



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02273

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

04/20/2018

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 24, 2014. On August 21, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J.¹ Applicant responded to the SOR on October 12, 2016, and requested a hearing before an administrative judge. The hearing was originally scheduled for July 31, 2017, with another administrative judge. At Applicant's request, it was continued. The case was then reassigned to a second administrative judge near the hearing location on August 8, 2017, and finally, reassigned to me on November 8, 2017.

¹ The DOD CAF acted 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 (AG) implemented by the DOD on September 1, 2006.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 8, 2017, and the hearing was convened on November 16, 2017. Government Exhibits (GE) 1 through 4 and Applicant's Exhibits (AE) A through N were admitted in evidence. Applicant testified. DOHA received the hearing transcript (Tr.) on December 1, 2017.

Findings of Fact

Applicant is a 34-year-old senior engineer working on advanced military aircraft, employed by a defense contractor since 2009. He received a bachelor's degree in 2006 and a master's degree in 2008. He is unmarried and has held a DOD security clearance since 2009.

The SOR alleges under Guidelines G and J, three alcohol-related arrests including in August 2013 for public intoxication; in October 2014 for driving while intoxicated (DWI); and in September 2015 for DWI. Each arrest resulted in a plea and conviction, although in the 2015 incident, Applicant pleaded guilty to obstructing a highway, and the DWI charge was dismissed. Applicant admitted the allegations with explanations, and provided documents with his answer.

Applicant was first arrested in August 2013, while walking to a vehicle in a parking lot after a professional football game. Applicant testified that he consumed several beers at the game. He denied drinking anything other than beer, however in his answer to the SOR, he noted that:

"I attended the game and that night was the first time my section was able to purchased [sic] hard liquor and mixed drinks. I did not pace myself as I should have an [sic] I made the mistake of drinking one too many alcoholic beverages."

At the hearing, Applicant testified that he did not know why he was stopped by the police and never inquired about why. He stated that he must have been stopped because he appeared intoxicated, noting "maybe someone saw me stumbling." When asked "you don't know if you were stumbling?" he answered "I felt fine." He was arrested for public intoxication and remained in jail overnight.² He pled no contest, and was found guilty of public intoxication. Applicant testified that he traveled to the game with an acquaintance that drove him, but they did not sit together and he could not recall his name at the hearing. He also testified that he could not recall whether he told a security clearance investigator during an interview in July 2014 that he attended the game by himself. He acknowledged that he may have told the investigator in 2014 that he learned his lesson from the public intoxication incident, and that he was not going to ever drive if he drank.³

² Applicant was unable to answer how many beers he would need to consume to feel intoxicated, despite a history of drinking alcohol since he was 21 years old. Tr. 44-45.

³ Tr. 51-54.

Applicant was arrested in October 2014 for DWI. He was drinking beer at a party and drove home. He testified that he did not know why he was stopped by the police, and based on information he previously learned, he refused a field sobriety and field breathalyzer test. After he was arrested, a breathalyzer test disclosed he had a .15% blood alcohol level.⁴ The court records show that Applicant used a vehicle interlock device and completed a DWI intervention program by the time he entered a final plea. In May 2015, he pled guilty to a lesser offense of misdemeanor DWI, and was sentenced to 90 days in jail suspended, one year probation with the condition that he abstain from alcohol abuse and have no more arrests. The vehicle interlock device was removed.⁵

While still on probation for the previous DWI, Applicant was again arrested in September 2015 for DWI, a second offense. He was driving home from an indoor golf facility with his friends after drinking alcohol. He testified that he pulled the vehicle over to the side of the road because one of his friends was sick from heavy drinking.⁶ He was then stopped by police, and after refusing a breathalyzer and field sobriety tests, he was arrested for DWI. Applicant first testified that he consumed "A beer. That's it," prior to driving, but later clarified that he consumed an unknown amount of beer.⁷ In May 2016, Applicant pled guilty to obstructing a highway, and the DWI was dismissed. He was placed on a 15-month deferred adjudication program, one year probation, was required to again use a vehicle interlock device and complete a DWI repeat offender program.

Applicant testified that he stopped drinking in April 2016 after his first contact with DOHA regarding his security clearance.⁸ This date also closely precedes his court appearance on his second DWI arrest. In August 2016, Applicant attended a presentation of the DWI victim impact panel, and in December 2016, completed the DWI intervention (repeat offender) program.⁹ In February 2017, his terms of probation were amended to include submission of urine, hair, blood, breath or saliva for testing and to pay for testing as required, and the alcohol monitoring device was ordered to be removed. The interlock device was removed in February 2017,¹⁰ and the deferred adjudication was dismissed in September 2017.¹¹

⁴ Tr. 25. During the hearing, Department Counsel asked: "And you blew a .15; is that right?" Applicant replied "yes, that's the .15. I don't recall what the number was."

⁵ Tr. 28; GE 2.

⁶ Tr. 31.

⁷ Tr. 29-30.

⁸ Tr. 33-34. Of note, the DOD CAF sent interrogatories to Applicant on March 18, 2016, and sent the SOR on August 21, 2016.

⁹ Tr. 46.

¹⁰ Tr. 35.

¹¹ AE N.

Applicant submitted various documents showing his background, education, work performance, recognition and awards, and letters of recommendation from two friends, one of whom is a current coworker. Neither letter discusses Applicant's use or abstinence from alcohol. The co-worker supplemented his 2015 letter with an e-mail dated November 15, 2017, stating that he "can attest that I have not witnessed [Applicant] drink an alcoholic beverage since 2016."¹² Applicant also submitted a letter of intent to refrain from alcohol abuse/use. Applicant has not independently pursued an alcohol abuse assessment, counseling, or treatment, outside of his court-ordered education programs.

Policies

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, on June 8, 2017. The revised guidelines are applicable to this decision.

"[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 § 2.

National security eligibility 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, 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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." 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

¹² AE M.

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 ¶ 1(d).

Analysis

Guideline G, Alcohol Consumption

The security concern for alcohol consumption 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

(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; and

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

Applicant was arrested for alcohol-related incidents in 2013, 2014, and 2015, the last occurring while he was on probation from the previous DWI conviction. The above disqualifying conditions apply.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

- (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.

Applicant was arrested three times after abusing alcohol, including while driving and while on probation. About one month after receiving the DOD CAF interrogatories, and one month before his last DWI court appearance, he claimed to have stopped drinking. His last DWI arrest occurred while he was on probation and shortly after completing a DWI education program and removal of a vehicle interlock device. Despite recurring incidents of alcohol-related arrests, probation, use of alcohol monitoring devices, and court-ordered education classes, he has not shown sufficient evidence of abstinence or the ability to drink responsibly. He has not independently sought an alcohol use assessment, counseling, or treatment, and I am not convinced that his abstinence will be sustained in the future. None of the mitigating conditions are sufficient to overcome concerns about his established pattern of excessive alcohol use.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

- (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.

Applicant's three arrests were established, and the above disqualifying condition applies.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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

(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.

Applicant has a strong work record and favorable character evidence. Between 2013 and 2015, he was arrested for public intoxication and twice for DWI, including once while on probation. He admitted to consuming alcohol before all three incidents. His vehicle interlock device was removed in February 2017, and he completed his deferred adjudication for his last arrest in September 2017. There has been insufficient time elapsed to show that similar criminal conduct will not recur. I also have unmitigated concerns under the same rationale discussed in the alcohol consumption analysis.

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 relevant 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), 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G and J

in my whole-person analysis. I also considered Applicant's education, work history, and favorable character evidence, as well as his testimony and documentary evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the alcohol consumption and criminal conduct security concerns.

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 J:	Against Applicant
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2; Guideline G:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge