



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 10-00318
)	
Applicant for Security Clearance)	

Appearances

For Government: Marc G. Laverdiere, Esq., Department Counsel
For Applicant: *Pro se*

March 30, 2011

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

On October 28, 2010, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to revoke his security clearance, citing security concerns under Guideline G. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on November 1, 2010; answered it in an undated document; and requested a hearing before an administrative judge. DOHA received the request on November 9, 2010. Department Counsel was ready to proceed on November 30, 2010, and the case was assigned to me on December 22, 2010.

Applicant was timely notified of the time and place of the hearing, and I conducted it as scheduled on January 5, 2011. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on January 26, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 32-year-old employee of a defense contractor. He served on active duty in the U.S. Navy from 1997 to 2008, and he began working for his current employer shortly after his discharge from the Navy. He has held a security clearance since March 1999.

Applicant began consuming alcohol in 1999, when he was 20 years old, drinking three or four beers on the weekend. From about 2001 to 2004, he consumed alcohol only once or twice a year, consuming one or two beers at a sitting. Starting in October 2004, he began consuming about 10 beers every night (GX 2 at 7.)

In March 2005, Applicant was arrested for driving under the influence of alcohol (DUI). He had a blood-alcohol level of .19%. In July 2005, he pleaded guilty and was sentenced to 12 months in jail (suspended), a \$500 fine with \$250 suspended, placed on probation for two years, and required to complete an Alcohol Safety Action Program (ASAP). His driver's license was suspended for 12 months. In May 2005, he completed a 2-week alcohol education program administered by the Navy, consisting of outpatient education, group sessions, and individual sessions. He completed the court-ordered ASAP in July 2006. (GX 2 at 8; GX 3.) He abstained from consuming alcohol from March 2005 to July 2006 (GX 2 at 7.)

In January 2006, Applicant was cited for reckless driving for driving 75 miles per hour (mph) in a 55 mph zone. He was convicted of improper driving and fined \$50, and he was required to attend an eight-hour driver improvement course. (GX 2 at 6; GX 4.) Alcohol was not involved in this incident.

In July 2006, Applicant began consuming two or three drinks at social occasions two or three times a month. In June 2008, he was arrested for DUI. He had a blood-alcohol level of .18%. In January 2009, he was convicted and sentenced to four days in jail and a fine. He was ordered to perform 80 hours of community service. He completed his community service in June 2009 (GX 2 at 11; GX 5; GX 8; GX 9; AX A at 2.) In August 2009, his driving privileges were reinstated in the jurisdiction where this offense occurred, but his license will not be reinstated in the jurisdiction where he lives until January 2012. (AX A at 7-8; Tr. 63.)

In October 2008, Applicant was arrested for DUI (2nd offense) and driving without a license. In January 2009 (the same month he was sentenced for the previous DUI), he was convicted of the DUI and sentenced to 365 days in jail (345 days suspended) and a \$1,000 fine (\$500 suspended). He was also convicted of driving without a license and sentenced to 30 days in jail (suspended), a \$100 fine, and unsupervised probation for four years. He was ordered to complete ASAP and required to have an ignition interlock installed on his vehicle. His driver's license was suspended for three years, but he was authorized to have a restricted license. (GX 6.) The court permitted Applicant to travel outside the continental United States on official business from October 20, 2008 to December 5, 2008. (GX 9; AX B at 7.)

In February 2009, the court issued an order of interdiction, prohibiting the sale of alcoholic beverages to Applicant. The order of interdiction was reviewed on December 1, 2010, and it was dismissed. (AX B at 5-6.) As of November 3, 2010, Applicant had completed the eight hours of required alcohol education, the victim impact panel, and a three-month substance abuse counseling program. He had attended all ASAP monitoring meetings, and he voluntarily attended weekly Alcoholics Anonymous (AA) meetings.

Applicant did not receive a diagnosis or prognosis during any of his alcohol treatment programs. He has abstained from alcohol since his DUI arrest in October 2008. He continues to attend AA meetings weekly. He undergoes blood-alcohol testing every three months. (Tr. 60-62.) He is involved in a serious relationship, and she knows about his past and supports him. He testified that he realizes that there can be no "next time," because if he is arrested again for anything, his career and his life as he knows it will be over. (Tr. 63-65.)

Applicant's manager since he was hired in August 2008 submitted a letter describing him as talented, hard working, dedicated, and dependable. The manager was familiar with his record of alcohol-related convictions and observed him complying with the conditions imposed by the court. He noted that Applicant has not let the restrictions imposed on him by the courts interfere with his job performance. He stated that Applicant frequently tries to educate his friends and coworkers about the devastating consequences of drinking and driving. He regards Applicant as honest, trustworthy, and loyal. (AX B at 11.) Applicant's roommate and coworker has witnessed Applicant's change of lifestyle and believes that he has become a stronger, more responsible person. (AX B at 12.)

Applicant's immediate supervisor testified that he has known Applicant since he was hired. His first impression of Applicant was that he was more confident than most new hires. The witness soon found that Applicant was one of the company's best engineers. He testified that Applicant has been honest and straightforward about his record of alcohol-related conduct. He has not seen Applicant consume alcohol, although he does not socialize with Applicant on weekends. (Tr. 32-35.)

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 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 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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).

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

Guideline G, Alcohol Consumption

The SOR alleges Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately 1999 to “at least” October 2008 (¶ 1.a). It also alleges Applicant’s three DUI arrests in March 2005 (¶ 1.b), June 2008 (¶ 1.d), and October 2008 (¶ 1.e), and the convictions and sentences as described in the above findings of fact. Finally, it alleges that he completed a 10-day alcohol education program administered by the Navy in May 2005 (¶ 1.c).

The concern under this guideline is set out in AG ¶ 21: “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.” The relevant disqualifying conditions are: AG ¶ 22(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”), 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”). The disqualifying conditions in AG ¶¶ 22(d)-(f) are not applicable because there is no evidence of a diagnosis of alcohol abuse or alcohol dependence.

Applicant’s admissions in his answer to the SOR and at the hearing and the documentary evidence of Applicant’s arrests, convictions, and sentences are sufficient to establish AG ¶¶ 22(a) and (c). Thus, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts established by his admissions and the evidence.

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). Applicant had multiple episodes of alcohol-related misconduct and they did not occur under unusual circumstances that made them unlikely to recur. Thus, the issue is whether the first prong of this mitigating condition (“so much time has passed”) is established. This prong focuses on whether the alcohol-related 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).

As of the date of the hearing, more than two years had passed since the October 2008 DUI, and Applicant has abstained from alcohol since that date. He has served his jail time, completed all court-ordered counseling, paid his fines and court costs, and completed his community service. He attends AA meetings weekly and warns his friends and coworkers about the dangers of drinking and driving. He has matured and is involved in a serious relationship. He has established a reputation for candor, dependability, and trustworthiness at work. On the other hand, he will be on probation until January 2013, and his driving privileges will not be restored until January 2012. He has been under pressure to protect his security clearance and his job since his arrest in October 2008. After balancing these considerations and observing Applicant’s candor and sincerity at the hearing, I am satisfied that he will stay on his current path even when the pressures of his probation and the fear of losing his clearance and his job are removed. He knows there will be no “next time.” Thus, 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). Applicant has not been diagnosed as alcohol dependent, but he has acknowledged his past bad judgment and decided that he must abstain from consuming alcohol. For this reason and those in the above discussion of AG ¶ 23(a), I conclude that AG ¶ 23(b) is established. No other enumerated mitigating conditions under this guideline are applicable.

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 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 served on active duty in the Navy for about 11 years. He has held a security clearance since 1999. All his alcohol-related misconduct occurred while he was on active duty, and he is now living, working, and socializing in a different environment. He has earned a reputation as a devoted and valued employee. He was sincere, candid, and credible at the hearing. The strong endorsements of his supervisors were persuasive.

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 decide close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on his 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.e: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge