



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-03460
)
 Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*
01/05/2021

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted his security clearance application (SCA) on May 9, 2018. On February 6, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, G, and E. The CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on March 12, 2020, and requested a decision based on the written record in lieu of a hearing. On June 25, 2020, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 4. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the

FORM on July 7, 2020, and did not submit a substantive response. Applicant did not object to any of the evidentiary documents included in the FORM. Item 1 contains the pleadings in the case. Items 2 through 4 are admitted into evidence. Applicant noted a correction to his name in the FORM which I appended to the record as Administrative Exhibit I. The case was assigned to me on September 22, 2020.

Findings of Fact

Applicant, age 32, is divorced with one minor child. He received a high school diploma in 2006. He has been employed as an avionics technician by a defense contractor since May 2018. Applicant previously held a security clearance while serving on active duty with the U.S. Marine Corps from October 2007 until September 2017, when he was discharged under other than honorable conditions. (Item 2)

In 2012, Applicant drove to a friend's house after a 24-hour work shift to help his friend with yard work. After completing the yard work, Applicant watched television for a time and then left to go home. During his drive home, he fell asleep at the wheel and hit a neighbor's truck. He attributed the incident to his lack of sleep. He was charged with reckless driving – wanton disregard. A court found him guilty of the charge. (Item 1; Item 3 at 7).

In 2014, Applicant consumed four mixed drinks over four and one-half hours while at a restaurant with coworkers. He then drove back to base. Because he smelled of alcohol when he presented his identification at the gate, he was administered a field sobriety test, which he failed. He was also administered a breathalyzer, which registered a .14 blood alcohol count (BAC). He attributed the incident to poor judgment and intoxication. He received a Non-Judicial Punishment (NJP) for Drunken or Reckless Operation of Vehicle (Article 111) under Article 15 of the Uniform Code of Military Justice (UCMJ). The NJP resulted in a reduction in rank, forfeiture of \$2,426, 45 days of restriction and extra duty. Applicant's driver's license was suspended for six months, and he was ordered to take alcohol-education courses. (Item 1; Item 2 at 21-22, 33-34; Item 3 at 5-6, 8)

In 2017, Applicant consumed six beers while at a few bars by himself. While walking outside one of the bars, two men unknown to Applicant approached him and asked if he wanted to go to a party. Applicant agreed and entered their car, which was parked in the parking lot outside of the bar. The men offered Applicant cocaine, which he accepted. He felt sick after consuming the cocaine and immediately exited the car to vomit. He then walked back to his car, which had been parked in the same parking lot. He decided to sleep in his car until morning, and then he drove home for the weekend. When he returned to work the following Monday, he was subjected to a random drug screening. He tested positive for cocaine. He attributed the incident to being intoxicated. He received an NJP for Wrongful Use of a Controlled Substance (Article 112a) under Article 15 of the UCMJ. The NJP resulted in a reduction in rank, forfeiture of \$2,534, and 45 days of restriction and extra duty. He was subsequently discharged from the U.S. Marine Corps under other than honorable conditions for this misconduct. (Item 1; Item 2 at 22, 34-36; Item 3 at 4-6; Item 4)

In December 2018, Applicant consumed four mixed drinks and two to three tall beers while at a bar by himself. He went outside of the bar to retrieve a pack of cigarettes from his car and decided to leave to go home. While driving home, an officer stopped him for failure to maintain his lane. After refusing to take a field sobriety test, he was arrested and transported to the police station. While at the station, he was administered a breathalyzer, which registered a .17 BAC. He was then charged with Driving Under the Influence (DUI) and spent two days in jail. He self-reported the incident to his employer the day following his release from jail. The charge was scheduled for disposition in April 2019, which was not pronounced in the record. (Item 1; Item 3 at 12)

There is no mention in the record of the specific day that Applicant's December 2018 DUI occurred. Applicant was interviewed on December 4, 2018 (Interview #1) and December 12, 2018 (Interview #2) in connection with the background investigation of his security clearance application. He did not discuss his December 2018 DUI during Interviews #1 and #2. In April 2019, he was interviewed specifically to discuss the December 2018 DUI. There is neither an indication in the record nor any allegation that he intentionally omitted the December 2018 DUI during Interviews #1 and #2. (Item 3)

Applicant first consumed alcohol in 2008 at age 20. Because it made him sick the first time, he did not consume it again until his 21st birthday. From ages 21 through 25, he consumed approximately six beers once per week. From age 25 through September 2017, he consumed approximately 12 beers two times per week. From September 2017 through at least December 2018, he consumed six beers two times per week. Applicant admitted that he consumed alcohol to intoxication twice per month between age 21 and December 2018. He defined intoxication as slurred speech and stumbling. He estimated that it takes approximately eight beers for him to become intoxicated. Applicant does not feel that he has a problem with alcohol. He has not had any alcohol counseling or treatment. He has no intent to drive under the influence in the future. (Item 3 at 8, 12)

Applicant acknowledged that his 2017 cocaine use was "wrong and stupid" and vowed never to use it or any other illegal drugs again. He asserted that he used cocaine only once, but admitted that he used marijuana two times in 2006. He has no intent to use any illegal drugs in the future because of the negative effect it had on his military career, his life, and prospective employment opportunities. (Item 2 at 35-36; Item 3 at 8)

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." (*Egan* 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." (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant 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." (EO 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. (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. (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; AG ¶ 2(b)).

Analysis

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.

The offenses alleged in SOR ¶¶ 1.a through 1.e establish 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 (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

AG ¶ 31 (e): discharge or dismissal from the Armed Forces for reasons less than "Honorable."

Neither of the following relevant mitigating conditions under this guideline are established:

AG ¶ 32(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

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 criminal activity demonstrates a pattern of questionable judgment that also casts doubt on his ability or willingness to comply with laws, rules, and regulations. The 2012, 2014, and 2017 offenses were particularly egregious since they occurred while he served in the Marine Corps and possessed a security clearance. The fact that his 2018 DUI took place at all is problematic, but its timing further exacerbates the concern. Whether the 2018 DUI occurred after either Interview #1 or #2 is relevant to the discussion, but was not addressed in the record. However, the fact that the December 2018 DUI occurred not only after Applicant was discharged from the Marine Corps for misconduct, but also after he submitted his May 2018 SCA is significant. Applicant's SCA statements expressing remorse about his drug use, particularly in light of its impact on his career and life appeared sincere. The fact that he drove a vehicle after excessively consuming alcohol for a second time following his SCA submission suggests that he is either unwilling or unable to modify his behavior. In light of the facts and circumstances of Applicant's criminal misconduct, there has not been a sufficient passage of time without incident to demonstrate reform. Moreover, I am unable to conclude that Applicant's underlying questionable judgment is not likely to recur.

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's excessive alcohol consumption, resulting in the incidents alleged in SOR ¶¶ 1.b, 1.c, and 1.e, establishes the following disqualifying conditions under this guideline:

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

Neither of the following relevant mitigating conditions under this guideline are established:

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.

The incidents alleged in SOR ¶¶ 1.b, 1.c, and 1.e collectively raise questions about Applicant's good judgment, reliability and trustworthiness. Incorporating my comments under Guideline J, I find that Applicant has not demonstrated a sufficient pattern of modified behavior for me to conclude that his excessive consumption of alcohol and questionable judgment are behind him.

Guideline E (Personal Conduct)

The security concern under this guideline, as set out in AG ¶ 15, includes: "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."

None of the listed disqualifying conditions under Guideline E strictly applies to Applicant's misconduct given my adverse determinations under Guidelines J and G. However, the facts alleged in SOR ¶¶ 1.a through 1.e establish the general concerns involving Applicant's questionable judgment and unwillingness to comply with rules and regulations.

Incorporating my comments under Guidelines J and G, the security concerns raised under this guideline have not been mitigated by the following relevant mitigating condition:

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.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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.

I have incorporated my comments under Guidelines J, G, and E in my whole-person analysis, and considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines J, G, and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by a pattern of offenses involving his excessive alcohol consumption, and criminal and personal misconduct. Accordingly, Applicant 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

Formal findings 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 J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.e:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge