



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



In the matter of:)	
)	
)	ISCR Case No. 19-02138
)	
Applicant for Security Clearance)	

Appearances

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

04/29/2020

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 10, 2018. On July 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Applicant responded to the SOR on August 20, 2019, and requested a hearing before an administrative judge. On October 1, 2019, Department Counsel amended the SOR to include allegations under Guidelines G and J. Applicant answered the amended SOR on October 24, 2019. The Defense Office of Hearings and Appeals issued a notice of hearing on December 9, 2019, for a scheduled hearing on January 14, 2020. The hearing was convened as scheduled.

Department Counsel offered Government Exhibits (GE) 1 through 8 into evidence. Applicant offered Applicant Exhibit (AE) A into evidence. All exhibits were admitted without objection. Department Counsel's discovery letter and summary of exhibits were marked as hearing exhibits (HE) 1 and 2, and appended to the record. Applicant testified at the hearing. The record was held open for Applicant to submit additional documentary evidence in mitigation. He submitted a statement (email) and additional documents, collectively marked as AE B, and admitted into evidence without objection. DOHA received the hearing transcript on January 24, 2020.

Findings of Fact

Applicant is a 38-year-old design engineer employed by a defense contractor since February 2019. He was previously employed as a shipyard contractor employee from 2004 to 2019. Applicant graduated from high school in 1999, and completed some college credits. He married in 2002, separated in about 2008, and divorced in 2010. He remarried in 2018 and has two children that do not live with him. He served on active duty in the United States Air Force from 2000 until he was honorably discharged in 2004.

The original SOR alleges Applicant has four delinquent debts totaling about \$45,000. The debts include a home equity line of credit and credit card accounts. Applicant admitted the SOR allegations, with explanations. The amended SOR alleges under guideline G, that Applicant was arrested in September 2019 for driving under the influence of alcohol (DUI). The DUI allegation was cross alleged under Guideline J. Applicant admitted the DUI arrest, but denied the cross allegation under Guideline J.

SOR ¶ 1.a alleges a home equity line of credit (HELOC) debt with his former spouse. According to Applicant's 2019 credit report, the last payment on the loan was in October 2013. Applicant's December 2008 separation agreement permitted him to live in the property and pay expenses until it was sold, but his former spouse was responsible for paying the HELOC as required. She did not do so, and the HELOC debt was eventually charged off. Applicant received an IRS Form 1099-C (Cancellation of Debt) for the charged-off amount. The account is resolved. Of note, but not alleged in the SOR, Applicant and his mother lived in the home for about one year without paying the majority of mortgage payments as required, and the home was foreclosed around 2009.

SOR ¶ 1.b is a consumer credit card debt. The debt was placed for collection in June 2018. Applicant negotiated a settlement and paid the debt in June 2018. This account is resolved. SOR ¶ 1.c is another credit account with the most recent payment being paid in August 2017. Applicant resolved it in Jan 2018 and it was removed from his

credit report. This account is resolved. SOR ¶ 1.d is a home improvement credit card account that fell into default and was charged off in about January 2018. Applicant testified that he paid the debt in 2018, and it was removed from his credit report. This account is resolved.

Applicant purchased a house in February 2019, and has not missed a house payment. He has bank savings accounts valued at about \$5,000, a 401K retirement account valued at about \$10,000, and a pension fund with over \$40,000. His current spouse works at the same government facility as he does. He has not had financial counseling.

In September 2019, Applicant was arrested for DUI. He met his spouse at a restaurant/bar to discuss plans for their wedding anniversary. When he left, he was stopped for not maintaining his lane, and failed the field-sobriety test. His blood alcohol level tested at .13%, well over the legal limit. He was confined and released on bail. He pleaded not guilty in September 2019, and is awaiting trial. Applicant had a previous DUI in 2006 that was resolved in 2007 with a dismissal after completing probation and an alcohol and substance abuse program. He has not submitted to a medical or substance abuse evaluation, although after the hearing in this case, he attempted to contact counselors that would accept a new client, but so far he has been unsuccessful in scheduling a program. He noted that he uses a ride share service after drinking when a designated driver is unavailable. He claims that he drinks one to two beers a week on a social basis. No character or work performance evidence was submitted.

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.

National security eligibility 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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. *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, e.g.*, ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g.*, 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; *see*, AG ¶ 1(d).

Analysis

Guideline F: Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The relevant financial considerations disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations.

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions under AG ¶¶ 19 (a), (b), and (c).

The following financial considerations mitigating conditions under AG ¶ 20 are potentially relevant:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant claims his debts were largely due to a separation from his spouse; however, he defaulted on his credit card debts well after his divorce in November 2010. He lived in the marital home without paying the mortgage for which he was responsible (not alleged in the SOR), and his spouse defaulted on the HELOC, which was the largest debt alleged in the SOR. At the time, Applicant had a full-time job that he held since 2004.

Applicant resolved all of the SOR debts and was issued a 1099-C for the charged-off HELOC. The HELOC was the responsibility of his former spouse, although it was a joint account. Applicant has not received financial counseling, however, it appears the debts are behind him; he has established financial solvency; a track record of on-time

payments; and with his current spouse, purchased a home and has been making payments as required.

There are clear indications that Applicant's financial delinquencies are resolved and his financial status is under control. I find that additional financial delinquencies are unlikely to recur, and his current financial status does not cast doubt on his reliability, trustworthiness, or good judgment. Mitigating conditions in AG ¶¶ 20(a), (b), and (d) apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern for 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 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, . . . , regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant's history of DUI arrests and alcohol-related impaired judgment, meets the conditions set forth in AG ¶¶ 22(a) and (c).

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23, 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

(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.

Applicant has two DUI arrests, the last in 2019 that is still pending trial or other resolution. Insufficient time has passed to know whether his alcohol consumption has changed to prevent a recurrence of alcohol-related incidents. Little convincing evidence of recent, successful abstinence or alcohol consumption in moderation has been proffered. He has not undergone alcohol abuse counseling or a medical evaluation after his most recent arrest to determine whether he has a drinking problem. I am not convinced that Applicant demonstrated a clear and established pattern of modified consumption; is making satisfactory progress toward a medical evaluation or treatment program given his history of DUI's; or that he has demonstrated a clear and established pattern of modified conduct to prevent a recurrence. No evidence of work performance or character was presented. Despite Applicant's testimony, there remains significant doubts about his current reliability, trustworthiness, and judgment. No mitigating conditions fully apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (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
- (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.

Applicant's admissions, testimony, and the documentary evidence in the record concerning his alcohol-related misconduct are sufficient to establish the disqualifying conditions above.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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

(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.

Applicant has not provided sufficient evidence in mitigation. The last DUI offense is recent and still pending judicial action. There has been no evidence of rehabilitation, a good employment record, or convincing character evidence to mitigate Applicant's criminal conduct or to convince me that this conduct will not recur.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines F, G, and J in my whole-person analysis. I considered Applicant's military service, divorce, and remarriage with an improved financial record. I believe Applicant adequately addressed his financial delinquencies, but has not shown that his alcohol consumption is under control and criminal conduct is unlikely to recur.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the financial consideration security concerns, but not the alcohol consumption or criminal conduct concerns. Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

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 F:
Subparagraphs 1.a to 1.d:

FOR APPLICANT
For Applicant

Paragraph 2, Guideline G:
Subparagraph 2.a:

AGAINST APPLICANT
Against Applicant

Paragraph 3, Guideline J:
Subparagraph 3.a:

AGAINST APPLICANT
Against Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge