



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



In the matter of:)
)
) ISCR Case No. 21-01104
)
Applicant for Security Clearance)

Appearances

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

08/07/2023

Decision

MURPHY, Braden M., Administrative Judge:

Applicant was arrested three times for alcohol-related driving offenses between 2015 and 2019. He has attended alcohol counseling, but a diagnosis of alcohol use disorder is not established. He remarried, moved to another state, and has established several years of moderated alcohol consumption. Applicant provided sufficient evidence to mitigate the security concerns alleged under Guideline G (alcohol consumption). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 27, 2019. On October 15, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline G (alcohol involvement). The CAF issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on January 5, 2022, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on April 18, 2023. On April 27, 2023, DOHA issued a notice scheduling a hearing for May 31, 2023, by video-teleconference through an online platform.

The hearing convened as scheduled. Department Counsel offered Government's Exhibits (GE) 1 through 6. Department Counsel also offered two documents for administrative notice (AN) purposes. Those materials are discussed below. Applicant testified and submitted Applicant's Exhibits (AE) A and B. All exhibits were admitted without objection. At the conclusion of the hearing, I left the record open to allow Applicant the opportunity to submit further documentation in support of his case. He submitted one reference letter, which was marked as AE C. Department Counsel did not object to admission of AE C but provided post-hearing argument. (June 7, 2023 e-mail, HE III). Applicant Exhibit C was admitted without objection. The record closed on June 12, 2023. DOHA received the hearing transcript (Tr.) on June 13, 2023.

Administrative Notice Documents

The day before the hearing, Department Counsel submitted two documents for administrative notice (AN) purposes, both concerning alcohol use disorders. The documents, a Fact Sheet from the National Institute on Alcohol Abuse and Alcoholism and an excerpt from the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-V), are marked as AN I and AN II, respectively.

Applicant initially objected to the documents on the grounds that they were untimely, since they were provided several days after my discovery deadline. (E-mails of May 30, 2023, Hearing Exhibits (HE) I and II). At the start of the hearing, I heard argument from counsel and the Applicant on the matter. Applicant ultimately said he wished to proceed with the hearing as scheduled. I ruled that I would consider the documents for administrative notice but would give Applicant time after the hearing to submit evidence in mitigation. (Tr. 11-27)

Findings of Fact

In his SOR Response, Applicant admitted SOR ¶¶ 1.a-1.f without further comment, but for SOR ¶ 1.e, which he admitted in part and denied in part. His SOR admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 60 years old. He has a high school education. He served on active duty in the U.S. Air Force from 1984 to 2005 and was honorably discharged as a tech sergeant (E-6). He has worked for a defense contractor in industrial security since February 2018. He was unemployed for most of 2017. He has held a clearance since he joined the Air Force but for 2012-2015 when he was unemployed. (GE 1; Tr. 41, 60)

Applicant and his first wife married in 1989. They separated in 2012 and divorced in 2016. He has an adult son from that marriage. He remarried in September 2020. He and his wife moved from state 1 to state 2 in February 2022. He remains with his employer, and he works from home full time. They moved in anticipation of retirement in about two or three years. (Tr. 43-47, 56, 58; GE 1)

On his 2019 SCA, Applicant listed his three most recent alcohol-related driving offenses, in 2015, 2017, and 2019. (GE 1 at 32-40) He had a background interview in January 2020. He authenticated and adopted it as accurate in a June 2021 interrogatory response without making changes. In the interview, he discussed each offense as well as his counseling, probation requirements, and alcohol involvement. (GE 2; Tr. 62)

Applicant was cited for drinking in public in 1999. (SOR ¶ 1.a) (GE 2, GE 3) He was in a public park with friends after a softball game. He acknowledged that there was alcohol in his cooler and he acknowledged receiving a citation, but he denied that he had been drinking. His most recent background interview summary references an acknowledgment during a prior investigation that he had been drinking at the time. He said that at his hearing that he would drink beers after softball but did not do so on that occasion. Like others who were there, he paid the \$50 fine rather than contest the matter in court. (Tr. 62-66; GE 2)

All three of Applicant's DWIs occurred during his separation, after his divorce and before his 2020 remarriage. (Tr. 114) He was also depressed due to the end of his first marriage. He had attempted to reconcile with his first wife but was not able to do so. (Tr. 115-116)

In April 2015, Applicant was arrested and charged with misdemeanor Driving While Intoxicated (DWI), first offense. He had been at a late lunch with a friend. He was there for several hours. He said he had two beers and a shot to celebrate the friend's birthday. He was pulled over on his way home after making an illegal U-turn. The officer smelled alcohol on Applicant's breath, and Applicant blew a 0.14 blood alcohol content (BAC) on a breathalyzer. In July 2015, he pled guilty to a reduced charge of misdemeanor reckless driving. (SOR ¶ 1.b) He received a 30-day suspended jail term, a \$500 fine, and an undetermined term of probation. He attended a 10-hour alcohol safety awareness program (ASAP) from October to December 2015. (Tr. 66-69; GE 1; GE 4)

Applicant said he curtailed his drinking after that offense. At the time, he said he consumed about two to three beers four or five times a week. He acknowledged drinking due to depression about the end of his marriage. He said his divorce was not due to drinking but more due to unemployment issues and lack of conversation. (Tr. 56-57, 70-71)

In June 2016, Applicant attended a concert and was there for several hours. He had been drinking beer. He was stopped at a checkpoint on his way home. He had a BAC of 0.14. He was arrested and charged with DWI. He pled guilty to a reduced charge of reckless driving in November 2016. He received a 90-day suspended jail sentence and six months of supervised probation, until May 2017. He was also fined.

He had a restricted license with an ignition interlock device for six months. He attended an eight-hour ASAP program in early 2017. (Tr. 73-76; GE 5) (SOR ¶ 1.c)

Applicant was referred to group counseling from November 2016 to April 2017. He was also subject to random alcohol testing about once a week. He abstained from alcohol for six months, though he failed one test. He was also required to attend Alcoholics Anonymous (AA) meetings. It was reinforced that he should avoid drinking and driving and making the same mistakes. He learned how quickly his BAC will increase when he drinks, but he did not believe he had a drinking problem. (Tr. 76-81, 105-107)

Applicant resumed social drinking at some point after the counseling sessions ended. (Tr. 82-83) One evening in February 2019, he attended a birthday party at a brewery. He left about 8:30 PM. He had consumed between two and four beers. He was pulled over for crossing the center line. His BAC was 0.19. Applicant was arrested and charged with DWI. He pled no contest, He was sentenced to 90 days in jail, all but six days suspended. He served three days. He received 12 months of supervised probation and was fined \$1,000. His license was suspended for 12 months, with an ignition interlock device for six months. He was ordered to attend eight hours of ASAP and referred to Counseling Center N. (Tr. 71-72, 84-90; GE 6) (SOR ¶ 1.e)

Applicant acknowledged one interlock ignition failure, in June 2019, though he denied that it was caused by drinking. He said it was caused by medication. (Tr. 100-104) He completed the counseling from July to November 2019. It was a small group, of about five people. He denied that he was told during counseling that he should stop drinking, and said the counselor said it was not wrong to have an occasional drink. The focus was on not drinking and driving and on limiting alcohol consumption. He found the counseling informative, and said, "I took a lot from that to make sure I never put myself in that situation again." The counseling center notified state authorities that he completed the program, but he did not receive a certificate or other documentation. (Tr. 49-55)

Applicant denied that he had ever been diagnosed with an alcohol use disorder, including during his 2019 counseling. (Answer to SOR ¶ 1.e; Tr. 24, 90) Even if that were established, he also denied that he was aware of it. He denied meeting with a medical professional while in counseling. (Tr. 53-54, 91-94, 98)

The interrogatory response (GE 2) asked the following question:

Available information indicates that from August 2019 to September 2019, you received alcohol counseling at [Counseling Center N]. You were diagnosed with Alcohol Use Disorder – Moderate.

Applicant checked "YES" without further comment. (GE 2 at 2) At his hearing, he said he did not intend to "admit" the diagnosis when he checked "YES." (Tr. 91-94, 98)

Further, the summary of Applicant's January 2020 background interview, which he adopted as accurate and authenticated without making edits or further comment, contains the following statements:

Subject has never been professionally diagnosed with abusing alcohol. Subject has never been professionally diagnosed as being alcohol dependent. (GE 2 at 10)

The Government's case does not include independent documentary evidence, from Counseling Center N or elsewhere, to support the allegation that Applicant had been diagnosed with an alcohol use disorder. (Tr. 95-96, 123-126) There is also no documentation in the record of a recommendation that Applicant should wholly abstain from alcohol use, for medical or other reasons, and he testified that he never received such a recommendation or instruction. (Tr. 117)

Applicant said he has been "clean" for four years. (Tr. 100) He does not believe that he has a drinking problem. (Tr. 107) He did not return to AA, as he felt his issues were drinking and driving and not due to other issues with alcohol, like others. (Tr. 108) He has not pursued any counseling beyond what he received at Counseling Center N or through court-ordered AA. He is not in counseling or treatment currently. (Tr. 107-108, 117) He said his support network is his wife, his family, and good friends. He remains close to his son and his grandchildren, who live elsewhere (Tr. 118)

Applicant drinks "a beer or two once in a while." (Tr. 107) At times he does not drink for one, two, or three weeks. (Tr. 109) He last consumed alcohol the weekend before the hearing, when he had two beers while at home watching sports on television. (Tr. 111-113) When he drinks, he drinks to moderation, either at home, or when his wife is the designated driver. (Tr. 42-43, 59, 113-114) He also acknowledged that he has mellowed and is "more settled" since he is "getting older." (Tr. 118)

As a result of his most recent counseling, Applicant stopped going out often. He also met his wife, which had a significant positive impact on him. They met in 2018 and have been together since 2019. (Tr. 56-57) He said his marriage has been a positive, stabilizing change in his life. He and his wife stay home or go to dinner with friends. He believes moving to State 2 has helped. They live a "slower-paced lifestyle that they enjoy. (Tr. 116) Applicant has had no subsequent arrests or offenses since 2019 and has no restrictions on his driver's license. (AE A, AE B)

Applicant said he has held a clearance for most of the last 40 years and has never had a security violation or an employment issue. He values his clearance and understands its importance. He believes he has made adjustments in his life and is not a risk to national security. (Tr. 132-133)

Applicant's supervisor, Mr. P, provided a letter of reference. Mr. P said Applicant is a reliable, trusted employee and a solid team player. He has a positive attitude, volunteers for duties, and works long hours to accomplish assigned tasks. He

exemplifies the company's core values and is highly regarded for his knowledge, dedication, and professional demeanor. (AE C)

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 several 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 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

(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.

In 1999, Applicant was with friends after a softball game. He was cited for drinking in public. Alcohol was present but he denies that he was drinking. He chose to pay a small fine rather than to contest the matter in court. He admitted SOR ¶ 1.a and AG ¶ 22(a) is established (though his guilt is not established merely because he chose to pre-pay the fine to resolve a misdemeanor citation).

Between 2015 and 2019, Applicant was arrested three times for DWI. He pled guilty to lesser offenses of reckless driving the first two times and pled no contest to the third offense. AG ¶ 22(a) is established for those offenses.

SOR ¶ 1.e alleges that in 2019, Applicant received alcohol counseling and was diagnosed with moderate alcohol use disorder. He admits the counseling but denies the diagnosis. Alcohol counseling is not, itself, a security concern, and no disqualifying condition is established by its presence. Indeed, it is mitigating.

The only evidence that Applicant received a diagnosis that he had an alcohol use disorder was its reference in the DOHA interrogatory that he received, which included a question referring to both counseling and an alcohol use disorder diagnosis. He answered "Yes" without further comment, and the Government makes much of this "admission."

But the same interrogatory also included a statement in Applicant's background interview summary, stating that he had "never been professionally diagnosed as abusing alcohol." He authenticated his interview summary in full, including this statement, also without comment. Most importantly, the Government did not produce independent documentary evidence of an alcohol use disorder diagnosis as part of its case (as it had the burden to do, since Applicant denied that portion of SOR ¶ 1.e). Documentation from the counseling center would have been the best evidence of the diagnosis, but there is no such documentation in the record. Without it, a diagnosis of alcohol use disorder is not established, and AG ¶ 22(d) does not apply.

Moreover, even if a diagnosis of moderate alcohol use disorder were established, it is neither alleged in the SOR nor established by the record evidence that Applicant's continued consumption of alcohol, at moderate levels, at home or when out with his wife

when she is the designated driver, is contrary to treatment or counseling recommendations.

Therefore, while I have considered the Government's administrative notice materials regarding alcohol use disorders (AN I and AN II), I have given them relatively little weight, as the premise for their relevance to this case is not established by the record evidence. Nor are they accompanied by a professional evaluation of how they are to be applied to this Applicant and his circumstances.

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; and

(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.

SOR ¶ 1.a, the citation for drinking in public, is mitigated by the passage of time. The other offenses are more recent and more serious. Applicant incurred three DWI arrests between 2015 and 2019, all in similar circumstances (driving home after social drinking). He has participated in several ASAP classes and has had several counseling sessions. He completed each requirement successfully and is no longer on probation. He has not had any recurrent instances of alcohol-related driving offenses in four years. All of these offenses occurred either during or after the collapse of his first marriage, which Applicant clearly struggled with emotionally. This is less so for his most recent offense (2019) though, tellingly, it occurred before his remarriage.

Applicant testified credibly that he has changed his lifestyle. He has remarried and moved to a new location in another state. He credits his marriage as a positive and stabilizing impact on his life. He is older and nearing retirement. This is not to say that his offenses are attributable to immaturity. They are not. But it has been four years since his most recent offense. Applicant's current alcohol consumption is either at home, or while out with his wife, with a designated driver. It is also moderate and reasonable, and, as noted, it is not contrary to treatment or counseling recommendations. I also credit Applicant's many years in the Air Force and the defense industry, with a clearance. I conclude that AG ¶ 23(a) and 23(b) apply to mitigate the Guideline G security concerns.

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 Guideline G in my whole-person analysis. Applicant provided sufficient evidence to mitigate the alcohol consumption security concerns. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. Eligibility for continued access to classified information is granted.

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 G:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant

Conclusion

Considering all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant continued eligibility for a security clearance. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge