



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-00309
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

March 29, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline G (Alcohol Consumption). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 20, 2008. On November 19, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline G. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on December 14, 2009; answered it on December 31, 2009; and requested a determination on the record without a hearing before an

administrative judge. DOHA received the request on January 4, 2010. On January 19, 2010, Department Counsel requested a hearing and notified Applicant of his request. (Hearing Exhibits (HX) I and II.) Department Counsel was ready to proceed on January 26, 2010, and the case was assigned to me on February 2, 2010. DOHA issued a notice of hearing on February 16, 2010, scheduling the hearing for February 25, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified but presented no documentary evidence. I kept the record open until March 8, 2010, to enable him to submit evidence. At his request, I extended the deadline until March 15, 2010. (HX III.) He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. Department Counsel's comments regarding AX A are attached to the record as HX III. DOHA received the transcript (Tr.) on March 4, 2010.

Procedural Issues

Department Counsel orally notified Applicant of the time and place of the hearing on February 13, 2010, and the notice of hearing was dated February 16, 2010. Both notifications were less than the 15 days required by Directive ¶ E3.1.8. I explained the notice requirement to Applicant, and he affirmatively waived the 15-day notice requirement. (Tr. 20-22.)

Findings of Fact

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

Applicant is a 23-year-old computer programmer employed by a federal contractor. He graduated from college in May 2008, and began working for his current employer in June 2008. (AX A at 1.) His performance appraisal for the period ending in May 2009 portrays him as eager to learn, hard working, creative, dependable, and considerate of colleagues and subordinates. His was rated "fully successful," the middle rating among five ranging from unsatisfactory to outstanding. (AX A at 12.)

In October 2007, while Applicant was 21 years old and in college, he was arrested in a bar for public intoxication.¹ The bar was open to the public, but its clientele was mostly members of certain fraternities of which Applicant was not a member. He had consumed more than six drinks, but there was no evidence that he was disruptive or disorderly. As he was standing alone waiting for a friend to return from the restroom, he was approached by a police officer performing security duties at the bar, and asked to go outside. He was arrested, held at the police station overnight to sober up, released, and fined \$70. (Tr. 43-46; GX 3 at 1; GX 4 at 3.) He disclosed this incident on his security clearance application. (GX 2 at 30.)

¹ The court records reflect the charge as "public swearing/intoxication." The parties agreed that there was no inappropriate language involved, and that the court information was based on the fact that both public swearing and public intoxication were proscribed by the same law. (Tr. 60.)

In October 2008, Applicant was arrested for having an open container of beer and obstructing justice. The incident occurred while he and his girlfriend were walking between two tailgate parties preceding a football game. He was carrying a plastic cup of beer. When he was approached by a police vehicle, he put his cup on the ground and walked between two cars in a parking lot. He was arrested and given a breathalyzer test, which registered a blood-alcohol level of .06%. The next day, he reported the incident to his security officer. In November 2008, he voluntarily disclosed this incident during a security interview with an investigator from the Office of Personnel Management (OPM), who apparently had not been informed of the incident. (Tr. 48-51; GX 4 at 3.)

Applicant pleaded guilty to having an open container. He was fined \$70, ordered to perform 70 hours of community service, and required to pay a \$125 registration fee for the community service.

When questioned about his drinking habits, Applicant told a OPM investigator that he drank four or five beers, enough to become intoxicated, one to three times a week while socializing with friends. The investigator's written summary of the interview recites: "Subject has not stopped or reduced use, because subject does not have a problem with alcohol. Subject intends to use alcohol in the future." (GX 4 at 4.) In response to DOHA interrogatories dated April 7, 2009, Applicant stated that the interview summary was accurate except for one item not relevant to the allegations in the SOR. (GX 4 at 6.) However, in his response to the SOR, he stated that the portion of the summary pertaining to his alcohol consumption was inaccurate. He stated it would have been more accurate to say, "You become intoxicated one time a week, but never more than three times." Finally, he stated that the portrayal of his future intentions in the interview summary was the product of an ill-framed question, because if he had been asked whether he would consider reducing his drinking, his answer would have been a resounding "yes." (Answer at 3.)

Applicant testified that his arrest in October 2008 and the security interview in November 2008 made him realize that alcohol-related incidents could jeopardize his employment. (Tr. 54.) He testified his job is "extremely" important to him. (Tr. 67.) At the hearing, he testified he has reduced his drinking to about once a month at social events. He limits his consumption to two drinks. He last consumed alcohol about six weeks before the hearing. (Tr. 56-57.) His reduced consumption was motivated in part by his decision to consume healthier foods and exercise more. He testified he feels better on a healthier diet and intends to adhere to it. (Tr. 65-66.)

Applicant has never received any alcohol-related treatment and has never been diagnosed as alcohol dependent. (Tr. 53.) He testified he has never driven while intoxicated. (Tr. 54.) He also testified he understands the concern that excessive alcohol consumption causes poor decisions, and "confidential information is not something you want to leave in the hands of somebody who can't control themselves." (Tr. 59.)

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 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 the applicant may deliberately or inadvertently fail to 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 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 not necessarily a determination as to the loyalty of the applicant. 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). “[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

The SOR alleges Applicant consumed alcohol, “at times to excess and to the point of intoxication,” from approximately 2005 to at least 2008 (SOR ¶ 1.a), and that he becomes intoxicated one to three times a week and does not intend to reduce or stop using alcohol (SOR ¶ 1.b). It also alleges he was arrested and charged with “public swearing/intoxication” in September 2007, pleaded guilty, and was sentenced to pay a fine and costs (SOR ¶ 1.c). Finally, it alleges he was arrested and charged with “public swearing/intoxication and obstruction of justice without force in about September 2008, prosecution was deferred, he was ordered to perform 50 hours of community service and pay court costs, and the charges were dismissed (SOR ¶ 1.d). Applicant admitted the allegations in SOR ¶¶ 1.a, 1.c, and 1.d, but he denied the allegations in SOR ¶ 1.b, and he testified that the allegations were based on an inaccurate summary of an OPM interview.

The concern under this guideline is set out in AG ¶ 21 as follows: “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.” A disqualifying condition may arise under this guideline by “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,” or “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 (a) and (c).

Both disqualifying conditions are raised by the evidence, shifting the burden to 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).

Security concerns under this guideline may be mitigated if “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(a). The first prong of this mitigating condition (“so much time has passed”) 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. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). Although Applicant did not specifically state the date on which he decided to reduce his alcohol consumption, it appears to have occurred shortly after his OPM interview in November 2008. He is not alcohol dependent, and his change of behavior was prompted by the realization that he could not continue his college lifestyle if he wanted to continue his employment. He has had no further instances of alcohol-related misconduct. He last consumed alcohol six weeks before the hearing. He limits his consumption to two drinks. I am satisfied that his excessive alcohol consumption is not recent and does not cast doubt on his current reliability, trustworthiness, and good judgment. Accordingly, I conclude that AG ¶ 23(a) is established.

Security concerns also may be mitigated if “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).” AG ¶ 23(b). After his security interview in November 2008, Applicant realized that his alcohol use could jeopardize his employment. He testified he does not believe he has an “alcohol problem,” but he acknowledged his previous alcohol abuse at the hearing. He drastically reduced his alcohol consumption and established a pattern of responsible use after his November 2008 security interview. I conclude AG ¶ 23(b) is established. No other enumerated mitigating conditions are relevant.

Whole-Person Concept

Under 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 the 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.

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. I have incorporated my comments under Guideline G 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 a young man, working at his first job after college. He is enthusiastic about his work and has performed well. The two arrests alleged in SOR ¶¶ 1.c and 1.d were for relatively minor offenses, but more serious security concerns were raised by his OPM interview describing his heavy alcohol consumption and his intention to continue it. Applicant mitigated those concerns at the hearing, when he declared his intention to drastically reduce his alcohol consumption. He was candid, sincere, remorseful, and credible. He has demonstrated his sincerity by reducing the frequency of his drinking and limiting himself to two drinks. He has learned that working for a federal contractor and holding a clearance are incompatible with the personal conduct that was tolerated in a college environment. There is no evidence that he is alcohol dependent. He persuaded me that he has put his college habits behind him, begun to act like an adult, and decided that his employment and his health require a more responsible lifestyle.

Applicant has been candid throughout the security clearance process. He disclosed his September 2007 arrest on his security clearance application. He reported the October 2008 incident to his superiors the day after it happened. He voluntarily disclosed the October 2008 incident to the security investigator, who apparently had not been informed of it by Applicant's superiors.

After weighing the disqualifying and mitigating conditions under Guideline G, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve doubtful cases in favor of national security, I conclude Applicant has mitigated the security concerns based on alcohol consumption. 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 G (Alcohol Consumption): FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

Conclusion

In light of all of the circumstances, 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