



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 15-06625
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Roland Lee, Esq.

01/05/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on September 25, 2014. On April 15, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006. The adjudicative 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 May 9, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 11, 2016, and

the case was assigned to me on July 20, 2016. On July 26, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for August 15, 2016. Applicant hired an attorney, who requested that the hearing be postponed. I granted the request. On October 25, 2016, DOHA notified Applicant's attorney that the hearing was rescheduled for November 14, 2016. I convened the hearing as scheduled. Government Exhibit (GX) 1 was admitted in evidence without objection. Applicant testified but did not submit any documentary evidence or present the testimony of any other witnesses. I kept the record open until November 30, 2016, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. DOHA received the transcript (Tr.) on November 22, 2016.

Findings of Fact¹

In his answer to the SOR, Applicant admitted the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 25-year-old machinist employed by a defense contractor since September 2010. He has never held a security clearance.

Applicant graduated from high school in June 2009. He attended a community college from August 2009 to May 2010 but did not receive a degree. He has never married, but he has been in a committed relationship for about three years and has a daughter born in May 2015. (Tr. 15-16, 44.)

When Applicant submitted his security clearance application, he disclosed that he purchased marijuana multiple times from street vendors and used it three or four times a week between January and July 2010. He disclosed that he had been arrested for misdemeanor possession of marijuana in July 2010 and that the charges were dismissed. He stated that he stopped using marijuana after his arrest. He also disclosed that he had been charged with felony driving while intoxicated (DWI) in January 2013, convicted of misdemeanor reckless driving, and sentenced to pay a fine. (GX 1 at 20-21.)

Applicant testified that the marijuana charge occurred in July 2010, when he was 18 years old. He was a passenger in a vehicle with two friends, they were stopped by the police for a traffic violation, and the police officer asked "if there was anything else in the vehicle." Applicant knew that there was marijuana in the center console of the car. He told the police officer about the marijuana and said it was his, even though he knew that it was the driver's marijuana. Applicant had recently dropped out of a community college, and he took the blame for the marijuana because he believed he had nothing to lose and knew his friend would lose his job if he was charged with marijuana possession. (Tr. 18-21.)

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

On the advice of his attorney, Applicant obtained substance-abuse counseling. He and his attorney anticipated that counseling would be required by the court, and he found it informative and helpful. (Tr. 23.) He has been tested twice for drugs since the incident, and both tests were negative. (AX A and B.) In his security clearance application and his testimony at the hearing, he stated that he does not intend to use marijuana again. (GX 1 at 23; Tr. 23.) He no longer associates with his former drug-using friends. (Tr. 32.)

On New Year's Day of 2013, at about 2:00 a.m., Applicant ran his car off the road at high speed and was seriously injured. He suffered head injuries, a broken mandible, and compound fractures of several vertebrae. He was not tested for alcohol consumption at the scene. He was unconscious for about a day, and it took him six months to recover from his injuries. At the hearing, he had limited memory of the details of the accident. (Tr. 35-36.)

While Applicant was being treated for his injuries, alcohol was detected in his blood, and he was charged with felony DWI. In accordance with a plea agreement, he pleaded guilty to misdemeanor reckless driving, the DWI charge was dismissed, and he paid a fine. (GX 1 at 21; Tr. 24-25, 35.)

Applicant testified that, before his car accident, he was drinking to the point of intoxication about twice a week, consuming beer as well as hard liquor. He now drinks beer about once a month, on weekends or special occasions, but he continues to drink to the point of intoxication. Usually, he consumes about five beers, at which point he is heavily intoxicated.² If he drinks more than five beers, he is "passing out in the bathroom." He last drank to the point of intoxication about three weeks before the hearing. He does not drive after drinking. (Tr. 38-40.)

Applicant's project manager submitted a letter attesting to Applicant's desire to learn and be promoted to more responsible positions. Applicant currently holds a position normally held by veteran employees, and he has demonstrated dedication, leadership, and responsibility. (AX C.)

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

² This level of consumption probably would qualify as "binge drinking" under the adjudicative guidelines for alcohol consumption. 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.

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 AG. 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 J, Criminal Conduct

The SOR alleges that Applicant was arrested and charged with possession of marijuana in July 2010 (SOR ¶ 1.a). It also alleges that he was charged with DWI in January 2013, and that in November 2013 he was convicted of a reduced charge of reckless driving (SOR ¶ 1.b).

The concern raised by criminal conduct is set out in AG ¶ 30: “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.”

Department Counsel relied on Applicant's admissions in his SCA and at the hearing to establish the allegations in the SOR. Applicant's admissions establish two disqualifying conditions under this guideline: AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

The SOR does not allege any security concerns under Guideline G (Alcohol Consumption). Thus, the disqualifying conditions in AG 22(a) (“alcohol-related incidents away from work, such as driving under the influence”) and AG ¶ 22(c) (“habitual or binge consumption of alcohol to the point of impaired judgment”) may not be independent grounds for denying Applicant a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the evidence of Applicant's alcohol consumption for these limited purposes.

Two mitigating conditions under Guideline J are potentially relevant:

AG ¶ 32(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; and

AG ¶ 32(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.

The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). 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.” *Id.*

In this case, more than six years have passed since Applicant was charged with a drug offense, and he stopped using marijuana after his arrest. Almost four years have passed since he was involved in an alcohol-related driving offense, and he has not been arrested for any alcohol-related offenses since January 2013. He was candid, sincere, and remorseful at the hearing, and he has earned the support and respect of his supervisor. However, he has continued to consume alcohol to the point of intoxication on a regular basis, most recently three weeks before the hearing. There is no evidence that he received counseling or treatment for his alcohol use, and no evidence of an evaluation for possible alcohol abuse or alcohol dependence. Based on this evidence, I am not satisfied that another alcohol-related criminal offense is unlikely. Accordingly, I conclude that AG ¶¶ 32(a) and 32(d) are established for the marijuana offense, but they are not established for the DWI arrest.³

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.

³ “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.” ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

I have incorporated my comments under Guideline J in my whole-person analysis, and I have considered factors in AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guideline J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct. 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 J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	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