



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-01706
)
Applicant for Security Clearance)

Appearances

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

May 17, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns raised by his alcohol consumption, criminal conduct, and personal conduct. Based upon a review of the pleadings, the documentary evidence, and the testimony, national security eligibility for access to classified information is denied.

Statement of the Case

On March 23, 2018, Applicant submitted a security clearance application (SCA) seeking a security clearance. On October 16, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) (AG) effective for all adjudicative decisions within the DoD on or after June 8, 2017.

On November 3, 2020, Applicant responded to the SOR (Answer). He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On January 21, 2021, the case was assigned to me. DOHA issued a notice of hearing on March 10, 2021, scheduling the hearing on April 7, 2021.

I convened the hearing as scheduled. Department Counsel presented six proposed exhibits, marked as Government Exhibits (GE) 1 through 6, and copies of two state statutes, which were submitted for administrative notice purposes and marked as AN I and II. I marked her exhibit list as Hearing Exhibit I. The Government's exhibits were admitted without objection. The administrative notice documents provide context of the criminal charges described in the state court records in evidence only by reference to their statutory citations. I accepted AN I and II as evidentiary references that were undisputable. Applicant testified, but offered no documentary evidence. DOHA received the hearing transcript (Tr.) on April 14, 2021. (Tr. at 9-13.)

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. In his Answer, he admitted all of the SOR allegations. After a thorough and careful review of the pleadings, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Background

Applicant is 31 and has never married. He lives with his girlfriend. He has one daughter, age 6, who lives with her mother. He earned a high school diploma in May 2008, and in 2010-2011 he took a few college courses. Since March 2018, he has worked for a DoD contractor as an aircraft mechanic. His employer has sponsored him for his first security clearance. (Tr. at 7, 15-16.)

Alcohol Consumption and Criminal Conduct

When Applicant was 18 years old, he was making bad choices in his life. In 2008, he had no money and decided to steal items he wanted. He was caught and charged with Petty Theft. He was fined and ordered to perform community service. He was also sentenced to 36 months of probation. (Tr. at 17; GE 3 at 3.)

Applicant began drinking alcohol in 2009 at age 19 after completing high school. When he drank, he would typically consume in excess of five to ten cans of beer at a time. In February 2009, he drank beer with some friends after work. One of the friends drove a vehicle while intoxicated and Applicant was a passenger. The friend was pulled over and they were both arrested. Applicant was charged with Disorderly Conduct and Drunk in Public. As noted above, Applicant was on probation at the time. The state court records reflect that he was also charged with Failure to Appear after Written Promise and was convicted of that charge as well as the charge of Drunk in Public. He was sentenced

to 36 months of summary probation, fined \$400, and given credit for one day in jail. (Tr. at 17-20; GE 3 at 4; GE 4 at 1-2.)

Applicant testified that after he turned 21, he started to drink in bars and would consume alcohol more maturely. On average, he drank alcohol once a week. In February 2015, he was celebrating his 25th birthday at a nearby bar. For convenience reasons, he drove to the bar rather than walk. A police officer stopped Applicant on his return from the bar and arrested him. He was charged with Driving Under the Influence (DUI) and Driving Under the Influence Alcohol/0.08% or more (DUI/0.08%). He was convicted on the second charge and again placed on summary probation for 36 months, which was scheduled to expire in August 2018. He was also fined \$1,888. The court ordered Applicant to enroll in an alcohol group counseling program and to perform community service. He was also given credit for having served two days in jail. (Tr. at 19-22; GE 3 at 4; GE 5 at 1-3.)

In December 2016, Applicant was again arrested after a night of drinking at a bar celebrating the Christmas holidays with co-workers. He was charged with DUI and DUI/0.08%. He plead *nolo contendere* to the second charge. He was still on probation at the time. On June 14, 2017, the court sentenced Applicant to a mandatory term of 60 months of probation, which will expire in June 2022. He was also sentenced to 96 hours in jail and fined \$390. He actually served 24 hours in jail. The court ordered Applicant to perform three months of community service and to participate in an 18-month alcohol treatment or counseling program. He completed a group counseling program in April 2019. The counseling was similar to the counseling he received in the 2015 program he attended, except that it was longer and he was required to attend a minimum number of sessions of Alcoholics Anonymous (AA). He attended the minimum AA sessions required to complete the program. Applicant did not receive a diagnosis regarding his use of alcohol. (Tr. at 23-27, 30-31, 33-34; GE 3 at 5; GE 6 at 1-3; AN I and II.)

After his most recent arrest, Applicant made changes in his life. He testified that he has learned and grown from his alcohol-related arrests. Whenever he knows he will be drinking alcohol, he develops a plan to avoid driving after drinking. He testified that he never drives after one sip of alcohol. He understands that another arrest for driving after drinking while on probation will likely result in an even more serious jail sentence than his past sentences. He only drinks a couple of times a month on average. When he does drink, he typically drinks two to three beers, sometimes one beer and sometimes five beers at a time. He testified that he drinks responsibly, though he admitted that he still will drink to the point of intoxication. He said further that he does not have any difficulty controlling the amount of alcohol he consumes. He does not consider himself to be an alcoholic, nor does he believe he has a problem of any nature with alcohol. He has also matured since he obtained his employment with his current employer and recognizes that importance of that job to his future. He testified that he has received excellent job performance evaluations and that he will never do anything that would jeopardize his job and career. Applicant's father is aware of his alcohol-related arrests, but Applicant provided no testimony or documentary evidence that he has shared this personal history with anyone else. (Tr. at 16, 24-28, 32, 34-35, 37-38, 41.)

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.

Eligibility for a security clearance 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 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.” 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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.

Analysis

Guideline G, Alcohol Consumption

The security concern under this guideline is set out in AG ¶ 21 as follows:

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 at AG ¶ 22 contains seven potentially disqualifying conditions that could raise security concerns under this guideline. Two conditions potentially apply to the facts found in this case:

(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

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

The record establishes both of the above potentially disqualifying conditions. Applicant has been arrested and convicted three times since 2009 for alcohol-related incidents. The evidence also established that for many years he drank alcohol excessively. Accordingly, further review is required.

The guideline in AG ¶ 23 contains four conditions that could mitigate security concerns arising from Applicant's alcohol consumption. Three of the conditions potentially apply:

(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

(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.

AG ¶ 23(a) is only partially established. Applicant's last alcohol-related arrest occurred over four years ago. While that is a significant period of time, Applicant has been on probation throughout that period and his probation will continue until June 2022. He is well aware that any repetition of his past behavior of driving while under the influence of alcohol will likely result in a significant period of incarceration. Under these circumstances, it cannot be concluded that his behavior is unlikely to recur. Also, Applicant's history of alcohol-related arrests casts doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 23(b) is only partially established. Applicant has acknowledged his pattern of maladaptive alcohol use and has provided testimony about the actions he has taken to avoid a future arrest for driving under the influence of alcohol. He has also testified that he has modified his consumption of alcohol. He has not, however, provided any evidence from third parties who know him to support his testimony. Also, he provided sparse testimony and no documentary evidence regarding the nature of his counseling. He has not received any treatment for his excessive drinking and has provided no evidence that he received any treatment recommendations.

AG ¶ 23(d) is not established. As noted, Applicant provided no evidence that he has sought or received any treatment for his alcohol consumption. He testified that he does not believe that he has any problems with alcohol. Therefore, he has made the judgment that he does not believe he requires any treatment.

Guideline J, Criminal Conduct

The security concern under this guideline is set out in AG ¶ 30 as follows:

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.

The guideline at AG ¶ 31 contains five potentially disqualifying conditions that could raise security concerns under this guideline. Three of the conditions potentially apply to the facts found in this case:

(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;

(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; and

(c): individual is currently on parole or probation.

The record evidence establishes all of the above disqualifying conditions. His arrests and convictions present a pattern of offenses, any one of which would be unlikely to affect a national security eligibility decision. In combination, the offenses cast doubt on Applicant's judgment, reliability, and trustworthiness. Applicant is currently on probation and will be on probation for more than one more year. Accordingly, further review is required.

The guideline in AG ¶ 32 contains four conditions that could mitigate security concerns arising from Applicant's criminal conduct. Two of the conditions potentially apply:

(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.

AG ¶ 32(a) is only partially established. Over four years have passed since Applicant's last criminal offense. For the reasons stated above, this fact alone does not support a conclusion that future criminal behavior is unlikely. He has been on probation since 2017, and that term of probation will continue until June 2022. The fact that his 2016 arrest occurred while he was on probation for his 2015 DUI/0.08% conviction undercuts Applicant's mitigation evidence. The evidence is insufficient to support a conclusion that after his probation has expired, Applicant will not again drive after drinking when it is convenient for him to do so. The evidence taken as a whole supports a conclusion that Applicant's past criminal conduct casts doubt upon his reliability, trustworthiness, and judgment.

AG ¶ 32(d) is only partially established. Applicant has shown his rehabilitation by performing his important job as an aircraft mechanic since 2018. He has not supported that evidence, however, with favorable statements from his supervisors or with performance evaluations. Also, the mitigating value of the passage of time since

Applicant's last criminal behavior is undercut by his ongoing term of probation, as noted above. Lastly, he has not provided other evidence of rehabilitation, such as higher education since 2016 or constructive community involvement, other than any community service ordered by a court.

Guideline E, Personal Conduct

The security concern under this guideline is set out in AG ¶ 15 as follows:

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.

The guideline at AG ¶ 16 contains seven potentially disqualifying conditions that could raise security concerns under this guideline. Two of the conditions potentially apply to the facts found in this case:

(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

In SOR ¶ 3 the Government cross-alleged the Guideline G alcohol-related facts under Guideline E of SOR ¶ 1. The record evidence that established Applicant's alcohol consumption as a disqualifying security concern is sufficient for an adverse determination under Guideline G. Accordingly, the potentially disqualifying condition set forth in AG ¶ 16(c) is not applicable.

AG ¶ 16(e) (1) is established. Applicant's history of alcohol consumption and his arrests and convictions for DUI/0.08% evidences a pattern of irresponsible behavior that has could affect his standing in his family and his community and could negatively impact him professionally. This creates a vulnerability to exploitation, manipulation, or duress by others. Applicant offered no testimony or documentary evidence in the form of reference letters or otherwise that would show that his history of abuse of alcohol and related

criminal charges is widely known, other than by his father, which would reduce his risk of exploitation. Further review is required.

The guideline in AG ¶ 17 contains seven conditions that could mitigate security concerns arising from Applicant's personal conduct. Two of the conditions potentially apply:

(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; and

(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

AG ¶ 17(c) is not established. Applicant's offenses are not minor. Driving under the influence of alcohol is a serious offense and can result in death, bodily injuries, and property damage. It cannot be concluded that his misconduct is unlikely to recur. His history of misconduct casts doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 17(d) is only partially established. Applicant has acknowledged his past misconduct and has taken steps to reduce its recurrence. He has not provided evidence, however, that he has taken positive steps to make his personal history widely known within his family, community, and place of employment to eliminate the risk of exploitation. With respect to his alcohol consumption, he has never voluntarily taken positive steps to seek ongoing counseling to ensure that his past misconduct after drinking alcohol is not repeated. As noted, his alcohol counseling was ordered by a court.

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 and applying the adjudicative factors in AG ¶ 2(d). These factors are:

(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.

I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Overall, the record evidence as described above leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions under Guideline G, J, and E and evaluating all the evidence in the context of the whole person, I conclude Applicant has failed to satisfy his burden to mitigate security concerns involving alcohol consumption, criminal conduct, and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 1.a through 1.e:	Against Applicant
Paragraph 2, Criminal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant
Paragraph 3, Personal Conduct:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of the entire record, I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge