



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



In the matter of:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 09-05496

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel

For Applicant: *Pro se*

September 29, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant has a lengthy history of excessive alcohol consumption. In September 2000 and September 2005, he was involved alcohol-related incidents with law enforcement and the courts. He received outpatient alcohol-related treatment and counseling. In 2007, he was diagnosed as alcohol dependent. He continues to consume alcohol. Eligibility for access to classified information is denied.

Statement of the Case

On February 19, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (Item 5). On March 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline G (alcohol consumption). (Item 1) 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 Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On June 22, 2010, Applicant responded to the SOR allegations. (Item 4) He requested a decision without a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated July 22, 2010, was provided to him on July 29, 2010. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ Applicant did not respond to the FORM. The case was assigned to me on September 21, 2010.

Findings of Fact²

In Applicant's response to the SOR, he admitted SOR ¶¶ 1.a-1.e. (Item 4) He denied that he was continuing to drive after consuming alcohol. (SOR ¶ 1.f) His admissions are accepted as factual findings.

Applicant is a 35-year-old employee of a defense contractor, working as a technician. (Item 5) He received a high school diploma or equivalent in 1997. (Item 5) He has not attended college. (Item 5) He has not served in the military. (Item 5) He has never married. (Item 5)

Alcohol Consumption

Applicant consumed alcohol to the point of intoxication from approximately 1991, when he was 16 years old, to at least May 2009. (SOR ¶ 1.a; Item 4) He stopped consuming alcohol from age 19 to age 21 because he was concerned it was affecting his anxiety medication. He resumed his consumption of alcohol after his doctor told him it was safe to drink alcohol at the same time he was taking his medication. In September 2000, Applicant was charged with public intoxication and criminal trespassing. (SOR ¶ 1.b; Item 4) He pleaded guilty, and he received a fine and probation. *Id.*

In September 2005, Applicant was charged with operating a vehicle while intoxicated. (SOR ¶ 1.c; Item 4; Item 6 at 4) He pleaded guilty, and the court sentenced him to one year of probation and fined him. *Id.* The court required him to attend alcohol treatment and counseling and suspended his driver's license. *Id.*

¹The DOHA transmittal letter is dated July 22, 2010, and Applicant's receipt is dated July 29, 2010. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant received alcohol treatment and counseling from September 2006 to February 2007. (SOR ¶ 1.d; Item 4; Item 8 at 2) He received a diagnosis of alcohol dependence from a medical doctor with a prognosis of “moderate” relapse potential. (Item 8 at 3, 8, 36-37, 55-57) He continues to consume alcohol. (SOR ¶ 1.e; Item 4; Item 6 at 5) However, he indicated that he does not “over indulge” in his alcohol consumption. (Item 4) He does not drive after consuming alcohol. (Item 4) He considered his alcohol consumption to be “responsible.” (Item 4; Item 6 at 5)

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 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 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 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 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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline G (alcohol consumption) with respect to the allegations set forth in the SOR.

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 listed in AG ¶ 22 could raise a security or trustworthiness concern and may be disqualifying in this case:

- (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(a), 22(c), and 22(d) apply. In September 2000 and September 2005, Applicant was arrested for alcohol-related incidents. He pleaded guilty to both offenses. Part of his sentence for the 2005 offense was attendance at an alcohol-treatment program. In 2007, a physician diagnosed him as alcohol dependent.³ He continues to consume alcohol.

³The well-respected psychiatric reference, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (DSM-IV-TR). Washington, DC, American Psychiatric Association, 2000, has defined "alcohol dependence" to be a psychiatric condition that meets the following diagnostic criteria:

A maladaptive pattern of alcohol use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period:

(1) Tolerance, as defined by either of the following: (a) a need for markedly increased amounts of the alcohol to achieve intoxication or desired effect; or (b) markedly diminished effect with continued use of the same amount of the alcohol.

(2) Withdrawal, as manifested by either of the following: (a) the characteristic withdrawal syndrome from the alcohol; or (b) the same (or a closely related) alcohol is taken to relieve or avoid withdrawal symptoms.

(3) The alcohol is often taken in larger amounts or over a longer period than was intended.

(4) There is a persistent desire or unsuccessful efforts to cut down or control alcohol use.

(5) A great deal of time is spent in activities necessary to obtain the alcohol (e.g., visiting multiple doctors or driving long distances), using the alcohol, or recovering from its effects.

(6) Important social, occupational, or recreational activities are given up or reduced because of alcohol use.

(7) The alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by

“Once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.” ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (citing *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)). Because the Government has met its initial burden concerning alcohol consumption security concerns, the burden now shifts to Applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15. Four Alcohol Consumption mitigating conditions under AG ¶ 23 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.

SOR ¶¶ 1.d and 1.f are mitigated. Applicant’s alcohol-related treatment is a positive, mitigating development, and does not constitute a disqualifying condition. Applicant does not drive after consuming alcohol.

None of the mitigating conditions fully apply to SOR ¶¶ 1.a to 1.c, and 1.e. Applicant began consuming alcohol at age 16. Applicant was convicted of two-alcohol related offenses. He was diagnosed as alcohol dependent in 2007, and he continues to consume alcohol. He is not currently attending AA meetings or receiving any other ongoing alcohol-related counseling or treatment. He does not fully acknowledge his alcohol-consumption problems. He believes he can consume alcohol responsibly, despite the diagnosis of alcohol dependence. He has not received a positive prognosis

the alcohol (e.g., continued drinking despite recognition that an ulcer was made worse by alcohol consumption).

from a medical professional. In sum, the possibility of relapse continues to cast doubt on his current reliability, trustworthiness, or good judgment. Alcohol consumption concerns are not fully mitigated for the reasons stated under this guideline and in the whole-person concept, *infra*.

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.

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 this guideline, but some warrant additional comment.

Although there is some evidence supporting approval of Applicant's clearance, the mitigation evidence is insufficient to resolve security concerns at this time. He attended an alcohol-treatment program, and he received some alcohol-related counseling from 2006 until February 2007. He is not on probation and his driver's license is not suspended. He contributes to his company and the Department of Defense. There is no evidence of any disciplinary problems unrelated to his off-duty alcohol-consumption in 2000 and 2005. There is no evidence of any drug abuse, financial problems, disloyalty, or violations of national security. His character and good work performance show some responsibility, rehabilitation, and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. Applicant knows the consequences of driving after excessive alcohol consumption, and he has does not drive after consuming alcohol. He states he is plans to drink alcohol responsibly.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has had a problem with alcohol use beginning when he was 16 years old. He has consumed alcohol at times to excess, with some periods of abstinence, for about 19 years. He was involved in alcohol-related offenses that resulted in misdemeanor convictions in 2000 and 2005. In 2007, a physician providing alcohol-treatment diagnosed him as alcohol dependent. Even though there is no

evidence of any alcohol-related incidents in five years, I am not convinced he fully recognizes the importance of overcoming his alcohol problems and establishing a significant pattern of abstinence.⁴

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 Appeal Board has determined in cases of substantial alcohol abuse or alcohol dependence that full mitigation of security concerns is not possible unless there was a fairly lengthy period of abstaining from alcohol consumption.⁵ Applicant continues to consume alcohol. Abstinance from alcohol consumption for a significant period of time is needed to provide sufficient assurance that he will not return to alcohol consumption. His limited rehabilitative efforts and lack of fundamental changes in behavior are important manifestations that increase security concerns. Lingering doubts remain concerning his current reliability, trustworthiness, or good judgment.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 12968, the Directive, the Regulation, the AGs, and other cited references to the facts and circumstances in the context of the whole person. For the reasons stated, Applicant has not mitigated or overcome the Government's case, and he is not 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:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

⁴For 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).

⁵See 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).

Conclusion

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

MARK HARVEY
Administrative Judge