



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



In the matter of:)
)
) ISCR Case No. 21-01029
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

04/21/2022

Decision

MURPHY, Braden M., Administrative Judge:

Applicant was arrested for driving while intoxicated (DWI) in May 2019. He was found guilty and placed on probation. While on probation, he had multiple violations on his ignition interlock device. Although he completed the resulting treatment program, not enough time has passed and Applicant did not provide sufficient evidence to mitigate the resulting security concerns about his alcohol consumption and related criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 14, 2020. On October 22, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). The SOR was issued 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on or about August 17, 2020, and elected a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) on the administrative (written) record, instead of a hearing. On December 8, 2021, DOHA Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 12. DOHA mailed the FORM to Applicant the next day, and he received it on December 20, 2021. He was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation, and on December 30, 2021, he submitted an e-mail in response. (FORM Response) On January 13, 2022, the case was forwarded to the DOHA hearing office for assignment to an administrative judge, and the case was assigned to me on February 8, 2021.

The SOR and the answer (Items 1 and 4) are the pleadings in the case and Items 2 and 3 are related administrative documents. Items 5 through 12 are admitted into evidence without objection, as is Applicant's FORM response.

Findings of Fact

Applicant admitted all four allegations under Guideline G (SOR ¶¶ 1.a-1.d) without comment. He did not answer the cross-allegation under Guideline J (SOR ¶ 2.a), but since it is a cross-allegation I deem it admitted. Applicant's SOR admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 33 years old. He graduated from high school in 2006 and attended four years of apprentice school (2007-2011) and some community college. (Item 5) He and his wife have been married since 2007. They have three sons, ages 12, 9, and 8. (Item 5) Applicant has worked for a large defense contractor at a naval shipyard since 2006. (Item 5) He has held a clearance for most of his career. (FORM Response)

On his SCA, Applicant reported a May 2019 DWI arrest and disclosed that he had received a "one-year suspension" as a result. (Item 5) He discussed the offense and the resulting requirements in a July 2020 background interview, the summary of which he authenticated as accurate in a May 2021 interrogatory response. (Item 6)

Applicant discussed the circumstances of his DWI arrest (SOR ¶ 1.a) in his background interview. In May 2019, he had been at a local bar and consumed four or five mixed drinks over a three- or four-hour period. He was pulled over while driving home. The officer smelled alcohol on his breath and requested that Applicant submit to a breathalyzer, which he refused. Applicant was arrested and detained overnight. (Item 6 at 3; Item 7)

Applicant acknowledged during his interview that he had been intoxicated. He went to court, retained counsel, and pleaded guilty to DWI in September 2019. His license was restricted for one year, he was placed on one year of unsupervised probation, and he was required to participate in alcohol safety classes. He was also fined. He was also required to have an ignition interlock device placed on his car and to

report monthly so his compliance could be tested. (Item 6 at 3-4) Applicant was also ordered to complete 10 weeks of alcohol education classes between October 2019 and December 2019. (SOR ¶ 1.b)

Between December 2019 and October 2020, Applicant incurred four violations of his ignition interlock device. As a result, he was considered non-compliant with his alcohol education program on two occasions, in July 2020 and August 2020. The ignition interlock program was extended for six months and he was ordered to attend substance abuse treatment. (Item 6 at 4; Items 10-12) (SOR ¶ 1.c)

After his first ignition interlock violation in December 2019, Applicant was required to participate in an alcohol assessment. (Item 6 at 8-9). In February 2020, his assessor concluded that he did not meet criteria for alcohol treatment. (Item 9)

Following his additional ignition interlock violations, Applicant was re-assessed in December 2020. He indicated to the assessor that “his time was extended for an additional six months” (Item 12 at 2), which I interpret as an extension of his probation to March 2021 (beyond his initial one-year term, from September 2019 to September 2020). When he was assessed, he met 3 of the 11 criteria for alcohol use disorder, mild (unsuccessful efforts to cut down or control alcohol use; recurrent alcohol use in physically hazardous situations; and tolerance as defined by need for marked increased amounts of alcohol to achieve intoxication or desired effect). (Item 12 at 3-4)

Applicant was also re-enrolled in the alcohol safety program. He met the criteria for an additional ten weeks of treatment and alcohol awareness education. (Item 12 at 3-4) (SOR ¶ 1.d) He completed that treatment program in March 2021, as required, through an on-line meeting platform. (Item 6 at 37-38; Item 8, Item 12 at 9)

Applicant discussed his alcohol history in his background interview. He began drinking at about age 18, at least sporadically. From age 21 until May 2019, the time of his DWI, he consumed four to seven drinks of liquor or beer about three or four times a week. Since his DWI, his drinking had decreased to three or four drinks about once or twice a week at the time of his interview in July 2020. (Item 6 at 4) As of May 2021, Applicant reported that he no longer consumed alcoholic beverages and does not intend to do so in the future. (Item 6 at 34)

In his December 2021 FORM Response, Applicant added little new information. He noted that he understood DOD’s concerns. He asked that his 15-year career with his employer be considered, including with a clearance, and said the events of the last two years are not who he has been in the past or is today. (FORM Response)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988)

The AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Under ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set forth 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 guideline notes several conditions that could raise security concerns under AG ¶ 22. The following disqualifying conditions are potentially applicable 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 an alcohol use disorder; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant was arrested in May 2019 and charged with DWI. (SOR ¶ 1.a) AG ¶ 22(a) applies. He received four violations of a court-ordered ignition interlock device between December 2019 and October 2020. (SOR ¶ 1.c) AG ¶ 22(g) applies.

As a condition of Applicant's probation, he was ordered to complete ten weeks of alcohol education through an alcohol safety program from October 2019 to December 2019. (SOR ¶ 1.b) As a result of his ignition interlock violations, he was ordered to participate in substance abuse treatment. (SOR ¶ 1.d) His participation in these programs, however, constitutes mitigating rather than disqualifying conduct under Guideline G, even though they occurred as a result of his DWI and his ignition interlock violations. No disqualifying AGs apply to SOR ¶¶ 1.b or 1.d.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

(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.

Applicant incurred a single DWI arrest in May 2019. Unfortunately, his time on probation included four ignition interlock violations between December 2019 and October 2020. The significance of these four interlock failures is that Applicant attempted to operate his car four times while under the influence of some amount of alcohol. While he completed the subsequent treatment program in March 2021 (and presumably the extended probation period as well), Applicant has not demonstrated sufficient compliance with rules and regulations with respect to alcohol consumption to warrant full application of the mitigating conditions.

Applicant did not establish that his offenses occurred under unusual circumstances, that his alcohol-related misconduct is unlikely to recur, or that it no

longer casts doubt on his current reliability, trustworthiness, or judgment. AG ¶ 23(a) does not apply.

Applicant completed the substance abuse treatment program in March 2021. AG ¶ 23(d) applies. Applicant gets some credit under AG ¶ 23(b) for his decreased alcohol intake since his DWI, but this is balanced against his multiple ignition interlock violations. AG ¶ 22(b) is not fully applicable, as he has not demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern for criminal conduct:

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. The following disqualifying conditions 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.

Under Guideline J in the SOR, the Government alleged a single cross-allegation, quoted in full as follows:

2.a. That information as set forth in subparagraphs 1.b through 1.d, above.

Curiously, Applicant's May 2019 DWI (SOR ¶ 1.a) was not included in the cross-allegation. Since it was not, it cannot be considered as disqualifying conduct under Guideline J, as it otherwise might have been. SOR ¶¶ 1.b and 1.d concern Applicant's participation in court-ordered alcohol education and treatment. No Guideline J disqualifying AGs apply to them. Applicant's four violations of the ignition interlock device under SOR ¶ 1.c, however, satisfy both AG ¶¶ 31(a) (a pattern of minor offenses) and AG ¶ 31(b) (evidence of criminal conduct, regardless of charge, prosecution, or conviction).

The following mitigating conditions for criminal conduct are potentially applicable under 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

(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) and 32(d) do not fully apply in mitigation of Applicant's criminal conduct for the same reasons as the alcohol consumption mitigating conditions are not fully applicable, as discussed above. Applicant's four ignition interlock violations raise doubts about his compliance with rules and regulations, and he has not provided sufficient evidence of mitigation in the limited time since then.

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(c):

(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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G and J in my whole-person analysis. I also note that since Applicant elected a decision on the written record, I did not have the opportunity to observe his demeanor or ask questions of him to assess his credibility and the strength of his case in mitigation. To mitigate the security concerns about his conduct, more time is needed, and Applicant needs to establish a demonstrated track record of compliance with rules and regulations, particularly with respect to alcohol consumption. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. Applicant did not provide sufficient evidence to mitigate the alcohol

involvement or criminal conduct security concerns. Eligibility for access to classified information is denied.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a, 1.c:	Against Applicant
Subparagraphs 1.b, 1.d:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge