



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06936

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Russell W. Crumbley, Esq.

12/29/2017

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines G (alcohol consumption) and E (personal conduct). Clearance is granted.

Statement of the Case

On January 31, 2011, Applicant submitted a Questionnaire for National Security Positions (SF-86). On October 3, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant. The action was taken pursuant to Executive Order 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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines G and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national security to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant provided an undated response to the SOR. On December 2, 2016, Department Counsel was prepared to proceed. On April 25, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 18, 2017, DOHA issued a notice of the hearing, setting the hearing on June 13, 2017. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were admitted without objection. Applicant did not offer any exhibits at the hearing. Applicant testified on his own behalf and called two character witnesses. I held the record open until July 28, 2017, to afford Applicant an opportunity to submit additional evidence. Post-hearing, Applicant timely submitted Applicant Exhibits (AE) A through G, which were admitted without objection. DOHA received the hearing transcript (Tr.) on June 21, 2017.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *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, as required.¹

Findings of Fact

Applicant admitted all of the SOR allegations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 59-year-old senior engineer employed by a defense contractor since September 2004. He seeks to retain his secret security clearance, which is a condition of his continued employment. Applicant has successfully held a clearance since 1982. (GE 1; Tr. 13-14)

Applicant graduated from high school in May 1976. He was awarded a bachelor’s degree in electrical engineering in December 1983, and a master’s degree in electrical engineering in November 1983. (GE 4, Tr. 14-16)

Applicant has been married and divorced three times. He has a total of five children. Of note, he raised two sons as a single parent from his second marriage. Both of those sons graduated from college and are successful engineers. All of his children are adults; however, at the time of his hearing, he was paying \$1,000 a month in child support to the mother of his youngest child, an 18-year-old son. His youngest son has

¹ The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

been awarded a full academic scholarship to a prestigious university. Applicant is presently not married. (GE 1, Tr. 17-21, 23)

Alcohol Consumption/Personal Conduct

Applicant's problems with alcohol stem from two separate alcohol-related arrests. The first arrest occurred in May 2014, and the second arrest occurred approximately five months later in September 2014. Both arrests were for driving under the influence (DUI). These DUI arrests occurred over a holiday weekend and his birthday weekend, respectively. His two sons, who Applicant had custody of and raised, had left home for college. Applicant was very involved in their lives, tutoring them and coaching them in basketball. He found a tremendous void in his life when they were gone and made the mistake of drinking and driving. (Tr. 32-36, 42-47)

The DUI arrests occurred in two different cities in the same state. The first DUI charge was dismissed, and the second DUI was referred to trial. Applicant was convicted of the second DUI in September 2015 and has completed all sentencing requirements. His sentence included two years of unsupervised probation, which he completed in September 2017, after his hearing was held. Applicant was not required to attend any alcohol counseling or rehabilitation as a result of his DUI conviction. (Tr. 36-42, 47-55)

Post-hearing, Applicant submitted a favorable drug and alcohol assessment dated July 5, 2017. Consistent with Applicant's testimony, his assessment revealed no current problems with alcohol affecting his personal or professional life nor did the evaluation identify any diagnosis of alcohol use disorder. (Tr. 36; AE G)

Character Evidence

Applicant called two character witnesses to testify on his behalf. Applicant tutored the first witness's daughter in math for five years and coached the second witness's son in basketball for one year. Both witnesses are familiar with Applicant and described him as trustworthy and honorable, and attribute their children's success, in large part, to his involvement with their children. (Tr. 55-69)

Applicant submitted three character references, who vouched for his trustworthiness and good character. They are familiar with Applicant's alcohol-related arrests, know him well as a member of the community, and have no reservations in supporting him for a security clearance. (AE A – C) Applicant also submitted three recent performance evaluations that demonstrate consistent solid performance and discuss in detail his past and ongoing contributions to the defense industry. (AE D – F)

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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision 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 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

Under Guideline G (alcohol consumption), the Government’s concern is that 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 ¶ 21.

The Government established its case under Guideline G through Applicant’s admissions and evidence presented. Applicant had two alcohol-related arrests in 2014. However, as noted, his first DUI charge was dismissed and he was tried and convicted only of his second DUI.

A review of the evidence supports application of one alcohol consumption disqualifying condition, AG ¶ 22(a) “alcohol-related incidents away from work, such as driving while under the influence”

Considering the totality of the circumstances in this case, I find application of two alcohol consumption mitigating conditions is appropriate with regard to Applicant’s 2014 DUI offenses:

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 good judgment; and

AG ¶ 23(b) the individual acknowledges his or her 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.

Applicant presented credible evidence of actions taken to overcome his 2014 alcohol-related arrests, has established that he is not alcohol dependent, and during the infrequent times he consumes alcohol, he does so responsibly. His performance evaluations, witness testimony, and reference letters show Applicant’s work behavior has not been indicative of his having an alcohol problem. He is a valuable employee, who is reliable, dependable, and professional and is a respected member of the community. His sobriety and responsible use of alcohol is supported by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged the

problems misuse of alcohol has caused him, demonstrated remorse, and a steadfast commitment to continue lifestyle changes consistent with responsible use of alcohol.

Personal Conduct

The conduct under alcohol consumption was cross-alleged under personal conduct without the addition of any additional facts or allegations. Given the fact that the SOR allegations were fully discussed and dealt with under alcohol consumption, it is unnecessary to discuss further under personal conduct

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) 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. The discussion in the Analysis section under Guidelines G and E is incorporated in this whole-person section. However further comments are warranted.

I was particularly impressed with Applicant's demeanor during his hearing and the apparent effect this process has had on him. Applicant has been willing to do whatever is necessary to recover from his alcohol-related arrests. The process has been costly for him, not only financially, but also personally and professionally. Applicant has dedicated the majority of his adult working life to the defense industry and has successfully held a security clearance since 1982. His witnesses and reference letters additionally provide insight regarding the role he has played as a father and mentor not only to his children, but to other children in the community. He demonstrated the correct attitude and commitment to responsible alcohol consumption.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the

whole-person factors” and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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.b: For Applicant

Paragraph 2, Guideline E: FOR Applicant

Subparagraph 1.a: 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 continue Applicant’s eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT TUIDER
Administrative Judge