



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



In the matter of:)
)
-----) ISCR Case No. 11-12875
)
Applicant for Security Clearance)

Appearances

For Government: Caroline Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

06/10/2013

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Applicant has a serious problem with alcohol as well as four incidents of alcohol-related criminal conduct during 1998–2012. He stopped drinking alcohol in December 2012, and he has taken the initial steps toward establishing a pattern of abstinence. He did not present sufficient evidence to explain and mitigate the concerns about his fitness and suitability to hold a security clearance. For the reasons discussed below, this case is decided against Applicant.

Statement of the Case

On February 13, 2013, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly

consistent with the national interest to grant him access to classified information.¹ The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline G for alcohol consumption, Guideline J for criminal conduct, and Guideline E for personal conduct. The Guideline J and E matters consist of cross-allegations to the matters alleged under Guideline G.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 23, 2013. The hearing took place by video teleconference as scheduled on May 23, 2013. The transcript (Tr.) was received on June 7, 2013.

Findings of Fact

Applicant's answer to the SOR was mixed. He admitted the factual allegations under Guideline G for alcohol in SOR ¶¶ 1.b and 1.d, but he denied the factual allegations in SOR ¶¶ 1.a and 1.c with explanations. He also denied the general allegations under Guidelines J and E, asserting that he is a law-abiding person who is honest and trustworthy. His admissions are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 45-year-old employee of a federal contractor. He has a high school education. His employment record includes honorable service in the U.S. Air Force during 1989–1995. He is employed as a special-repair technician. His company is sponsoring him for a security clearance for this job, which he began in 2011. He submitted a security clearance application in July 2011.²

There is substantial evidence establishing that Applicant has a history of alcohol-related criminal conduct as follows:³

1. He was arrested and charged with driving under the influence of alcohol (DUI)⁴ in 1998; his blood-alcohol concentration (BAC) was measured at .11% and .12%

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibit 1.

³ Exhibits 1–6.

⁴ Under the relevant state statute for DUI, it is unlawful for anyone (a) to drive a vehicle under the influence of any alcoholic beverage or drug or (b) to drive a vehicle with 0.08%, by weight, of alcohol in their blood.

when he was arrested.⁵ His sentence included three years of probation. This incident was not alleged in the SOR.⁶

2. He was arrested and charged with DUI in 2002; his BAC was measured at .18% and .19% when he was arrested. He pleaded no contest and was found guilty of driving with 0.08% or greater of alcohol in his blood. His sentence included 60 months of conditional/revocable release (summary probation), 14 days of jail, a fine, and 18 months of restricted driving privileges.
3. He was arrested and charged with DUI in 2011; his BAC was measured at .20% and .22%. He pleaded no contest and was found guilty of driving with 0.08% or greater of alcohol in his blood. His sentence included conditional/revocable release (summary probation) for 36 months and 96 hours of jail (stayed). The summary probation began in December 2011.
4. He was cited or arrested (or both) for the offense of public intoxication in July 2012.⁷ His BAC was measured at .29% at the local county jail. He explained the incident stemmed from celebrating his birthday at a neighbor's residence. It was the opinion of the deputy sheriff that Applicant was in such a condition that he was unable to exercise care for his own safety or the safety of others due to intoxication. The matter was resolved with Applicant's release per the local law. He did not report the incident to probation or court officials, explaining that "No, I did not. I mentioned it to my lawyer, that's about it. I'm not going to volunteer that kind of information."⁸

In addition, SOR ¶ 1.c alleged that Applicant reported for work intoxicated in December 2004, which resulted in his supervisor reprimanding him and sending him home. He denies being intoxicated, and explained at the hearing that he went to work on a Saturday, unexpectedly, after attending a company holiday party the night before. He stated that he was tired or had a hangover, but he was not intoxicated.⁹

Applicant stopped drinking alcohol in December 2012. He was last intoxicated in July 2012, as discussed above. He is attending Alcoholics Anonymous (AA) on an irregular basis, about two to three times per month. He has two sponsors at AA, one of

⁵ Exhibit 2 at 35 and 37.

⁶ Because the 1998 DUI is not alleged in the SOR, I considered it for the limited purposes of (1) assessing the full extent of Applicant's alcohol-related criminal conduct, (2) evaluating his evidence of reform and rehabilitation, and (3) under the whole-person concept (e.g., frequency of the conduct).

⁷ Exhibit 4.

⁸ Tr. 35.

⁹ On this basis, there is not substantial evidence to prove Applicant was intoxicated. And it appears he did not expect to work that Saturday, but reported to work on short notice. For these reasons, this is not an alcohol-related incident of security concern. Accordingly, SOR ¶ 1.c is decided for Applicant.

whom is his brother. Between two sponsors and his mother, he believes he has a good support system in place. He enjoys not drinking alcohol, and he believes he is thinking clearer and is more productive at work.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁰ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹² An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹³

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁴ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁵ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁶ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁷ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁸ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁹

¹⁰ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

¹¹ 484 U.S. at 531.

¹² Directive, ¶ 3.2.

¹³ Directive, ¶ 3.2.

¹⁴ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁵ Directive, Enclosure 3, ¶ E3.1.14.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ *Egan*, 484 U.S. at 531.

¹⁹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²⁰ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The alcohol consumption and criminal conduct concerns are discussed together because they are factually interrelated. Under Guideline G for alcohol consumption,²¹ the security concern is that excessive alcohol consumption often leads to the exercise of questionable judgment or failure to control impulses, and it can raise questions about a person's reliability and trustworthiness. And under Guideline J for criminal conduct,²² the security concern is that criminal activity creates doubt about a person's judgment, reliability, trustworthiness, and ability or willingness to comply with laws, rules, and regulations.

Applicant has a serious problem with alcohol. This is rather obvious in light of: (1) the four incidents of alcohol-related criminal conduct during 1998–2012; (2) the BAC levels during the four incidents; and (3) the recent 2012 public intoxication incident while on probation for his third DUI conviction. His adverse history with alcohol raises concerns under the following Guideline G and Guideline J disqualifying conditions:

AG ¶ 22(a) alcohol-related incidents away from work, such as driving while under the influence, . . . ;

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 ¶ 31(a) a single serious crime or multiple lesser offenses;

²⁰ Executive Order 10865, § 7.

²¹ AG ¶¶ 21, 22, and 23 (setting forth the security concern and the disqualifying and mitigating conditions).

²² AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

AG ¶ 31(d) individual is currently on parole or probation.²³

Both guidelines also contain certain conditions that may mitigate security concerns. Based on the evidence, none of the mitigating conditions are sufficient to fully mitigate the concerns. With that said, Applicant receives credit for stopping drinking in December 2012 and for his attendance at AA. He appears to be making a sincere effort to abstain from alcohol and remain sober, and I applaud him for his efforts.

Nevertheless, the evidence in disqualification is more persuasive. His four incidents of alcohol-related criminal conduct are not minor or trivial. They cannot be mitigated or explained away by the passage of time at this point. Considering the seriousness, frequency, and recency of the four incidents, it is simply too soon to tell if Applicant will abstain from alcohol (or use it responsibly) and be a law-abiding person in the future. This is especially so given his status as a probationer until December 2014, a circumstance that militates against a favorable clearance decision.

Under Guideline E for personal conduct,²⁴ the SOR cross-alleges the matters alleged under Guideline G for alcohol consumption. These matters are discussed above and will not be repeated here; the same rationale is applicable.

Applicant's extensive and long-standing history of alcohol-related criminal conduct raises serious doubt about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve that doubt in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²⁵ Having done so, I conclude that Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline G: Against Applicant

²³ I did not consider AG ¶ 31(e), because there is no evidence that the court with jurisdiction over Applicant's current probation has found him in violation of the court's probation order.

²⁴ AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

²⁵ AG ¶ 2(a)(1)–(9).

Subparagraphs 1.a, 1.b, 1.d:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	Against Applicant
Subparagraph 3.a:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge