



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



In the matter of:

)
)
)
)
)

ISCR Case No. 17-00781

Applicant for Security Clearance

Appearances

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro se*

02/07/2018

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant did not present sufficient information to mitigate the concerns raised under the financial considerations guideline or the alcohol consumption and criminal conduct guidelines. Access to classified information is denied.

Statement of the Case

On February 22, 2013, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). On April 28, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, which became effective on September 1, 2006 (Sept. 1, 2006 AGs).

Specifically, the amended SOR set forth security concerns arising under Guideline G (alcohol consumption), Guideline F (financial considerations) and Guideline J (criminal conduct). Applicant answered the SOR and requested a decision on the administrative (written record). (Item 3)

On July 14, 2017, Department Counsel sent Applicant the Government's written case, known as a file of relevant material (FORM). With the FORM, Department Counsel

forwarded to Applicant 14 exhibits for admission into the record. Applicant submitted a response to the FORM (Response). The information accompanying the FORM and the documents Applicant submitted with his Answer and Response are admitted into the record. On November 21, 2017, I was assigned the case.

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

Findings of Fact

In Applicant’s SOR response, he admitted the SOR allegations. He also provided extenuating and mitigating information. (Item 4)

Applicant is a 30-year-old nuclear machinist who has worked for the same defense contractor for almost five years. (Item 5) In 2005, he graduated from high school. He attended college for about one year, and he also attended a technical institute, but he did not receive a degree or diploma. He has never married. Applicant has never held a security clearance. (Item 5)

Alcohol Consumption and Criminal Conduct

In October 2013, Applicant, after being stopped by the police, was arrested and charged with Driving under the Influence of Alcohol (DUI). He was found guilty of misdemeanor DUI. He was placed on probation for two years. (Item 7) He also received a restricted driver’s license for one year. (Item 7) Applicant admitted that he had a few drinks and that he should not have been driving. He attended and successfully completed an ASAP class and paid a fine. (Item 4) While he was still on probation, Applicant was charged with another DUI. This happened on November 23, 2015 when Applicant was visiting family and consumed two half-full red solo cups of straight whiskey.

Applicant failed to appear in court for this second DUI, and as of May 2017, the charge was unresolved. (Item 4) In January 2016, a bench warrant was issued after he failed to appear in court for the DUI charge from November 2015. He has a misdemeanor-level criminal conviction for DUI.

Applicant responded that his use of alcohol has never affected his work. He noted that it is not an addiction and he has never received a complaint at work. He reported that

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

he only drank on special occasions and not every day. He also disputed that he was on unsupervised probation during his subject interview, but the disposition summary in the record states that he was placed on a two-year probation. (Item 5, 7) He is in the process of resolving the bench warrant issue. He wrote that he moved to another location and could not return to the court. He has found a lawyer to represent him, and he will get the matter resolved. He noted that no one is perfect. He just made a mistake. (Response to FORM). According to Applicant, he never drank every day and has basically stopped drinking. He acknowledged that before 2016, he drank on weekends when he was not working. There is no diagnosis of alcohol abuse or dependence in the record. He has never sought counseling or treatment. (Item 5)

Financial

The SOR alleges seven delinquent debts totaling approximately \$6,825; that Applicant's wages were garnished in 2016 to satisfy a state tax lien; and that he failed to pay Federal and state income taxes for tax years 2013 and 2014.

Applicant explained that when he was young, he did not handle his finances properly. He did not learn the basics of having a budget and paying bills. He understands that he made bad decisions. He was also unemployed various times. He acknowledges his debts and does not make excuses. It is his intention to resolve all delinquencies. He has worked with his current employer for four years and loves his job. He stated that he obtained a financial counselor, planned a budget and began to pay his debts. He also filed his income tax returns each year and does not understand why he still owes money because he set up a payment plan. He believes he only owes for tax year 2013. He told the Government to garnish his pay check in 2015 so that the debt would be repaid. (Item 6)

As to SOR 2.a, a 2016 judgment for \$1,767, it has been satisfied and the Government stipulated to the payment. (Item 13)

As to SOR 2.b, a car loan in the amount of \$14,798, with a past-due amount of \$1,175, Applicant's girlfriend did not make the promised payments. She gave it to someone else who did not make payments and the car was stolen and totaled. Applicant stated that he informed the credit union but there is nothing in the record concerning any resolution of the loan. He assumed that insurance paid the amount owed, but he did not submit any documentation to support his claim.

As to SOR 2.c, 2.f, and 2.g, Applicant stated that these accounts have been paid in full. He did not provide any receipts or other evidence of payment.

As to SOR 2.d, a collection account in the amount of \$2,466, Applicant admits that he has not paid the rent for an apartment that he leased in 2010. He vacated the apartment in 2010 and stated that he did not have the money to pay the rent. He has not made any payments since 2010. This collection account remains delinquent. (Item 6)

As to SOR 2.e, a collection account for \$241, Applicant stated that he had a payment plan, with one payment left. There is nothing in the record to substantiate his assertion.

As to SOR 2.h, Applicant's wages were garnished in the amount of \$2,863 to satisfy a state tax lien. The garnishment began in 2015.

As to SOR 2.i, failure to file state income tax returns for tax years 2011, 2012, and 2013 as required, the allegation was withdrawn by the Government.

As to SOR 2. j, Applicant failed to pay his Federal income taxes for tax year 2013 and 2014. His wages were garnished and he believes he has paid the taxes for 2014, but he believes he still owes "a little" for tax year 2013. He did not submit any information to confirm his assertions.

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 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 or her 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 articulates the Government’s concern about 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 two conditions that could raise a security concern and may be disqualifying in this case including:

- (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 alcohol² to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

² Although the term “binge” drinking is not defined in the Adjudicative Guidelines, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, NIAAA

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 two DUIs involving the police and courts happened in October 2013 and November 2015. He was convicted for the first DUI and placed on two years probation. He did not appear in court for the second DUI, which is still unresolved.

AG ¶ 23 details 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.

The Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th

Newsletter 3 (Winter 2004 No. 3), <http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf>. “Binge drinking is the most common pattern of excessive alcohol use in the United States.” See the Center for Disease Control website, (stating “The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person’s blood alcohol concentration (BAC) to 0.08 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours.”), <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>.

Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007).

I have carefully considered the Appeal Board’s jurisprudence on alcohol consumption and Applicant’s history of alcohol consumption. Applicant’s latest DUI was in 2015, but has not been resolved due to his failure to appear in court. The record does not reflect any other alcohol incidents. Applicant did not complete probation before the second DUI in 2015. He completed an alcohol education class and claims that he rarely drinks. There is not sufficient evidence to resolve my doubts about Applicant’s current reliability, trustworthiness, and good judgment. Alcohol consumption security concerns are not mitigated.

Financial Considerations

18. *The Concern.* Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

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

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;

(c) a history of not meeting financial obligations;

(e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators; and

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant incurred delinquent debt when he was young. He had some unemployment, but he has been steadily employed in the last four years. He accumulated debt, which he has not resolved. He also did not pay state or federal income taxes as required. In 2015, his wages were garnished to pay state income tax. He still owes for federal taxes. Applicant satisfied one judgment. He stated that he paid or has payment plans for the other alleged delinquencies in the SOR, but he presented no evidentiary materials. The debts have been outstanding for a number of years. The facts support the disqualifying conditions listed above.

20. Conditions that could mitigate security concerns include:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

In light of the information presented in the record none of the above mitigating conditions apply.

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "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 ¶ 31 lists conditions that could raise a security concern and may be disqualifying including:

(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; and

(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.

AG ¶¶ 31(a) and 31(b) apply because in January 2016, a bench warrant was issued after Applicant failed to appear in court for the DUI charge from November 2015. The warrant is currently active. Applicant has not returned to court. Applicant admitted the incident of criminal conduct.

AG ¶ 32 describes conditions that could mitigate security concerns including:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

For the reasons indicated in the previous section, criminal conduct security concerns are not mitigated. Applicant's second DUI before the end of his two-year probation and failure to appear in court for the November 2015, DUI creates doubt about his judgment, reliability, and trustworthiness, and raise questions about his ability or willingness to comply with laws, rules and regulations.

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

Applicant is a 30-year-old nuclear machinist who has worked for his defense contractor for almost five years. Applicant has two DUI's from 2013 and 2015. While he did complete an alcohol education class, he committed his second DUI before completing his probation for his first DUI conviction. He did not appear in court for the second DUI and has not resolved that charge. There is an active bench warrant for Applicant to which he has admitted that he has not yet resolved. He has not carried his burden of proof in this case.

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, criminal conduct, and financial considerations security concerns are mitigated.

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
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2.j:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge