



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



In the matter of:)
)
-----) ISCR Case No. 14-01310
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2015

Decision

Harvey, Mark, Administrative Judge:

In 2008, 2009, and 2012, Applicant was arrested for alcohol-related offenses. He has not had any incidents with police or the courts since 2012. He ended his alcohol consumption on August 1, 2012. He attends Alcoholics Anonymous (AA) meetings to reinforce his abstinence. Alcohol consumption security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On September 13, 2013, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On July 29, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD could not make the affirmative finding under the Directive that it is clearly consistent with

national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On September 2, 2014, Applicant responded to the SOR. (HE 3) On January 8, 2015, Department Counsel was prepared to proceed. On January 15, 2015, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On March 10, 2015, DOHA issued a notice of the hearing, setting the hearing for March 12, 2015. (HE 1) The hearing was held as scheduled. Applicant waived his right to 15 days of notice of the date, time, and place of the hearing. (Tr. 20-22) Department Counsel offered six exhibits into evidence, and Applicant did not offer any exhibits into evidence. (Tr. 32-34; GE 1-6) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 34; GE 1-6) On March 20, 2015, I received the transcript of the hearing.

Procedural Issue

Department Counsel moved to withdraw the allegations in SOR ¶ 2 and 2.a because the conduct is duplicated in SOR ¶ 1. (Tr. 18-19) There was no objection, and I granted Department Counsel's motion. (Tr. 19)

Findings of Fact¹

Applicant admitted the conduct alleged in SOR ¶¶ 1.a to 1.c, 1.e, and 2.a. (HE 3) He also provided some extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 32-year-old employee of a defense contractor, who has worked in aviation testing and maintenance for defense contractors since 2010. (Tr. 6, 10; GE 1) He received his General Educational Development Diploma (GED) in 2001. (Tr. 6) He married in 2008, and he has two stepchildren, three children, and two nephews in his household. (Tr. 8-9) The seven children in his household are ages 3, 4, 5, 10, 12, 13, and 14. (Tr. 8) His spouse does not work outside their home. (Tr. 9) He is enrolled in college and is seeking a bachelor of science in aviation science. (Tr. 9)

From 2003 to 2010, Applicant served in the Army; he left active duty as an E-4; his military occupational specialty (MOS) was 15D (aircraft power train repair and nondestructive inspector); and he received an honorable discharge. (Tr. 6-7) He was awarded the Army Good Conduct Medal and Army Achievement Medal. (Tr. 7) He served in Iraq from July 2003 to January 2004 and from October 2005 to September 2006. (Tr. 7) The Department of Veterans Affairs (VA) has rated his Post Traumatic Stress Disorder (PTSD) at 30 percent. (Tr. 128-129)

¹The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

Alcohol Consumption

Applicant consumed alcohol at times to excess from the age of 16 to August 1, 2012. (SOR ¶ 1.a) From 2008 to August 1, 2012, he occasionally consumed $\frac{3}{4}$ of a bottle of whiskey or 12 beers at a single setting. On March 10, 2008, Applicant went to a bar to check on his fiancée after consuming several drinks containing alcohol. (GE 2) He was in possession of a firearm. (GE 2) The bar called the police, and he was arrested and charged with public intoxication and unlawful carrying of a weapon. (SOR response ¶ 1.b; GE 2) The unlawful carrying of a weapon charge was dismissed because he had a permit to carry a firearm. (GE 2) He pleaded guilty to public intoxication and received fines and court costs of \$250. (GE 2)

On December 11, 2009, Applicant slid into a truck because the road was icy, and he was intoxicated. (GE 2) He was very close to his home, and decided to leave his vehicle and walk home. (GE 2) He was about 150 feet from the accident when he was arrested and charged with driving under the influence of alcohol (DUI), evading arrest, and leaving the scene of an accident. (SOR response ¶ 1.c; GE 2) He was convicted of DUI and leaving the scene of an accident. (GE 2) He was sentenced to 11 months and 29 days in jail (suspended to three months of workhouse to be served on weekends), fines and court costs of \$3,000, and revocation of his driver's license for one year. (SOR response ¶ 1.c; GE 2) He was unable to reenlist because of the DUI. (Tr. 100) He could have reenlisted later after leaving active duty. (Tr. 101)

On August 1, 2012, Applicant consumed alcohol to excess and was intoxicated; he punched his spouse in the head for no reason, and he was arrested for domestic assault. (Tr. 111-112; SOR ¶ 1.e; GE 2) He has very little memory of the incident. (GE 2) He attended anger management classes. (GE 2) The judge told him that the charge would be dismissed if he did not have any problems for one year, and in September 2013, the charge was dismissed. (GE 2)

Alcohol counseling and treatment

After his second Iraq deployment, but before his 2009 DUI, Applicant attempted to enroll in the Army's Substance Abuse Program (ASAP). However, he was not permitted to enroll because his alcohol use was not of sufficient duration to justify enrollment. (Tr. 101-103) His alcohol consumption increased until he was becoming intoxicated three or four times a week. (Tr. 103) After his 2009 DUI, he was command-referred into ASAP, which consisted of outpatient group awareness and counseling once a week for 90 minutes for eight weeks. (Tr. 104-106) There is no evidence that he was diagnosed as alcohol dependent or as an alcohol abuser by a qualified medical professional or licensed clinical social worker.

Applicant acknowledged that he is a recovering alcoholic. (Tr. 30, 125) He attended more than 100 AA meetings in the last 30 months. (Tr. 127-128) He used his AA meetings to reinforce his sobriety. (Tr. 124-125) He has earned a two-year-sobriety chip from AA; however, AA did not provide it to Applicant because his chapter was out of two-year chips. (Tr. 126) He understands that he will never be able to consume

alcohol in the future. (Tr. 31,114) He has changed dramatically since August 1, 2012. (Tr. 120) He is a better husband, father, employee, and person because he ended his alcohol consumption. (Tr. 120-122) He expressed remorse for his alcohol-related misconduct. (Tr. 31) The following exchange occurred between Applicant and the Administrative Judge:

Administrative Judge: So, you are making a commitment to—to us today that you are not going to consume any alcohol at all? Is that right?

Applicant: I make a commitment to you. I will make a commitment to myself. I will make a commitment to my family. I will make a commitment to my Lord. I am not going back down that road. (Tr. 131)

Character evidence

Applicant's AA sponsor has known him since August 2012. (Tr. 40) Applicant changed significantly as he progressed through AA, becoming more humble and accepting personal responsibility for his shortcomings and misbehavior. (Tr. 39-41, 45-46) He is honest and generous. (Tr. 48) He has learned from his mistakes. (Tr. 49) He frequently attends AA meetings. (Tr. 41) There were no indications whatsoever that he had resumed his alcohol consumption after August 1, 2012. (Tr. 46-47)

Several friends, his supervisor, and two coworkers described Applicant as dedicated to his family, reliable, law abiding and abstinent from alcohol consumption after his arrest on August 1, 2012. (Tr. 52-98) He takes responsibility for his conduct, and he is sincere, trustworthy, diligent, and professional. (Tr. 52-98) Applicant was open and honest about his history of alcohol consumption. (Tr. 52-98)

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 that, "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 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 and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). 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 consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Nothing in this decision should be construed to suggest that I based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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

Alcohol Consumption

AG ¶ 21 articulates the Government’s concern about alcohol consumption, “[e]xcessive 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.”

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

(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;

(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;

(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;

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

(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;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b) and 22(d) to 22(g) do not apply. Applicant did not have any alcohol-related incidents at work, did not violate any court orders, and did not have a diagnosis of alcohol abuse or alcohol dependence.

AG ¶ 22(a) applies because his excessive alcohol consumption resulted in arrests in 2008, 2009, and 2012. Two of his arrests resulted in convictions, and various penalties imposed by the courts. AG ¶ 22(c) applies because he engaged in binge alcohol consumption.²

²Although the term “binge” drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), <http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf>.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) 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 good judgment;

(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);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(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.

AG ¶ 23(a) to 23(d) apply. Applicant completed some alcohol-use classes or outpatient therapy after his 2009 DUI. However, it was not sufficient to convince him to end his alcohol consumption. He has not attended any intensive, inpatient alcohol rehabilitation or counseling programs.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge's grant of a clearance and noted, "That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge's application of MC 3."

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his

alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. See *also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge's grant of a clearance).

In August 2012, Applicant started attending AA meetings. He has changed and no longer consumes alcohol. He abstains from alcohol consumption, which is the basis for all alcohol-related security concerns. Enough time has elapsed without alcohol-related problems to fully establish his alcohol consumption is under control, and his alcohol consumption no longer casts doubt on Applicant's "current reliability, trustworthiness, or good judgment." After careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude his extensive AA involvement and his abstinence from alcohol consumption since August 1, 2012, are sufficient to resolve my doubts about Applicant's alcohol consumption and to mitigate security concerns under Guideline G.

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(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.

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

There is some evidence supporting denial of Applicant's access to classified information. Applicant had alcohol-related arrests in 2008, 2009, and 2012. He had two alcohol-related convictions resulting from his conduct in 2008 and 2009. He described frequent episodes of binge-alcohol consumption from 2008 to 2012.

The evidence supporting approval of Applicant's clearance is more substantial than the evidence supporting denial. Applicant is a 32-year-old employee of a defense

contractor, who has worked in aviation testing and maintenance for defense contractors since 2010. From 2003 to 2010, he served in the Army; he left active duty as an E-4; and he received an honorable discharge. He served in Iraq from July 2003 to January 2004 and from October 2005 to September 2006. The VA has rated his PTSD at 30 percent. There is no evidence at his current employment of any disciplinary problems. Applicant changed significantly as he progressed through AA. He accepted personal responsibility for his shortcomings and misbehavior. He is honest and generous and has learned from his mistakes.

Several friends, his supervisor, and two coworkers described Applicant as dedicated to his family, reliable, law abiding and abstinent from alcohol consumption after his arrest on August 1, 2012. He takes responsibility for his conduct. He is sincere, trustworthy, diligent, and professional. There is no evidence of security violations, disloyalty, or that he would intentionally violate national security. He has not consumed alcohol since August 1, 2012. His alcohol abstinence for 30 months and commitment not to consume alcohol in the future show Applicant's current reliability, trustworthiness, and good judgment.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude approval of Applicant's access to classified information is clearly consistent with national security.

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 to 1.f:	For Applicant
Paragraph 2, Guideline J:	WITHDRAWN
Subparagraph 2.a:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to approve Applicant's security clearance. Eligibility for access to classified information is approved.

MARK HARVEY
Administrative Judge