



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



In the matter of:)
)
-----) ISCR Case No. 10-04261
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

09/10/2013

Decision

Harvey, Mark, Administrative Judge:

Applicant was convicted of driving under the influence of alcohol (DUI) on May 2, 2009. Applicant acknowledges he is an alcoholic. He ended his alcohol consumption on July 3, 2011. He has attended hundreds of Alcoholics Anonymous (AA) meetings. Applicant mitigated alcohol consumption concerns. Eligibility for access to classified information is granted.

Statement of the Case

On November 12, 2009, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On April 17, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The statement of reasons (SOR) alleged security concerns under Guideline G (alcohol consumption). (Hearing Exhibit (HE) 2) The SOR further informed Applicant that DOD adjudicators could not make the preliminary affirmative finding that it is clearly

consistent with the national interest to grant or continue his security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked. (HE 2)

On May 10, 2013, Applicant responded to the SOR. (HE 3) On July 11, 2013, Department Counsel indicated he was ready to proceed on Applicant's case. On July 15, 2013, the case was assigned to me. On July 29, 2013, DOHA issued a hearing notice, setting the hearing for August 8, 2013. (HE 1A) On August 8, 2013, DOHA issued an amended hearing notice, setting the hearing for August 15, 2013. (HE 1B) On August 15, 2013, Applicant's hearing was held as scheduled, using video teleconference. Department Counsel offered eight exhibits, and Applicant offered four exhibits. (Tr. 19, 21; GE 1-8; AE A-D) There were no objections, and I admitted GE 1-8 and AE A-D. (Tr. 19, 21) Additionally, I admitted the hearing notices, SOR, and Applicant's response to the SOR. (HE 1-3) On August 21, 2013, I received the transcript. The record was open until August 28, 2013, to permit Applicant to submit additional evidence. (Tr. 33) On August 28, 2013, I received an additional exhibit, which was admitted without objection. (AE D)

Findings of Fact¹

Applicant admitted the conduct alleged in SOR ¶¶ 1.a to 1.e, and he denied the allegation in SOR ¶ 1.f. He also provided some extenuating and mitigating information. (HE 3) He admitted that he was diagnosed as alcohol dependent, but clarified that he was in remission. He said he stopped consuming alcohol on July 3, 2011. His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 55-year-old software engineer, who is an employee of a government contractor. (Tr. 6, 9) He has held his current position with his employer since 2000. (Tr. 9) In 1976, he graduated from high school. (Tr. 7) In 1982, he was awarded a bachelor's of science degree in electrical engineering. (Tr. 7) He was married in 1983 and divorced in 1992. (Tr. 8) In 1996, he married his spouse. (Tr. 8) His five children are 13, 32, 33, 34, and 34 (twins). (Tr. 8) He has never served in the military. (Tr. 9; GE 1)

Alcohol Consumption

Applicant has a history of excessive and habitual alcohol consumption for many years. In 2001 and 2012, Applicant was diagnosed under Axis 1 as alcohol dependent (DSM 303.90) by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program or equivalent. (Tr. 24; GE 7, 8; AE C; SOR ¶¶ 1.a and 1.f) In 2003-2004, he was alcohol-free for about 18 months. (SOR ¶ 1.b) About 2004 or 2005, Applicant became depressed because of the death of his mother, and he resumed his

¹The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

alcohol consumption. (Tr. 24; SOR ¶ 1.c) In 2003, 2004, and 2011, Applicant successfully completed alcohol treatment and counseling programs. (GE 3)

On May 2, 2009, Applicant fell asleep while driving, and he was in a car accident. (Tr. 29, 32) His blood alcohol by breath analysis test indicated .14. (GE 7) The police arrested him for DUI and failure to provide proof of automobile insurance. (Tr. 29; SOR ¶ 1.d) He pleaded guilty and was sentenced to pay a fine, to complete community service, to attend an alcohol counseling program, and to comply with the terms of his probation for two years. Applicant did not have any problems at work due to his alcohol consumption. (Tr. 28) He continued to consume alcohol until July 3, 2011. (Tr. 24, 30-31; SOR ¶ 1.e)

Applicant has been sober for more than two years. (Tr. 24) He has attended hundreds of AA meetings in the past two years. (Tr. 25) He also attends monthly meetings at a non-AA alcohol counseling center. (Tr. 26) He fully understands and accepts that his alcohol consumption was an addiction, whereas before he had not completely accepted that he is unable to control his alcohol consumption. (Tr. 29) His attendance at AA meetings reinforces his conviction that he cannot consume any alcohol because if he does, he will be unable to control his alcohol consumption. (Tr. 29-30) He successfully completed his two-year, court-ordered probation.

On May 3, 2013, the alcohol treatment center clarified that their diagnosis was alcohol dependence in early full remission. (AE C) The evaluation noted his complete abstinence from alcohol consumption, regular AA involvement, and monthly attendance at an alcohol-therapy-related group activity. (AE C)

Character Evidence

Applicant's second level supervisor portrays him as professional, effective, diligent, customer-oriented, trustworthy, and responsible. (AE D) Applicant's evaluations from 1997 to 2012 corroborate this positive assessment. (AE D) There are no allegations of security violations or evidence that he abused illegal drugs.

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 meeting the criteria contained in the 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 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. Adverse clearance decisions are made "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. Nothing in this decision should be construed to suggest that I 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 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

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 could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

(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(b), 22(d), and 22(g) do not apply. Applicant did not have any alcohol-related incidents at work; a physician, clinical psychologist, or psychiatrist did not diagnose him with alcohol dependence; and he did not violate any court orders.

AG ¶¶ 22(a), 22(c), 22(e), and 22(f) apply. In 2009, Applicant was convicted of DUI. He engaged in binge and habitual alcohol consumption.² A licensed clinical social

²Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), <http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf>.

worker who is a staff member of a recognized alcohol treatment program or equivalent diagnosed him as alcohol dependent. He had relapses in 2004 and 2011 after being diagnosed as alcohol dependent.

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.

AG ¶¶ 23(a) and 23(b) apply. Applicant acknowledged his alcoholism, provided evidence of his actions to overcome his alcoholism through his attendance at hundreds of AA meetings and other therapy, and "established a pattern of abstinence." He completely terminated his alcohol consumption on July 3, 2011, more than two years ago. This is a sufficient period of abstinence to establish his alcohol consumption is "unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." Alcohol consumption security concerns are 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.

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. My comments under Guideline G are incorporated into my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline G, but some warrant additional comment.

Some facts weigh against reinstatement of his access to classified information. In 2001, he was diagnosed as alcohol dependent. In 2003, 2004, and 2011, Applicant successfully completed alcohol treatment or counseling programs; however, after the 2004 and 2011 programs, he resumed his alcohol consumption and relapsed. Applicant was convicted of DUI in 2009.

The evidence supporting reinstatement of his access to classified information is more persuasive. Applicant is a 55-year-old software engineer, who has worked for the same employer since 2000. His evaluations and supervisors describe him as reliable, trustworthy, professional, diligent, responsible, conscientious, mission-oriented, and honest. There are no allegations of security violations or evidence that he abused illegal drugs. I am confident that he has the ability to comply with security requirements. He is an intelligent person who knows what he must do to continue to maintain sobriety. He ended his alcohol consumption on July 3, 2011, and he has attended hundreds of AA meetings in order to reinforce his pattern of abstinence. He understands the importance of his sobriety and that a return to alcohol consumption will jeopardize his continued access to classified information.³ His sobriety for more than two years shows good judgment and has established his reliability, trustworthiness and ability to protect classified information. See AG ¶ 21. Alcohol consumption concerns are mitigated.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude reinstatement of Applicant's access to classified information is clearly consistent with national security.

³The Government can validate Applicant's abstinence status at any time through investigation and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. Violation of a promise made in a security context to maintain sobriety also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have authority to grant a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000). See also ISCR Case No. 04-03907 at 2 (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance" and citing ISCR Case No. 03-07418 at 3 (App. Bd. Oct. 13, 2004)). This footnote does not imply that this Applicant's clearance is conditional.

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: FOR APPLICANT

Subparagraphs 1.a to 1.f: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to reinstate Applicant's security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge