



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-00328
)
 Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Dennis J. Sysko, Esq.

10/16/2012

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

Applicant submitted a security clearance application on September 21, 2010. On June 29, 2012, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it was clearly consistent with the national interest to continue his access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to continue or revoke his security clearance. DOHA set forth the basis for its action in a Statement of Reasons (SOR), 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 July 10, 2012; answered it on July 26, 2012; and requested a hearing before an administrative judge. DOHA received the request on August 1, 2012. Department Counsel was ready to proceed on August 22, 2012, and the case was assigned to me on August 30, 2012. DOHA issued a notice of hearing on September 6, 2012, scheduling it for September 27, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through E,¹ which were admitted without objection. DOHA received the transcript (Tr.) on October 4, 2012.

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 34-year-old employee of a defense contractor. He worked as an intern with his current employer from July 1999 to August 2000. He received a bachelor's degree in management science in May 2001, and he began full-time employment in December 2001. (GX 1 at 12-13.) He received a security clearance in June 2004. (GX 1 at 37-38.) In May 2011, he was promoted and assigned to a sensitive, high-visibility program providing direct support to troops deployed in a combat zone. The program requires conference calls with deployed units seven days a week and frequent briefings for high-level officials. (Tr. 29-30.)

Applicant and his wife work for the same defense contractor. Applicant's wife received a security clearance in 2007. (Tr. 90.) They met at work, began dating in 2005, started living together in 2006, and married in May 2008. They have a 22-month-old son and are expecting another child in January 2013.

Applicant began consuming alcohol in high school. In the early morning of September 14, 1996, his first month in college, he was cited for public intoxication after the police found him lying beside a road, heavily intoxicated. He was held in jail for about six hours and released on his own recognizance. In October 1996, he paid a \$25 fine and was required to perform 30 hours of community service. (GX 8; Tr. 34.)

In June 1997, Applicant was cited for underage possession of alcohol after police were called to quell a loud party at which he and other underage friends were consuming alcohol. The case was disposed of by *nolle prosequi*. (GX 7; Tr. 35.)

In December 2002, Applicant was cited for possession of an open container of alcohol in public as he and friends were walking home from a tailgate party. He was not intoxicated. After he completed eight hours of community service, the case was disposed of by *nolle prosequi*. (GX 2 at 6; GX 6; Tr. 36.)

¹ AX E consists of ten documents, marked as AX E-1 through AX E-10.

In April 2003, Applicant was stopped for speeding (40 miles per hour in a 25-mile-per-hour zone). The police officer smelled alcohol and noticed that Applicant's speech was slurred. Applicant failed a field sobriety test and registered a blood-alcohol content (BAC) of .11 in a breath test. He was charged with driving under the influence (DUI). He pleaded guilty and was sentenced to 30 days in jail (suspended), a \$750 fine (\$500 suspended), and placed on probation for 12 months. He was required to attend an alcohol safety action program (ASAP) and his driver's license was suspended for 12 months. (GX 5.)

In September 2004, Applicant was arrested for DUI. He pleaded guilty, paid a \$250 fine, and received probation before judgment. The charges were dismissed after he completed community service. His driver's license was suspended for 12 months, and he was required to obtain alcohol counseling. From February to June 2005, he attended a one-hour group counseling session once a week. He received no diagnosis or prognosis. (GX 2 at 5, 25-26.)

Applicant testified that his September 2004 DUI caused him to realize that he needed to change his behavior. He was in a serious relationship with his future wife, remodeling a house, assuming more responsibility at work, and making new friends among his coworkers. (Tr. 39.) His wife testified that their weekends moved away from the college-party lifestyle to a more "domesticated" lifestyle, in which they took care of the house, did the laundry, and cared for their son. (Tr. 92-93.) She also testified, "If we do have a social event, it's typically with people that we're working with. I mean we work -- we have very intense jobs and we're surrounding ourselves with people who share those common values." (Tr. 98-99.) Applicant moderated his alcohol consumption and had no alcohol-related incidents for six years.

On September 1, 2010, while on temporary duty away from home, Applicant was arrested for aggravated DUI (a BAC of .16 or more) and careless driving. (GX 4.) This arrest occurred after he arrived at the temporary duty station late in the evening and learned that the mission had been cancelled. He drove to a restaurant about two miles from his hotel, where he expected to meet a colleague for dinner. The colleague never arrived. Applicant ate dinner and consumed one drink of hard liquor and several beers while watching sports on television. He waited about an hour before leaving the restaurant, in order to allow the effects of the alcohol to wear off. He drove away from the restaurant, heading for his hotel, and was stopped by a police officer for speeding, weaving, and tailgating. He failed a field sobriety test and his breath test registered a BAC between .17 and .18. He was held in jail overnight. The next morning, he notified his facility security officer, supervisor, and wife of his arrest and detention. (Tr. 45.) He disclosed his arrest when he submitted his security clearance application three weeks later. (GX 1 at 34.)

Applicant's wife testified that after he was released and returned home, he told her: "This is the way it is going to be. This is what we are going to do. And we're going to move forward." (Tr. 96.) Applicant began attending Alcoholics Anonymous (AA) meetings four or five times a week. (Tr. 45.) In September and October 2010, he

voluntarily obtained weekly counseling from a medical professional recommended by his employer. He received no diagnosis or prognosis. (GX 2 at 5, 12.)

In November 2010, Applicant returned to the site of his DUI arrest for his trial, accompanied by his father. He pleaded guilty to DUI and was placed on probation for one year. He was required to perform 24 hours of community service, attend an alcohol education class, and attend a victim-impact panel. He continued to attend AA meetings until November 2011. (GX 2 at 21; GX 4; Tr. 42-44.) He completed all the court-ordered requirements. (AX A; AX B.)

Applicant abstained from alcohol until January 2011. He testified that abstaining from alcohol was much easier than he thought it would be. He then began occasionally consuming one or two drinks at a sitting. He testified that, after a long conversation with his wife, he decided to “have a couple of drinks every now and then” to demonstrate that he could be a responsible drinker. Applicant’s wife was familiar with the effects of alcohol abuse on a family before she married Applicant, because her brother had serious alcohol problems. (Tr. 113-14.)

At the hearing, Applicant estimated that he consumed alcohol in moderation on about ten occasions after January 2011. He decided to stop drinking on July 4, 2012, because he discovered that he no longer enjoyed it. He decided that “the hassle of making sure that everything is perfectly aligned” before consuming alcohol “doesn’t seem worth it.” He had not resumed his alcohol consumption as of the date of the hearing. He resumed his AA participation in July 2012 and now attends about one meeting a week. (Tr. 51-53, 79.)

Applicant testified that he and his wife socialize with young parents and professionals, and their social life is focused on “children and naptime and getting in bed at an early time.” (Tr. 54-55.) He avoids bars, and on occasion has declined social invitations to alcohol-centered events. (Tr. 84-85.) His wife described him as “an amazing father and an amazing husband.” (Tr. 106.)

Starting in February 2011, Applicant became the primary care-taker for his aged and disabled mother. About a year ago, Applicant’s wife, who was then seven or eight weeks pregnant, suffered a miscarriage, thrusting additional physical and emotional burdens on Applicant. In October 2011, his wife broke her foot, requiring that Applicant be the primary caregiver for her and their infant child. All these responsibilities have made Applicant focus on family responsibilities. (Tr. 55-58.) He testified that he stopped drinking while his wife was recovering because he “couldn’t be a position where someone needed a ride and [he] was not able to provide that ride.” (Tr. 58.)

On September 4, 2012, Applicant obtained an evaluation from a licensed clinical alcohol and drug counselor, but it did not include a diagnosis or prognosis. The counselor recommended that Applicant totally abstain from alcohol. (AX C.) On September 19, 2012, Applicant executed a “Statement of Intent” to never abuse alcohol

in the future, and he stated that he consented to automatic revocation of his security clearance if there should be “any violation with regard to alcohol use.” (AX D.)

Applicant’s senior manager, who had daily contact with him from July 2009 to October 2010 and weekly contact from October 2010 to the present, submitted a letter supporting continuance of Applicant’s security clearance. He described Applicant’s performance as “exemplary.” He stated that Applicant’s “work is impeccable, the results are consistently lauded by his clients, and he maintains a reputation for outstanding and professional work both within our company and with his clients.” He described Applicant as a reliable, trustworthy, and valuable employee. (AX E-1.)

A retired Army lieutenant colonel, who has 22 years of military service and 19 years as a defense contractor, has known Applicant since his initial employment as an intern. He considers Applicant an exceptionally talented, hard-working, dedicated, trustworthy, and mature employee. (AX E-2.)

A friend who has known Applicant since elementary school and was his college classmate introduced him to AA in September 2010. He described Applicant as a good friend and a dedicated spouse and father, with “good values to the core.” He believes that Applicant has been proactive in addressing his alcohol problems and now has the tools to move forward with his life. (AX E-3.)

Another long-time friend and professional colleague stated that Applicant retains his “upmost respect, trust, and confidence.” He has personally observed Applicant’s actions to overcome his alcohol-related problems, and recommends that his clearance be continued. (AX E-5.)

A friend since college, who is now a senior federal employee, is one of a group of five friends (including Applicant) who meet regularly for breakfast. He considers Applicant professionally competent, capable, a person of high integrity, and a “friend of the highest caliber.” He states that Applicants “trajectory in life is one of progress and improvement. (AX E-7.)

A former colleague from 2000-2004, who is now a senior civilian employee of the Army, regards Applicant as dependable and trustworthy. He is aware that Applicant “had a DWI a few years back,” but he is confident that Applicant has overcome his problems with alcohol and can be entrusted with classified information. (AX E-4.)

Another colleague, who has known Applicant for about four years, states that Applicant “demonstrates strong technical competence, depth of subject matter expertise, and [a] work ethic matched by few of his peers.” He has watched Applicant demonstrate his maturity, sound judgment, and respect for others. He regards Applicant as a mentor, a friend, and a dedicated family man. (AX E-6.)

A coworker, for whom Applicant has been a mentor for the past three years, has great trust and confidence in Applicant’s guidance on professional as well as personal

matters. He states that he “cannot speak highly enough” regarding Applicant’s loyalty, trustworthiness, good character, and integrity. (AX E-8.)

A currently-serving federal law enforcement agent, who worked for Applicant’s employer from 1998 to 2002, encouraged Applicant to work for their employer because they needed an intelligent, dependable, and hard-working individual for a specific project. He found that Applicant was mature, truthful, and trustworthy. (AX E-9.)

A former client of Applicant’s employer, who is now a senior federal employee and has known Applicant for more than eight years, stated that he has observed a “drastic change” in Applicant’s behavior over the past 18 months. He states that Applicant has become a role model and has recognized the importance of being a father. (AX E-10.)

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 and 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 that 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 was charged with aggravated DUI and careless driving in September 2010 and pleaded guilty to DUI (SOR ¶ 1.a); charged with DUI in September 2004 and received probation before judgment (SOR ¶ 1.b); charged with DUI in April 2003 and pleaded guilty (SOR ¶ 1.c); cited for possession of an open container of alcohol in December 2002 (SOR ¶ 1.d); cited for underage possession of alcohol in June 1997 (SOR ¶ 1.e); and cited for public intoxication in September 1996 (SOR ¶ 1.f).

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 following disqualifying conditions under this guideline are potentially relevant:

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;

AG ¶ 22(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;

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

AG ¶ 22(g): failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

The evidence set out in the above “Findings of Fact” establishes AG ¶¶ 22(a) and (c). AG ¶¶ 22(d) and (e) are not established, because Applicant has never had a diagnosis or evaluation of alcohol abuse or alcohol dependence. His DUI arrest in September 2010 was a “relapse” within the meaning of AG ¶ 22(f), but this disqualifying condition is not fully established because he has not received a diagnosis of alcohol abuse or dependence. AG ¶ 22(f) is not established because Applicant complied with all court orders that followed his alcohol-related behavior.

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 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 last alcohol-related incident was two years ago, which is a significant period of time. Six years of responsible alcohol use preceded his September 2010 arrest. He has alternated between responsible use and abstinence since his September 2010 arrest. He decided in July 2012 that abstinence was the best course of action for him, because he no longer enjoyed consuming alcohol and it was easier than carefully monitoring his consumption. I conclude that the first prong of AG ¶ 23(a) is established. The second prong (“so infrequent”) is not established, nor is the third (“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”).

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). Although Applicant has never received a diagnosis or evaluation of alcohol dependence or alcohol abuse, he has acknowledged that he has an alcohol problem. He voluntarily sought alcohol counseling in September and October 2010. He abstained for 11 months, tried responsible use without incident, but decided on his own that abstinence was his best course of action. He participated frequently in AA until November 2011, and he has recently resumed participation. I conclude that AG ¶ 23(b) is established.

Finally, security concerns under this guideline may be mitigated under AG ¶ 23(d) if:

[T]he 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.

This mitigating condition is partially established. Applicant has successfully completed outpatient counseling. He did not receive any treatment recommendations until September 2012. He has modified his alcohol consumption and recently decided to abstain. He is participating in AA. However, he did not present evidence of a favorable prognosis.

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 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 is a mature, well-educated, talented employee. He was candid, sincere, thoughtful, and remorseful at the hearing. After his September 2004 DUI, he obtained counseling, became seriously involved with the woman who became his wife, and moderated his alcohol consumption. His September 2010 DUI differed from his previous alcohol-related episodes, because it involved solitary drinking rather than social drinking, but the common denominator with his prior episodes was his inability or unwillingness to stop drinking before becoming intoxicated. Since September 2010, he has acted responsibly. He has a new circle of friends who are more interested in family and work than in partying and drinking. He has strong support from his wife, who has previously dealt with her brother's alcohol problems.

Applicant is a devoted father and husband. He has disclosed his alcohol problem to his colleagues, supervisors, family members and friends, minimizing the potential for pressure, coercion, exploitation, or duress. His "Statement of Intent" does not fall within any of the mitigating conditions under Guideline G, but it is analogous to the Statement of Intent for drug involvement in AG ¶ 26(b)(4) under Guideline H. It is a strong demonstration of his intent to refrain from further alcohol abuse. I am satisfied that recurrence is unlikely.

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 responsibility to decide close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on alcohol consumption. Accordingly, I conclude he has 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): **FOR APPLICANT**

Subparagraphs 1.a-1.f: **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