



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



In the matter of:)
)
) ISCR Case No. 23-01090
)
Applicant for Security Clearance)

Appearances

For Government: Alison P. O’Connell, Esq., Department Counsel
For Applicant: Patrick J. Hughes, Esq.

11/04/2024

Decision

Curry, Marc E., Administrative Judge:

Applicant mitigated the criminal conduct and alcohol consumption security concerns. Clearance is granted.

Statement of the Case

On May 31, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline G, alcohol consumption and Guideline J, criminal conduct. The SOR explained why the DCSA CAS was unable to find it clearly consistent with the national interest to grant or continue his security clearance eligibility. The DCSA CAS took the action under Executive Order (EO) 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 the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on June 5, 2023, admitting the allegations, and requesting a hearing. On April 2, 2024, the case was assigned to me. On April 30, 2024, DOHA scheduled the hearing for May 30, 2024. The hearing was held as scheduled. I received four Government exhibits (GE 1 – GE 4) and nine Applicant exhibits (AE A – AE I). Also, I received the testimony of Applicant and two character witnesses.

Findings of Fact

Applicant is a 62-year-old, single man with three children, two of whom are adults. A previous marriage ended in divorce. Applicant earned a high school diploma. He served in the Air Force from 1982 to 1986. He was honorably discharged. (Tr. 22) He enlisted in the Army National Guard in 2004 where he served through 2021. (AE G at 1) He was honorably discharged.

Currently, Applicant works in the field of computer network defense, conducting vulnerability assessments. (Tr. 22) He has been with the same company, a defense contractor, for nearly four years. Previously, he worked as an intelligence analyst. (Tr. 22) He has held a security clearance since 1994. (Tr. 24) Per a friend, Applicant is a dedicated professional “who has always demonstrated a genuine drive to further himself in his ever-changing role as an IT [information technology] specialist.” (AE H, Attachment (Att.) 1) Per his sister, he is very active in his community, and has a strong sense of honesty, integrity, reliability, and responsibility. (Att. H at 3)

Thirty-six years ago, in February 1988, Applicant was arrested and charged with driving under the influence (DUI). (Answer at 1) The disposition of the case is unknown from the record.

Three years later, in 1991, Applicant was arrested and charged with DUI. (Answer at 1) The disposition of the case is unknown from the record.

On the evening of January 2, 2021, Applicant met some friends at a local brewpub. (Tr. 29) Over the course of two and a half hours, he drank two 16-ounce glasses of beer and one eight-ounce glass of beer. (Tr. 26) Applicant left the brewpub at 10:00 pm and drove home. After Applicant arrived at home, he drank three to four shots of whiskey, to pay homage to loved ones and friends who passed away in the previous year. (Tr. 72) Then, he went to bed.

At or about 11:00 pm, his son woke him up to tell him that a police officer was at the door and wanted to talk with him. (Tr. 35) When Applicant went to the door, the police officer told him that he had received a report that a driver in a car matching the description and the license plate number of Applicant’s car had been seen hitting another car while backing out of a parking spot at the brewpub parking lot, and leaving without stopping. (Tr. 54) The officer then asked Applicant if he could take a look at the rear license plate of his car and see if there was any damage. (Tr. 55) Applicant was perplexed by the allegation because having backed into the parking spot when he arrived at the brewpub, there was no reason to back out when he left the brewpub. (Tr., 55) Nevertheless, he agreed and walked

outside to the driveway to inspect the license plate with the officer. After observing scratches, the officer walked with Applicant back to the front door. When Applicant walked through the doorway, the officer blocked the front door with his foot, grabbed him by the arm, and demanded that he undergo a field sobriety test. (Tr. 38) Applicant refused to take the sobriety test, explaining that it would be an inaccurate reflection of how much alcohol was in his system when he left the brewpub because he had consumed a few drinks after he got home. (Tr. 51, 56) After a heated exchange, the officer arrested Applicant and charged him with DUI, refusing to take a breathalyzer, resisting arrest, and obstruction of justice. (GE 2-GE 3)

The obstruction charge was dismissed shortly after Applicant was arrested. (GE 4 at 20) The remaining charges were bifurcated, with the court adjudicating the DUI case first. In the local district court, a judge heard the case and found Applicant guilty. Applicant then exercised his right in the state where the arrest occurred to request a *de novo* circuit court jury trial.

At the trial, the state presented the testimony of three customers at the brewpub and the arresting officer. Arguing that the state's witness' testimony that Applicant backed into the vehicle was primarily double hearsay and that the arresting police officer unlawfully entered Applicant's house when he arrested him (after the officer admitted on the stand that he made a mistake when he entered Applicant's home), criminal counsel for Applicant moved for a motion to dismiss the case. (AE A at 10-14) The court granted the motion, reasoning that there was no "*prima facie* element of a lawful arrest" and as such, there was "no way a reasonable jury could find the defendant guilty beyond a reasonable doubt." (AE A at 11, 31, 33) Later, at a pre-trial hearing related to the trial of the charges that the court had previously bifurcated, the state circuit court dismissed the charges, reasoning that the court was collaterally estopped from moving forward based upon the decision that there was no probable cause in the DUI hearing.(AE A at 34)

Applicant has not consumed alcohol to the point of intoxication since the January 2021 arrest. (GE 4 at 5) His alcohol consumption is limited to two or three beers a few times a month. (GE 4 at 15)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense

decision. According to AG ¶ 2(a), 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J: Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness, [and] by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (AG ¶ 30) Applicant’s DUI arrests in 1988, 1991, and 2021 trigger the application of AG ¶ 31(b), “evidence (including, but not limited to, a credible allegation, or an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.”

After a *de novo* appeal, a state circuit court dismissed the 2021 DUI charge, reasoning that there was no requisite probable cause to justify the arrest. Later, the circuit court dismissed the refusal to take a breathalyzer charge, reasoning that collateral estoppel applied *vis a vis* the decision in the earlier case. Under these circumstances, AG ¶ 32(c), no reliable evidence to support that the individual committed the offense,” applies.

The two previous arrests occurred 33 years ago and 36 years ago, respectively. Since then, Applicant served in two branches of the armed services, cultivated a career as an intelligence analyst, followed by a career in cybersecurity, and has held a security clearance for 30 years. Under these circumstances, “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,” applies. I conclude Applicant has mitigated the criminal conduct security concern.

Guideline G: Alcohol Consumption

Under 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.”

Assuming for the sake of argument that Applicant was not intoxicated when he drove home from the brewpub in January 2021, it is undisputed that he drank three to four shots of liquor once he returned home and before he went to bed. Regardless of whether he was drinking to honor deceased relatives, this consumption, combined with the alcohol he drank earlier at the brewpub, constituted excessive drinking. When considered together with the DUI arrests of 1988 and 1991, the following disqualifying conditions under AG ¶ 22 apply:

- (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;

- (c) binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol-use disorder;

Applicant has not drunk to intoxication since January 2021. Per the record evidence, Applicant’s most recent alcohol-related episode that preceded the 2021 episode was 30 years ago. Since then, he served honorably in two branches of the armed forces, held a security clearance for 30 years, and cultivated careers in two professions. Under these circumstances, 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,” applies. I conclude Applicant has mitigated the alcohol consumption security concerns.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

(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.

Given the strong record of Applicant's good character, the infrequency of his alcohol-related episodes, and the amount of time that has elapsed since the most recent one, I conclude that the likelihood of recurrence is minimal. I conclude that Applicant has mitigated the 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:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Marc E. Curry
Administrative Judge