



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 16-01153
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

03/20/2018

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under, Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Applicant mitigated the security concerns raised by his history of arrests for driving under the influence of alcohol. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on October 2, 2015. On July 18, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines G, J and E. The DOD acted under Executive Order (Ex. 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 (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 16, 2016, and the case was assigned to me on April 25, 2017. On May 4, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant's counsel that the hearing was scheduled for May

23, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, submitted Applicant's Exhibits (AX) A through L, which were admitted without objection, and called five witnesses. DOHA received the transcript (Tr.) on June 5, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017.

Findings of Fact

Under Guideline G, the SOR alleges that Applicant was arrested and charged with driving under the influence of alcohol (DUI) in February 2014, pled guilty, received a suspended jail sentence, and two years' probation until January 2017. It further alleges that Applicant was arrested in October 1989, charged with DUI, and pled guilty to the offense. Finally, the SOR alleges that Applicant was arrested in April 1988 and charged with DUI. These allegations are cross alleged under Guidelines J and E. In his Answer, Applicant admits each of the allegations, gives an explanation of each of the events, and states that he does not believe he should lose his clearance. Applicant's admissions are incorporated in my findings of facts.

Applicant is a 52-year-old software engineer employed by a defense contractor since June 2010. He has held a security clearance since approximately 1996. Applicant married his wife in 1995. (GX 1.)

Applicant graduated from high school and started college in 1983. While he had some scholarship and grant money, as well as some assistance from his parents, Applicant was financially unable to complete college through continuous attendance. Applicant worked during the breaks, over the summers, and at one point worked in lieu of attending college for an entire school year. (Tr. 24-25.) The local industry was comprised primarily of tourism, and Applicant worked in varying jobs in the restaurant and hospitality industry. In April 1988, Applicant, then 22, was in the midst of taking a year off from school and was working at a restaurant. After work, he and the other employees got together for a few drinks. On his way home from the after-shift gathering, Applicant was pulled over and arrested for DUI. He pled guilty to the reduced charge of reckless driving, paid a fine, did 40 hours of community service and attended DUI awareness classes. (Tr. 25-26.)

By October 1989, Applicant, then 23, had returned to college. He attended a fraternity party where he consumed alcohol, and on his way home from the party had car trouble and pulled to the shoulder of the road. As he was walking to a nearby gas station to use the payphone, a police officer pulled up to his car. Applicant returned to his car, spoke with the police officer, and was arrested for DUI. He pled guilty, was fined, was required to attend DUI awareness classes, and his driver's license was suspended. (GX 3.)

Following the second DUI in 18 months, Applicant evaluated his conduct and determined that he needed to be more responsible, particularly about drinking too much, and focus on “growing up, graduating, getting out, and moving on with my life.” (Tr. 28.)

Applicant graduated from college in 1991 with a double major in mathematics and computer science. He remained in the restaurant industry, moving into restaurant management until 1993, when the restaurant he had been working in closed. He moved home and began seeking employment in his field of study. After about eight months, he found work at a small engineering firm where he remained for approximately one year. He then joined some friends from college doing contract work, soon met and married his wife, and by 1996, had begun working as a consultant programmer. (Tr. 28-32.)

Applicant's career moved forward, and although Applicant remained a social drinker, at no point between 1989 and 2014 did alcohol have any negative impact on Applicant. (Tr. 32-34.) Applicant's wife, a software systems analyst who has held a security clearance since 1988, always considered her husband to be an occasional drinker. She considered his two DUIs to be youthful indiscretions, and has never had any concerns about her husband's alcohol consumption. (Tr. 59-61.)

In February 2014, an old friend of Applicant's, whom he hadn't seen in several years, called Applicant to say he'd be coming to town. They agreed to meet Friday after work near where the friend was staying, an area of town that was unfamiliar to Applicant. Applicant met his friend and they had several drinks. Applicant left the bar to drive home, and quickly realized that he had had more to drink than he should have before driving. To compound the problem, Applicant headed in the wrong direction, and got lost. He pulled off the road into a restaurant parking lot, and called his wife to come get him. However, because he was lost, he was unable to explain to his wife where he was. After a short period of time, the police arrived, spoke with Applicant, and placed him under arrest for DUI. Although Applicant had turned off his engine, because his car had a remote ignition, he was considered to be in control of the vehicle. (Tr. 34-43; Tr. 50-52.) Applicant pled guilty to DUI. After returning to work, he properly reported his arrest to his facility security officer. (GX 3.)

Following his 2014 arrest and conviction for DUI, Applicant modified his drinking by significantly decreasing his consumption, and absolutely never driving after having a single drink. (Answer.) After receiving the SOR, Applicant “went through another period of introspection. And that was when I decided an even better barrier than not drinking when I had keys on me, was just not drinking at all.” (Tr. 47.)

In late July 2016, Applicant decided to practice complete abstinence and began attending Alcoholics Anonymous (AA) meetings. Since beginning AA, Applicant has attended at least one meeting every week, regularly attends three meetings per week, and his goal is to always try to attend four meetings per week. (Tr. 47-49.) Applicant successfully completed his probation without incident in January 2017. (Tr. 41.)

Applicant's AA sponsor, who has held a security clearance since 1984, testified that Applicant is doing well in his sobriety, and that he has "his head working in the right direction." Applicant's sponsor thinks that he is trustworthy and honest and that he should be permitted to maintain his clearance. (Tr. 86-87.)

Applicant's friend of over nine years and former coworker, who has held a clearance for more than 20 years recommends Applicant for clearance. In the past, Applicant's friend attended many social gatherings where Applicant consumed alcohol. He did not have any concerns about Applicant's drinking previously, and does not now. (Tr. 68-69.) Applicant's former coworker, who was held a clearance since 1999, has known Applicant for about 18 years.

Applicant's former coworker testified that he is aware of the SOR allegations and has no hesitation in recommending Applicant for continued security clearance (Tr.) 72-74.) Applicant's friend, employed in the commercial software industry, testified that Applicant is respected in the community and also recommends him for clearance. (Tr. 76-79.) From 2002 through 2016, Applicant has received positive performance appraisals. (AX A-K.)

Although Applicant previously categorized his two DUI arrests while in his early 20s as reckless, irresponsible behavior of a young man, and his 2014 DUI arrest as a result of poor judgment, he now views these events as manifestations of the negative impact that alcohol had on his life. He is committed to his sobriety, regrets his behavior, accepts responsibility for his actions, and understands the security concerns related to his conduct. (Tr. 38-40; Answer.)

Policies

"[N]o 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 applicants 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's meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made “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, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[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

Guideline G, Alcohol Consumption

The concern under this guideline is set out in AG ¶ 21:

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.

Conditions that could raise a security concern and may be disqualifying include:

AG ¶ 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 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;

Conditions that could mitigate security concerns include:

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; 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's three DUIs in 1988, 1989, and 2014 raise concerns about his overall judgment, reliability, and trustworthiness. While three DUIs could constitute a pattern, it is significant that there was a span of 25 years between Applicant's second and final DUI. Specifically, in 1989, after his second DUI in 18 months, Applicant reflected on his conduct and made a concerted effort to modify his behavior by acting more responsibly, particularly regarding his alcohol consumption. He focused on growing up and starting his career. His 2014 DUI was the result of a lapse of judgment. Initially, Applicant reduced his drinking and absolutely never drove after having even one drink. However, after receiving the SOR, Applicant acknowledged the overall negative impact that alcohol had on his life, and determined that he would no longer consume alcohol. In July 2016, Applicant began attending AA meetings on a regular basis. He has practiced complete abstinence since that time. His AA sponsor thinks Applicant is doing very well and his sobriety. AG ¶¶ 23(a) and 23(b) apply.

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30:

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.

The following disqualifying conditions apply under this guideline:

AG ¶ 31(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;

AG ¶ 31(b): evidence . . . of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted;

The following mitigating conditions are potentially applicable:

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 Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006).

Applicant has been sober since July 2016, nearly 2 years. His last DUI in February 2014 was not recent. He is committed to his sobriety, and it is unlikely that he will engage in driving while intoxicated, or any other criminal activity, in the future. He successfully completed his probation in January 2017. His past conduct does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, 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. . . .

The following disqualifying conditions are potentially applicable:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

The following mitigating conditions are potentially applicable:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Given Applicant's commitment to sobriety for nearly 2 years, it is unlikely that he will drive under the influence of alcohol in the future. Further, Applicant has acknowledged the wrongfulness of his conduct and accepted responsibility for his actions. AG ¶¶ 17(c) and 17(d) apply.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a).

I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Applicant stepped back and evaluated the negative impact that alcohol had had on his life, determined that he would stop consuming alcohol, and sought the support of AA. He is trusted and respected by his wife, his AA sponsor, his coworkers, and his

friends. He accepts responsibility of his past conduct, and is committed to his sobriety, his wife, and his job. He has held a security clearance since 1999.

After weighing the disqualifying and mitigating conditions under Guidelines G, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Paragraph 2, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraphs 2.a: For Applicant

Paragraph 3, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraphs 3.a: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge