



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



In the matter of:)
)
) ISCR Case No. 20-01095
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*
05/12/2021

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has three driving while intoxicated (DWI) arrests (2008, 2012, and 2018) and was convicted of the last two DWIs. Additionally, he was convicted in 2007 of simple possession of a Schedule II Controlled Substance, and he illegally used marijuana between 2007 and 2017. Without additional current evidence of rehabilitation, a pattern of abstinence, disassociation, and a changed lifestyle, the passage of time alone is insufficient to mitigate the alcohol consumption and substance abuse security concerns. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 20, 2018, seeking eligibility for access to classified information required for his position with a federal contractor. He was interviewed by government investigators twice in August 2018. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on October 15, 2020, alleging security concerns under Guideline G (alcohol consumption) and Guideline H (drug involvement and substance misuse). Applicant answered the SOR (undated), and requested a decision based on the written record without a hearing.

A copy of the Government's file of relevant material (FORM), containing the evidence supporting the security concerns, was provided to Applicant by letter dated December 16, 2020. Applicant received the FORM on January 23, 2021. He was granted a period of 30 days after receipt of the FORM to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant did not respond to the FORM. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on April 12, 2021.

Findings of Fact

Applicant is a 37-year-old employee of a federal contractor. He is a 2002 high school graduate and disclosed no further advanced education. He has never been married. He has a 12-year-old son.

According to his April 2018 SCA, Applicant worked for private companies between 2008 and 2016. During that same period, he was self-employed as the owner and operator of a construction business. He was hired as an optics technician by his current employer, a federal contractor and security sponsor, in April 2018. This is his first SCA.

In his responses to Sections 22 (Police Record) of his 2018 SCA, Applicant disclosed a history of alcohol-related and substance misuse offenses. The background investigation provided additional details about the security concerns alleged in the SOR. In substance, the SOR alleges under Guideline G that Applicant:

(1) was arrested for DWI in 2008 (SOR 1.c). In his SOR answer, Applicant admitted the arrest for DWI, but denied that he was charged or convicted. Applicant explained that he tested .08 on a breathalyzer test when he was stopped by a police officer, and .06 when retested at the police station. He was not charged with any offenses.

(2) drove a boat while intoxicated in 2012 (SOR 1.b). Applicant admitted he drove a boat after consuming six beers. He pled guilty to the DWI and was fined about \$400. The court imposed no other punishment or requirements; and

(3) was charged with DWI and drinking beer-wine while driving in June 2018. (SOR 1.a) During his August 2018 interview, Applicant explained that in June 2018, he was stopped by a police officer and a subsequent breathalyzer test indicated a .08. At the police station, he refused to perform another breathalyzer test and he was charged with DWI. He pled guilty to DWI and was fined \$400. He was required to participate in an alcohol assessment and a short-term outpatient program. The assessment was favorable to Applicant and it did not find Applicant had a problem with alcohol. He was not referred for any alcohol counseling or aftercare treatment. There was no alcohol abuse or dependence diagnosis made. Applicant successfully completed the treatment program and his prognosis was considered excellent. (FORM Items 3 - 5)

Applicant started drinking at age 21. He does not consider himself a big drinker. He claimed he currently drinks two beers during the weekends, about every other week. His future plans were to limit his alcohol consumption, and never to drink and drive. He told the investigator that recurrence of a similar incident was unlikely because he was consuming less alcohol and had learned his lesson. In his SOR Answer, Applicant stated "sobriety has been sustained."

Under Guideline H, the SOR alleges that Applicant was arrested and charged with possession of methamphetamine and simple possession of a Scheduled II Controlled Substance in May 2007 (SOR 2.a). Applicant admitted the SOR allegation, and explained that the possession of methamphetamine charge was reduced by the court to simple possession of a Schedule II Controlled Substance. He was also found guilty of possession of paraphernalia. He was sentenced to 45 days' confinement, 12 months' probation, to participate in a substance abuse assessment and to attend treatment. (FORM, Items 6, 7) Applicant denied ever using the Schedule II Controlled Substance and averred he was charged because he was in the car with the person possessing it. (FORM Item 3)

Applicant disclosed in his 2018 SCA that he used marijuana with varying frequency between January 2007 and March 2017 (SOR 2.b). He explained to the government investigator that he was an occasional marijuana user. Once in a while he would have a couple of puffs from a marijuana cigarette being shared among friends at a party or other social activity. He described his marijuana use as once every four to six months. Applicant denied using any other illegal drugs. He claimed he stopped using marijuana in March 2017, because he believed nothing good would ever come from it. Applicant stated that because of his career obligations he had no intention of ever using marijuana or any other controlled substance in the future. (FORM, Item 1 - SOR answer)

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended. The case will be adjudicated under 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.

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

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.

Applicant has a history of alcohol abuse covering the period from 2008 through June 2018. His three DWI arrests (2008, 2012, and 2018) and DWI convictions in 2012 and 2018 demonstrate that he has consumed alcohol excessively and to the point of impaired judgment. The record establishes the following disqualifying condition 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.

AG ¶ 23 provides for mitigating conditions that may be applicable to this case:

(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; and

(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 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's most recent DWI offense occurred in June 2018, and there is no evidence of any subsequent alcohol-related misconduct. After the 2018 DWI, Applicant successfully participated in an alcohol counseling-treatment program. There was no diagnosis of alcohol use disorder made. He successfully completed his treatment and his prognosis was considered "excellent." In his answer to the SOR, Applicant stated "sobriety has been sustained."

I considered that the record evidence shows that Applicant completed his treatment, received a favorable prognosis, his BAC tests were low, and that he has been sober (no evidence of further alcohol-related misconduct). Notwithstanding, Applicant submitted little evidence of his current alcohol consumption, of any permanent lifestyle changes made to reduce his alcohol consumption and to prevent any further alcohol-related incidents, or of any additional counseling or treatment received. Considering the record as a whole, Applicant's evidence is insufficient to mitigate the alcohol consumption concerns.

Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern for the illegal use of drugs:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner

inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802.

In 2007, Applicant was charged with possession of methamphetamine. He was convicted of simple possession of a Schedule II Controlled Substance. Additionally, Applicant disclosed in his 2018 SCA that he used marijuana with varying frequency between 2007 and March 2017.

AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The record established the disqualifying conditions under AG ¶¶ 25(a) and (c), requiring additional inquiry about the possible applicability of some of the mitigating conditions under AG ¶ 26:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements,

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dormont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Considering the evidence as a whole, some of the above mitigating conditions are partially applicable to this case, but do not fully mitigate the substance abuse concerns. Applicant was convicted in 2007 for possession of a Schedule II Controlled Substance. He was sentenced to 45 days' confinement (suspended), 12 months' probation, to participate in a substance abuse assessment and to attend treatment. Notwithstanding, Applicant continued to illegally use marijuana, another controlled substance, between 2007 and 2017. His recalcitrant behavior shows that he learned little from his 2007 conviction or subsequent substance abuse treatment and counseling. It further demonstrates Applicant's inability or unwillingness to comply with laws, rules, and regulations.

Without current evidence of abstinence, rehabilitation, disassociation from drug users, permanent lifestyle changes, and a clear intent to abstain from all drug involvement, the passage of time alone is insufficient to mitigate the questionable judgment associated with his alcohol-related and drug involvement misconduct.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. Security Executive Agent Directive (SEAD) 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines G and H in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 37, has been working for his employer, a federal contractor since 2018. This is his first clearance application. Applicant did not appear at his hearing and

submitted little favorable information. His sparse evidence is insufficient to demonstrate a pattern of modified behavior and rehabilitation. The alcohol consumption and drug involvement security concerns are not mitigated.

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:

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|----------------------------|-------------------|
| Paragraph 1, Guideline G: | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.c: | Against Applicant |
| Paragraph 2, Guideline H: | AGAINST APPLICANT |
| Subparagraphs 1.a and 1.b: | Against Applicant |

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge