



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



In the matter of:)
)
) ISCR Case No. 10-03998
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

July 29, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline G, Alcohol Consumption. Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on January 28, 2010. On March 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline G. DOHA acted under 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*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

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 a clearance should be granted, continued, denied, or revoked. Applicant answered the SOR on March 23, 2011, and indicated she did not wish to have a hearing. Department Counsel submitted a timely request for a hearing. The case was assigned to me on May 18, 2011. DOHA issued the Notice of Hearing on June 2, 2011. The hearing was held as scheduled on June 23, 2011. Department Counsel offered exhibits (GE) 1 through 4 that were admitted into evidence without objection. The Government's list of exhibits was entered into the record as HE I. Applicant testified and offered exhibits (AE) A through D that were admitted without objection. DOHA received the transcript (Tr.) of the hearing on July 7, 2011.

Findings of Fact

Applicant is a 29-year-old employee of a defense contractor. She has worked for that contractor since January 2010. She was awarded a bachelor's degree in 2004 and a master's degree in 2008. She has never been married and has no children. She is engaged to marry. This is the first time that she has applied for a security clearance.¹

The SOR alleged two alcohol-related incidents. The first allegation asserted that Applicant was arrested in State A for Operating a Motor Vehicle While Intoxicated (OMVI) in about 2006. She pled guilty to that offense and was sentenced to 180 days in jail (177 days suspended), fined, and had her driver's license suspended. The second allegation asserted she was arrested in State B for Driving Under the Influence (DUI) in about 2010 and that charge was still pending. In her Answer to the SOR, Applicant admitted both of the factual allegations, but denied the paragraph that recited the Guideline G security concern. Her admissions are incorporated herein as findings of fact.²

Applicant estimated that she started consuming alcohol when she was a junior in college (approximately 21 years old). In the beginning, she consumed beer and, in graduate school, switched to wine. She worked throughout college and graduate school and drank alcohol primarily on weekends, but not every weekend. Since then, she consumed alcohol in social settings on some weekends or special occasions³

In March 2006, a police officer stopped Applicant while she was driving. She had just left a bar and was attempting to find the home of a friend who lived about a quarter of a mile from the bar. She intended to stay at the friend's home that night. She believed that the police stopped her because she stopped too long at a stop sign trying to

¹ Tr. 5-6, 17-18, 39-40; GE 1.

² Tr. 34; Applicant's Answer to the SOR.

³ Tr. 17-18, 37-38, 42-43; GE 2.

determine which way to turn. She reportedly told the police officer that she had one beer to drink that evening. In her interview with an Office of Personnel Management (OPM) investigator, she indicated that she thought she passed the field sobriety test. Nevertheless, she was arrested. At the police station, she was administered a breathalyzer test that indicated her blood alcohol content was .14%. At the hearing, she estimated that she had consumed four to six beers over a four or five hour period on that occasion. She hired an attorney to represent her in this matter. In March 2007, she pled guilty to OMVI, a misdemeanor, and was sentenced as noted above. Her three-day jail sentence consisted of spending a weekend at a hotel attending alcohol education classes.⁴

The second alcohol-related incident occurred on January 29, 2010. When she went out that evening, Applicant believed she was going to dinner with her sister to celebrate her birthday. As it turned out, she was going to a surprise birthday party. During the party, she thought that she drank responsibly. Following guidance provided at the prior alcohol education classes she attended, she consumed less than one drink per hour. She estimated that she consumed two or three glasses of wine over a five to six hour period. A police officer stopped her while she was driving home. The police report reflects, “[s]ubject stopped for swerving, smelled of alcohol, admitted to having been drinking . . . failed [field sobriety] test, arrested for DUI.” She refused a breathalyzer test, but later regretted that decision. She refused that test based on comments her attorney made during her first case. During this incident, she was charged with DUI. In March 2010, she pled no contest to the lesser offense of Driving with Unlawful Alcohol Concentration (DUAC), a misdemeanor, and was fined \$997, required to complete an Alcohol Drug Safety Action Program (ADSAP), and received a provisional driver’s license for six months.⁵

Applicant attended ADSAP classes from February 16, 2010, to April 8, 2010. As part of that program, a licensed professional counselor evaluated her and determined that she did not require alcohol treatment but needed to follow only low-risk guidelines. She successfully completed the ADSAP. She did not consume alcohol during that program. Since her second alcohol-related arrest, she has again consumed alcoholic beverages, but has not driven after drinking. She indicated that she will not drink and drive in the future. She did not consume any alcohol within three weeks of the hearing. She indicated that she is not consuming alcohol now because she is planning to start a family soon and is monitoring closely what she is eating and drinking. Throughout her testimony, she was very open and forthcoming. She was a credible witness.⁶

⁴ Tr. 18-20, 33-37, 41-42; Applicant’s Answer to the SOR; GE 1, 2, 4.

⁵ Tr. 20-22, 31-33, 35-37, 40-42; GE 2, 3; AE A.

⁶ Tr. 33-34, 38-39, 42-45; GE 2; AE A. The licensed professional counselor diagnosed Applicant with Alcohol Related Disorder Not Otherwise Specified, Section 291.9 of the Diagnostic and Statistical Manual for Mental Disorders (DSM IV). Section 291.9 is for disorders associated with the use of alcohol that are not classifiable as Alcohol Dependence, Alcohol Abuse, Alcohol Intoxication, or other recognized alcohol disorders.

Applicant testified that her consumption of alcohol has had no impact on her work. She has never missed work or been late to work because of her alcohol consumption. Her latest performance appraisal reflects that she exceeds expectations in all evaluated categories. Specifically, her attitude and contributions received praise. Her previous employers also praised her attitude, empathy, integrity, diligence, and dependability. One reference stated, “[s]he is intelligent, resourceful, extremely trustworthy, and dedicated to finishing every task she takes on. I have trusted her with my business and I would do it again in a second.”⁷

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense 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. 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, to reach his decision.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the

⁷ Tr. 17-18; AE B-D

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 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 G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

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.

I have considered all of the disqualifying conditions under AG ¶ 22 including:

(a) alcohol-related incidents away from work, such as driving 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

Applicant committed two alcohol-related driving offenses. She pled guilty to OMVI in March 2007 and no contest to DUAC in March 2010. I find disqualifying condition AG ¶ 22(a) applies.

Two alcohol consumption mitigation conditions under AG ¶ 23 are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unique circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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).

Applicant's commission of two alcohol-related driving offenses within a four-year period is troubling. Nevertheless, based on the evidence presented, these offenses appear to be anomalies. Before her first arrest, she consumed alcohol a couple of times a month. Following her OMVI conviction in 2006, she attended mandatory alcohol education classes. Since then, she continued her occasional consumption of alcohol, doing so primarily on weekends or special occasions. Prior to her arrest in January 2010, she thought she was going to dinner with her sister to celebrate her birthday. Instead, she was going to a surprise birthday party. At the party, she followed the guidance provided at the prior alcohol education classes by consuming less than one drink per hour. On that occasion, she consumed two to three glasses of wine over a five to six hour period. When she was later stopped by the police, she refused a breathalyzer test based on comments her attorney made in the earlier court proceeding. While she later regretted her decision to refuse the breathalyzer test, she admits that she acted improperly by drinking and driving on that occasion. She has accepted responsibility for her wrongdoing. Following her DUAC conviction in 2010, a licensed professional counselor evaluated her and determined she did not need alcohol treatment. She successfully completed ADSAP and did not consume alcohol during that program. While she has consumed alcohol following her second conviction, she credibly testified that she has not driven after drinking and indicated that she will not do so in the future. She did not consume alcohol for three weeks prior to the hearing. In short, she has acknowledged her alcohol-related issues, taken action to resolve them, and established a pattern of responsible use. Her misuse of alcohol is unlikely to recur. I find that AG ¶¶ 23(a) and 23(b) apply.

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).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant is a dedicated and hard working individual. She was employed throughout undergraduate and graduate school. Her prior and current employers speak very highly of her. She has made mistakes by drinking and driving. She has accepted responsibility for that misconduct and learned her lesson. She has indicated that she will not drink and drive in the future. I found her testimony both credible and compelling. Overall, the record evidence leaves me with no questions and doubts about Appellant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for Alcohol Consumption.

Formal Findings

Formal findings 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

Decision

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

James F. Duffy
Administrative Judge