



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 20-03342
)	
Applicant for Security Clearance)	

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: Anthony J. Kuhn, Esq.

07/15/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on October 22, 2019. On January 22, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The DCSA CAF acted 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 the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on March 25, 2021, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 10, 2021, but

scheduling of the hearing was delayed by COVID-19. The case was assigned to me on April 5, 2022. On May 5, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on June 3, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibit (AX) A (consisting of Tabs A through K) and AX B, which were admitted without objection. DOHA received the transcript (Tr.) on June 22, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegation in SOR ¶ 1.a, admitted the allegations in SOR ¶¶ 1.b and 1.c in part, and admitted the allegations in SOR ¶ 1.d and 2.a. His admissions are incorporated in my findings of fact.

Applicant is a 47-year-old flight instructor employed by defense contractors since October 2017. He has worked for his current employer since April 21, 2022. (Tr. 11.) He graduated from the U.S. Air Force Academy in May 1998 and served on active duty until he retired in September 2017 with the rank of major. While on active duty, he completed 12 deployments and flew 304 combat missions consisting of more than 2,000 combat flight hours. He received numerous awards and commendations for his service, including three awards of the Meritorious Service Medal, seven awards of the Air Medal, the Joint Service Commendation Medal, the Aerial Achievement Medal, and the Air Force Achievement Medal. (AX A, TAB E.) He held a security clearance throughout his military service and as an employee of a defense contractor. His clearance has not been suspended during the ongoing security clearance adjudication. (Tr. 179.)

Applicant married in May 2003 and divorced in February 2005, due to his then wife's infidelity and drug abuse. He married again in June 2006, separated in January 2019, and divorced in May 2019. He and his second ex-wife share custody of their five-year-old daughter. He has lived with a cohabitant since June 2019.

Applicant first consumed alcohol on his 21st birthday, while he was a cadet. He and fellow cadets consumed a six-pack of beer and a bottle of cognac. He was very sick the next day and did not drink again until the night he graduated from the Air Force academy, at age 23, when he consumed numerous "tequila poppers" and again was very sick. (Tr. 120-21.)

Beginning in about 2013, Applicant began drinking heavily, consuming about 350 milliliters of whiskey every evening (six to seven standard drinks), but he abstained from alcohol for at least 12 hours before flying. He attributed his heavy drinking to the stress of an unhappy marriage. He used his educational benefits to allow his then wife to complete her education and begin a career as a nurse practitioner. He believed that his then wife became totally involved in her own career and was no longer interested in contributing to the marriage. (GX 2 at 5; GX 3 at 38.) His then wife and his brother attempted to intervene to stop his excessive drinking, without success. He testified that

he resisted their efforts to intervene because he and his then wife had discussed divorce, and he believed that their efforts were intended to discredit him and gain leverage in any subsequent divorce. (Tr. 113-14.) As a result of the attempted intervention and other factors, Applicant is estranged from his brother. (GX 2 at 4.) Applicant is also estranged from his father because of his father's heavy alcohol consumption, use of marijuana, and abusive behavior. (Tr. 126; AX A, TAB F at 52.) He is close to his mother, who helped him pay for inpatient treatment for an alcohol abuse disorder in 2018.

About two or three months after the attempted intervention by his then wife and his brother, Applicant voluntarily admitted himself into a medical facility, because he believed he was drinking too much. (Tr. 114.) He chose the facility because it was advertised on the Internet as a facility that specialized in trauma treatment, including trauma-induced substance abuse. (Tr. 133; AX A, TAB F at 53.)

Applicant testified that there were two stressors in his life. The first was the result of 12 deployments, where he "killed a bunch of people, saw a lot of stuff that people probably shouldn't see," and the second was "a one-sided marriage." (Tr. 130.)

From November 2018 to December 2018, Applicant was treated at the medical facility. During his intake interview, he disclosed that on November 5, 2018, he was briefly hospitalized after threatening to kill himself after his wife took his alcohol away from him. He disclosed that he made the threat to frighten his wife and make her realize "where he was emotionally," but he did not believe he was suicidal. (GX 3 at 30.)

When Applicant was discharged from the medical facility, he was diagnosed with alcohol use disorder, severe; posttraumatic stress disorder (PTSD); anxiety disorder, unspecified; major depressive disorder, recurrent and unspecified; sleep disorder, unspecified; and exposure to disaster, war, and other hostilities. The discharge notes recited that his alcohol use disorder was in remission; his PTSD was mild; his anxiety and depression were in remission; and he was sleeping well. His follow-up recommendations included follow-up with his primary care doctor and a therapist. His prognosis was "good." The suggestions for continued recovery were to attend 90 Alcoholics Anonymous (AA) meetings in 90 days, to obtain an AA sponsor, to continue receiving counseling, and to find an AA "home group" where he could continue his AA participation. (GX 3 at 1-4.) He testified that he was never advised to completely abstain from alcohol. (Tr. 119.)

In accordance with the recommendation of the medical facility, Applicant met with a counselor, found his techniques unusual, and stopped seeing him after two visits. He attended AA meetings for a couple of months but found it unhelpful. (Tr. 113.) He had a sponsor and initially met with him at almost every meeting. (Tr. 160.)

Applicant met his cohabitant while they both were being treated at the same medical facility. His cohabitant was being treated for trauma, but not for any alcohol issues, and she became his "recovery friend." (Tr. 161, 169). He testified that his divorce in May 2019 removed much of the stress that caused his excessive drinking. (Tr. 113.) He and his cohabitant began living together in June 2019.

Applicant abstained from alcohol while in treatment in November and December 2018. In September 2019, he and his cohabitant went out for dinner, where they each had two drinks. At his cohabitant's suggestion, they went to a bar after dinner, where they met several of Applicant's colleagues for drinks. Applicant drank too much, went to a fast-food restaurant, and was rear-ended by another vehicle as he left the fast-food restaurant. The other driver who rear-ended him claimed that Applicant pulled out in front of him.

Applicant was charged with driving under the influence of alcohol (DUI) with a blood-alcohol content (BAC) of greater than .15. On April 9, 2020, he pleaded guilty to DUI with a BAC of less than .15. On April 17, 2020, he was fined \$50, required to perform 30 days of community service and was placed on supervised probation for 11.29 months. (The fractional length of probation for 11.29 months is reflected in the court records but was not explained in the records or elsewhere.) He was also required to attend a substance-abuse school and attend a victim-impact panel. His driver's license was suspended for six months. (GX 2 at 12-14.) He successfully completed his term of supervised probation in April 2021.

During a security interview in April 2020, Applicant told an investigator that he was consuming about "two fingers" of whiskey twice a month on weekends. (GX 2 at 4.) His shared custody of his daughter motivates him to moderate his consumption. He testified, "Obviously, alcohol consumption and chasing around a 5-year-old is not conducive, so that doesn't happen." (Tr. 117.)

After Applicant received the SOR in January 2021, his attorney recommended that he undergo a psychological evaluation. In February and March 2021, he was evaluated by a board-certified psychologist with extensive military and medical experience, including evaluations in connection with security clearance adjudications. (AX B.) The psychologist concluded that Applicant met the diagnostic criteria for a moderate alcohol use disorder between early 2017 and late 2018, but he was in sustained remission at the time of the evaluation, and his prognosis was good because he did not have a long history of alcohol abuse and he had maintained sobriety for about 18 months before resuming moderate consumption of alcohol. He concluded that Applicant does not have an alcohol use condition that could negatively impact his judgment, reliability or trustworthiness and he does not have any behavioral pattern or personality characteristics that could render him unable or unwilling to safeguard national security information. (AX A at TAB F.)

The psychologist had two virtual meetings with Applicant shortly before the hearing. He testified that, based on the additional passage of time, he changed his prognosis from "good" to "excellent." (Tr. 36.) He disagreed with the December 2018 diagnoses of severe alcohol use disorder and PTSD, describing them as "relatively sloppily assigned," and he would have counseled Applicant rather than send him to someone else for treatment. (Tr. 38-39.)

On cross-examination, the psychologist testified that his diagnosis was based on information provided by Applicant. He had not seen the medical records from Applicant's treatment in 2018. (Tr. 64.) He was not aware that the medical records for Applicant's

treatment in 2018 reflected that he showed signs of alcohol withdrawal and that he was prescribed a drug used to minimize the effects of withdrawal. The psychologist also was not aware that Applicant began drinking alcohol at age 21, that during his period of heavy drinking that he experienced blackouts, that he had been drinking heavily for five years instead of three years, and that he told a staff member in 2018 that he experienced depression, low interest, flashbacks, and hyper-vigilance of mild severity. (Tr. 70-74, 84.) The psychologist testified that he did not believe Applicant intentionally withheld information. He admitted that his opinions might have been different if he had been aware of the additional facts. However, even after learning about the additional facts, he still believed that Applicant's prognosis is good. (Tr. 102.)

One of Applicant's coworkers, who has known him for about ten years and is a lieutenant colonel in the U.S. Air Force Reserve, testified that he has never observed him drink to excess, come to work under the influence of alcohol, or drive a vehicle after drinking. He considers Applicant reliable, honest and trustworthy. He believes that Applicant's DUI was a one-time mistake that he regrets and will not repeat. (Tr. 18-21; AX A, TAB G.)

Another coworker, a retired Air Force lieutenant colonel who has known Applicant for about 22 years, has become a good friend since around 2018. They work together on a daily basis and they "hang out" socially. He considers Applicant "the most skilled pilot [he has] ever flown with." He believes that the DUI was a one-time incident that will not recur. He has never observed Applicant intoxicated, come to work intoxicated, or operate a vehicle or any type of equipment under the influence of alcohol. He considers Applicant honest and trustworthy. He testified that when they go to lunch or dinner, Applicant usually does not drink, but when he drinks the amount is insignificant. (Tr. 23-28; AX A, TAB H.)

The training integrator who supervises Applicant has known him for more than 13 years. He regards Applicant as "one of the best and most thoughtful pilots" that he has known. He notified the Federal Aviation Administration (FAA) that Applicant would never attempt to operate an aircraft while impaired. He told the FAA that "it is just not how he is wired." (AX A, TAB I.)

In Applicant's response to the SOR and at the hearing, he submitted a statement of intent not to abuse alcohol in the future, and he agreed that any alcohol abuse would constitute grounds for automatic revocation of his security clearance. (AX A, TAB J.)

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 SOR alleges that Applicant received treatment from November to December 2018 for a condition diagnosed as alcohol use disorder (severe) (SOR ¶ 1.a); that when he was discharged from the treatment facility, he was advised to obtain follow-up psychotherapy treatment for his substance abuse disorder but failed to follow this treatment advice (SOR ¶ 1.b); and that he continued to consume alcohol, notwithstanding his treatment for alcohol use disorder (severe) (SOR ¶ 1.c). It also alleges that in about September 2019, he was charged with DUI with a BAC more than .15, that he pleaded guilty to DUI with a BAC of less than .15, that he was placed on probation for 11.29 months, and that he remained on probation until about April 2021 (SOR ¶ 1.d).

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 are relevant:

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 ¶ 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;

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;

AG ¶ 22(e): the failure to follow treatment advice once diagnosed; and

AG ¶ 22(f): alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

Applicant’s admissions and the evidence submitted at the hearing establish the disqualifying conditions in AG ¶¶ 22(a), 22(b), 22(c), and 22(d). The disqualifying condition in AG ¶ 22(f) is not established, because there is no evidence establishing that any medical provider recommended that Applicant completely abstain from consuming alcohol.

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;

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; and

AG ¶ 23(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) and 23(b) are established. Applicant's last incident of maladaptive alcohol consumption was in September 2019, almost three years ago. The first prong of AG ¶ 23(a) ("so much time has passed") focuses on whether the conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the evidence. If the evidence shows a significant period of time has passed without recurrence, 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).

Before Applicant's DUI in September 2019, he had been careful to confine his drinking to off-duty hours at home and more than 12 hours before flying. He resisted his then wife's attempts to intervene, which was understandable because she was the source of his stress. Shortly after his then wife's efforts, he acknowledged his problem and voluntarily sought treatment, which he completed. The source of the stress caused by the deterioration of his marriage of ten years apparently has been resolved by divorce and is unlikely to recur. The testimonials of the coworkers and supervisors indicate that he has continued his outstanding duty performance. He recognizes that he will not receive a second chance if he abuses alcohol again. By submitting his signed declaration of intent, he has placed himself on probation, and he is not likely to again risk his lifelong love of flying.

AG ¶ 23(d) is not fully established. Applicant successfully completed his treatment program and has adhered to a pattern of moderate alcohol consumption for almost three years. However, he did not follow the recommendations for aftercare counseling and AA participation.

Guideline J, Criminal Conduct

The SOR cross-alleges the DUI arrest and conviction alleged in SOR ¶ 1.d. 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 following disqualifying conditions are relevant:

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; and

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;

AG ¶ 31(a) is not established, because a single incident does not constitute a pattern. However, AG ¶ 31(b) is established by Applicant's conviction of DUI.

The following mitigating conditions are potentially relevant:

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.

AG ¶ 32(a) and 32(d) are established, for the reasons set out in the above discussion of Guideline G.

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(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 G and J in my whole-person analysis and considered the factors in AG ¶ 2(d). Applicant was sincere, candid, remorseful, and credible at the hearing. He served as an Air Force officer honorably and with distinction for 20 years, with considerable service under combat conditions. He is highly regarded by his colleagues and supervisors, who believe that his DUI was a one-time incident that will not recur. He has voluntarily sought and received treatment for the stressful conditions he endured. He loves being a pilot, and the risk of losing his pilot's license has been a major motivator to moderate his alcohol consumption. He has placed himself on probation by submitting the letter of intent. He has received a "good" prognosis from medical professionals. After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his alcohol consumption and criminal conduct.

Formal Findings

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

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge