



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 20-01472
)	
Applicant for Security Clearance)	

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*
03/11/2021

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Applicant failed to mitigate the security concerns raised by his recent alcohol-related arrests and his failure to disclose his illegal-drug use on his 2012 and 2014 security clearance applications. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on April 1, 2019. On October 16, 2020, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines G, J, and E. The DOD acted under Executive Order (E.O.) 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 adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant answered the SOR on October 27, 2020, and requested a decision on the record without a hearing. Department Counsel submitted the Government’s written case and on November 13, 2020, a complete copy of the file of relevant material (FORM,)

which included Government Exhibits (GX) 1 through 9, was sent to Applicant. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on December 10, 2020, and did not submit a response. The DOHA transmittal letter and receipt are marked as Administrative Exhibit 1. The case was assigned to me on February 11, 2021.

Findings of Fact

Under Guideline G, the SOR alleges that Applicant was arrested in 2014 for driving while intoxicated (DWI), pled guilty and was convicted in January 2016. His sentence included 15 months' probation. He participated in treatment from December 2017 to January 2018 following a diagnosis of alcohol use disorder. Applicant was arrested in March 2018 and charged with DWI, second offense. He pled guilty and was convicted in January 2019. His sentence included 180 days confinement, suspended, and 15 months' probation. He was evaluated in March 2019 and diagnosed with moderate alcohol use disorder in early partial remission. Applicant was advised to abstain from all mood altering chemicals, including alcohol. Applicant admits each of these allegations. Applicant stated in his answer that he also participated in treatment from April 2018 until June 2018. The two DWI arrests are cross alleged under Guideline J. Applicant admits the Guideline J allegation.

Under Guideline E, the SOR alleges that Applicant intentionally falsified material facts on his 2012 and 2014 e-QIPs by failing to disclose that he had illegally used marijuana from May 2004 until 2012. Applicant admits the two allegations under Guideline E. Applicant's admissions are incorporated in my findings of fact.

Applicant, 35, is a trade compliance specialist employed by a defense contractor since August 2016. He worked for another defense contractor from April 2013 until August 2016. He received his associate's degree in 2007 and his bachelor's degree in 2012. He married in 2015 and he and his wife have two children. He was previously granted a security clearance in February 2014. (GX 3; GX 4.)

In response to DOHA's June 2020 interrogatories, which stated that records obtained in Applicant's background investigation revealed past illegal-drug use and asked Applicant to describe his marijuana use, Applicant disclosed that he first used marijuana in May 2004 and last used it in 2012 with a frequency of less than once a month. He did not disclose this use on his 2012 and 2014 e-QIPs as required. (GX 4; GX 3.) The record does not contain any explanation by Applicant regarding his falsifications.

In May 2014, while holding a security clearance, Applicant consumed eight or nine beers over approximately three hours with his then girlfriend now wife at her home. They got into an argument and Applicant left with the intention of dropping to his parents' house. He was pulled over for speeding and ultimately arrested for DWI with a blood alcohol content of .13. In approximately January 2016 he pled guilty to DWI and was sentenced to 15 months of supervised probation, 70 hours of community service, a fine of

approximately \$1,000, and required to pay the state DWI surcharge of \$800 a year for three years. He was also required to attend alcohol awareness classes. He underwent a court-ordered alcohol abuse evaluation and the evaluator did not recommend treatment. In December 2017, Applicant voluntarily entered an alcohol treatment program where he was diagnosed with alcohol use disorder. He participated in the program for 30 days. (GX 4.)

In March 2018, Applicant was drinking beer at home, argued with his wife, and got in his car and drove away. He was pulled over for speeding and ultimately arrested for DWI with a blood alcohol content of .08. In January 2019, he pled guilty to DWI and was sentenced to 180 days in jail, suspended, 15 months' supervised probation which included random alcohol and drug screening, 60 hours of community service, court costs and fines of \$850, and the state DWI surcharge of \$800 for three years. (GX 4.) He was still on probation when he underwent his 2019 background investigation.

In April 2018, Applicant again voluntarily entered an alcohol abuse treatment program at the same facility. He successfully completed a 60-day program in June 2018 and Applicant asserts that has maintained sobriety since completing the program and that he regularly attends Alcoholics Anonymous meetings. (GX 4; GX 3.) However, he did not submit any substantiating evidence of his continued abstinence.

Applicant again underwent a court-ordered alcohol-abuse evaluation in March 2019 and was diagnosed with moderate alcohol use disorder in early partial remission. The evaluator made the following recommendations: that Applicant remain abstinent from all mood altering chemicals to include alcohol; that Applicant undergo random drug screening; and that Applicant participate in a 30-hour DWI intervention course for repeat DWI offenders. The evaluator did not recommend treatment unless evidence indicated that Applicant was using alcohol or illegal drugs or abusing prescription medication, in which case he should be required to participate in intensive outpatient treatment. (GX 4.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. 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 all available and 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 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.” See 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. 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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 ¶ 2(b).

Guideline G, Alcohol Consumption

The concern under this guideline 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 following disqualifying conditions apply:

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; and

AG ¶ 22(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;

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 23(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.

Applicant was arrested for DWI in 2014 while holding a security clearance and convicted of the offense in January 2016. His sentence included 15 months' supervised probation and required attendance of alcohol awareness classes. He voluntarily entered a 30-day treatment program in December 2017 and was diagnosed with alcohol use disorder. Despite his diagnosis and treatment, Applicant continued to abuse alcohol. He was again arrested for DWI in March 2018 and was convicted of the offense in January 2019. He was sentenced, in part, to 15 months' supervised probation which included random alcohol and drug screening, and to 180 days in jail, suspended. He returned to the same treatment facility and successfully completed a 60-day program in June 2018. Applicant states that he has been sober since completing the program and that he regularly attends AA meetings. His March 2019 evaluation of moderate alcohol use disorder in early partial remission supports Applicant's assertion of practicing abstinence from alcohol.

There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

In considering the totality of the evidence, I conclude that Applicant's 2018 arrest for DWI use was recent and casts doubt on his current reliability, trustworthiness, and good judgment. Further, while Applicant asserted, and his March 2019 evaluation supported, that he was maintaining sobriety at that time, there is no record evidence regarding his current alcohol use. Applicant remained on supervised probation during his 2019 background investigation. The probation included random alcohol screening. Applicant was subject to 180 days' incarceration if he violated the terms of his probation. The possibility of incarceration may have served as a motivating factor for Applicant's abstinence. Although Applicant successfully completed a 60-day treatment program, he previously relapsed after participating in treatment. While Applicant is to be commended for his efforts to manage his alcohol use disorder, his recent alcohol-related arrest and previous relapse after treatment combined with the absence of any record evidence of ongoing sobriety leave me with doubts about Applicant's current security clearance worthiness. AG ¶¶ 25(a) and 25(d) apply. None of the mitigating conditions apply.

Guideline J, Criminal Conduct

The concern under this guideline 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.

I have considered the following disqualifying conditions under this guideline:

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 . . . of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The following mitigating condition is potentially applicable:

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.

Applicant's 2014 and 2018 DWI arrests and convictions constitute criminal conduct as anticipated by this guideline. While there is evidence of rehabilitation and that Applicant complied with the terms of his two periods of supervised probation, the 2018 arrest and subsequent conviction is too recent to be mitigated by time. Applicant has not mitigated

the concern under this guideline. I have more thoroughly evaluated his conduct under Guideline G, as set forth above.

Guideline E: Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16: Conditions that could raise a security concern and may be disqualifying include:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

Conditions that could mitigate security concerns include:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances

that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

Applicant admits that he intentionally falsified material facts on his 2012 and 2014 e-QIPs. He does not offer any explanation for the falsifications. He did not disclose his illegal drug use until confronted with the information in 2020. His falsifications and lack of candor cast doubt on his current reliability, trustworthiness, judgment, and willingness to comply with rules and regulations. Applicant's false statements and omissions about material facts raise concerns that he might not be forthcoming about future potentially derogatory conduct such as alcohol consumption. Applicant has not mitigated the concerns under this guideline.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a).

After weighing the disqualifying and mitigating conditions under Guidelines G, J, and E and evaluating all the evidence in the context of the whole-person factors set forth in AG ¶ 2(a), I conclude Applicant has not mitigated the security concerns raised by his conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

Conclusion

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

Stephanie C. Hess
Administrative Judge