



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



In the matter of:

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ISCR Case No. 15-06469

Applicant for Security Clearance

Appearances

For Government: Charles Hale, Esq., Department Counsel

For Applicant: Alan V. Edmunds, Esq.

05/09/2017

Decision

RIVERA, Juan J., Administrative Judge:

In 2002 and 2008, Applicant was arrested for driving while intoxicated (DWI). He has been drinking alcohol responsibly since 2008, successfully attended alcohol-related classes in 2010, and recently committed to abstinence. Alcohol consumption security concerns are mitigated. Access to classified information is granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on August 16, 2013. 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 March 29, 2016, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline G (alcohol consumption).¹

Applicant answered the SOR on June 1, 2016, and requested a hearing before an administrative judge. The case was assigned to me on November 17, 2016. The Defense

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.

Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 18, 2016, scheduling a hearing for December 13, 2016.

At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant testified, and submitted exhibit 1 (AE 1), comprised of Tabs A through H. All exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on December 21, 2016.

Findings of Fact

In Applicant's response, he denied the SOR allegations. He admitted, however, most of the underlying facts alleged in the four SOR allegations and provided evidence in mitigation and extenuation. Applicant's SOR and hearing admissions are incorporated into my findings of fact. Additional findings of fact follow:

Applicant is a 39-year-old training development specialist working for a defense contractor. He graduated from high school in 1995. He has attended college on-and-off since 2009, and as of December 2016, he was four classes shy of a bachelor's degree. He has never married and has no children.

Applicant served in the U.S. Navy between 1999 and 2009. He was granted a secret clearance in 2001 that was terminated upon his discharge from the service.

Concerning the alcohol consumption allegations, Applicant explained that in August 2002, he was young and immature and drove while under the influence of alcohol (DWI). He had been on leave at home and drinking at a party. A friend asked him for a ride home and he drove while intoxicated. He was arrested and later convicted of DWI.

In July 2008, Applicant drove while intoxicated and he received non-judicial punishment from his command in the Navy. He was ordered to participate in the Navy's Substance Abuse Response Program (SARP), which he failed to complete. He was determined to be an alcohol rehabilitation failure and was discharged from the Navy with a general discharge (under honorable conditions) in 2009. Applicant sought additional alcohol counseling, which he successfully completed in 2010.

As a result of these two alcohol-related incidents, Applicant was diagnosed with alcohol abuse. Following his 2010 alcohol-treatment program, Applicant reduced his alcohol consumption and learned to drink responsibly. He has not been involved in any alcohol-related incidents since 2008, and he no longer drives after consuming alcohol. He is remorseful for his DWIs.

Applicant believes that he has learned from his mistakes and that he has matured as a person. He understands the adverse effects alcohol consumption can have on his life and the lives of others. In his SOR response, Applicant stated that he had made a commitment to abstain from any further alcohol consumption. Applicant further believes that he has demonstrated he is truthful, honest, and reliable. He further believes that his current abstinence and the lack of alcohol-related incidents since 2008 demonstrate his

good judgment. Applicant provided a signed statement of intent with automatic revocation of clearance for any future alcohol abuse. (AE 1, Tab A)

After his discharge from the Navy, Applicant was unemployed for about eight months and then worked odd jobs for several employers. His current employer, a federal contractor, hired him in 2013. Applicant's employee performance evaluations indicate he is a valuable employee. He has never received any disciplinary actions at his employment. His references lauded Applicant's trustworthiness, responsibility, professionalism, exceptional work ethic, and subject matter expertise. (AE 1, Tabs B, C, E, and F) Applicant purchased a home in 2014.

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 concern for 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.”

Three 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;

(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; and

(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.

Applicant admitted and the evidence establishes that in 2002 and 2008, he was arrested and found guilty for DWI. His level of alcohol consumption established that he engaged in binge consumption to the extent of impaired judgment.² AG ¶¶ 22(a), 22(c), and 22(e) are established by the evidence.

Four Alcohol Consumption Mitigating Conditions under AG ¶ 23 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);

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>.

(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 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) and 23(b) apply. Applicant was arrested for DWIs in 2002 and 2008. He pleaded guilty to both. After 2008, Applicant has consumed alcoholic beverages more responsibly. He committed to not driving after consuming alcohol, and a DWI is unlikely to recur because of this change in circumstances. Some of his lifestyle changes after 2008 include: moving to another state; purchasing a home; associating with co-workers and their 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 DWIs and has taken responsibility for his past misconduct.

Applicant initially failed to complete a substance abuse counseling program in 2008, but then successfully completed an alcohol-related training program in 2010. He provided a signed statement of intent with automatic revocation of clearance for any future alcohol abuse. Applicant has not been involved in any alcohol-related incidents after his 2008 DWI. His awards, commendations, reference statements, and performance evaluations show he has matured and is a productive member of society. He has eliminated doubts about his current reliability, trustworthiness, and good judgment. Alcohol consumption 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 Guideline G in my whole-person analysis. Some of the factors in AG were addressed under those guidelines, but some warrant additional comment.

Applicant is a 39-year-old employee of a defense contractor. He has worked over three years for his employer. Applicant's employee performance evaluations indicate he is a valuable employee. He has never received any disciplinary actions at his employment. His references lauded Applicant's trustworthiness, responsibility, professionalism, exceptional work ethic, and subject matter expertise.

In 2002 and 2008, Applicant committed DWIs. He successfully attended alcohol-related classes in 2010, and thereafter he has consumed alcohol responsibly. He reduced the frequency and magnitude of his alcohol consumption. He has not had any alcohol-related incidents involving the police and courts since 2008. He expressed remorse about his DWIs, 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 alcohol abuse. He has established his current reliability, trustworthiness, and good judgment. I believe such incidents are unlikely to recur. Alcohol consumption 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 - 1.d: 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