



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 12-09788
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

04/15/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on May 14, 2012. On September 11, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G, J, and E. The DOD acted under Executive Order 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on September 18, 2013; answered it on October 3, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 17, 2013, and the case was assigned to me on December 19, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a

notice of hearing on January 13, 2014, scheduling it for February 20, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on March 5, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations except SOR ¶ 3.a, which he denied. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 59-year-old software engineer. He accepted an employment offer from a federal contractor in January 2014, contingent on obtaining a security clearance.

Applicant married in January 1980 and divorced in April 2006. He and his ex-wife have three adult children, ages 30, 28, and 23.

In May 1980, Applicant was arrested and charged with driving under the influence (DUI). He was convicted, placed on probation, and ordered to attend alcohol awareness classes. During the 1980s, he usually did not consume alcohol during the week, but on weekends he would consume a case of beer or a 750 milliliter bottle of hard liquor. (Tr. 37.)

In September 1986, Applicant was arrested and charged with DUI and child endangerment. The child endangerment charge was based on his having his three-year-old son in the vehicle with him when he was arrested for DUI. He was convicted of DUI. The child endangerment charge was dismissed after he surrendered his driver's license for one year, attended a two-week rehabilitation program, and was ordered to attend Alcoholics Anonymous (AA) meetings for one year. (GX 4 at 2; GX 5 at 6, 8.)

After his September 1986 arrest, Applicant stopped consuming alcohol. He attended a university from January 1991 to December 1993 and earned a bachelor's degree. He had no alcohol-related incidents for about 17 years. In 2003, his marriage broke up, he was separated from his children, and he began drinking heavily. (Tr. 32.) In October 2003, he was arrested and charged with DUI, convicted, sentenced to jail for 60 days (suspended) and his driver's license was suspended for one year. (GX 3.),

In February 2006, Applicant voluntarily left his job to accept another higher-paying job. He denied the allegation in SOR ¶ 3.a that he was terminated for absenteeism, and Department Counsel presented no evidence to contradict his denial.

In March and December 2006, Applicant was terminated from employment due to absenteeism. In August 2009, he was charged with refusal to take a test for DUI after having his license suspended. He was convicted, placed on probation, ordered to AA meetings, and fined \$500. (GX 4 at 3; GX 5 at 9.) He admitted at the hearing that he

refused to take the DUI test because he was intoxicated. (Tr. 62-63.) As a result of this incident, he was terminated from employment.

In June and December 2010, Applicant was terminated from employment due to absenteeism. In October 2011 and July 2012, he was terminated for unsatisfactory performance. He testified that his absenteeism was due to excessive drinking. He did not drink every day and sometimes would abstain from alcohol for months; but when he became sad and depressed, he would drink heavily, become ill, and would be unable to work. He testified he was never intoxicated at work. (Tr. 58.)

In 2012, based on personal research, Applicant determined that he was allergic to alcohol, because his body lacks a chemical that metabolizes alcohol. The result is that his body adapts to the presence of alcohol, and when alcohol is absent, he has severe cravings for alcohol. (Tr. 39-42.)

In December 2012, Applicant was arrested and charged with operating a motor vehicle while impaired. He was convicted and sentenced to 12 months of supervised probation. He also was fined \$300, ordered to attend AA meetings four times a week for 12 months, and ordered to complete alcohol counseling. In January 2013, he enrolled in a 30-day inpatient treatment program. (GX 6 at 11.) He completed all the terms of his probation in December 2013, and the charges were dismissed in December 2013. (Tr. 33, 46; AX G.)

After his December 2012 conviction, Applicant enrolled in an outpatient counseling program, but he was not satisfied with his progress after a few months. He began a 13-week individual psychotherapy program on August 29, 2013, and completed it on December 11, 2013. During his therapy, he attended AA meetings frequently. He has an AA sponsor, and he continues to attend three or four AA meetings a week, even though he is no longer on probation. He also attends two group counseling sessions with a licensed therapist every week. (Tr. 50-51; AX H.)

At the beginning of Applicant's psychotherapy, his therapist, a licensed clinical social worker, diagnosed him with severe alcohol dependence (DSM-IV-TR 303.90), a moderate depressive disorder (DSM-IV-TR 296.21), and a generalized anxiety disorder (DSM-IV-TR 300.021). His therapist has concluded that he "appears to be functioning within a high level of accountability in dealing with everyday life stresses. [He] continues to show a lot of character in how he has and continues to work through his life experience." (AX A-C.)

Applicant has been prescribed psychotropic medications that he refers to as "mood stabilizers". He takes them for depression, and they are not related to his alcohol abuse. He testified that he takes his medications daily. He now has a good relationship with his children, and he sees them regularly. He has been divorced for ten years, has no contact with his ex-wife, and has a relationship with a "significant other." (Tr. 56-62.)

Applicant has been unemployed since July 2012, because most jobs in his specialty require a security clearance. (Tr. 35.) He received job offers in April 2013 and January 2014, which he accepted. However, both job offers were contingent on his ability to obtain a security clearance. He testified that both job offers are still open. (Tr. 50-51; AX E; AX F.)

In response to DOHA interrogatories in June 2013, Applicant stated that he did not disclose the December 2012 charges and conviction to the prospective employer who offered him a job in April 2013, but he will disclose his conviction if he gets a job. (GX 6 at 2.) There is no evidence that he has disclosed his arrest and conviction to either of his prospective employers.

Applicant testified that he recognizes that idle time is very dangerous. Therefore, during his period of unemployment, he has stayed active as a software programmer. He works on home-improvement projects, takes trips to visit his children, visits his "significant other," exercises regularly, looks for work on various websites, and fills out job applications. (Tr. 63-64.)

A friend and former coworker, who has known Applicant for about 12 years, considers him a person of high character and integrity. He has been open about his difficulties with alcohol and has demonstrated his ability to resolve his alcohol problem. (AX D.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline G (Alcohol Consumption)

The SOR alleges five alcohol-related arrests and convictions between May 1980 and December 2012 (SOR ¶¶ 1.a-1.e). 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 under this guideline are potentially 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(b): alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

AG ¶ 22(e): evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and

AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

AG ¶¶ 22(a) and (c) are established by Applicant's admissions and the corroborating evidence. AG ¶ 22(b) is not established, because there is no evidence that he consumed alcohol at work or reported for duty while intoxicated or impaired. Instead, the evidence shows that he confined his drinking to weekends and frequently was unable to go to work because of his excessive drinking.

AG ¶ 22(d) is not established, because there is no evidence that Applicant has been diagnosed by a "duly qualified medical professional." However, AG ¶ 22(e) is established by the diagnosis of alcohol dependence by a licensed clinical social worker. AG ¶ 22(f) is not established because there is no evidence of a relapse since Applicant's diagnosis of alcohol dependence in August 2013.

The following mitigating conditions are potentially relevant:

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 good judgment;

AG ¶ 23(b): the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

AG ¶ 23(d): the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare,

has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

The first prong of AG ¶ 23(a) 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. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). 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.” *Id.*

At the time of the hearing, Applicant had abstained from alcohol for about 14 months, and he had just completed his psychotherapy program and all the conditions of supervised probation. He abstained from alcohol for almost 17 years after his DUI in September 1986, but he relapsed in October 2003 and began a pattern of heavy drinking, multiple arrests, and a poor employment record. He has been unemployed since July 2012 and has not had an opportunity to demonstrate his trustworthiness and reliability as an employee. He has been under the pressure of the court-ordered probation for most of the time after his December 2012 conviction. I conclude that insufficient time has passed to demonstrate that his alcohol-related criminal conduct and unsatisfactory work performance will not recur. Thus, I conclude that AG ¶ 23(a) is not established.

AG ¶ 23(b) is partially established, because Applicant has acknowledged his alcohol dependence and has provided evidence of substantial steps to overcome his problem. However, as noted in the above discussion of AG ¶ 23(a), insufficient time has passed to establish a pattern of abstinence.

AG ¶ 23(d) is not fully established. Insufficient time has passed, and the comments of Applicant’s therapist, while favorably describing his progress, fall short of a favorable prognosis.

Guideline J, Criminal Conduct

The SOR cross-alleges Applicant’s alcohol-related arrests and convictions under this guideline. The concern raised by criminal conduct 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.” Applicant’s arrests and convictions establish two disqualifying conditions under this guideline: AG ¶ 31(a) (“a single serious crime or multiple lesser

offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

For the reasons set out in the above discussion of Guideline G, I conclude that no mitigating conditions under this guideline are established.

Guideline E, Personal Conduct

The SOR alleges eight instances in which Applicant’s employment was terminated under unfavorable circumstances (SOR ¶¶ 3.a-3.h). It also cross-alleges the Guideline G and Guideline J conduct under this guideline (SOR ¶ 3.i). The concern under this guideline is set out in AG ¶ 15: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information”

Applicant denied that he was terminated as alleged in SOR ¶ 3.a, and Department Counsel produced no evidence to contradict his denial. I conclude that SOR ¶ 3.a has been refuted. However, Applicant’s admissions are sufficient to establish the facts alleged SOR ¶¶ 3.b-3.i and to establish the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable

judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not established. Although some of the conduct alleged is arguably minor, Applicant's course of conduct from October 2003 to December 2012 was frequent, did not happen under unique circumstances making it unlikely to recur, and casts doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 17(d) is partially established by Applicant's acknowledgment of his alcohol dependence and depression, his participation in counseling, and regular attendance at AA meetings. However, insufficient time has passed to conclude that his past conduct is unlikely to recur.

AG ¶ 17(e) is not established. Applicant has not informed his prospective employers about his December 2012 arrest and conviction.

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(a):

(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, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who appears to have acknowledged late in life that he has a serious alcohol problem. He was candid, sincere, remorseful, and credible at the hearing. He has taken significant steps to turn his life around, but insufficient time has passed to mitigate his conduct.

After weighing the disqualifying and mitigating conditions under Guidelines G, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his alcohol consumption, criminal conduct, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraphs 3.b-3.i:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge