



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-01467

Appearances

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

For Applicant: Alan V. Edmunds, Esq.

11/15/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He did not present sufficient evidence of reform and rehabilitation to explain, extenuate, or mitigate the security concern stemming from a well-established pattern of failure to conform his behavior to the law, as shown by multiple arrests, charges, and convictions for alcohol-related incidents. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on November 13, 2013.¹ This document is commonly known as a security clearance application. Thereafter, on March 24, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent

¹ Exhibit 1.

Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline G for alcohol consumption and Guideline J for criminal conduct.

Applicant answered the SOR on May 9, 2016; he admitted the factual allegations in the SOR with the exception of the allegation in ¶ 1.a; and he initially requested a decision based on the written record, but subsequently requested a hearing. The case was assigned to me December 7, 2016. The hearing took place as scheduled on April 4, 2017. The hearing transcript (Tr.) was received April 13, 2017.

Procedural Matters

At the close of evidence, the allegation in SOR ¶ 1.a was amended, on my own motion, due to a variance between the alleged date of an alcohol-related incident and the evidence.² Specifically, without objections from either party, the allegation was amended to conform to the evidence as follows: “You were arrested for driving while intoxicated in 2004 in [county], [state], and the charge was subsequently dismissed.”

Findings of Fact

Applicant is a 44-year-old employee who requires a security clearance for his job as an information technology and hosting manager for software development for a federal contractor. He has worked for his current employer since July 2013, and his annual salary is about \$154,000. He has worked in the field of information technology since at least 1995. His educational background includes a high school diploma and some college. He married in 2007, he has an 18-year-old daughter from a previous relationship, and he has a 20-year-old stepdaughter.

Applicant admits a history of criminal conduct resulting in arrests, charges, and convictions going back to 2004. This includes a number of alcohol-related incidents, the most recent of which occurred in 2014. When the record closed in this case in April 2017, Applicant was on probation from the 2014 conviction, although probation was expected to end in early August 2017. The various incidents are discussed below.

First, Applicant was arrested and charged with driving while intoxicated (DWI) in 2004.³ He was arrested while driving home from a club where he had consumed about three beers. The police stopped him for speeding and subsequently arrested him for DWI. He went to court, the DWI charge was dismissed, and he was ordered to pay a fine and court costs of about \$250 for the speeding violation.

² Tr. 45-50, 84-86.

³ Tr. 45-50; Exhibit 2.

Second, Applicant was arrested and charged with domestic abuse of a family member in 2011. This matter stemmed from an instance of Applicant disciplining his daughter by spanking her with a belt, which left marks. He pleaded guilty to the charge in the state's juvenile and domestic relations district court, and he was ordered to serve probation for one year and complete an anger-management course. He also completed a court-approved four-hour parenting class,⁴ and he completed the period of probation without incident. That daughter, who is now 18, resides with her mother in a different state.

Third, Applicant was arrested and charged with DWI, first offense, with a BAC of .15-.20% in 2013.⁵ He pleaded guilty to an amended charge of DWI, first offense. The state court sentenced him to serve 30 days in jail (suspended); unsupervised probation for one year; imposed various restrictions on his driver's license for one year beginning August 29, 2013, and ending June 24, 2014; and imposed a \$300 fine and \$202 in court costs. The court-ordered restrictions included an ignition-interlock restriction, which he violated in December 2013 and February 2014.

Fourth, the February 2014 violation of the ignition-interlock restriction stemmed from Applicant's arrest for the misdemeanor offenses of DWI, second offense within five years; operating a vehicle with a suspended or revoked driver's license; and operating a vehicle with an ignition-interlock device.⁶ In August 2014, he pleaded guilty to the DWI charge and the other two charges were *nolle prossed*. The state court sentenced him to serve 180 days in jail (120 days suspended); unsupervised probation for 36 months; suspended his driver's license for 36 months; and imposed a \$1,000 fine and \$252 in court costs.

Fifth, in early May 2014, while the charges discussed in the above paragraph were pending, Applicant was arrested and charged with the misdemeanor offense of operating a vehicle with a suspended or revoked driver's license.⁷ He pleaded guilty in early September 2014, and the state court sentenced him to 30 days in jail and imposed \$127 in court costs. The court record does not reflect whether he served the 30 days in jail concurrently or consecutively with another sentence.

Sixth, in late May 2014, Applicant was charged with non-compliance with the state's alcohol safety action program (ASAP).⁸ He pleaded no contest in late August 2014, and the state court sentenced him to 30 days in jail. The court record does not reflect whether he served the 30 days in jail concurrently or consecutively with another sentence.

⁴ Exhibit C.

⁵ Exhibit 3.

⁶ Exhibits 4, 5, and 6.

⁷ Exhibit 7.

⁸ Exhibit 9.

Seventh, on June 26, 2014, Applicant was arrested based on an allegation that he violated the terms of his release on secure or unsecure bond or promise to appear, with an offense date of May 8, 2014.⁹ The court record describes the case type as “capias,” which is essentially an order to arrest and detain an individual for the purpose of guaranteeing a court appearance. The charge was *nolle prossed* in early August 2014.

Applicant presented evidence of reform and rehabilitation. As noted above, he completed a four-hour parenting class in 2011.¹⁰ His daughter proved to be a difficult child, which resulted in a decision to have her live with her mother in a different state. He participated in an outpatient alcohol treatment program during 2014-2015. The program is part of a hospital’s comprehensive addiction treatment services for adults. He graduated from the program in March 2015.¹¹ According to a January 25, 2017 letter from his probation officer, Applicant was then compliant with the ASAP program; completed a DUI education in August 2015, and substance abuse treatment in June 2016; had an ignition interlock installed in August 2016 with no recorded violations through January 4, 2017; and probation was scheduled to end on August 6, 2017.¹² In addition, Applicant has a good employment record according to recent performance evaluations and letters of recommendation from co-workers.¹³ Likewise, he presented a witness and submitted letters of recommendation from others vouching for him as a person of good character who was suitable for a security clearance.¹⁴

Applicant underwent a comprehensive psychological evaluation by a licensed clinical psychologist.¹⁵ According to the March 22, 2017 report, the evaluation results did not find any concurrent evidence for psychopathology or substance-abuse problems. Instead, the evaluation suggested that Applicant may have exhibited bereavement symptoms following familial deaths and used alcohol as a means to cope with emotional loss; however, no recent or ongoing evidence for such concerns was found during the evaluation. The evaluation noted that Applicant’s personal history included the deaths of his father and father-in-law within two days of each other in 2012, his mother’s passing in 2013, and the passing of an aunt in 2014.¹⁶ The evaluation did not recommend medical, psychological, or substance-abuse treatment for Applicant.

⁹ Exhibit 8.

¹⁰ Exhibit C.

¹¹ Exhibit E.

¹² Exhibit D.

¹³ Exhibits F and G.

¹⁴ Exhibit G.

¹⁵ Exhibit A.

¹⁶ Tr. 36-38.

At the hearing, Applicant stated that he has abstained from alcohol since January 2015, which was nearly a year after the February 2014 arrest for DWI.¹⁷ In addition, he submitted a signed statement of intent wherein he stated his intention to never abuse alcohol again, and he agreed that any violation with regard to alcohol use may result in the automatic revocation of his security clearance.

Law and Policies

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.¹⁸

It is well-established law that no one has a right to a security clearance.¹⁹ As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁰ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²¹ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²²

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²³ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁴

¹⁷ Tr. 40-41.

¹⁸ The 2017 AG are available at <http://ogc.osd.mil/doha>.

¹⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²⁰ 484 U.S. at 531.

²¹ 484 U.S. at 531.

²² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²³ Directive, ¶ 3.2.

²⁴ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁸

Discussion

The alcohol consumption and criminal conduct matters are discussed together because they are based on the same set of facts and circumstances. In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent under Guidelines G and J, respectively:

AG ¶ 22(a) alcohol-related incidents away from work, such as driving 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;

AG ¶ 22(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

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 judgment;

AG ¶ 23(b) the individual acknowledges [their] pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

AG ¶ 23(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 of alcohol or abstinence in accordance with treatment recommendations;

²⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁶ Directive, Enclosure 3, ¶ E3.1.14.

²⁷ Directive, Enclosure 3, ¶ E3.1.15.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

AG ¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(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(c) individual is currently on parole or probation;

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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The evidence supports a conclusion that Applicant has a history of alcohol-related criminal conduct dating back to 2004, when he was first arrested for DWI. His history includes three arrests and two convictions for DWI. The most recent DWI offense occurred in February 2014, he was convicted in August 2014, and he was on probation until August 2017. His alcohol-related criminal conduct has resulted in jail time. Taken together, his alcohol-related criminal conduct constitutes a well-established pattern of failure to conform his behavior to the law, which suggests he is not a good candidate for eligibility for access to classified information.

With that said, I am no longer concerned about the single incident of criminal conduct involving his then teenage daughter. That matter was successfully resolved through the appropriate court and she has not lived with Applicant for some time, instead residing with her mother in another state. These circumstances suggest that a repeat of similar conduct is unlikely. Accordingly, the allegation in SOR ¶ 1.b is decided for Applicant.

Turning to the other matters, I considered the mitigating conditions noted above and none are sufficient to resolve this case in Applicant's favor. Applicant was a problem drinker who exercised poor judgment when he was under the influence of alcohol. This is readily established by three arrests and two convictions for DWI during a ten-year period. Indeed, the two DWI convictions were back-to-back in 2013 and 2014. In addition, he has other criminal violations associated with the DWI offenses as noted in the findings of fact. In other words, this was not an isolated incident, and this was not a problem for a limited time. He presented a decent case in reform and rehabilitation. And I certainly have empathy for anyone who suffers the loss of four close family

members in a relatively brief period. It is apparent that Applicant was close to those family members and he went through a difficult grieving process.

Nevertheless, it is simply too soon to tell if Applicant's days of being a problem drinker are truly behind him. On this point, I note that he did not abstain from drinking alcohol until nearly a year after his most recent arrest for DWI. I also note that he was still on probation from the last DWI conviction when the record in this case closed, although the probation has now probably ended as it was scheduled to end in early August 2017. Given his well-established pattern of alcohol-related criminal conduct, additional time is necessary in order for Applicant to establish that he can consume alcohol in a responsible fashion and be a law-abiding person. He's on the right path, but he is yet to arrive at the destination.

Applicant's history of alcohol-related criminal conduct creates serious doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.f:	Against Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraph 2.a:	For Applicant ²⁹
Subparagraph 2.b:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge

²⁹ This allegation is decided for Applicant because it does not allege disqualifying conduct under Guideline G for alcohol consumption. It should be obvious that participation in an outpatient treatment program is a matter in mitigation, not disqualification, under the guideline.