



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



In the matter of:

)
)
)
)
)

ISCR Case No. 16-01035

Applicant for Security Clearance

Appearances

For Government: David Hayes, Esq., Department Counsel

For Applicant: Rod Sylvester, Esq.

04/25/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). Clearance is denied.

Statement of the Case

On March 25, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On November 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Exec. Or. 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; 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 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. Specifically, the SOR set forth security concerns arising under Guidelines G and J.

On December 15, 2016, Applicant responded to the SOR. On January 22, 2017, Department Counsel was ready to proceed. On February 14, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On March 2, 2017,

DOHA issued a hearing notice, setting the hearing for March 15, 2017. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A through F, which were received into evidence without objection. On March 23, 2017, DOHA received the hearing transcript (Tr.). I held the record open until April 28, 2017, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE G through N, which were received into evidence without objection. I marked five non-evidentiary post-hearing documents as Exhibits (Ex) I through XI, discussed below.

On October 19, 2017,¹ I notified Department Counsel that after reviewing Applicant's post-hearing documents, I intended to issue a summary decision granting his security clearance. (Ex. I) On October 20, 2017, Department Counsel objected to the issuance of a summary decision without comment. On October 23, 2017, I advised all parties that I would not be issuing Applicant's decision within the next two months and offered Applicant's counsel an opportunity to submit additional evidence of his client's sobriety. (Ex. II) On October 24, 2017, Applicant's counsel responded in the affirmative and on the same day, I informed all parties that I would reopen the record until December 1, 2017. (Ex III)

On January 29, 2018, I informed all parties that I had received Department Counsel's Motion to Reopen the Record, dated January 19, 2018. The Motion contained evidence that on January 9, 2018, Applicant had been arrested for inappropriate lane change and driving under the influence (DUI). As a result of this arrest, his Facility Security Officer suspended his security clearance. Subsequently, Department Counsel, Applicant's counsel, and I exchanged a series of e-mails discussing options to receive additional evidence and hearing venue and medium options. On March 13, 2018, I granted the request of Applicant's counsel to hold the record open until April 13, 2018, to allow him an opportunity to supplement the record with evidence addressing Applicant's January 9, 2018 arrest. Applicant's counsel did not submit any evidence, and on April 19, 2018, I informed all parties that the record had closed and I intended to issue a decision based on the evidence in the case file. (Ex IV – Ex XI)

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 September 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.²

¹ All post-hearing communications referred to in this and the following paragraph were by e-mail.

² The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

Findings of Fact³

Applicant's SOR response admitted all of the allegations with comment. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 34-year-old electronics technician employed by a defense contractor since June 2008. (Tr. 17-18) He seeks to retain his secret security clearance, which is a requirement of his continued employment. There is no evidence of security violations. (Tr. 18) In May 2001, he graduated from high school, and in May 2008, he received an associate's degree in electronics. (Tr. 19-20) Applicant has never married and has no dependents. (Tr. 20)

Alcohol Consumption

In May 2001, Applicant was charged with possession of alcohol while a minor for which he received "court fines and referral programs." (Tr. 21-22, 39-41) In November 2001, he was charged with possession of alcohol while a minor for which he received "fines and a court program." (Tr. 22-23, 41-43) In February 2007, Applicant was charged with public intoxication, which was dismissed. (Tr. 23, 43-44)

In June 2008, Applicant was arrested and charged with DUI, resisting an officer, and reckless endangerment. He pled guilty to the DUI and was sentenced to a fine, a 90-day driver's license suspension, one year of probation, and ordered to attend alcohol classes. This DUI occurred shortly after being granted a security clearance. (Tr. 23-25, 44-49) In June 2009, Applicant received a citation for being a passenger in a vehicle with an open container of alcohol for which he paid a \$25 fine. (Tr. 25-26, 49-50)

In October 2012, Applicant was charged with DUI. After being found guilty, he appealed, and was awarded a new trial. At his second trial in March 2016, he pled guilty to DUI and was sentenced to a fine and probation. (Tr. 25-29, 50-52, 56-58; AE D, AE E) In April 2016, Applicant was charged with obstructing governmental operations, which was dismissed. (Tr. 29-31, 63-65; AE F)

Applicant stated that he quit drinking because of what he learned after attending alcohol programs and recognizing that alcohol had not been a positive force in his life. He submitted a record of attendance from Alcoholics Anonymous (AA) meetings from December 30, 2016, to March 6, 2017. Applicant stated that attending AA meetings was helping him maintain sobriety adding that he planned to continue attending AA meetings. Because of the steps he took to maintain sobriety, he did not anticipate having any further alcohol-related problems. In addition to AA, Applicant has a support system to include his immediate family. (Tr. 34-35, 36-38, 53-60, 67)

Applicant submitted a March 7, 2017 letter from his Substance Abuse Outpatient Coordinator stating that he entered Level I of a substance abuse outpatient program in December 2016. His Coordinator stated that he was making good progress. (Tr. 32-33;

³ Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

AE B) Applicant testified that he had not had a drink since December 2016. (Tr. 33, 53) Applicant's April 2017 outpatient program documents included a discharge summary from his primary counselor, a substance abuse services continuing care plan, substance abuse drug testing documentation, and documentation of completing Level 3 and 12 months of monitoring. All of these post-hearing documents showed favorable progress of sobriety. (AE H - M) Of note, his April 2017 discharge summary recommended, among other things, that he continue attending at least two AA meetings per week and continue implementing relapse skills in order to abstain from drinking. (AE H) The record does not contain any formal diagnosis of any alcohol-use disorder.

While this decision was pending, as discussed above, I received Department Counsel's Motion to Reopen the Record. The Motion contained evidence that Applicant was arrested on January 6, 2018, for the offenses of inappropriate lane change and DUI. Because of this arrest, Applicant's Facility Security Officer suspended his access to classified information. (See Ex. I – XI) Secondary and primary source documents containing evidence of Applicant's arrest was marked as GE 4 and 5, respectively, and received into evidence. Applicant's counsel was provided an opportunity to rebut, explain, or mitigate the new adverse information. No additional evidence was provided.

Character Evidence

Applicant submitted a reference letter from his supervisor, who lauded his performance and contribution to the job. (Tr. 61-62; AE A) Applicant spends his discretionary free time with his family, and they live close by. His hobbies include working on cars, fishing and hunting. (Tr. 66-67) Post-hearing, Applicant's sister submitted a reference letter. She spoke highly of his character and opined that he learned from his past mistakes. (AE G)

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 in this decision should be construed to suggest that it is based, 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, Secretary of Defense, and DNI 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

AG ¶ 21 described the security concern pertaining to 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 at least one condition that 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 . . . regardless of the frequency of the individual’s alcohol use or whether the individual has been 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) applies. Applicant's has two DUI arrests and convictions and four non-DUI alcohol-related arrests or incidents.

AG ¶ 23 provides four 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 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.

None of the mitigating conditions fully apply. Applicant was arrested and convicted following his DUIs in 2008 and 2012. As noted, Applicant was making progress towards maintaining sobriety following his 2016 conviction for his 2012 DUI arrest. He made a favorable impression during his hearing. His hearing and post-hearing evidence was also favorable and suggested that he was on a successful path to sobriety. Unfortunately, he was arrested for DUI in January 2018 while this case was pending a decision. Because of his most recent arrest, Applicant has failed to demonstrate sufficient resolve to address his problems with alcohol. His alcohol-related problems continue to cast doubt on his current reliability, trustworthiness, and judgment. Alcohol consumption security concerns are not mitigated.

Criminal Conduct

As noted, criminal conduct security concerns were cross-alleged with no additional facts or evidence presented. The security concerns raised by Applicant's conduct were discussed under alcohol consumption security concerns. Accordingly, further discussion of Applicant's alcohol-related arrests under criminal conduct would be duplicative and unnecessary.

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(g) were addressed under those guidelines but some warrant additional comment.

Applicant is 34-year-old electronics technician, and he has been employed by a DOD contractor for nine years. He held security clearance since he began his current employment until it was recently suspended following his January 2018 DUI. He is well regarded by his supervisor and was having a successful career. Unfortunately, Applicant has been plagued with documented alcohol-related problems that arose shortly after graduating from high school 2001. "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses" and raises "questions about [his] reliability and trustworthiness." See AG ¶ 21.

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 not mitigated. It is not clearly consistent with the interests of national security to grant Applicant security clearance eligibility at this time.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d – 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant

Paragraph 2, Guideline J:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Clearance is denied.

Robert Tuider
Administrative Judge