



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



In the matter of:

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ISCR Case No. 15-04720

Applicant for Security Clearance

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel

For Applicant: John V. Berry, Esq.

11/29/2016

Decision

RIVERA, Juan J., Administrative Judge:

In 2008 and 2012, Applicant was arrested for driving under the influence of alcohol (DUI). He attended alcohol-related classes, and he currently drinks alcohol responsibly. There was no diagnosis of alcohol abuse or dependence. He committed to not driving after consuming alcohol. Alcohol consumption and criminal conduct security concerns are mitigated. Access to classified information is granted.

History of the Case

Applicant submitted his most recent security clearance application (SCA) on August 13, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant a clearance. On December 4, 2015, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline G (alcohol consumption) and Guideline J (criminal conduct).¹

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

Applicant answered the SOR on December 22, 2015, and requested a hearing before an administrative judge. The case was assigned to me on April 12, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 19, 2016, scheduling a hearing for May 19, 2016.

At the hearing, the Government offered four exhibits (GE 1 through 4). GE 4 is the Government's discovery letter that was marked and made part of the record, but it will not be considered as evidence. Applicant testified, and submitted eight exhibits (AE) A through H. (AE F, G, and H were received post-hearing.) All exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on June 1, 2016. The record closed on June 3, 2016.

Findings of Fact

In Applicant's response, he admitted the allegations in SOR ¶¶ 1.a and 1.b. He did not address SOR ¶ 2.a, which cross-alleged the same facts alleged in SOR ¶¶ 1.a and 1.b. I considered SOR ¶ 2.a admitted. Applicant's admissions are accepted as findings of fact.

Applicant is a 35-year-old employee of a defense contractor. His duties include facilitation of meetings, tracking sales, and answering information technology (IT) questions. He has worked for his employer for 30 months. Applicant graduated from high school in 1998, and received a bachelor's degree in 2014. He has never married, and he does not have any children.

Concerning his alcohol consumption allegations, Applicant explained that in February 2008, he was celebrating a friend's graduation at a restaurant where he consumed alcohol. He consumed six or seven beers and one or two shots of alcoholic beverages over about four hours. He believed he could safely drive about two miles to his home. He failed to signal a turn, and the police stopped him. He was arrested and charged with DUI. He pleaded guilty and received probation before judgment from the court. From April 2008 to November 2008, he attended 26 alcohol-related classes. He did not receive any one-on-one alcohol-related counseling. After completing the terms of his probation before judgment, his DUI charge was dismissed. (AE A)

On October 5, 2012, Applicant consumed eight or nine vodka tonics, and then he drove away from a bar. He failed to stop at a stop sign, and the police stopped him. The police tested his breath, and the result was .18 for blood alcohol content (BAC). He was charged with DUI. That BAC was subsequently "stricken." In the summer of 2013, he completed a 12-week alcohol-related class. Applicant testified that his post-2012 DUI classes were much more effective than those he received after his DUI in 2008. (Tr. 33-36, 48; AE C) In January 2013, he pleaded guilty to DUI, and he received a sentence of 180 days in jail (176 days suspended), a \$1,500 fine (\$1,000 suspended), and 12 months of suspension of his driver's license. He subsequently received a restricted driver's license. (AE B)

Applicant disclosed his 2008 DUI on his May 20, 2009 SCA. He disclosed both his 2008 and 2012 DUIs in his August 13, 2014 SCAs, and during his February 10, 2015 interview with a government background investigator. (GE 1-3) He took responsibility for the two DUIs; he acknowledged he showed very poor judgment when he drove after consuming alcohol; and he completed all court-ordered requirements, including paying fines and the completion of alcohol-related classes.

After the 2012 DUI, Applicant matured; he moved to the suburbs; he became closer to his family; and he returned to church attendance. His friends have families and are less involved in alcohol consumption than the younger single work-related friends he spent his free time with before 2012. Applicant testified that he reduced his alcohol consumption, and now he drinks alcohol once or twice a week. He also reduced the magnitude of his alcohol consumption to two or three drinks. He avoids situations where he might be tempted to drive after consuming alcohol. He has not driven after consuming alcohol after his 2012 DUI. He uses taxi services when he has consumed alcohol. He is remorseful for his DUIs.

Applicant provided a signed statement of intent with automatic revocation of clearance for any future DUI. (AE E) He did not receive a diagnosis of alcohol abuse or dependence after compliance with the court ordered alcohol-related classes.

Applicant's employee performance evaluations have been excellent, and he has received pay increases. He has never received any disciplinary actions at his employment. (AE D) Applicant's sister has lived with Applicant for four years. She believes that he has matured and become more responsible after his 2012 DUI. Since then, he consumes alcohol less frequently, and he does not drive after he consumes alcohol. Applicant's close friend of 12 years, his cousin, and a project manager at his employment described the reduction in his alcohol consumption and his responsible alcohol consumption after 2012. They lauded Applicant's trustworthiness, responsibility, and loyalty. (AE F-AE H)

Policies

Eligibility for access to classified information may be granted "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. 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).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration

of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

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."

Two alcohol consumption disqualifying conditions under AG ¶ 22 could raise a security concern and may be disqualifying in this case:

- (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; and
- (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.

Applicant admitted and the evidence establishes that in 2008 and 2012, he was arrested for DUI. His level of alcohol consumption established that he engaged in binge-

alcohol consumption to the extent of impaired judgment.² AG ¶¶ 22(a) and 22(c) are established by the evidence.

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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access

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>.

to classified information will be resolved in favor of the national security.”
Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 23(a) applies. Applicant was arrested for DUI in 2008 and 2012. He pleaded guilty to both DUIs, although he only had one DUI conviction because the first DUI charge was dismissed after he completed all of the probation before judgment requirements. After 2012, Applicant has been consuming alcoholic beverages more responsibly. He committed to not driving after consuming alcohol, and a DUI is unlikely to recur because of this change in circumstances. Some of his lifestyle changes after 2012 include: moving to the suburbs; attending church; associating with people with families; decreasing his association with single people at drinking establishments; and reducing the frequency and magnitude of his alcohol consumption. He has demonstrated remorse for his DUIs and has taken responsibility for his past misconduct.

Applicant attended and successfully completed alcohol-related classes. He provided a signed statement of intent with automatic revocation of clearance for any future DUI. He did not receive a diagnosis of alcohol abuse or dependence. Applicant has eliminated doubts about his current reliability, trustworthiness, and good judgment. Alcohol consumption security concerns are mitigated.

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶¶ 31(a) and 31(c) apply. SOR ¶ 2.a cross alleges the same conduct as alleged in SOR ¶¶ 1.a and 1.b and discussed in the previous section. In 2008 and 2012, Applicant committed DUIs, which are misdemeanor-level crimes.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(a) 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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;

(c) evidence that the person did not commit the offense; and

(d) 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.

For the same reasons discussed under the alcohol consumption guideline, incorporated herein, I find that AG ¶¶ 32(a) and 32(d) apply. Criminal conduct security concerns are mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. (AG ¶¶ 2(a) and 2(c)) I have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of the factors in AG were addressed under those guidelines, but some warrant additional comment.

Applicant is a 35-year-old employee of a defense contractor. He has worked 30 months for his employer. His employee performance evaluations are excellent; he has received pay increases; and has received no disciplinary actions. His sister, a close friend of 12 years, his cousin, and a project manager at his employment described his reduction in alcohol consumption and his responsible alcohol consumption after 2012. They lauded his trustworthiness, responsibility, and loyalty.

In 2008 and 2012, Applicant committed DUIs, which are misdemeanor-level criminal offenses. He attended alcohol-related classes, and after 2012, he drinks alcohol responsibly. He reduced the frequency and magnitude of his alcohol consumption. There was no diagnosis of alcohol abuse or dependence. He has not had any alcohol-related incidents involving the police and courts since 2012. He expressed remorse about his DUIs, and he sincerely committed to not driving after consuming alcohol. Applicant provided a signed statement of intent with automatic revocation of clearance for any future DUI. He has established his current reliability, trustworthiness, and good judgment. I believe such incidents are unlikely to recur. Alcohol consumption and criminal conduct security concerns are mitigated.

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: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Paragraph 2, Guideline J:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge