



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



In the matter of:)
)
) ISCR Case No. 08-03786
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: Joseph P. Smith, III, Esquire

November 23, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a repeating pattern of abusing alcohol to cope with stress and emotional issues and there is a concern about whether Applicant will be able to control his cravings for alcohol. A seven month period of abstinence is not sufficient to mitigate Applicant's long-time abuse of alcohol. At this time, his favorable evidence is not sufficient, to show it is unlikely that he will have an alcohol-related relapse. He mitigated the personal conduct concern, but failed to mitigate the security concerns arising from his alcohol consumption. Eligibility for access to classified information is denied.

Statement of the Case

On November 16, 2007, Applicant submitted a security clearance application. On February 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) (amended on May 20, 2009) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

dated January 2, 1992, as modified and revised.¹ The SOR (as amended) alleges security concerns under Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether a clearance should be granted, denied or revoked.

On April 16, 2009 and on June 4, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on June 5, 2009. DOHA issued a notice of hearing on June 25, 2009. The hearing was convened as scheduled on July 8, 2009. The government offered Government Exhibits (GE) 1 through 7, all of which were admitted without objection, except for GE 5, which was withdrawn (Tr. 16, 132). Applicant testified on his own behalf, presented four witnesses, and submitted Applicant Exhibits (AE) 1 through 10, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 17, 2009.

Procedural Issues

On May 20, 2009, the government amended the SOR issued on February 20, 2009, by deleting the Guideline J concern in SOR ¶ 1, and alleging in its place a Guideline E concern. I granted the amendment without objection (Tr. 10).

Applicant affirmatively waived his 15 days advance notice of the date of his hearing. Department counsel telephonically contacted Applicant on June 18, 2009 to ascertain a convenient date to schedule Applicant's hearing. On June 23, 2009, they agreed to schedule Applicant's hearing on July 8, 2009. At his hearing, Applicant indicated he had sufficient time to prepare for his hearing, and that he was ready to proceed (Tr. 8).

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.a and 1.b, and 2.a and 2.d. He denied the allegations under SOR ¶¶ 2.b and 2.c. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines in all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

Applicant is a 56-year-old senior staff software engineer working for a defense contractor. He graduated from college in 1994, and received a Bachelor of Arts degree in English. He also completed his Master of Software Systems Engineering degree that same year. He married in 1986, and was divorced in 1998.

Applicant worked for government contractors from 1976 to 1993. During that time he had access to classified information at the secret level. Between 1993 and 1998, he had no need for and required no access to classified information. In 1998, he again was granted access to classified information at the secret level. He has continuously possessed access to classified information to the present. Outside of the current SOR allegations, there is no evidence he has ever compromised classified information, committed any security violations, or caused others to compromise classified information.

Applicant started to consume alcohol to excess in 1981. His abuse of alcohol escalated in 1986 when he was consuming alcoholic beverages before reporting to work and during the work day. Between July 1986 and September 1986, Applicant reported to work numerous times while under the influence of alcohol, and twice he was intoxicated to the point of being disoriented and confused. On September 22, 1986, he was the subject of a serious incident report to the Defense Industrial Security Clearance Office (GE 1). He claimed that he stop consuming alcoholic beverages for several years after these incidents (Tr. 159).

Applicant explained then that his mid 1980s alcohol abuse was caused by the stresses he suffered because of his father's serious illness, his wedding, and adapting to married life. In his January 1987 sworn statement to a government background investigator, Applicant considered himself to be a recovering alcoholic. He acknowledged then that the only way to control his alcohol abuse was not to start drinking. He stated he had sought counseling for alcohol abuse more than once, and that he would seek formal counseling if he was not able to remain abstinent. Applicant promised to remain sober (GE 2).

In July 1998, Applicant illegally used marijuana. At the time, he was holding a security clearance. He testified he only used marijuana once, and that he has never abused any other illegal drugs. He terminated his association with the person who offered him the marijuana. He promised never to use any illegal drugs ever again (Tr. 139).

He stated that in 2000 and 2002, he attended Alcoholic Anonymous and Rational Recovery support groups to learn from others how to control his use of alcohol. He was finding it difficult to avoid or to limit his use of alcohol when stressed. His brother died in November 2003, and Applicant was having difficulty dealing with his brother's death, his brother's surviving family, and his personal work and romantic stresses. The treatment helped him deal with the emotional stress (GE 4). In 2003 and 2004, Applicant consulted with two different doctors. He was concerned about his use of alcohol as a means of coping with emotional stress and depression.

In June 2005, Applicant was charged with driving under the influence (DUI) of alcohol. He pled *nolo contendere* and enrolled in a DUI First Offender Program. He successfully completed a 12-week court-ordered alcohol rehabilitation and counseling program, and was released early of his probation in February 2006 (GE 7). While in the alcohol rehabilitation and counseling program, apparently Applicant was diagnosed as alcohol dependent. There is no evidence as to whether the diagnosis was performed by a qualified medical professional or a licensed clinical social worker as required under AG ¶¶ 22(d) and (e). The counselors at the rehabilitation counseling program recommended no follow on treatment (AE 3).

In his September 2008 response to DOHA interrogatories, Applicant provided a detailed accountability of his then alcohol consumption. He stated he was consuming approximately nine ounces of vodka, nearly daily. His last intoxication was on his birthday in July 2008. He would get intoxicated as often as once every two to three months. Applicant indicated that if his then consumption of alcohol threatened his security clearance, he would enroll in a treatment program, participate in group counseling, and abstain from alcohol.

In March 2009, after receipt of his SOR, Applicant sought the assistance of a psychiatrist to control his excessive consumption of alcohol. He was prescribed two medications to help him remain abstinent. Applicant claimed he has been abstinent since March 4, 2009 (Tr. 165). The psychiatrist recommended Applicant attend Smart Recovery (group counseling program) weekly, and was referred for further alcohol treatment to an addiction counselor. In the psychiatrist's opinion, as of June 2009, Applicant has remedied his alcohol consumption problem. He has been abstinent, compliant with the treatment recommendations, attended Smart Recovery (AE 6 & 7) and continues to take his medications. The psychiatrist believes Applicant does not pose a risk to the handling of classified information (AE 1).

According to Applicant's cardiologist's opinion, Applicant has never been alcohol dependent, and he has been abstinent since March 2009. The cardiologist's opinion is based on his personal observations of Applicant during the last nine years and medical data he has compiled concerning Applicant since 2000 (AE 2).

In April 2009, Applicant was referred by his psychiatrist for a substance abuse evaluation. The evaluation was conducted by a master addiction counselor and substance abuse professional. In the counselor's opinion, Applicant has a history of moderate to severe level of alcohol abuse. The counselor opined that Applicant did not meet the criteria for an alcohol dependence diagnosis. He also believes that during the past six months, Applicant made significant lifestyle changes that indicate alcohol is no longer a problem for Applicant (AE 4). Based on his counselor's advice, Applicant attended and participated in the Smart Recovery program from May to July 2009 (AE 6).

At his hearing, Applicant presented the testimony of the vice president of his company, his direct supervisor and friend, and his manager. The vice president has

known Applicant for 30 years. They were colleagues in 1986 at the same company where Applicant reported for work in an intoxicated state. After this incident, the vice president never saw Applicant impaired at work ever again. In his opinion, Applicant has an excellent reputation for truthfulness and veracity. To his knowledge, Applicant has never been involved in a security violation. He believes Applicant is not a risk to national security and endorses Applicant's security clearance without reservations.

Applicant's supervisor and his manager have known and worked with Applicant since around 1995. They have had daily contact with Applicant since 2004. Both consider Applicant an outstanding employee and believe Applicant is held in high esteem by all of his colleagues. In their opinions, Applicant is conscientious in the handling of classified information, and does an outstanding job complying with all security rules and procedures. Applicant has never been involved in a security violation. They believe Applicant is not a risk to national security, and both endorsed Applicant's security clearance without reservations.

Applicant expressed remorse for his behavior and alcohol consumption. He is very concerned about losing his security clearance and his job. Applicant promised that his questionable alcohol-related behavior will not happen again. He has continued his addiction counseling to learn to control his impulses, and is participating in group counseling. Moreover, he is also taking medications to assist him to remain abstinent.

Applicant has been successfully working for several government contractors for over 30 years. He affirmed that he can be trusted to serve with honor and integrity. Applicant takes the security clearance process seriously. He averred he has been truthful, honest, and forthcoming throughout the whole process. Applicant believes he has learned to control his alcohol consumption and is rehabilitated.

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 the Applicant meeting the criteria contained in the revised 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, by necessity, consideration of the possible risk that 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. Clearance decisions must be “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. 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 as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that 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

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Between July 1986 and September 1986, Applicant reported to work numerous times while under the influence of alcohol, and twice he was intoxicated at work, disoriented and confused. In July 1998, Applicant illegally used marijuana, while holding a security clearance. In June 2005, Applicant drove under the influence (DUI) of alcohol and was subject to judicial proceedings.

Applicant's behavior triggers the applicability of disqualifying condition 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 ¶ 17 lists seven conditions that could mitigate personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that AG ¶¶ 17(a), 17(b), and 17(f) do not apply to the facts of this case. I specifically considered AG ¶ 17(c), and determined it partially applies. Applicant's DUI and use of illegal drugs while holding a security clearance constitute serious offenses. However, both incidents are temporally remote and the behavior is infrequent. As such, I find that these incidents do not cast doubt on his judgment, reliability, and trustworthiness. His alcohol-related behavior would be better addressed under Guideline G.

AG ¶¶ 17(d) and 17(e) apply. Applicant has acknowledged his questionable alcohol-related behavior. He has obtained psychiatric treatment, is taking medications, and participated in addiction and group counseling to change his behavior. He has taken positive steps to change his lifestyle and to alleviate the stressors that caused his questionable behavior. By his actions, he has reduced his vulnerability to exploitation or manipulation. AG ¶ 17(g) applies because Applicant no longer associates with the individual who provided him the marijuana. Considering the evidence as a whole, I find Applicant has mitigated the Guideline E security concerns.

Guideline G, Alcohol Consumption

Under Guideline G 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 under Guideline G by showing that Applicant has consumed alcohol to excess intermittently since 1981. His abuse of alcohol escalated between July 1986 and September 1986, when Applicant reported to work numerous times while under the influence of alcohol, and twice he was intoxicated at work. He was abstinent for several years after this incident.

Applicant's alcohol abuse was caused by stress. He considers himself to be a recovering alcoholic. He acknowledged then that the only way to control his alcohol abuse was not to start drinking. He has sought counseling for alcohol abuse more than once. In 2003 and 2004, Applicant consulted with two different doctors because he was finding it difficult to avoid or to limit his use of alcohol when under stress. He was concerned about his use of alcohol as a means of coping with emotional stress and

depression. In 2000 and 2002, he attended Alcoholic Anonymous and Rational Recovery support groups to learn from others how to control his use of alcohol.

In June 2005, Applicant drove under the influence (DUI) of alcohol. As of September 2008, Applicant was consuming approximately nine ounces of vodka, nearly daily. His last intoxication was in July 2008. He would get intoxicated as often as once every two to three months.

Applicant established a history of excessive consumption of alcohol, at times to the point of intoxication. Applicant's excessive alcohol consumption resulted in his exercising questionable judgment. Guideline G disqualifying conditions AG ¶ 22(a): "alcohol-related incidents away from work, such as driving while under the influence," AG ¶ 22(b): "alcohol-related incidents at work, such as reporting for work in an intoxicated or impaired condition," and 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," apply.

There is no evidence that Applicant has been involved in any alcohol-related misconduct since June 2005. Available evidence shows Applicant continued consuming alcohol up to at least March 2009.

There are four Alcohol Consumption Mitigating Conditions under AG ¶ 23 potentially applicable to these disqualifying conditions:

(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.

After considering the mitigating conditions, I find that they partially apply. Applicant's last alcohol-related behavior occurred in June 2005, and as such, it may be considered temporally remote. However, after his 2005 DUI, he continued his excessive alcohol consumption. He was getting intoxicated once every two to three months, and he was last intoxicated in July 2008. He has been abstinent only since March 2009.

Applicant has acknowledged his questionable alcohol-related behavior. He obtained psychiatric treatment, has been taking medications, and participated in addiction counseling and group counseling to change his behavior. He has taken positive steps to change his lifestyle and to alleviate the stressors that caused his questionable behavior. By his actions, he has reduced his vulnerability to exploitation or manipulation.

Considering the totality of the circumstances, at this time, Applicant's past questionable alcohol-related behavior does cast doubt on his judgment, reliability, and trustworthiness. He has had alcohol-related problems during the last 20 years. He has long been aware of what is required of him to avoid future alcohol-related problems; notwithstanding, he continued to consume alcohol to excess. The Guideline G security concern is not fully mitigated.

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 relevant 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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature and well-educated man. He has been successful working for several defense contractors for

more than 30 years. During most of this time he had access to classified information. There is no evidence he has ever compromised classified information or committed any security violations. To the contrary, Applicant is considered to be conscientious about his security duties and has a reputation for following security rules and procedures.

He has established a reputation as a valuable, dedicated and reliable employee. Applicant expressed remorse for his questionable behavior and is resolute in avoiding similar behavior. He obtained psychiatric treatment, has been taking medications to assist him remaining sober, and participated in addiction counseling and group counseling to change his behavior. He has taken positive steps to change his lifestyle and to alleviate the stressors that caused his questionable behavior. He has been abstinent since March 2009. Applicant is aware of what is required of him to possess a security clearance and has promised to remain sober. These factors show responsibility, good judgment, and mitigation.

On the other hand, Applicant has developed a repeating pattern of abusing alcohol to cope with stress and emotional issues and there is a concern about whether Applicant will be able to control his cravings for alcohol. On balance, I conclude that Applicant's favorable evidence is not sufficient, at this time, to show it is unlikely that he will have an alcohol-related relapse. I find that a seven month period of abstinence is not sufficient to mitigate Applicant's long-time abuse of alcohol. I conclude he has mitigated the personal conduct concern, but failed to mitigate the security concerns arising from his alcohol consumption.

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 E:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge