered no evidence from witnesses to attest to his character or furnish support for his claimed abstinence.

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 his alcohol consumption. 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:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.c.:	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