



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-07804
)
 Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on March 16, 2006. On October 29, 2007, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it is clearly consistent with the national interest to grant him access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to revoke his clearance. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guidelines G and J. 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 admitted all the allegations in the SOR and requested a hearing before an administrative judge. An administrative judge conducted a hearing on March 6, 2008, and determined that the security concerns under Guidelines G and J were mitigated. ISCR Case No. 07-03160 (Mar. 28, 2008).

In February 2010, Applicant was arrested for driving under the influence of alcohol (DUI). He was convicted in April 2010. On October 12, 2011, DOHA issued a second SOR, which included all the Guideline G and J allegations that were in the October 2007 SOR, and added allegations regarding his DUI arrest, conviction, and subsequent treatment in 2010-2011.

Applicant received the second SOR on October 19, 2011; answered it on November 7, 2011; and requested a determination on the record without a hearing. Department Counsel submitted the Government's written case on December 2, 2011. Included in the Department Counsel's submission was an amendment to the SOR. On December 5, 2011, a complete copy of the file of relevant material (FORM), including the amendment to the SOR, was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant also was requested to admit or deny the additional allegations in the amendment to the SOR. He received the FORM on December 9, 2011, and did not respond. The case was assigned to me on February 7, 2012.

Amendment of the SOR

The SOR was amended on December 2, 2011, to delete ¶ 3.a in its entirety and replace it with a new allegation, to delete ¶ 3.b in its entirety, and to add ¶ 1.k, cross-alleging the Guideline E allegations under Guideline G.

As amended, SOR ¶ 1.k alleges: "That information as set forth in subparagraph 3.a below."

As amended, SOR ¶ 3.a alleges:

In October 2007, you were issued a Statement of Reasons by the Defense Office of Hearings and Appeals that included allegations 1.a through 1.h, 2.b, and 2.c as set forth in this Statement of Reasons. On March 28, 2008, a DOHA Administrative Judge issued a favorable decision, granting you access to classified information. Despite this favorable decision, you continued drinking alcohol to excess, resulting in the DUI arrest as set forth in subparagraph 1.i above and the Alcohol Dependency diagnosis as set forth in subparagraph 1.j above.

Applicant did not respond to the amendment, and I have treated his lack of response as a denial of the allegations in the amendment.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR, except those added in the December 2011 amendment. His admissions are incorporated in my findings of fact.

Applicant is a 47-year-old employee of a defense contractor. He has worked for his current employer since November 1983. He received a security clearance in February 1985.

Applicant married in September 1987 and divorced in March 2003. Two children, ages 16 and 14, were born during the marriage. He completed a pipefitting apprenticeship at a shipyard in 1988, and he received an associate's degree from a community college in 1997. (Item 14 at 25.)

In September 1985, Applicant was arrested for driving under the influence (DUI). He was convicted, fined, and ordered to attend an alcohol safety action program (ASAP).

In October 1986, Applicant was arrested for DUI. He was convicted, fined, and ordered to attend ASAP.

In June 1993, Applicant was charged with assault and battery. This charge arose from a domestic disturbance and apparently was not alcohol-related. No verdict was entered, but Applicant and his wife were required to attend marital counseling for six months.

In June 1999, Applicant was charged with abduction and kidnapping, and assault and battery on a family member, as the result of an alcohol-related domestic disturbance. No verdict was entered, but Applicant was required to attend family counseling.

In August 2000, Applicant was arrested for DUI and possession of marijuana. The DUI charge was reduced to reckless driving. He was convicted of reckless driving and the marijuana offense. He was fined and required to attend ASAP.

In June 2002, Applicant was arrested for DUI. The charged was reduced to reckless driving. He was convicted of the reduced charge and fined.

In June 2003, Applicant was charged with DUI. After the charge was reduced to public drunkenness, he pleaded guilty and was fined.

In October 2003, Applicant was charged with urinating in public after he spent an evening drinking in a bar with friends. He was convicted and fined.

In May 2007, Applicant was charged with DUI, convicted, and sentenced to confinement for 180 days (suspended) and fined. His driver's license was suspended for 12 months and he was required to attend ASAP.

After the May 2007 conviction, Applicant was examined by a psychiatrist certified in treatment of addiction. He was diagnosed as alcohol dependent, prescribed medications for abstinence, and referred to an 18-session, nine-week outpatient treatment program. He completed the program, continued to take medication for abstinence, and attended Alcoholics Anonymous (AA) meetings regularly.

All of the above events were established by Applicant's admissions in response to the October 2007 SOR and his admissions at his DOHA hearing in 2008. (Items 11-14.) He admitted them again in response to the current SOR, and he did not dispute them after receiving the FORM.

In February 2010, Applicant was arrested for DUI. He had a blood-alcohol level of .13, well above the state limit of .08. In April 2010, he was convicted and sentenced to 15 days in jail, fined, and ordered to attend ASAP. He served his jail time on five consecutive weekends. His driver's license was suspended for 12 months, but a restricted license was authorized. (Item 5; Item 6 at 2.)

Applicant began a 26-week outpatient group therapy program in June 2010 and completed it in January 2011. He underwent seven urinalysis screenings and all were negative. Upon discharge from the program, he was diagnosed with alcohol dependence in early full remission. No prognosis was provided. (Item 7.)

In his response to the SOR, Applicant provided no information about his record of abstinence, AA attendance, or other aftercare after his completion of the treatment program in January 2011. He did not respond to the FORM.

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 eight alcohol-related incidents between September 1985 and February 2010 (SOR ¶¶ 1.a-1.g, 1.i). It also alleges that Applicant was diagnosed as alcohol dependent in 2007 and in 2011. (SOR ¶¶ 1.h and 1.j) Finally, it cross-alleges the conduct alleged in SOR ¶ 3.a (SOR ¶ 1.k).

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 evidence establishes the following disqualifying conditions under this guideline:

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;

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;

AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and

AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

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 criminal 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).

Applicant's alcohol-related incidents are numerous and did not occur under unusual circumstances that make them unlikely to recur. His most recent DUI occurred less than three years after he completed a nine-week outpatient treatment program. He apparently maintained sobriety while participating in the 26-week treatment program that he completed in January 2011. He has presented no evidence regarding his sobriety, AA attendance, or aftercare after he completed the 26-week treatment program in January 2011. Even if he has maintained sobriety for the past year, it is too soon to conclude that he has been rehabilitated, in light of his long history of alcohol-related incidents and previous relapse after counseling and treatment. I conclude that AG ¶ 23(a) is not 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 acknowledged his problems with alcohol dependence and has twice completed treatment programs for his alcohol dependence, but he has not established a sufficient pattern of abstinence after completing his most recent treatment. I conclude that AG ¶ 23(b) is not established.

Finally, security concerns under this guideline may be mitigated if “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(d). Applicant completed outpatient counseling programs in 2007 and again in 2011. He apparently abstained from alcohol for almost three years after completing the 2007 program. He provided no evidence regarding his abstinence, AA participation, or aftercare after completing the second program in January 2011. No prognosis was provided upon completion of either treatment program. I conclude that this mitigating condition is not established.

Guideline J, Criminal Conduct

The SOR cross-alleges SOR ¶¶ 1.a-1.g and 1.i under this guideline (SOR ¶ 2.a). It also alleges an arrest for assault and battery in June 1993 and an arrest for public urination in October 2003 (SOR ¶¶ 2.b and 2.c).

The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

Disqualifying conditions under this guideline include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant's long history of arrests and convictions establishes these two disqualifying conditions.

Security concerns under this guideline may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 32(a). They also may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community

involvement.” AG ¶ 32(d). Neither of these mitigating conditions is established, for the reasons set out in the above discussion under Guideline G.

Guideline E, Personal Conduct

The SOR, as amended, cross-alleges the conduct alleged in SOR ¶¶ 1.i and 1.j. The concern under this guideline is set in AG ¶ 15: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.”

Applicant’s history of alcohol-related criminal conduct establishes the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Security concerns raised by personal conduct may be mitigated if “(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). They also may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur. AG ¶ 17(d). Neither of these mitigating conditions is established, for the reasons set out in the above discussion under Guideline G.

Finally, security concerns under this guideline may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant’s record of arrests and convictions are a matter of public record and cannot be used to exploit or manipulate him. However, the likelihood of further alcohol-related incidents poses a significant risk that he will exercise questionable judgment or succumb to manipulation. I conclude that this mitigating condition is not established.

Whole-Person Concept

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. In applying 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.

I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who has worked for his current employer for more than 28 years and held a clearance for about 27 years, apparently without incident. He was given an opportunity to retain his clearance when he received a favorable decision from a DOHA administrative judge in March 2008. His most recent DUI conviction demonstrates that he is either unable or unwilling to control his alcohol dependence.

After weighing the disqualifying and mitigating conditions under Guidelines G, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on alcohol consumption, criminal conduct, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his 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): AGAINST APPLICANT

Subparagraphs 1.a-1.k: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge