



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



In the matter of:)
)
) ISCR Case No. 15-04476
)
Applicant for Security Clearance)

Appearances

For Government: Carroll Connelly, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2017

Decision

Curry, Marc, Administrative Judge:

Given the amount of Applicant's current alcohol consumption and the frequency of his alcohol-related criminal conduct, it is too soon to conclude that he has mitigated the security concern. Eligibility for access to classified information is denied.

Statement of the Case

On May 3, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR), alleging security concerns under Guideline G (alcohol consumption) and Guideline E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

On June 2, 2016, Applicant responded to the SOR, denying all of the allegations except subparagraphs 1.b, 1.d, and 1.e. He requested a hearing, and on December 6 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On February 9, 2017, DOHA issued a notice of the hearing, setting the hearing for February 27, 2017. The hearing was held as scheduled. As a preliminary matter, the Government withdrew Paragraph 2 of the SOR, which contained the alleged security concerns pertaining to personal conduct. (Transcript (Tr.) at 7) I received four Government exhibits

(GE 1 - 4), and I considered Applicant's testimony. I received the Tr. of the hearing on March 8, 2017.

Findings of Fact

Applicant is a 50-year-old married man with two adult children. He is a high school graduate who served in the U.S. Navy on active duty from 1984 through 1989, and in the active reserve from 1988 to 1999. He was honorably discharged. (Tr. 15) Since August 2008, Applicant has worked for a defense contractor in the information technology field. Currently, he is a senior professional engineer. (Tr. 15) He has held a top secret clearance since 1984.

Applicant has a history of alcohol-related misconduct. In October 2007, he was arrested and charged with driving under the influence of alcohol (DUI) after a police officer stopped him after observing his car weaving from lane to lane. Subsequently, the court fined Applicant \$630 and required him to take a driving education course. (GE 2 at 4)

In September 2010, Applicant was stopped by a police officer who suspected that he was driving while under the influence of alcohol. Because the Applicant was close to his home, the police officer allowed him to park the vehicle and walk home, rather than administer a roadside sobriety test. (Tr. 33) Applicant was, however, charged with reckless driving and fined \$510.

In March 2011, Applicant was arrested after being charged with possession of drug paraphernalia and open container. Immediately before the arrest, Applicant had been drinking beer with friends in the courtyard of an apartment complex that he managed for his mother, who owned it. When he walked across the street to his car to retrieve a pack of cigarettes, a police officer stopped him. Applicant admits having an open beer in his hand, but does not admit possessing any drug paraphernalia. (Tr. 18) The charges were later dropped. (Tr. 19) As a result of this incident, Applicant was suspended from his then-job for four weeks. (Tr. 33)

One afternoon in November 2013, Applicant drank a six-pack of beer. That evening, he decided to visit a friend. Contrary to his wife's advice, he drove to his friend's house. While at the friend's home, Applicant drank a pint of liquor. While driving home, Applicant was stopped by the police and charged with the following: 1) possession of open container of alcohol in a vehicle; 2) operating a vehicle while impaired; 3) DUI; and 4) driving without a permit. (Answer at 1) His blood/alcohol content at the time of the arrest was approximately .20 percent. (Tr. 28) Subsequently, Counts 1 and 3 were dropped, and Applicant was sentenced to 210 days incarceration, with all but ten days suspended, ordered to pay a fine, and ordered to complete probation through July 2015. (GE 2 at 4; Tr. 17) As part of Applicant's probation, he had to take an alcohol education course. (Tr. 18) Applicant successfully completed the probation requirements.

As of January 2015, Applicant was drinking approximately 12 beers every weekend. As of the hearing date, he has been drinking six beers every weekend. He has

never been diagnosed or evaluated as either alcohol dependent or alcohol abusive. (Tr. 39)

Applicant testified that he gained an increased understanding, through his alcohol education classes, of the harm that alcohol abuse can cause, and the danger that driving while intoxicated can pose to others. (Tr. 3) He still keeps in touch with the counselors at the alcohol education center. (Tr. 39)

Applicant is active in his community, participating in a charitable organization that feeds the homeless and distributes holiday meals to the needy. Occasionally, Applicant will grocery shop for neighborhood senior citizens. (Tr. 35)

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, “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 applicant’s 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 adjudicative guidelines. 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, 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 “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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about 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).

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.

Analysis

Alcohol Consumption

Under this guideline, “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.” Applicant’s history of alcohol-related arrests and citations triggers the application of AG ¶¶ 22(a), “alcohol-related incidents away from work, such as driving while under the influence . . . or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” and 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.”

The potentially applicable mitigating conditions are set for in AG ¶¶ 23(a) and 23(b), as follows:

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; and

(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).

In the context of Applicant's entire adult life, his episodes of alcohol-related misconduct have been infrequent. Conversely, they have all occurred within the past ten years, which is more troubling than if they had occurred long ago when he was in his late teens to early twenties. Moreover, by 2011 Applicant was acutely aware of the negative career consequences that alcohol abuse can pose, as his arrest that year prompted his employer to suspend him. Yet, he was arrested again, charged with DUI, and ultimately convicted, less than three years later. (subparagraph 1.b).

As recently as January 2015, Applicant was drinking 12 beers per week. This amount of alcohol consumption, less than two years after an alcohol-related conviction resulted in prison time and probation, undermines his testimony that he internalized the lessons taught during his alcohol education classes, taken as part of his probation requirements.

In sum, Applicant is a civic-minded individual who has a history of volunteering in his community. He is a veteran who has held a security clearance for more than 30 years. However, his current alcohol consumption is too high, given the recency and frequency of his alcohol-related criminal episodes, for either AG ¶ 23(a) or AG ¶ 23(b) to apply. Applicant has failed to mitigate the alcohol consumption security concern.

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.e:	Against Applicant
Paragraph 2, Guideline E:	WITHDRAWN

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Marc Curry
Administrative Judge