



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



In the matter of:)
)
-----) ISCR Case No. 11-05750
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

01/09/2013

Decision

Harvey, Mark, Administrative Judge:

From December 2009 to November 16, 2011, Applicant was admitted on five occasions to an emergency room for acute alcohol intoxication, and in May 2010, he was diagnosed as alcohol dependent. Recently, he made some very positive changes in his life. On March 22, 2012, he ended his alcohol consumption; he attends at least two Alcoholics Anonymous (AA) meetings each week; he talks to his AA counselor almost every day; and he attends therapy twice a week. Nevertheless, more time abstaining from alcohol is necessary before alcohol consumption concerns will be fully mitigated. Eligibility for access to classified information is revoked.

Statement of the Case

On August 30, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On September 12, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to 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* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The 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 it is clearly consistent with the national interest to grant or continue Applicant's 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.

On October 19, 2012, Applicant responded to the SOR. On November 8, 2012, Department Counsel requested a hearing. On November 9, 2012, Department Counsel indicated he was ready to proceed on Applicant's case. On November 19, 2012, Applicant's case was assigned to me. On November 27, 2012, DOHA issued a hearing notice, setting the hearing for December 18, 2012. Applicant's hearing was held as scheduled. Department Counsel offered six exhibits, and Applicant offered one exhibit. (Tr. 15-17; GE 1-6; AE A) There were no objections, and I admitted GE 1-6 and AE A. (Tr. 15, 17) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. On December 28, 2012, I received the transcript.

Findings of Fact¹

Applicant admitted the conduct alleged in SOR ¶¶ 1.a to 1.f, and he provided some extenuating and mitigating information. 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 31-year-old parts buyer employed by a major defense contractor for the last four and a half years. (Tr. 5, 20) In 2000, he graduated from high school, and in 2004, he earned a bachelor's degree in business. (Tr. 5) In 2004, he married, and he does not have any children. (Tr. 20) His annual salary is about \$50,000. (Tr. 21) He has never served in the military. (Tr. 6) He has held a secret or interim secret clearance for four and a half years. (Tr. 6)

Alcohol consumption

Applicant consumed alcohol from high school to March 22, 2012. (SOR response to ¶ 1.a) He consumed alcohol at a responsible level until 2009. He drank alcohol at home and not in public places. (Tr. 29-30) In December 2009, Applicant's spouse took him to the emergency room for acute alcohol intoxication. (Tr. 23) He received inpatient alcohol treatment and counseling for ten days. (Tr. 23) A physician at the treatment center told him he was an alcoholic and recommended he abstain from alcohol consumption. (Tr. 24) He maintained sobriety after that hospital admission for one or two months. (Tr. 24)

Applicant's medical records reflect that he told his attending physician that for "the last two weeks or so he has been sipping alcohol [at] work and yesterday he had a

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

binge.” (Tr. 25) Applicant did not recall making this statement to a physician; however, he may have been intoxicated and made the statement. (Tr. 26) Sometimes he did not recall being questioned or traveling in an ambulance to the emergency room. (Tr. 47) In any event, he denied consuming alcohol at work, bringing alcohol to work, and coming to work under the influence of alcohol, and there was no evidence from his employer contradicting his statements denying alcohol consumption at work. (Tr. 25-27) Applicant conceded there may have been alcohol in his blood when he came to work, and on several occasions in 2010 and 2011, he could have been 30 minutes late at times or called in sick for work because of alcohol consumption. (Tr. 27-28)

In January 2010, on May 26, 2010, August 9, 2010, and November 16, 2011, Applicant was binge drinking. (Tr. 22, 28; SOR response to SOR ¶¶ 1.c to 1.e) He was taken to the emergency room and diagnosed as suffering from acute alcohol intoxication. (Tr. 22, 28; SOR response to SOR ¶¶ 1.c to 1.e) On August 9, 2010, Applicant was brought to the emergency room by ambulance. (GE 6 at 67, 74) His blood alcohol test (BAT) was 418.8 H². (GE 6 at 83) Fatalities have been reported at over 400 mg/dl. (GE 6 at 83) His medical history notes that patient is 12-days sober, has consumed “massive amounts of ETOH,” and “has had ETOH levels as high as .500.” (GE 6 at 67)

In February 2010, Applicant received inpatient treatment, and in May 2010, his treating physician diagnosed him as alcohol dependent. (SOR response to SOR ¶ 1.b; GE 6 at 28) Despite his diagnosis of alcohol dependence, Applicant continued to consume alcohol until March 22, 2012. (Tr. 22; SOR response to SOR ¶ 1.f; GE 5)

Applicant met with an alcohol or aftercare counselor once a week from February 2010 until early in 2012, and then he met with the same counselor twice a week until the present. (Tr. 30, 32) The counselor verified Applicant’s attendance, but did not provide a prognosis. (GE 3) He also began attending AA meetings once a week from February 2010 to early in 2012. (Tr. 32) His counselor was aware of Applicant’s relapses. (Tr. 30; GE 3) Applicant has never been arrested for alcohol-related conduct. (Tr. 31) He has not received any professional medical prognosis about his likelihood of relapse or his continued maintenance of sobriety. (Tr. 34)

Applicant’s AA sponsor corroborated Applicant’s statement that he has been sober since March 22, 2012. (Tr. 39) He began working with Applicant on March 22, 2012, and he talks to Applicant at least five times each week. (Tr. 39, 41) Applicant has undergone a “huge change” in attitude. (Tr. 39) He verified Applicant’s sobriety since March 22, 2012. (Tr. 39)

Applicant attributed his ability to refrain from alcohol consumption after March 22, 2012 to his firm commitment to AA. (Tr. 31-33) From early 2012 to present, Applicant increased his attendance at AA meetings to at least twice a week. (Tr. 32) His spouse does not consume alcohol, and they do not have any alcohol in their home. (Tr. 35) His spouse is very supportive of Applicant’s rehabilitative efforts. (Tr. 46) He intends to continue to abstain from alcohol consumption, to attend AA meetings, and to meet with his counselor. (Tr. 36)

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(e), 22(f) and 22(g) do not apply. Applicant did not have any alcohol-related incidents at work, and he did not violate any court orders concerning his alcohol consumption. A licensed clinical social worker did not diagnose Applicant's alcohol problem as alcohol abuse or dependence. Applicant completed some inpatient alcohol treatment and had several periods of a month or two of sobriety after December 2009; however, his alcohol counseling and treatment is ongoing and is incomplete. He has not suffered a relapse because his alcohol treatment and therapy is continuing.

Applicant had several alcohol-related "incidents of concern" where he became acutely intoxicated and received emergency medical treatment. He habitually engaged in binge-alcohol consumption to the extent of impaired judgment.² AG ¶¶ 22(a), 22(c), and 22(d) apply. The allegations in SOR ¶¶ 1.a to 1.f are established.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) 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.

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>.

AG ¶¶ 23(a) to 23(d) apply in part because he has recently made some very positive changes in his life. On March 22, 2012, he ended his alcohol consumption; he attends two AA meetings each week; and he attends two therapy meetings each week with his alcohol counselor. He also receives some credit because, “it happened under such unusual circumstances,” as he has somewhat matured and recognized that he is an alcoholic and must abstain from alcohol consumption.

Alcohol consumption concerns are not fully mitigated because of his history of alcohol consumption, and not enough time has elapsed without alcohol consumption to establish his alcohol consumption is under control. There is still a significant possibility that alcohol-related problems will recur, and his history of excessive alcohol consumption continues to cast doubt on Applicant’s current reliability, trustworthiness, and good judgment.

After careful consideration of the Appeal Board’s jurisprudence on alcohol consumption, I conclude Applicant’s multiple instances of acute alcohol intoxication, diagnosis of alcohol dependence, and primarily, the passage of insufficient time of sobriety cause lingering doubts about mitigation of Applicant’s alcohol-consumption security concerns.

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 the 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 those guidelines, but some warrant additional comment.

There is considerable evidence supporting reinstatement of Applicant’s access to classified information. Applicant is a 31-year-old buyer of parts employed by a major defense contractor for the last four and a half years. In 2004, he earned a bachelor’s degree in business. He has held a security clearance for four and a half years without security violations. He did not commit alcohol-related criminal offenses. He did not

consume alcohol at work. From early 2012 to present, he increased his attendance at AA meetings and his meetings with his alcohol counselor from once a week to at least twice a week. He has abstained from alcohol consumption since March 22, 2012. His spouse does not consume alcohol, and they do not have any alcohol in their home. His spouse is very supportive of Applicant's rehabilitative efforts. He intends to continue to abstain from alcohol consumption, to attend AA meetings, and to meet with his counselor. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security.

The evidence against reinstatement of Applicant's clearance is more substantial than the evidence supporting reinstatement. In December 2009, January 2010, on May 26, 2010, August 9, 2010, and November 16, 2011, Applicant was binge drinking and was taken to the emergency room and diagnosed as suffering from acute alcohol intoxication. On August 9, 2010, Applicant's BAT showed a 418.8 H² result, which is near a fatal level of alcohol consumption. His medical history indicates this was not the first time he risked death by excessive alcohol consumption. In May 2010, his treating physician diagnosed him as alcohol dependent. Nevertheless, he continued to consume alcohol until March 22, 2012. Excessive alcohol consumption shows a lack of judgment, rehabilitation, and impulse control. His problems with alcohol cannot be fully mitigated at this time because more time without alcohol consumption is necessary.

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 not warranted at this time.

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:	AGAINST APPLICANT
Subparagraphs 1.a to 1.f:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to reinstate Applicant's security clearance. Eligibility for access to classified information is revoked.

MARK HARVEY
Administrative Judge