



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



In the matter of:)
)
) ISCR Case No. 17-01588
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/30/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), G (Alcohol Consumption), and E (Personal Conduct). Applicant was convicted twice of operating a vehicle after consuming alcohol, and is still on probation for his most recent arrest. Additionally, he was involved in two alcohol-related domestic violence incidents. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application on August 4, 2014. On July 31, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, G, and E. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all decisions on or after June 8, 2017.

Applicant answered the SOR on August 11, 2017, and requested a decision on the record without a hearing. On October 13, 2017, a complete copy of the File of Relevant Material (FORM), containing eight Items, was mailed to Applicant and received by him on October 18, 2017. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not object to the Government's Items. Hence, Items 1 through 8 are admitted into evidence without objection. He submitted additional evidence, which was admitted without objection as Applicant's Exhibit (AX) A. The case was assigned to me on February 12, 2018.

Findings of Fact¹

Applicant is a 36-year-old employee who requires a security clearance for his employment as a federal contractor. He was worked as a senior system engineer since May 2013. He has never been married and has a six-year-old son. Applicant received his associate's degree in 2003, finished his undergraduate degree in May 2016, and is working toward a master's degree.

The SOR contains three allegations under Guideline J for criminal activity that occurred between 2009 and 2016 (SOR ¶¶ 1.a. through 1.c), all of which were cross-alleged under Guideline G (SOR ¶ 2.a.) and Guideline E (SOR ¶ 3.a.). After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

In August 2009, Applicant was charged with Driving Under the Influence (DUI) and Failure to Obey a Traffic Control Device (SOR ¶ 1.a.). While at a house party, Applicant consumed two to three beers over the course of eight hours. When he left the party, driving his own vehicle, he did not think he was over the legal limit or too impaired to drive. When he was pulled over by a police officer, he passed the field sobriety tests, but because he admitted to consuming alcohol, the police requested he take a breathalyzer test. He does not recall the results of this test. Applicant pleaded guilty to Driving While Impaired (DWI) by Alcohol and was placed on probation before judgment. He paid a fine and court costs, and completed alcohol education classes (Item 4 at 18-19 and Item 5).² In his Answer to the SOR, Applicant admitted to the underlying conduct (Item 2).

In November 2011, a one-year Domestic Violence Protective Order was issued against Applicant. This order was issued on behalf of the mother of Applicant's son, his former girlfriend (SOR ¶ 1.b.). On November 11, 2011, Applicant pushed and hit her with their son's car seat, bruising her leg. A week later, while she was holding their four-month-old-son, he approached them in a drunken stupor, took the baby, ran to his car, and put the baby in the car without a car seat (Item 6 at 13). He also threw two beer bottles at her. The judge found that there were reasonable grounds to believe this information and

¹ Applicant's personal information is extracted from his security application (Item 3) unless otherwise indicated by a parenthetical citation to the record.

² Applicant was originally interviewed on October 9, 2014. He told the investigator that he has not driven after drinking since his August 2009 arrest and there is no likelihood of recurrence (Item 4 at 19).

granted Applicant's former girlfriend a one-year Protective Order (Item 6 at 5). Applicant admitted that a Protective Order was issued against him, but denied he assaulted his former girlfriend or consumed alcohol.

During a December 6, 2016 interview with a government investigator, Applicant disclosed he was arrested after an incident in June 2016, in which he choked, struck, and digitally penetrated his former girlfriend. She asserted he was intoxicated and on drugs when the incident occurred. Applicant denied he assaulted his former girlfriend or consumed alcohol or drugs. He went to a jury trial in October 2016. (Item 4 at 13-14).³

In November 2016, Applicant was arrested and charged with DUI of Alcohol Per Se. Applicant was at a lounge attending a friend's birthday party where he consumed approximately three alcoholic beverages. When he left the lounge, he did not feel intoxicated, and he drove his personal vehicle. A police officer pulled him over as he entered a restaurant's drive-thru. Applicant performed a field sobriety test and was requested to go to the police station for a breathalyzer. He tested over the legal limit, but cannot remember his blood alcohol content (Item 4 at 12-13). Applicant pled guilty and was sentenced, in part, to two years of probation, ending on March 6, 2019 (SOR ¶ 1.c.). Applicant admitted this allegation and provided evidence that in March 2017, he completed a substance abuse class (Item 2 at 4).

As of August 2016, Applicant stated that he consumes two to three beers a year, while attending social events (Item 4 at 14). He claims he has no intention of drinking and driving again (Item 4 at 13).

Policies

"[N]o one has a 'right' to a security clearance."⁴ 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."⁵ 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."⁶

Eligibility for a security clearance is predicated upon the applicant 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

³ The SOR did not allege this derogatory information as an allegation. Hence, it will not be analyzed as a potential disqualifying condition, but may be considered under the analysis of mitigating conditions and the whole-person concept, in addition to an evaluation of Applicant's credibility.

⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁵ *Egan* at 527.

⁶ EO 10865 § 2.

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."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.⁸ "Substantial evidence" is "more than a scintilla but less than a preponderance."⁹ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.¹⁰ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹¹ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹²

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."¹³ "[S]ecurity clearance determinations should err, if they must, on the side of denials."¹⁴

⁷ EO 10865 § 7.

⁸ See *Egan*, 484 U.S. at 531.

⁹ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁰ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹¹ Directive ¶ E3.1.15.

¹² ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹³ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁴ *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

Analysis

Guideline J: Criminal Conduct

AG ¶ 30 expresses the security concerns 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 describes conditions that could raise a security concern and may be disqualifying. Three are potentially applicable in this case:

- (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;
- (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; and
- (c) individual is currently on parole or probation.

Applicant's history of criminal activity between 2009 and 2016 and his current parole status establishes the above disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate security concerns raised in this case. The following two 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 was 28 years old when he was first arrested for DWI and was subsequently convicted. Two years later, he was issued a Domestic Violence Protective Order after he assaulted the mother of his son. He consumed alcohol prior to that incident. In October 2016, he went to trial for a second alcohol-related physical altercation. In

November 2016, he was arrested for a second DUI. One year ago, he was convicted and sentenced to two years of probation for that DUI. His probation is not set to expire until March 2019.

The three alleged alcohol-related incidents collectively establish a pattern of questionable judgment that calls into question Applicant's ability or willingness to comply with laws, rules, and regulations. After completing his SCA in 2014, at age 33, Applicant was arrested again; despite telling the government investigator that he did not intend to drive after consuming alcohol. Based on all the evidence, Applicant has not demonstrated a sufficient pattern of modified behavior to conclude that his questionable judgment associated with past criminal misconduct is behind him or that he has provided sufficient evidence of rehabilitation. AG ¶¶ 32(a) and 32(d) are not established.

Guideline G: Alcohol Consumption

AG ¶ 21 expresses 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 describes conditions that could raise a security concern and be disqualifying. One is 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant admitted to consuming alcohol before his 2009 and 2016 arrests. He denied the underlying behavior which led to the issuance of a Protective Order and that alcohol was involved in this incident. Applicant's denials are not credible.

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut and prove mitigation of the resulting security concerns. AG ¶ 23 provides conditions that could mitigate security concerns raised under this guideline. Three 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 good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Within a seven-year period, Applicant was charged twice with crimes involving alcohol and driving. Not enough time has passed since the last offense in November 2016, nor has any of the conduct occurred under unusual conditions. AG ¶ 23(a) does not apply. Applicant acknowledged he consumed alcohol and drove, but he has not provided sufficient evidence of steps he has taken to prevent similar incidents. Despite his claim to be more vigilant after his first arrest, he failed to do so. AG ¶ 23(b) does not apply. There is no evidence to establish mitigation under AG ¶ 23(d). Although he participated in alcohol education classes, he has not participated in counseling or a treatment program as prescribed in the mitigating conditions. Additionally, the documentation he submitted regarding the completion of his second alcohol class, does not contain treatment recommendations.

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to personal conduct:

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 SOR cross-alleges Applicant's criminal conduct as a concern under Guideline E. As explained previously, such conduct calls into question Applicant's judgment and willingness to comply with rules and regulations. His conduct also establishes disqualifying condition AG ¶ 16(c).¹⁵ I have considered all the mitigating conditions under Guideline E and, for similar reasons explained under Guidelines J and G, find that none apply.

¹⁵ Credible adverse information in several adjudicative issue areas that . . . 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 person may not properly safeguard classified or sensitive information.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guidelines J, G, and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines J, G, and E, and evaluating all the evidence in the context of the whole person, Applicant has not mitigated the security concerns raised by his criminal and alcohol related conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraphs 1.a. – 1.c.: Against Applicant

Paragraph 2, Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3, Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Conclusion

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

Caroline E. Heintzelman
Administrative Judge