



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 14-01588
)	
Applicant for Security Clearance)	

Appearances

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

03/23/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline G (alcohol consumption). Clearance is granted.

Statement of the Case

On November 7, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On June 26, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant. The action was taken pursuant to 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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline G (alcohol consumption). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national security to continue a security clearance for Applicant, and it

recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On July 21, 2014, Applicant responded to the SOR. At that time, Applicant requested that a determination be made without a hearing. However, on October 22, 2014, Applicant requested a hearing. On December 16, 2014, Department Counsel indicated he was ready to proceed on Applicant's case. On January 14, 2015, the case was assigned to me. On January 23, 2015, DOHA issued a hearing notice, setting the hearing for February 11, 2015. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 7, which were admitted without objection. Applicant offered Applicant Exhibits (AE) A through D, which were admitted without objection. Applicant did not call any witnesses, but did testify on his own behalf. DOHA received the hearing transcript (Tr.) on February 24, 2015.

Findings of Fact

Applicant admitted SOR ¶¶ 1.b and 1.d, and denied SOR ¶¶ 1.a and 1.c. After a thorough review of the record, I make the following findings of fact.

Preliminary Matters

Department Counsel moved to withdraw SOR ¶ 1.c. Without objection from the Applicant, I granted Department Counsel's motion. (Tr. 9-10.)

Background Information

Applicant is a 49-year-old field aerospace technician, who has been employed by a defense contractor since September 1985. He seeks to retain his secret security clearance, which is a condition of his continued employment. Applicant has successfully held a clearance since 1995. On February 9, 2015, he was suspended and placed on unpaid administrative leave while he awaits the results of this hearing. (GE 1; Tr. 23, 25-28, 31-33, 56-59.)

Applicant graduated from high school in May 1983. In the 1994 to 1995 timeframe, he attended community college and is three classes short of earning an associate's degree. (GE 4, Tr. 23-24.)

Applicant's marriage from September 1986 to October 2001 ended by divorce. He has three adult children from his marriage. Applicant has not remarried. (GE 1, Tr. 29-31.)

Alcohol Consumption

Applicant's problems with alcohol stem from two separate alcohol-related arrests. The first arrest occurred in February 2006. On the evening of this arrest, Applicant was

having dinner with a female friend. Applicant acknowledged consuming more alcohol than he should have, and that he “made the foolish decision to drive home after [he] had been drinking and that’s when [he] got pulled over.” (SOR ¶ 1.d; SOR answer; Tr. 33-35.) Applicant was charged with driving under the influence (DUI) and resisting arrest. In July 2007, he pled guilty to misdemeanor DUI and was sentenced to 90 days suspended license, 50 hours of community service, fined approximately \$771, and ordered to complete an alcohol awareness class. On July 13, 2006, and before final disposition of his case, Applicant was placed on supervised probation for 12 months. He satisfactorily completed his probation on May 10, 2007. Applicant did not receive an adverse alcohol diagnosis following this incident, and fully complied with his July 2007 sentence. (SOR ¶ 1.d; SOR answer; GE 1 – GE 6; Tr. 35-44, 72.) The terms of Applicant’s one year of probation from July 2007 to July 2008 precluded him from consuming any alcohol. (Tr. 54.)

Applicant’s second alcohol-related arrest occurred in July 2012. On the evening of this arrest, Applicant was having dinner and drinks alone. According to the police report, a police officer observed Applicant’s car swerving while he was on the way home. Applicant acknowledged that he had been drinking. He was charged with the amended charge of a second offense of DUI, refusing to take a DUI test, and having an open container. He pled no contest to the lesser offense of reckless driving and refusing to take a DUI test. Applicant was sentenced to two days in jail, but received credit for time served, supervised probation for 11 months and 20 days, driver’s license was revoked for 18 months, pay approximately \$2,389 in fines, and ordered to attend DUI school and a victim awareness program, undergo a substance abuse evaluation, and perform 75 hours of community service. Applicant underwent an alcohol assessment and like the previous 2007 assessment, he did not receive an adverse alcohol diagnosis. (SOR ¶ 1.b; SOR answer; GE 1-5, GE 7; Tr. 44-54, 72.) Applicant completed his probation in July 2014. (Tr. 61.)

During Applicant’s recent probation, he was required to take random drug tests. He produced documentation that all of his tests were negative. (Tr. 55-56, AE A, AE B.) Applicant did not offer any excuses for his second alcohol-related offense. He stated that he had broken up with his girlfriend and was feeling sorry for himself and what he did was “extremely stupid,” and that he exercised “extremely bad judgment.” (Tr. 60.) Applicant testified that he is not a heavy drinker and that he does not drink to excess adding that his mother said he always learned things the hard way. (Tr. 61.)

Since completing his probation in July 2014, Applicant stated that the only alcohol he consumed was a glass of wine with Christmas dinner in 2014. (Tr. 62.) Applicant’s moderate alcohol consumption is consistent with the information he provided during his November 2013 Office of Personal Management Personal Subject Interview (OPM PSI). (GE 4.) Applicant denied SOR ¶ 1.a that he consumed alcohol at times to excess and to the point of intoxication from 1979 to 2012. The Government’s evidence did not substantiate this allegation nor did it rebut Applicant’s denial.

Applicant stated that he did not receive any formal counseling from his employer after his second alcohol-related offense. However, he did receive informal counseling from human resources and his senior managers and “got chewed pretty good.” (Tr. 62.)

Character Evidence

Applicant has received several work-related awards and certificates, as well as certificates for completion of programs following his second alcohol-related offense: (1) two specific-timely-achievement-recognition-system awards in October 2011 and June 2014; (2) a certificate of appreciation; (3) a Bureau of Alcohol, Tobacco, Firearms and Explosives permit to transport, ship, receive, or possess explosive materials in the performance of his duties in July 2012; (4) a certificate of completion for driver safety course in December 2013; (5) a certification of completion for the Victim Awareness Program in August 2013; (6) a certificate of achievement for successful completion of 15 substance abuse treatment sessions in December 2013; and (7) a certificate of successful completion for a Level II DUI and substance abuse program in September 2013. (Tr. 63-69; AE A – AE D.)

Applicant purchased a new home in April 2014 and spends most of his discretionary free time working on the house. Currently, his middle daughter lives with him. Applicant likes to play pool and softball when he is not working on his house. (Tr. 70-72.)

Having observed Applicant’s demeanor, I found his testimony to be credible. At his hearing, Applicant promptly answered all the questions asked. He was frank, candid, and forthcoming in his answers and explained his answers without hesitation. He readily admitted his lapses in judgment in having been arrested for two alcohol-related offenses.

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, *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 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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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 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 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

Under Guideline G (alcohol consumption), the Government’s concern is that 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 ¶ 21.

The Government established its case, in part, under Guideline G through Applicant's admissions and evidence presented. Applicant had two alcohol-related arrests in 2006 and 2012. However, as noted, his 2006 arrest resulted in him being convicted of misdemeanor DUI and his 2012 arrest resulted in him being convicted of reckless driving.

A review of the evidence supports application of one alcohol consumption disqualifying condition, AG ¶ 22(a) "alcohol-related incidents away from work, such as driving while under the influence," applies as a result of Applicant's 2006 and 2012 alcohol-related arrests. Applicant successfully refuted the underlying facts that gave rise to his consuming alcohol, at times to excess and to the point of intoxication, from 1979 to 2012. Accordingly, no further discussion is warranted for SOR ¶ 1.a.

Considering the totality of the circumstances in this case, I find application of two alcohol consumption mitigating conditions is appropriate with regard to Applicant's 2006 and 2012 DUI offenses:

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; 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; apply.

Applicant presented credible evidence of actions taken to overcome his 2006 and 2012 alcohol-related arrests, has established that he is not alcohol dependent, and during the infrequent times he consumes alcohol, he does so responsibly. He is remorseful for his behavior and has initiated changes in his lifestyle. His work performance, certificates of achievement, and awards show Applicant's work behavior has not been indicative of his having an alcohol problem. He is a valuable employee, who is reliable, dependable, and professional. His sobriety and responsible use of alcohol is supported by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged the problems misuse of alcohol has caused him, demonstrated remorse, and a steadfast commitment to continue lifestyle changes consistent with responsible use of alcohol.

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) 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. The discussion in the Analysis section under Guideline G is incorporated in this whole-person section. However further comments are warranted.

I was particularly impressed with Applicant's demeanor during his hearing and the apparent effect this process has had on him. Applicant has been willing to do whatever is necessary to recover from his alcohol-related arrests. The process has been costly for him, not only financially, but also personally and professionally. Applicant has dedicated the majority of his adult working life, 20 years, to the defense industry. He attained a level of trust within his company in which he is allowed among other things to transport, ship, receive, or possess explosive materials. He demonstrated the correct attitude and commitment to responsible alcohol consumption.

Also noteworthy is Applicant's past behavior, which serves as a reliable indicator of future behavior. In particular, he has successfully held a security clearance for the past ten years. He has been cooperative throughout this process and recognizes the gravity of these proceedings. He recently took on the responsibilities of becoming a new home owner, is an involved father with his three children, a responsible and contributing citizen, and a valued and trusted employee. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the

Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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.b:	For Applicant
Subparagraph 1.c:	Withdrawn
Subparagraph 1.d:	For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge