DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 14-00461
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

05/28/2014

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 15, 2012. On February 7, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J. 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 answered the SOR on March 19, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 9, 2014, and the case was assigned to me on April 10, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 18, 2014, scheduling the hearing for May 15, 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 E, which were admitted without objection. DOHA received the transcript (Tr.) on May 23, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a and 1.b. He admitted SOR ¶ 1.c in part, and he denied SOR ¶ 1.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 26-year-old heating, ventilation, and air conditioning (HVAC) technician employed by a federal contractor since October 2012. He previously was employed as a HVAC technician by a state university. He attended a technical education school from June 2004 to May 2009 at night, while working full time, and he was certified as a journeyman HVAC technician. He lived with his parents until May 2007, when he bought his own home. (GX 1 at 7-8.) He has attended a community college since August 2010 but has not yet received a degree. He is unmarried and has no children. He has never held a security clearance.

On April 5, 2008, about four months before Applicant's 21st birthday, he rode with a friend to a convenience store to buy beer and condiments. His friend purchased two six-packs of beer and handed them to Applicant through the passenger window. Applicant testified that his friend bought the beer for his own use, not Applicant's. (Tr. 33.) A police officer observed the transfer and charged Applicant with underage possession of alcohol and using profane language. Applicant admitted having possession of the beer but denied using profane language. The charge of underage possession of alcohol was continued for one year and dismissed. The charge of using profanity in public was disposed of by *nolle prosequi.* (GX 3; GX 4.)

On November 14, 2008, Applicant was charged with driving while intoxicated (DWI), with a blood-alcohol content of .15-.20%. He was convicted, sentenced to 60 days in jail, with 55 days suspended, and fined $250. He was required to attend alcohol education classes, and his driver's license was restricted. (GX 5.) He completed the alcohol education classes and served the five days in jail on weekends. (GX 2 at 9-10.) He stopped consuming alcohol for about six months after his arrest. (Answer to SOR; GX 2 at 11; Tr. 38.)

On New Year's Eve, 2011, Applicant was cited for public intoxication as he was leaving a brewery with two friends after consuming about four or five beers in a two-hour period. (GX 2 at 10; Tr. 38.) He chose to pay a $100 fine instead of contesting the charges because it was a six-hour drive from his home to the courthouse. (Answer to SOR; GX 2 at 10; Tr. 26-27.)

Applicant has never been required to undergo evaluation for alcohol dependence or alcohol abuse. (Tr. 36.) He testified that he does not believe he has a "drinking problem." (Tr. 39.)

In October 2012, Applicant was arrested for grand larceny, a felony. The charges arose when Applicant's girlfriend used his cell phone, without his knowledge, to have an ex-boyfriend's boat towed from her garage. Applicant was arrested when the police traced the phone call to his cell phone. Applicant was not required to appear in court or enter a plea. After Applicant's girlfriend paid the impoundment fee for the boat, the charges were dismissed. (Answer to SOR; GX 2 at 10; GX 6; Tr. 39-41.)

In response to DOHA interrogatories in January 2014, Applicant stated that he learned his lesson after his convictions of DWI and public intoxication. (GX 2 at 12.) He knows that if he repeats his youthful mistakes, it will cost him his job and everything he owns. He testified his experience with alcohol-related criminal conduct has been "a real wakeup call." (Tr. 30.) On March 1, 2014, after he received the SOR but before he answered it, he decided to stop drinking. He explained, "Drinking's not worth it to me, and I'd rather have a career, and I'd rather work for, you know, the Department of Defense, and I really enjoy my job . . . ." (Tr. 26.) He believes that his current job offers him "the best future possible." (GX 2 at 12.)

Applicant's program manager, a retired U.S. Army colonel, submitted a letter stating that Applicant has displayed integrity and trustworthiness on the job, acknowledged responsibility for his youthful mistakes, and made the necessary lifestyle changes to preclude recurrence. He stated that Applicant's overall character has been exemplary, and he strongly recommends that Applicant be granted a clearance. (AX A; Tr. 29-30.)

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 J, Criminal Conduct

The SOR alleges that Applicant was charged in April 2008 with underage possession of alcohol and profane swearing or intoxication in public (SOR ¶ 1.a), the underage possession charge was continued for a year and dismissed, and the public swearing or intoxication was dismissed. It also alleges that he was charged with DWI in November 2008 and sentenced to 60 days in jail with 55 days suspended, fined $250, assessed $216 in costs, required to attend alcohol safety action program classes, and his license was restricted (SOR ¶ 1.b). It alleges that he was arrested for public intoxication in December 2011 and paid fines and costs of $100 (SOR ¶ 1.c). Finally, it alleges that he was arrested for grand larceny in October 2012 and the charge was dismissed (SOR 1.d).

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 admissions, corroborated by the documentary evidence in the record, established 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;
>
> AG ¶ 32(c): evidence that the person did not commit the offense; 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.

The first prong of AG ¶ 32(a) focuses on whether the criminal 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*.

AG ¶¶ 32(a) and 32(d) are established for the underage possession charge alleged in SOR ¶ 1.a, the DWI alleged in SOR ¶ 1.b, and the public intoxication alleged in SOR ¶ 1.c. The underage possession was six years ago, the DWI more than five years ago, and the public intoxication more than two years ago. All three offenses preceded his current employment. His conduct since being hired for his current job has been exemplary, and he has established a reputation for integrity and trustworthiness. He has decided to stop drinking. He is enthusiastic about his current employment, and he realizes that any further irresponsible behavior is likely to cost him his job.

AG ¶ 32(c) is established for the grand larceny alleged in SOR ¶ 1.d. Applicant's explanation of the incident was not contradicted by any evidence presented by Department Counsel, and it is corroborated by the dismissal of the charge after his girlfriend paid the impoundment fees.

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 Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is still relatively young, but he appears to have put his youthful irresponsible conduct behind him. His decision to abstain from alcohol is recent, but it is indicative of a lifestyle change. There is no evidence that he is alcohol dependent. He is enthusiastic about his current job and recognizes that further indiscretions may end his budding career. He has earned the respect and support of his current supervisor. He was candid, sincere, remorseful, and credible at the hearing.

After weighing the disqualifying and mitigating conditions under Guideline J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on criminal conduct. Accordingly, I conclude he has 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 J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge