



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



In the matter of:

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

11/22/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate the security concerns regarding his alcohol, personal conduct, and criminal conduct problems concerning his alcohol-related arrests. Eligibility for access to classified information is denied.

Statement of Case

On September 2, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken 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 (AGs) implemented by DOD on September 1, 2006.

Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs). They apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect as of the issuance of the SOR would not affect my decision in this case.

Applicant responded to the SOR on October 1, 2016, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on March 15, 2017. He did not respond to the FORM.

Summary of Pleadings

Under Guidelines G and E, Applicant allegedly (a) was arrested in June 2011, charged with Driving Under the Influence (DUI), and placed on probation until 2017; (b) was arrested in August 2014, charged with DUI and child endangerment, placed on probation until 2020, and ordered to attend an alcohol education program for 18 months; and (c) continued to consume alcohol while on probation for his 2011 DUI arrest.

The 2011 DUI and continuing to consume alcohol while on probation charges covered in Guideline G are included in the Guideline E allegations and incorporated by reference. Both the 2011 and 2014 DUI charges are included in the Guideline J allegations and incorporated by reference.

In his response to the SOR, Applicant admitted the allegations contained in SOR ¶¶ 1.a-1.b, but neither admitted nor denied the allegations contained in SOR ¶ 1.c. Addressing SOR allegations ¶ 2.a and ¶ 3.a, Applicant admitted the allegations with explanations. He claimed he self-reported the DUI incidents after they occurred and was very cooperative in helping file the incident reports with his security department.

Addressing the two alcohol-related offenses covered in SOR ¶¶ 1.a and 1.b, Applicant claimed the two self-reported DUI incidents reflect his ability to comply with rules and regulations. He claimed (supported by signed attachments) that he was assigned to a DUI medium risk supervision program. And he claimed he has regularly attended self-help meetings between June 2010 and March 4, 2016 and Alcoholics Anonymous (AA) meetings between June 2015 and September 2015.

Applicant claimed in his response he is a retired Navy chief petty officer with over 22 years of honorable service and years of holding a security clearance throughout his Navy career. He claimed he has not consumed any alcohol beverages of any kind for the past 24 months and 25 days and still counting. And he claimed he has made the decision to abstain from alcohol for the remainder of his life, claims that conflict to some extent with his response to SOR ¶ 1.c.

Findings of Fact

Applicant is a 55 year-old electronics warfare technician who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in April 1981 and divorced in November 1994. (Items 6 and 9) He remarried in November 1994 and has two adult children from his first marriage. (Items 6 and 9) He earned no post-high school diploma. He enlisted in the Navy in May 1984 and served 12 years of active duty. He received an honorable discharge in May 2006 with the rank of chief petty officer. (Items 6 and 9)

Since August 2006, Applicant has been employed by his current employer. (Items 6-9) He reported unemployment between June 2006 and August 2006 following his Navy discharge. (Items 6 and 9)

Applicant's alcohol-related incidents

Records document that Applicant was arrested in June 2011 and charged with DUI. According to the statements Applicant provided his facility security officer (FSO) and interviewing agent from the Office of Personnel Management (OPM), respectively, he had been out to a restaurant with his wife and consumed two beers and a soda drink. (Items 8-9) After pulling out of the parking lot, he was stopped by a highway police officer for not using his turn signal. The officer administered a Breathalyzer test on Applicant that recorded a blood-alcohol content (BAC) level of .14 per cent, a finding seemingly at odds with Applicant's assurances of consuming no more than two beers (quantities not identified) before exiting the restaurant. (Items 8-9)

After administering a sobriety test on Applicant the investigating officer arrested Applicant and escorted him to a local police station. In court, Applicant pled guilty to DUI (a general intent crime classified as a misdemeanor) through his appearing lawyer and was ordered to complete a three-month first offender program for alcohol education. After competing the required first offender program classes in 2011, Applicant was ordered to complete a Mothers Against Drunk Driving (MADD) course (which he did), fined \$2,100, and placed on five years of probation until 2017. (Items 7-9)

Because of inconsistencies in Applicant's alcohol consumption explanations preceding his exit from the restaurant he frequented prior to his 2011 incident, and other inconsistencies in his response about the extent of his alcohol consumption following his 2014 DUI incident. Without further explanations, Applicant's abstention assurances cannot be accepted at face value. To gain full acceptance, his OPM interview sobriety claims required some corroboration from persons who have had close interaction with him away from work. Neither his supervisor nor lawyer provided sufficient corroboration of Applicant's abstinence claims with their letters to fully substantiate his claims. And

because Applicant did not list his 2011 DUI offense in his Electronic Questionnaire for Investigations Processing (e-QIP), his disputed assurances of his promptly informing his facility clearance officer (FSO) of his 2011 DUI incident cannot be afforded full weight and remains an issue in dispute with the Government.

In August 2014, Applicant consumed four beers while barbequing at his home. He admitted to making a poor decision to pick up his grandson from school in the afternoon of the same day. (Item 9) While driving home with his grandson in heavy traffic, he shifted lanes and struck a stopped police officer on a motorcycle. Asked by the same officer whether he had been drinking, Applicant admitted he had and was administered a Breathalyzer test by the officer that registered a .12 BAC level. (Items 8-9) Applicant, in turn, was arrested for DUI by the same investigating officer and taken to a nearby police station where he spent six hours in jail before he was released on bail.

Appearing in court in December 2014, Applicant pled guilty to DUI and child endangerment charges (both felonies). Both felonies were dropped by the court, which fined Applicant to \$850 (since paid off), ordered him to complete an 18-month alcohol education program, and placed him on five years of probation until 2010. (Item 9) Both the DUI and child endangerment charges remained in Applicant's plea agreement and were covered by the court's probation order. (Items 7-8)

After completing the three meeting requirements of his 2014-ordered probation in 2015, Applicant's probation status was reduced by the sentencing court to low risk probation. (Items 3 and 9) He is credited with completing his ordered 18-month education program. (Item 5)

In the e-QIP Applicant completed in September 2015, he acknowledged prior errors in judgment in driving his vehicle after consuming alcohol. In his e-QIP he attested to his maintaining his sobriety for almost 13 months and committed to never "taking another drink in his life." (Item 6) In his follow-up interview with an OPM agent, Applicant assured the agent who interviewed him in December 2015 that he had not consumed any alcohol since his August 2014 DUI incident and had no intention of resuming drinking in the future. (Items 3 and 9) Applicant, however, is still on probation and declined to admit or deny consuming alcohol while on probation.

Applicant's attached letters from his lawyer and program director of the multiple offender DUI 18-month education program he completed in 2016 are certainly helpful. They are not enough, however, to resolve questions about his past and post-2014 drinking status. For although the DUI program offers individual and group counseling for court referrals, it provides no announced individual evaluations by licensed substance abuse counselors as part of its core curriculum. Without more supporting evidence of his alcohol consumption history (to include professional evaluations from substance abuse specialists) and steps he is taking to avoid recurrent alcohol abuse (such as continuing participation in alcoholics anonymous (AA) or comparable support groups if warranted), his assured commitments to avoidance of recurrent alcohol incidents cannot be afforded full weight.

Character references

Applicant is well-regarded by his direct supervisor who has known him for over 10 years and his attorney who represented him in the two DUI incidents. (Item 3) His supervisor has never witnessed anything negative or irresponsible in his behavior. (Item 3) His supervisor expressed an enormous amount of confidence in Applicant, his character, and his ability to make the right decisions. (Item 3) His supervisor credited Applicant with being proactive in avoiding another alcohol-related incident and avoiding alcohol consumption "in more than two years." (Item 3) His supervisor's observations are credible as to how he observed Applicant in his work environment, but do not account for any interactions he may have had with Applicant outside of his employment venue.

In his separate opinions of Applicant's trustworthiness in light of his two alcohol-related incidents in 2011 and 2014, his attorney who represented Applicant in both cases vouched for Applicant's being a responsible person without offering any observations about whether Applicant continues to consume alcohol away from work, or whether an alcohol evaluation would be helpful. (Item 3)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

These AGs include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and any of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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 chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Alcohol Consumption

The Concern: 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to provide truthful and candid answers during national security investigative or adjudicative processes. . . . AG, ¶ 15.

Criminal Conduct

The Concern: 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 ¶ 30

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of E. O. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns are raised over Applicant's 2011 and 2014 alcohol-related arrests and convictions and the absence of any corroborated alcohol consumption history to gauge potential risks of recurrent alcohol abuse. By all accounts, Applicant is a highly regarded technician. Principal security issues raised in this case center on the recency of Applicant's two alcohol-related arrests. Since his 2014 DUI conviction and ordered probation through 2020, he has satisfied all of the imposed probation conditions, but still remains on probation until 2020, absent an earlier probation release by the supervising court.

While little is known about Applicant's drinking history or whether he abused alcohol at any time in his life before 2011, or during his periods of court-imposed probation between 2011 and the present, his two alcohol-related incidents in 2011 and 2014, when considered together, are enough to raise concerns over the risk of his engaging in recurrent alcohol-related offenses in the foreseeable future. On the strength of the evidence presented, one disqualifying condition (DC) of the AGs for alcohol consumption (AG ¶ 21) may be applied: DC ¶ 22(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.”

Because Applicant provided so little information about his alcohol history and steps he has taken or is taking to mitigate alcohol recurrence risks, assessing recurrence risks are difficult to gauge with the information available in the record. Evaluation by a certified substance abuse counselor and evidence of continued participation in AA-type support groups in 2016 and 2017 (if warranted) could have been helpful in assessing Applicant's alcohol abuse risk levels but were not undertaken in any verifiable way. Until more is

known about Applicant's drinking history and warranted continuing corrective initiatives, the presence of extenuating circumstances and other mitigating factors cannot be reliably evaluated.

In most instances, convincing assurances of sustained abstinence over a number of years (three and one-half years in Applicant's case) might normally be enough to avoid inferences and conclusions of drinking during an applicant's probation. For even without sufficient corroborating proof of sustained abstinence, potential abuse predictions, generally, may not be based on supposition or suspicion. See ISCR Case No. 01-26893 (App. Bd. Oct. 2002); ISCR Case No. 97-0356 (App. Bd. April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used a substance (legal or otherwise) since his last recorded use, or based on his past use is likely to resume usage in the future. See ISCR Case No. 02-08032 (App. Bd. May 2004).

In Applicant's situation, however, he neither admitted nor denied continued drinking during his probation in his response to the SOR. Applicant's manifest avoidance of any further incidents of alcohol abuse over the past three-plus years, while encouraging, is not dispositive of recurrence risk avoidance absent more evidence of his alcohol consumption history and, if warranted, evidence of a recent evaluation by a certified substance abuse counselor or medical expert. Assessment of Applicant's alcohol-related offenses must necessarily be made on the basis of a review of the entire evidentiary record developed to date, not merely the information developed with respect to his identified two relatively recent alcohol-related offenses.

In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, recent alcohol-related incidents, professional evaluations if undertaken, recurrent alcohol-related problems in or outside the work place over the past three-plus years, and the adequacy of the time elapsed since his last abuse of alcohol (*i.e.*, in August 2014). These considerations need answering in the face of Applicant's still limited track record of corrective steps to help him avert alcohol-related incidents in the future and his continuing probation status covering his 2014 alcohol-related incident.

To be sure, Applicant's manifest avoidance of any recurrent alcohol-related incidents for over three years is encouraging. The alcohol-related incidents to which he pled guilty to in 2011 and 2014, respectively, represent serious alcohol-related offenses, however, for which his probation conditions remain in effect until 2020. Evaluations and follow-up counseling have not been initiated to date, and Applicant has not provided probative evidence of his drinking history or identified any alcohol problems in need of counseling. Without closure on his court-ordered probation under the circumstances presented, recurrence risks cannot be fully and accurately ruled out.

Under the facts of Applicant's case, the evidence is not sufficiently developed to warrant application of any of the mitigating conditions covered by Guideline G. Certainly, professional evaluation and continued abstinence, if warranted, are important considerations in determining what weight to assign to his reformed drinking claims. See

ISCR Case 02-03186 (App. Bd. Feb. 16, 2006); ISCR Case 01-20579, at 5 (App. Bd. Apr. 14, 2004). But his assurances of recurrence avoidance of alcohol abuse over a three-plus-year period without more evidence of efforts to minimize recurrence risks are not enough to absolve him of recurrence risks at this time.

Historically, the Appeal Board has emphasized the importance of a strong rehabilitation program and a seasoned track record of alcohol resumption avoidance. See ISCR Case No. 06-17541 (App. Bd. Jan. 14, 2008); ISCR Case No. 04-10799 (App. Bd. Nov. 9, 2007); ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007). Despite encouraging efforts to avoid alcohol altogether, his efforts to date are not enough to absolve him of risks of recurrence of alcohol abuse under all of the circumstances considered.

Taking into account both Applicant's history of alcohol abuse and incidents away from work, corresponding insufficient development of probative evidence of a seasoned track record of evaluation and seasoned avoidance of alcohol abuse, abstinence (both with and without probation reporting requirements), Applicant's continued probation status, the applicable guidelines, and a whole-person assessment of his contributions to the Navy and his employer, safe conclusions cannot yet be made that Applicant is free of risks of potential recurrent alcohol abuse.

Allegations covering Applicant's two alcohol-related incidents in 2011 and 2014, respectively, raise trustworthiness and judgment concerns under Guideline E and are fully covered for the most part under Guideline G. To the extent Applicant's inconsistent statements about his pre-2011 incident consumption level and promptness about his reporting the incident to his FSO raise separate trustworthiness concerns about his candor, DC ¶ 16(e), personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group" has some application (e.g., "(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . .") has some application.

Applicable, too, to Applicant's situation are DC ¶ 31(a) of the criminal conduct guideline, "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," DC ¶ 31(b), "evidence (including but not limited to, a credible allegation, and admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted," and DC ¶ 31(c) "individual is currently on parole or probation." Both of Applicant's alcohol-related offenses were adjudicated as misdemeanor offenses that resulted in court-ordered probation conditions.

While initial felony charges of child endangerment (related to Applicant having his minor grandson in his vehicle at the time of the 2014 incident) were dismissed by the court, Applicant's actions were never denied and remain part of his administrative record. Further, Applicant's court-ordered probation relative to his 2014 offense is still in effect and will remain so until 2020 absent relief from the supervising court. None of the mitigating conditions covered by Guidelines E and J apply to Applicant's situation.

Considering all of the facts and circumstances surrounding Applicant's alcohol-related offenses and the positive impressions he has forged with his employer, Applicant's alcohol-related offenses covered by Guidelines G, E, and J are not mitigated. Security concerns over Applicant's risk of recurrent drinking are not resolved.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE G (ALCOHOL CONSUMPTION): AGAINST APPLICANT

Subparagraphs 1.a-1.c: Against Applicant

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

