



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



In the matter of:

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ISCR Case No. 16-00640

Applicant for Security Clearance

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel

For Applicant: Dominique Sims, Esq.

07/17/2017

Decision

Harvey, Mark, Administrative Judge:

On May 24, 2015, Applicant was arrested for driving while intoxicated (DWI) by alcohol. On January 21, 2016, she pleaded guilty. She completed all court-ordered requirements. She ended her alcohol consumption in October 2015, expressed remorse, and completed an alcohol-education program. Alcohol consumption and criminal conduct security concerns are mitigated. Access to classified information is granted.

Statement of the Case

On September 8, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). On June 17, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, which became effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant 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 Guidelines G (alcohol consumption) and J (criminal conduct).

On July 28, 2016, Applicant responded to the SOR and requested a hearing. On August 26, 2016, Department Counsel was ready to proceed. On January 10, 2017, the case was assigned to me. On February 27, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 14, 2017. (HE 1) Applicant waived her right to 15 days of notice of the date, time, and location of the hearing. (Transcript (Tr.) 10-11) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered three exhibits; Applicant offered five exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 16-14, 29-32, 48, 58; Government Exhibits (GE) 1-3; Applicant Exhibits (AE) A-E) On March 22, 2017, DOHA received a copy of the transcript of the hearing. On May 24, 2017, Applicant provided one document, and it was admitted without objection. (AE F) The record closed on May 24, 2017. (Tr. 61)

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing then *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact

In Applicant's SOR response, she admitted the SOR allegations. She also provided extenuating and mitigating information.

Applicant is a 51-year-old facility security officer (FSO) who has worked for the same defense contractor for 16 years. (Tr. 18-19) In 1984, she graduated from high school. (GE 1) She did not attend college. She has held a security clearance for 30 years, and there is no evidence of a security violation or abuse of illegal drugs. (Tr. 20; GE 1)

Alcohol Consumption and Criminal Conduct

On May 24, 2015, Applicant drank two 24-ounce beers at her mother's house. (Tr. 22, 40; GE 2) Then she stopped at a restaurant and drank two margaritas. (Tr. 22-24, 41) On her way home she was stopped by the police, and she was arrested for DWI. (Tr. 25)

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

Her blood test indicated her blood alcohol content (BAC) was .15.² (Tr. 42) The next duty day she reported the DWI to her security officer. (Tr. 26-27)

On January 21, 2016, Applicant pleaded guilty, and she was sentenced to pay a fine,³ to perform 50 hours of community service, to complete a 12-hour DWI education program, to attend a victim-impact panel, to 16 months of probation, and to maintain an alcohol-interlock device on her vehicle during her probation. (Tr. 29-38, 43-44) She completed all sentencing terms, including her probation. (Tr. 29-38, 44; AE A-AE F) She has a misdemeanor-level criminal conviction for DWI.

Before her May 24, 2015 DWI arrest, Applicant consumed alcohol once or twice a week. (Tr. 21) She usually drank about two drinks. (Tr. 27) She most recently consumed one drink of alcohol on her 50th birthday in October 2015. (Tr. 44) She was not diagnosed as alcohol dependent. (Tr. 21) Her only criminal charge is the May 24, 2015 DWI charge. (Tr. 27)

Character Evidence

Applicant was promoted in March 2016 to FSO. (Tr. 40) Her supervisor for the previous two years described Applicant as reliable, trustworthy, dedicated, dependable, and diligent. (Tr. 51-52; SOR response) Applicant reported to her supervisor the next duty day after the DWI that she was arrested for DWI, and Applicant admitted that she committed the DWI offense. (Tr. 54-55; SOR response) Applicant was disappointed in her own lack of judgment; she accepted full responsibility for her DWI; and she felt sincere remorse for her DWI. (Tr. 55-57; SOR response) Her supervisor recommended that Applicant retain her security clearance. (Tr. 56)

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.

² Rate and magnitude of alcohol consumption, body weight, and time of testing are variables that can be used to predict blood alcohol content. See Cleveland Clinic website, http://www.clevelandclinic.org/health/interactive/alcohol_calculator.asp; Nolo website, <http://dui.drivinglaws.org/calc.php>.

³ Applicant said she “paid a total of \$4,508 for fees, fines, probation, programs, and in total the DWI has cost her about \$11,000. (SOR response)

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. "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, "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."

AG ¶ 22 lists two conditions that could raise a security concern and may be disqualifying in this case including:

(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol⁴ to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

An Administrative "Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility." ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted).

AG ¶¶ 22(a) and 22(c) apply. Applicant's single alcohol-related incident involving the police and courts happened on May 24, 2015. Her BAC was .15, establishing that she engaged in binge-alcohol consumption to the extent of impaired judgment.

AG ¶ 23 details conditions that could mitigate security concerns including:

(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 judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has

⁴ Although the term "binge" drinking is not defined in the Adjudicative Guidelines, 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>. "Binge drinking is the most common pattern of excessive alcohol use in the United States." See the Center for Disease Control website, (stating "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 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours."), <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>.

demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

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).

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 and Applicant's history of alcohol consumption. She has a sustained period of alcohol abstinence; she expressed her remorse about her poor judgment; she has a good record of employment; she received education about alcohol abuse; she successfully completed her probation; she paid a heavy penalty for DWI; and she only has one alcohol-related conviction. The evidence has resolved my doubts about Applicant's 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 lists conditions that could raise a security concern and may be disqualifying including:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶¶ 31(a) does not apply because she committed one DWI offense. AG ¶ 31(b) applies. The SOR alleges and the record establishes Applicant committed one misdemeanor-level criminal offense involving alcohol and the court. Applicant admitted the incident of criminal conduct.

AG ¶ 32 describes conditions that could mitigate security concerns including:

- (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 individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

For the reasons indicated in the previous section, criminal conduct security concerns are mitigated. Her single misdemeanor-level DWI offense does not create doubt about her judgment, reliability, and trustworthiness, and raise questions about her ability

or willingness to comply with laws, rules and regulations. She has ended her alcohol consumption, and there is sufficient assurance that criminal conduct is unlikely to recur.

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(d):

(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines G and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 51-year-old FSO who has worked for the same defense contractor for 16 years. She has held a security clearance for 30 years, and there is no evidence of a security violation. Applicant has a sustained period of abstinence. She expressed her remorse about her DWI because it showed poor judgment. She has an excellent record of employment; she received a substantial penalty for her DWI; and she completed all court-ordered requirements. She received alcohol-related education. She has learned from her error in judgment, and I am convinced she will not repeat it.

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 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

Subparagraph 1.a: 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 the interests of 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