



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-05025
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/24/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline G (Alcohol Consumption). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 5, 2014. On December 16, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline G. The DOD acted under Executive Order (Exec. Or.) 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 DOD on September 1, 2006. The guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on January 25, 2015, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on March 7, 2016. On March 8, 2016, a complete copy of the file of relevant

material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. The FORM included the SOR (Item 1), two administrative documents (Items 2 and 3), Applicant's answer to the SOR (Item 4), his SCA (Item 5), his arrest records (Items 6-10) and a summary of personal subject interviews (PSI) on February 5 and February 12, 2015 (Item 11). He received the FORM on March 16, 2016, and did not respond.¹ The case was assigned to me on February 2, 2017.

Findings of Fact²

In his answer to the SOR, Applicant admitted all the allegations, with explanations. His admissions are incorporated in my findings of fact.

Applicant is a 37-year-old analyst employed by a defense contractor since August 2012. He attended a community college from January 2008 to May 2010 and received an associate's degree. He worked part time as a DOD employee from August 2010 to a date not reflected in the record, and he received a security clearance in connection with his DOD employment in March 2011. He is physically disabled and requires use of a wheel chair.

Applicant married in August 1997 and divorced in February 2007. He married his current spouse in October 2011. He has two children from his first marriage, ages 16 and 15, and one from his current marriage, age 3.

The SOR ¶ 1.a alleges that Applicant was arrested in November 2002 for possession of an open alcoholic beverage container in a motor vehicle. The basis for this allegation is not reflected in the record, but Applicant admitted the arrest in his answer to the SOR. He explained that he was driving a vehicle with a bag of empty beverage cans in the vehicle, but no one consumed alcohol in the vehicle. The record does not reflect the disposition of the charge.

The SOR ¶ 1.b alleges that Applicant was charged with "Alcohol Intoxication 1st/2nd" in May 2003. The basis for this allegation is not reflected in the record, but Applicant admitted it. The record does not reflect the circumstances of the incident or the disposition of the charge.

¹ Department Counsel informed Applicant that he was entitled to make corrections, additions, deletions, and updates to Item 11. She also informed him that he was entitled to object to consideration of Item 5 on the ground that it was not authenticated. His failure to respond to the FORM constitutes a waiver of any objection to Item 11. See ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016) ("Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive.").

² Applicant's personal information is extracted from his SCA (Item 5) unless otherwise indicated by a parenthetical citation to the record.

The SOR ¶ 1.c alleges that Applicant was charged with driving under the influence (DUI) in February 2004. The police records reflect that he was convicted, sentenced to “1 day,” and his driver’s license was suspended for 120 days. (Item 6.)

The SOR ¶ 1.d alleges that Applicant was charged with DUI in July 2006. The offense occurred on a military installation. Records of the U.S. magistrate on the installation reflect that Applicant was given a breathalyzer test which registered a blood-alcohol level of .147. He was convicted of DUI, barred from the installation for 12 months, and fined \$360. (Item 7.)

The SOR ¶ 1.e alleges that Applicant was charged with alcohol intoxication in a public place in August 2008. Police records reflect the charge but not the circumstances or disposition. (Item 8.)

The SOR ¶ 1.f alleges that Applicant was charged with operating a motor vehicle under the influence of alcohol or drugs in May 2014 and was convicted. According to Appellant’s account of the incident in his answer to the SOR and in the PSI, his wife was driving their car to run an errand and he was riding in the passenger seat. While backing out of a parking place, she hit another vehicle. She called the police and exited the car to wait for the police. Applicant moved from the passenger seat to the driver’s seat. The police arrived and found Applicant in the driver’s seat and the keys in the ignition. In the PSI, Applicant said he could not exit from the driver’s seat before they arrived, because he did not have his wheel chair. He did not explain how he moved from the passenger seat to the driver’s seat without his wheel chair. The police smelled alcohol and Applicant was found to have a blood-alcohol level of .09. (Items 9 and 11.) The record does not reflect the disposition of the charge, but Applicant admitted he was convicted. In the PSI, he stated that he was required to complete an alcohol-counseling program, but he was not fined or jailed. (Item 11 at 3.)

In his answer to the SOR and in the PSI, Applicant stated that he stopped consuming alcohol in July 2014. (Item 4 at 4-6; Item 11 at 5.) Between 2004 and 2014, his normal consumption was one pint of bourbon each weekend, consumed at home. He estimated that he would need to consume two pints during the weekend to reach the point of intoxication, which occurred only about three times during 2004-2014. (Item 11 at 5.) He entered an alcohol-counseling program in July 2014 and completed it in December 2014. He was diagnosed with “alcohol intoxication with mild use,” but he was not diagnosed as alcohol dependent. The discharge report did not include a prognosis. (Item 4 at 10-11.)

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 § 2.

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, 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.” 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 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 are 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; and

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(a) is established by Applicant's record of alcohol-related arrests, charges, and convictions. AG 22(c) is established by Applicant's three DUI convictions and his admission that he routinely consumed a pint of alcohol every weekend for about ten years. The National Institute on Alcohol Abuse and Alcoholism defines “binge drinking” as “a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 percent or above,” which typically occurs when a man has five or more drinks or a woman has four or more drinks within a two-hour period. Centers for Disease Control and Prevention, *Fact Sheets – Binge Drinking*, www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm. On at least two instances alleged in the SOR, Applicant's BAC exceeded 0.08. If he consumed a pint of alcohol over a weekend, it would amount to at least ten drinks per weekend, which would be sufficient to establish binge drinking.

The following mitigating conditions are potentially relevant:

AG ¶ 23(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;

AG ¶ 23(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); and

AG ¶ 23(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.

None of these mitigating conditions are established. All three mitigation conditions require a period of abstinence or responsible use. 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). In this case, the record is inadequate to determine whether Applicant adhered to his intention to abstain from alcohol after he submitted his response to the SOR in January 2015, which was only about six months after he began abstaining from alcohol. Applicant has not carried his burden of establishing mitigating conditions.

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 and I have considered the factors in AG ¶ 2(a). Because Applicant requested a determination on the record without a hearing, I had no opportunity to question him about his continued abstinence from alcohol or to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

After weighing the disqualifying and mitigating conditions under Guideline G, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his alcohol consumption. Accordingly, I

conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him 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): AGAINST APPLICANT

Subparagraphs 1.a-1.g: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge