



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



In the matter of:

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ISCR Case No. 15-07807

Applicant for Security Clearance

Appearances

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

For Applicant: Kristan A. Siegwart, Esq.

10/25/2016

Decision

HARVEY, Mark, Administrative Judge:

In 1999, Applicant was convicted of driving under the influence of alcohol (DUI). He was diagnosed as alcohol dependent. He repeatedly relapsed after alcohol treatment. On March 28, 2015, he ended his alcohol consumption, and he frequently attends Alcoholics Anonymous (AA) meetings to reinforce his abstinence. Alcohol consumption security concerns are mitigated. Access to classified information is granted.

History of the Case

On October 3, 2014, Applicant completed and signed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On May 3, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2)

Specifically, the SOR set forth security concerns arising under Guideline G (alcohol consumption).

On May 23, 2016, Applicant responded to the SOR. (HE 3) On June 24, 2016, Department Counsel was ready to proceed. On August 15, 2016, the case was assigned to me. On September 12, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 6, 2016. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered 4 exhibits; Applicant offered 12 exhibits; and all proffered exhibits were admitted into evidence without objection. (Transcript (Tr.) 8-10; Government Exhibits (GE) 1-4; Applicant Exhibits (AE) A-L) On October 13, 2016, DOHA received a copy of the transcript of the hearing.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 53-year-old employee of a major defense contractor, who has worked as an applications analyst, program manager, and sector director for 11 years. (Tr. 14; GE 1) In 1988, he received a bachelor's degree in physics, computer science, and mathematics; in 1989, he received a master's degree in physics; and in 1993, he received a Ph.D. in physics. (Tr. 13) He taught physics at the university level, and he worked for several technology companies and government contractors. (Tr. 13-14) In 1991, he married, and he has a 22-year-old son. (Tr. 12; GE 1) He has held a security clearance since 2009, and there is no evidence of security violations. (Tr. 15)

Alcohol Consumption

Applicant's inpatient alcohol treatment records describe alcohol consumption beginning before he attended grammar school. (GE 4, 5) He continued to consume alcohol at increasing levels through his college years. (GE 4, 5; AE A-AE C) Applicant observed that his alcohol consumption was increasing, and he received some alcohol counseling in the mid-1990s. (Tr. 15-16) He disclosed his alcohol-related treatment on his October 3, 2014 SCA and his May 7, 2015 Office of Personnel Management (OPM) personal subject interview (PSI). (AE A)

In May 1998, Applicant was arrested for DUI. (Tr. 30-31; SOR ¶ 1.b response; AE A) His blood alcohol content was about .26. (Tr. 45) At times he consumed a liter of alcohol in an evening. In September 1998, he received alcohol detoxification treatment, and he was diagnosed as alcohol dependent. (SOR ¶ 1.c response) In March 1999, he pleaded guilty to DUI, and the court imposed a fine, probation for one year, and suspended his driver's license for six months. (SOR ¶ 1.c response) He continued with sporadic alcohol counseling and AA meetings in 2000. (Tr. 17) From March to April 1999, and in February 2001, Applicant was an inpatient for alcohol detoxification. (Tr.

18; SCA) After leaving the hospital, Applicant attended numerous AA meetings, and he was sober for almost 13 years from February 2001 until November 2013, when he resumed his alcohol consumption. (Tr. 19)

In February 2014, Applicant voluntarily sought alcohol treatment, and he attended 28 days of inpatient alcohol treatment and counseling. (Tr. 21; GE 3) He was diagnosed as alcohol dependent. (Tr. 21, 35; SOR ¶ 1.d response) After leaving alcohol treatment, he was sober for about two months, and then he resumed his alcohol consumption. (Tr. 22) On March 28, 2015, he realized he needed to establish and reinforce his abstinence, and he voluntarily sought alcohol treatment. (Tr. 22; SOR ¶ 1.e response) He received an additional 28 days of inpatient alcohol treatment and counseling. (Tr. 24) He has been sober since March 28, 2015. (Tr. 30, 46) His 2015 therapy focused on avoiding and resisting alcohol triggers and use of AA meetings to reinforce abstinence. (Tr. 23) In April 2015, he began a program of attending at least 90 AA meetings in 90 days. (Tr. 26-28) He currently attends three to five AA meetings each week. (Tr. 26)

After April 2015, Applicant made increased efforts to live a healthier lifestyle. (Tr. 28-29) He concurred with the diagnosis of alcohol dependence, and he acknowledged the requirement for his abstinence from alcohol consumption. (Tr. 35-36) The person who diagnosed him as alcohol dependent in 2014 and 2015 is a psychologist or physician. (Tr. 47) The reason Applicant relapsed after almost 13 years of alcohol abstinence was because he had grown complacent about being sober. He had stopped attending AA meetings and had lost that group's support. He incorrectly believed he had the self-control to maintain sobriety or at least to drink responsibly without the frequent reinforcement provided by attending AA meetings. Now he fully understands that ongoing reinforcement through attendance at AA meetings is essential for him to maintain sobriety; he must not become complacent; and he must continue to be vigilant about maintaining sobriety and avoiding triggers for alcohol use. (Tr. 35-43)

Applicant's spouse is a nurse practitioner. (Tr. 57) She is very supportive of Applicant's sobriety. (Tr. 29, 51-58) They do not have any alcohol in their home. (Tr. 29) She said she would report his resumption of alcohol consumption to his security manager. (Tr. 57)

Applicant's AA sponsor has known him for 18 months. (AE E) Applicant regularly attends AA meetings, and he sees his AA sponsor at least twice a week, when Applicant is not on temporary duty away from his residence. (AE E)

Character Evidence

A Ph.D. software engineer, who works closely with Applicant and has known him for ten years socially and professionally, said he has never observed Applicant consuming alcohol. (Tr. 62) Applicant contributes to mission accomplishment. (Tr. 63) If Applicant returns to alcohol consumption, he committed to reporting Applicant's return to alcohol consumption to his security manager. (Tr. 66) He recommends continuation of Applicant's security clearance. (Tr. 64)

Applicant provided character reference statements from three coworkers.¹ The general sense of the letters is that Applicant is diligent, dedicated, reliable, trustworthy, and sincerely seeking to continue his rehabilitation and maintain his sobriety. The character references support reinstatement of his security clearance. His performance evaluations and resume describe his hard work, accomplishments, competence, professionalism, and important contributions to his company. (AE I-AE L)

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. Thus, nothing 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.

¹The three character letters are at AE F-AE H.

“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).

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.”

Four 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;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;² and

²In 1952, the American Psychiatric Association (APA) published the first of a series of Diagnostic and Statistical Manuals of Mental Disorders. In 2000, the APA published the DSM–IV–TR. The criteria for “alcohol abuse” and “alcohol dependence” in AG ¶ 22 are drawn from the DSM–IV–TR, which was in effect when the Adjudicative Guidelines were issued in 2006. In May 2013, the APA issued the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM–5). The criteria in DSM–IV–TR for alcohol dependence and in DSM–5 for alcohol use disorder (AUD) are objective, well established, and rely primarily on self-reports and descriptions. DSM–5 integrates the two DSM–IV disorders, alcohol abuse and alcohol dependence, into a single disorder called alcohol use disorder (AUD) with mild, moderate,

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

Applicant's SCA, OPM PSI, SOR response, and hearing record establish AG §§ 22(a), 22(c), 22(d), and 22(f). He had one DUI arrest in 1998, which resulted in a DUI conviction in 1999. Applicant engaged in binge-alcohol consumption to the extent of impaired judgment.³ He voluntarily attended inpatient alcohol treatment on multiple occasions, and he relapsed after each treatment session, except for the treatment in March-April 2015. He was repeatedly diagnosed as alcohol dependent.

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

and severe sub-classifications. DSM-IV-TR and DSM-5 are used throughout the medical and legal communities to determine alcohol dependence and AUD severe, which have the same criteria. AUD-moderate overlaps with both alcohol abuse and alcohol dependence. The DSM-5 notes that, "early remission from a DSM-5 substance use disorder is defined as at least 3 but less than 12 months without substance use disorder criteria (except craving), and sustained remission is defined as at least 12 months without criteria (except craving)." Additionally the new DSM-5 includes "in a controlled environment" and "on maintenance therapy" as the situation warrants. The alcohol consumption guideline does not incorporate DSM remission criteria and leaves mitigation to a case-by-case determination. See National Institute of Health, National Institute on Alcohol Abuse and Alcoholism website, "Alcohol Use Disorder: A Comparison Between DSM-IV and DSM-5" <http://pubs.niaaa.nih.gov/publications/dsmfactsheet/dsmfact.pdf>. (HE 4) See also American Psychiatric Association, "Highlights of Changes from DSM-IV-TR to DSM-5," at 15, (Substance Abuse Disorders), <http://www.dsm5.org/documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf>. (HE 5)

³Although 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>.

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(b) applies. On March 28, 2015, Applicant ended his alcohol consumption; he completed a 28-day inpatient alcohol treatment program; and he attends at least three AA meetings a week to reinforce his abstinence. Applicant is credited with voluntarily seeking alcohol treatment. After 1999, he sought treatment before being arrested for DUI or other criminal offense and before it affected his employment.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007).

I have carefully considered the Appeal Board's jurisprudence on alcohol consumption, Applicant's history of alcohol consumption, his almost 13 year period of alcohol abstinence from 2001 to 2014, his 19-months of alcohol abstinence from March 28, 2015, to the present, his supportive spouse, coworker, and AA sponsor, and his sincere commitment to continued alcohol abstinence. He has a "sustained period of remission" under DSM-5 because he has more than 12 months of abstinence. See note 2, *supra*. He has not had any alcohol-related incidents involving the police and courts since 1998. Applicant has eliminated doubts about his current reliability, trustworthiness, and good judgment. Alcohol consumption security concerns are mitigated.

Whole-Person Concept

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.

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. I have incorporated my comments under Guideline G in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 53-year-old employee of a major defense contractor, who has worked as an applications analyst, program manager, and sector director for 11 years. He has a bachelor's degree in physics, computer science, and mathematics; a master's degree in physics; and a Ph.D. in physics. He taught physics at the university level, and he worked for several technology companies and government contractors. He has held a security clearance since 2009, and there is no evidence of security violations.

The general sense of Applicant's character statements and performance evaluations is that Applicant is diligent, dedicated, reliable, trustworthy, provides important contributions to his employer, and sincerely seeks to continue his rehabilitation and maintain sobriety. The character evidence supports continuation of his security clearance.

A Ph.D. software engineer, who works closely with Applicant and has known him for ten years socially and professionally, and Applicant's spouse made statements during his hearing. They strongly support his continued alcohol abstinence. If Applicant resumes his alcohol consumption, they committed to reporting Applicant's return to alcohol consumption to his security manager.

Applicant has a long history of serious alcohol abuse. In 1999, he was convicted of DUI. He attended inpatient alcohol treatment or detoxification on five occasions. He was repeatedly diagnosed as alcohol dependent. He was abstinent from alcohol consumption for almost 13 years from 2001 to 2014. He has been abstinent+++++++ from alcohol consumption for 19 months from March 28, 2015 to present. Under DSM-5,

he currently has a “sustained period of remission” because he has more than 12 months of abstinence. He has not had any alcohol-related incidents involving the police and courts since 1998, and such incidents are unlikely to recur. He has attended hundreds of AA meetings. He has sincerely committed to abstain from alcohol consumption. He has established his current reliability, trustworthiness, and good judgment.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. 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 through 1.e: 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.

MARK HARVEY
Administrative Judge