



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



In the matter of:

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ISCR Case No. 23-00891

Applicant for Security Clearance

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel

For Applicant: *Pro se*

02/06/2024

Decision

HARVEY, Mark, Administrative Judge:

Applicant mitigated security concerns arising under Guideline G (alcohol consumption); however, he failed to mitigate Guideline J (criminal conduct) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 26, 2022, Applicant completed and signed a Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On May 16, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant. This action was taken under Executive Order (Exec. Or.) 12968, *Access to Classified Information*, dated August 2, 1995; DoD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, effective on April 3, 2017 (DoDM 5200.02); and Security Executive Agent Directive 4 (SEAD 4), establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AG)*, effective on June 8, 2017.

The SOR detailed reasons why the DCSA CAS notified Applicant that it intended to deny or revoke his security clearance because it did not find that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guidelines G

and J. (Hearing Exhibit (HE) 2) On July 31, 2023, Applicant responded to the SOR. (HE 3)

On September 25, 2023, DOHA issued a notice of hearing, setting the hearing for November 7, 2023. (HE 1) Applicant's hearing was held as scheduled using the Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered three exhibits, and Applicant offered one exhibit. (Tr. 14-15, 21-24; GE 1-3; Applicant Exhibit (AE) A) All proffered exhibits were admitted into evidence without objection. (Tr. 24; GE 1-3) On November 22, 2023, DOHA received a transcript of Applicant's security clearance hearing. Applicant provided six post-hearing exhibits, which were admitted without objection. (AE B-AE G) The record closed on January 24, 2024. (Tr. 61; AE G)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a and 2.a. (HE 3) He also provided mitigating information. (*Id.*)

Applicant is a 40-year-old supervisor and avionics technician, who has been employed by a large defense contractor for seven years. (Tr. 7, 9-10, 26) In 2001, he graduated from high school. (Tr. 7) In 2022, he received a bachelor's degree. (Tr. 7) He held a security clearance from 2001 to 2014. (Tr. 24) His first marriage was from 2005 to 2013, and his current marriage began in 2018. (Tr. 9) He has a five-year-old daughter and an 18-year-old son. (Tr. 9)

Applicant served in the Air Force (AF) from 2001 to 2014; his AF specialty was COMSEC and Avionics Technician; he left active duty as a staff sergeant; and he received an honorable discharge. (Tr. 8) Applicant received the following AF awards: AF Commendation Medal; Meritorious Unit Award with 2 oak leaf clusters; AF Outstanding Unit Award with 1 oak leaf cluster; AF Good Conduct Medal with 3 oak leaf clusters; National Defense Service Medal; Afghanistan Campaign Medal with 2 service stars; Global War On Terrorism Expeditionary Medal; Global War on Terrorism Service Medal; Humanitarian Service Medal; AF Overseas Ribbon Short; AF Overseas Ribbon Long; AF Expeditionary Service Ribbon with Gold Border with 1 oak leaf cluster; AF Longevity Service with 2 oak leaf clusters; USAF NCO PME Graduate Ribbon; Small Arms Expert Marksmanship Ribbon (Rifle); AF Training Ribbon; and NATO Medal with 1 service star. (AE A) He did not receive any reprimands or nonjudicial punishment while in the Air Force. (Tr. 26)

Alcohol Consumption and Criminal Conduct

SOR ¶ 1.a alleges under Guideline G that in about July 2022, Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI). He pleaded guilty, and in March 2023, he was sentenced to three years of probation and to attend six months

of first offender alcohol program. SOR ¶ 2.a cross-alleged the conduct in SOR ¶ 1.a under Guideline J.

Applicant does not have any other arrests or convictions. (Tr. 25, 27) No friends or family have expressed a concern to him about his alcohol consumption. (Tr. 29) He rarely consumed alcohol because his employer required him to work in a country that does not permit alcohol use. (Tr. 30) When he consumed alcohol in July 2022, he had not had any alcohol to drink for six months. (Tr. 31) He claimed he drank one beer and two hard drinks in a bar. (Tr. 31, 36) His ticket for the DUI offense states he weighs 235 pounds; and he said at the hearing he weighed about 300 pounds in July 2022. (Tr. 32; AE B)

Applicant left the bar about midnight, and he believed it was safe for him to drive. (Tr. 32) He said he did not feel any effects from his previous alcohol consumption at the time he left the bar. (Tr. 33) His hotel was about 15 miles from the bar. (Tr. 33) After about five minutes, he felt ill, and he pulled over onto the side of the road. (Tr. 34) Applicant's vehicle was at an off ramp where truckers park, and the vehicle may have been slightly over the line. (Tr. 40) He felt like he had been drugged or was suffering from food poisoning. (Tr. 34, 37) He felt it was unsafe to drive, and he fell asleep at about 1:00 a.m. (Tr. 34, 41) He did not remember if he turned off the ignition of his vehicle. (Tr. 39-40) At about 3:00 or 4:00 a.m., the police woke him. (Tr. 34, 41) He had a breath-alcohol test (BAT) at the site of his arrest, and the officer said it showed he was over the legal limit; however, he said he did not remember the BAT result. (Tr. 42) He received another BAT at the police station, and the result was over the limit. He said he did not remember the result of the second BAT.

Applicant told an Office of Personnel Management (OPM) investigator that he did not receive a blood-alcohol test, and he could not remember the alcohol content for his breathalyzer tests. (GE 2) Two weeks after his arrest, he returned to the foreign country where he is employed. (Tr. 48) He returns to the United States about every six months to be with his family.

Applicant pleaded guilty to DUI. (Tr. 44) He received three years of informal probation. (AE D) His probation permits him to drink alcohol. (*Id.*) He was sentenced to pay fines and court costs of \$1,545, and to attend a six-month alcohol program. (*Id.*) The six-month alcohol program is required when a driver's blood-alcohol content (BAC) is "between 0.15% and 0.19%." (HE 5) Applicant believes he can successfully complete the three-year probation period, and the DUI conviction will be removed from his record. (Tr. 25) He is not permitted to drive in the state where he was arrested for DUI for three years. (Tr. 46) He does not have a probation officer. (Tr. 46) He acknowledged that driving after drinking alcohol was "extremely stupid." (Tr. 49)

Applicant provided court documents after his hearing which indicated his BAC was .16 percent. (AE C at 5) He acknowledged it was not possible for a person who weighs 300 pounds to drink three drinks, stop drinking about 1:00 a.m., and provide a breath sample several hours later to test above the legal limit. (Tr. 54-55) He stood by his claim of only consuming three drinks. (Tr. 56)

On June 27, 2023, Appellant completed the six-month First Offender Alcohol Program. (SOR response) He paid the fines and costs and completed all requirements of his sentence except for the three years of informal probation.

In response to a question on January 23, 2024, about when he most recently consumed alcohol, he said:

Honestly, I do not remember the exact date, but I believe it was holiday season of 2022 going into 2023. And even then it was only wine/champagne to celebrate the season. Since the event that had happened to me it has been a real eye opener & rude awakening. I have since refrained & been trying to get healthier & lose weight. Both for my career & for my children. Being overweight & having sleep apnea is bad enough. You add alcohol into the mix it only heightens the risk for medical issues. (AE G)

Applicant's manager served with him in Europe when they were both on active duty and supervises him in his current overseas employment. He described Applicant as follows:

During the time I have known Applicant I could always count on him to get the job done and done right. [He] gives 100% in everything he does and makes security of the systems he works a priority. He is always willing to let our customer know what the requirements are and ensures we are in compliance with all requirements. Please consider [him] for his security clearance. (AE E)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Criminal Conduct

AG ¶ 30 describes the security concern about 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 in this case:

(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

(c) individual is currently on parole or probation.

AG ¶¶ 31(b), and 31(c) are established. Discussion of the disqualifying conditions is in the mitigating section *infra*.

AG ¶ 32 lists conditions that could mitigate security concerns:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

In July 2022, Applicant was arrested and charged with DUI. He pleaded guilty, and in March 2023, he was sentenced to fines, costs, six months of an alcohol program, and three years of probation. He completed all of the terms of his sentence including six

months of an alcohol program except for his probation. He has an excellent employment record.

Applicant appears to have minimized the amount of alcohol he consumed before driving and being arrested. He said he only had three drinks before driving. He fell asleep in his vehicle which was parked on the side of the road. Several hours later he received a BAT, and his BAC was .16 percent.

Applicant's DUI offense shows poor judgment. None of the mitigating conditions are fully established because he is currently on probation, and he did not provide a credible account of the amount of alcohol he consumed before his DUI arrest. Criminal conduct security concerns are not mitigated.

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "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."

AG ¶ 22 lists conditions that could raise a security concern and may be disqualifying in this case including:

(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.

AG ¶ 22(a) and 22(c) are established. Discussion of the disqualifying conditions is in the mitigating section *infra*.

AG ¶ 23 details conditions that could mitigate security concerns including:

(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.

In July 2022, Applicant was arrested and charged with DUI. His BAC was .16 percent, which is of a sufficient magnitude to constitute binge-alcohol consumption. He pleaded guilty, and in March 2023, he was sentenced to three years of probation. He completed all of the terms of his sentence including a six-month alcohol program, except for his informal probation.

Applicant is working for the defense contractor in a country where alcohol consumption is not permitted. He only returns to the United States about every six months to visit his family. He rarely consumes alcohol. (AE E) AG ¶ 23(b) applies. Alcohol consumption security concerns are mitigated.

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 the circumstances. The 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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines J and G are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 40-year-old supervisor and avionics technician, who has been employed by a large defense contractor for seven years. In 2022, he received a bachelor's degree. He held a security clearance from 2001 to 2014. He served in the Air Force from 2001 to 2014; his specialty was COMSEC and Avionics Technician; he left active duty as a staff sergeant; and he received an honorable discharge. He received numerous Air

Force awards. His manager praised him for his diligence, compliance with all requirements, and contributions to his employer. There is no evidence of security violations, improper disclosure of classified information, or that Applicant compromised national security. See ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (noting admissibility of “good security record,” and commenting that security concerns may nevertheless not be mitigated).

The evidence against mitigation is more persuasive. Applicant committed a DUI offense in July 2022, and he is currently on informal probation. His BAC was .16 percent. Driving a vehicle at such a high level of intoxication shows poor judgment. At his hearing, he minimized the amount of alcohol he consumed prior to his DUI arrest.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated alcohol consumption security concerns; however, he failed to mitigate criminal conduct security concerns.

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: Subparagraph 1.a:	FOR APPLICANT For Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	AGAINST APPLICANT 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 or continue Applicant’s eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge