



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



In the matter of:)
)
) ISCR Case No. 21-00938
)
Applicant for Security Clearance)

Appearances

For Government: Daniel P. O'Reilley, Esq., Department Counsel
For Applicant: *Pro se*

02/14/2023

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under G (Alcohol Consumption). Eligibility for continued access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 28, 2019. On January 20, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline G. The 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 July 8, 2022, and requested a decision on the written record without a hearing. Included with his answer were two letters of recommendation, and documents regarding his court-ordered obligations. Applicant's five

exhibits will be cited as Applicant Exhibits (AE) at the applicable page number in his Answer, Item 2. Department Counsel submitted the Government's written case on September 26, 2022. A complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on October 20, 2022, and did not respond. The case was assigned to me on January 26, 2023.

The SOR and the Answer (Items 1 and 2) are the pleadings in the case. The Government exhibits included in the FORM (Items 3-6) and Applicant's five exhibits (on pages 4 through 8) are admitted into evidence without objection. Items 1 and 2 include the SOR and Answer and are already part of the record.

Evidentiary Issue

FORM Items 5 and 6 are summaries of personal subject interviews (PSI) conducted on September 27, 2019, and March 11, 2015, respectively. Neither PSI summary was authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant these PSIs were being provided to the Administrative Judge for consideration as part of the record evidence in this case, and he was entitled to comment on the accuracy of either PSI; make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate; or object on the ground that the report is unauthenticated. I conclude that Applicant waived any objections to the PSI summaries by failing to respond to the FORM. "Although pro se applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive." ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016).

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 1.b, and 1.c, with explanations. Included with his answer were two letters of recommendation, and documents demonstrating that he satisfied his court-ordered obligations. (AE at 4 through AE at 8.) His admissions are incorporated in my findings of fact.

Applicant is 35 years old. He has never married, and he does not have children. He holds two bachelor's degrees, one in German (2011) and the other in Electrical Engineering (2014). He worked for a defense contractor from 2014 to 2019. As part of his employment, he was granted a security clearance in 2016. He has been employed by his sponsor since February 2019 as a senior field service engineer.

In March 2013, Applicant was arrested for driving under the influence (DUI) and refusal to submit to a chemical test. In his PSI in 2015, Applicant reports he consumed three to four beers over two hours at a local restaurant. (Item 6 at 6.) During his drive home he was pulled over, failed the field sobriety tests, and was arrested for DUI. He pled guilty to the lesser charge of Refusal to Submit to a Chemical Test. In his answer he made no excuses for his actions and stated he "willingly put [himself] in a position to be a danger

to those around me.” (Item 2 at 2.) He was ordered to pay fines and complete 10 hours of community service.

In August 2018, Applicant was arrested for DUI. He explained that he had been drinking at a friend's house and consumed five to six beers over a seven-hour period. (Item 5 at 3.) He offered that he had been limiting myself to approximately one beer per hour, based a guideline he learned after his 2013 DUI and then “waited a little under an hour after finishing” his last beer before he left. He states he struck a parked vehicle while attempting to pull up a navigation application while driving. The police responded to the accident, and he was administered a field sobriety test, which he passed. The police detected the odor of alcohol on him, and he was arrested on suspicion of DUI. A breathalyzer was administered at the police station and the test generated a blood alcohol level of 0.12 or 0.13. (Item 5 at 3.) He was charged with Illegal Operation of a Moving Vehicle While Under the Influence of Alcohol and Failure to Drive Upon Right. He reported the DUI arrest to his security officer. He successfully completed the court-ordered alcohol education classes and the ignition interlock requirement without issue. (AE at 6 and AE at 7.) With the successful completion of the alcohol education course, the charges were dismissed in May 2020. (AE at 8.)

In Applicant’s answer, he stated he no longer drinks anything at all if he is driving. He acknowledges he still consumes alcohol, “but it is nothing like what” it was in the past. (Item 2 at 2.) He reiterates that under no circumstances does he operate motor vehicles if he has been drinking. (Item 2 at 2.) He submitted character references to attest to his professionalism, integrity, and attention to detail, along with an awareness and respect for security. (AE at 5 and AE at 4.)

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 for alcohol consumption is detailed 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 are potentially applicable 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; 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.

SOR ¶ 1.a alleges Applicant consumed alcohol, at times in excess and to the point of intoxication, since about March 2013 to the present. SOR ¶ 1.b alleges Applicant's arrest and conviction of DUI in January 2008, and SOR ¶ 1.c alleges Applicant's arrest for DUI in September 2017 and his subsequent conviction in June 2019. Applicant admitted all the SOR allegations. The above AGs apply.

The following mitigating conditions are potentially applicable under 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;

(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;

(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

(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 established. 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 totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, 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).

Applicant's August 2018 DUI is more than four years ago. He successfully completed his alcohol treatment program in 2020 resulting in an Alcohol Education Dismissal of his charges. His two DUI arrests were more than five years apart. In his answer to the SOR, he stated that he moderated his alcohol consumption after his DUI conviction in 2018, and no longer operates a motor vehicle if he has been drinking. The evidence is sufficient to establish reform or rehabilitation.

AG ¶ 23(b) is established. Applicant has acknowledged his maladaptive alcohol use. He provided evidence of counseling and treatment after his second DUI conviction. His answer to the SOR indicates that he has matured and intends to moderate his alcohol consumption but not to abstain. There is sufficient time and evidence to determine that he will adhere to his statements of moderate consumption and proper behavior after drinking to show a "clear and established pattern of modified consumption."

AG ¶¶ 23(c) and 23(d) are applicable. Applicant provided evidence he received counseling and treatment after his most recent DUI conviction and that he had successfully completed the treatment program.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline G in my whole-person analysis. Applicant reported his 2018 DUI incident to his security officer. He has also provided two letters of recommendation. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance.

After weighing the disqualifying and mitigating conditions under Guideline G and evaluating all the evidence in the context of the whole person, I conclude Applicant has

mitigated the security concerns raised by his alcohol-related conduct. Eligibility for continued access to classified information is granted.

Formal Findings

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

Paragraph 1, Guideline G: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

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

Charles C. Hale
Administrative Judge