



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



In the matter of:)
)
) ISCR Case No. 17-01942
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

09/12/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline G, alcohol consumption, because his alcohol-related offenses are not recent and he modified his alcohol consumption. Applicant did not provide sufficient information to mitigate the security concerns under Guideline J, criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 7, 2016. On June 16, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns under Guideline G, alcohol consumption, and Guideline J, criminal conduct. The action was taken 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 national security adjudicative guidelines implemented by the DOD on June 8, 2017.

Applicant answered the SOR on August 7, 2017, and requested a hearing. The case was assigned to me on March 12, 2018. On April 20, 2018, a notice of hearing was issued scheduling the case for May 24, 2018. The hearing convened as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 12, which were admitted without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. I left the record open to allow Applicant the opportunity to submit additional evidence. Applicant timely submitted AE B and AE C, which were admitted without objection. The record closed on June 1, 2018. DOHA received the hearing transcript (Tr.) on June 6, 2018.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-1.d, and ¶¶ 2.a-2.c, with some explanations. He partially admitted and partially denied SOR ¶ 2.d, with an explanation. His admissions and explanations are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 51 years old. He has never married but he has a longtime cohabitant. He has no children. Applicant has a bachelor's degree and a master's degree. He has been a federal contractor for about 30 years. He has worked for his current employer for about four years. He has held a security clearance since about 2010, and also held one in the early 1990s. (Tr. 31-33; GE 1; GE 2)

All of the Guideline G allegations concern arrests for driving under the influence of alcohol (DUI) or driving while impaired (DWI). (SOR ¶ 1) Those allegations are cross-alleged under Guideline J (SOR ¶ 2.a) along with other, more recent traffic offenses. (SOR ¶¶ 2.b, 2.c, and 2.d)

Applicant's first offense occurred in June 1994. He went out drinking with friends after a softball game. He was pulled over on his way home. He was arrested and charged with DUI. (SOR ¶ 1.d) He received six months of unsupervised probation before judgment (PBJ). Applicant testified that, while he was on probation, his driver's license was suspended, and he was ordered to attend Alcoholics Anonymous (AA) once a week. He was also ordered to attend an alcohol-education course. (Tr. 36-38, 64; GE 2 at 37)

One morning in July 2010, Applicant's cohabitant got in his car to drive to work. The car broke down about half a mile from their house. She "came storming back to the house, threw the keys at me, and told me to deal with it." (Tr. 39) Applicant called a tow truck and went out to the car to meet it. (Tr. 38-41) Applicant smelled of alcohol because he had been drinking at a neighborhood party the night before until early that morning. When the police arrived, they observed his condition and saw him with the car keys. (Tr. 39; GE 1) Applicant was arrested and charged with DUI and DWI. (SOR ¶ 1.c) Although the DWI charge was *nolle prosequi*, he pleaded guilty to the DUI charge and was sentenced to PBJ and fined \$140, plus court costs. (GE 6; GE 7)

Applicant reported the 2010 arrest on his 2016 SCA, but also stated that the DUI charge was “immediately dismissed and the record expunged” because he had not been driving. (GE 1 at 28-29) At hearing, Applicant repeated his claim that the charge had been dismissed, and denied receiving probation. (Tr. 39, 64) In fact, as noted above, he pleaded guilty to the DUI charge and received a term of PBJ (the length of which is unclear).

In December 2012, Applicant was drinking at a bar watching a football game with friends. His cohabitant was to meet him there after work. She was running late, so she asked him to go out and run an errand for her. While running the errand, Applicant rear-ended another driver at an intersection when he failed to stop soon enough at a traffic light. Applicant acknowledged at hearing that he had been at fault and had been drinking “more than I should have been to get behind the wheel.” (Tr. 43-44, 49-51, 83)

Applicant was arrested for DUI *per se*, DUI, and DWI. (SOR ¶¶ 1.a, 1.b)¹ (GE 3; GE 4; GE 5) Though not alleged, Applicant was also charged with failure to control speed to avoid collision, negligent driving, and driving on an expired license, as shown by documentation he submitted after the hearing. (AE B) Applicant pleaded guilty to DUI *per se* in March 2013. He received a 60-day suspended jail sentence and was sentenced to two years of unsupervised probation and fined \$565. The other counts were *nolle prosequi*. (Tr. 43-44, 64-65; AE B; GE 1; GE 3; GE 4; GE 5). The other driver later sued for damages, and the case settled. (Tr. 44; GE 1 at 39)

While on probation, Applicant participated in an alcohol counseling and education program. He attended weekly group counseling sessions from March to August 2013. He was also given (and passed) a breathalyzer at each meeting. He completed the program successfully, with early termination. Applicant was not diagnosed with an alcohol-use disorder. (Tr. 65-67, 83-85; AE B)

Applicant testified that after the 2012 accident, he “self-imposed a rule . . . that if I’m responsible for getting anywhere I won’t drink” and to “be smarter about my own behavior.” (Tr. 48, 49) He testified that he used the incident as a “springboard to clean up [his] act.” He has not had any alcohol offenses since then. (Tr. 67) He does not drink anything at happy hour after work or when he knows he might be driving. He confines his drinking to when he is “stationary” or when he is out camping. When he drinks, he has two or three beers, and does not drink to intoxication. (Tr. 74-75, 85-86)

In July 2015, Applicant was driving to work on an interstate highway. He believed he was being pursued by a driver he considered aggressive.² When he got to his exit, he decided to pull off the road because he didn’t want her following him to his workplace. The exit ramp lanes were constricted due to construction and traffic cones,

¹ The accident was alleged in SOR ¶ 1.b and the resulting charges were alleged in SOR ¶ 1.a. (Tr. 49-51, 93-94) SOR ¶ 1.b is therefore duplicative.

² Tr. 51-52 (“Going up the road there was a woman that kept flashing her lights at me and zipping in front of me and zipping behind me. I honestly don’t know what she had a problem with. She either thought I had cut her off or did something. I don’t know.”); see also Tr. 69.

and traffic was congested and heavy. A police officer drove up and asked why he was stopped on the side of the roadway because he was holding up traffic. The other driver drove away. Applicant explained what had happened and the officer told him what he was doing could be considered aggressive driving. Applicant was cited for driving off the roadway while passing a vehicle. (Answer; Tr. 51-53, 67-71; GE 8) Applicant had not been drinking prior to that incident. (Tr. 70) Although not alleged, Applicant's driver's license was suspended in August 2015 when he failed to pay the ticket within 30 days. (GE 8) In September 2015, he was found guilty and fined \$110. (SOR ¶ 2.b) He paid the ticket and his license was restored. (GE 8)

In November 2016, on the day before Thanksgiving, Applicant was running late while driving to a family member's house. He was stopped for "failure to obey traffic control device" (i.e., for speeding). He was driving about 60 miles an hour in a 45 mile-an-hour zone. Applicant received a \$90 ticket. He acknowledged at hearing that he threw the ticket on the floor of the car because he was "still in a rush" at the time. Because Applicant did not pay the ticket within 30 days, his driver's license was again suspended in December 2016, (SOR ¶ 2.c) although he said he was not aware of it. (Answer; Tr. 53-55, 61; GE 9)

In March 2017, Applicant was driving to a family member's house at the end of the workday. He and another driver were approaching each other from opposite sides of the road. They were both "crowding the center line," and they swerved to avoid hitting each other. Applicant kept going, but the other driver did a U-turn and drove after him. They both pulled over, and the other driver "just started screaming [and] yelling about how I had hit him." The other driver claimed that "we clipped mirrors" but Applicant denied that their vehicles had made any contact. (Answer; Tr. 56-57) The other driver's wife remained in their car. (Tr. 77)

Applicant testified that when he examined the other driver's mirror and mirror casing at the scene, he saw "a nick in the paint on his mirror," as might have been caused if a rock in the road had hit the paint and chipped it. (Tr. 72, 78) Applicant was driving a pickup truck and the other vehicle was an SUV, so the two mirrors were about the same height. (Tr. 75)

AE A includes pictures Applicant took of his own driver's-side mirror, including the front casing. He took the pictures the next morning at his insurance company's request. During his testimony, Applicant used AE A to demonstrate where the "nick in the paint" was on the front of the mirror casing on the other vehicle. (Tr. 78-79) There are no photos of the other vehicle in evidence in this proceeding. The photos in AE A do not show any noticeable damage to Applicant's vehicle.

The two drivers continued their roadside argument, but at some point Applicant drove away. Applicant did not give the other driver his insurance information "because I'm not paying for something I didn't do." (Tr. 58, 72, 79) After Applicant left, the other driver called the police. The next morning, Applicant's insurance company called and asked about the incident. Applicant took the photos (AE A) and submitted them. He said

that the insurance company later denied the claim because they didn't see any damage and concluded that Applicant had not hit the other car. (Tr. 58, 81)

Applicant was contacted by the police soon thereafter. He was cited for failing to drive right of center and for failing to stop after an accident involving damage to an attended vehicle. (GE 10; GE 12) He was also charged with driving on a suspended license when records showed his license was suspended due to the unpaid ticket from November 2016. (SOR ¶ 2.d) (GE 11) (Tr. 58-59)

Applicant testified that he was not aware until then that his license had been suspended. (Tr. 61) He paid the overdue ticket in June 2017, and his license was restored. (Tr. 59, 73-74; AE A) He testified that he had not been drinking prior to the incident. (Tr. 73)

Applicant went to court in October 2017. On the advice of counsel, he pleaded guilty to the charge of failing to stop after the accident. He was fined \$147.50 and sentenced to one day of probation (the day of the court hearing). The other two charges were *nolle prosequi*. (Tr. 60-61, 73-74; AE A)

Since the record was left open after the hearing for other purposes (AE B; AE C), Applicant was also afforded the opportunity to submit post-hearing evidence such as letters of reference, for consideration under the whole person concept. (Tr. 86-87) Applicant did not do so.

Policies

It is well established that no one has a right to a security clearance.³ As the Supreme Court noted in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”⁴

The AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” Under ¶ E3.1.14, the

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”).

⁴ 484 U.S. at 531.

Government must present evidence to establish controverted facts alleged in the SOR. Under ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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 of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set forth 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 disqualifying condition is 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 an alcohol use disorder.

Applicant committed three alcohol-related offenses between 1994 and 2012. All of them involved charges of either DUI, DWI, or both. AG ¶ 22(a) applies. The December 2012 accident was alleged in SOR ¶ 1.b and the resulting charges were alleged in SOR ¶ 1.a. SOR ¶ 1.b is therefore found for Applicant as duplicative.⁵

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

⁵ When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant’s favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (same debt alleged twice).

(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

(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 incurred three alcohol-related DUI/DWI offenses, in 1994, 2010, and 2012. All of them occurred after he had been drinking in social situations.

Applicant's explanations on his SCA and in testimony about the circumstances of the 2010 arrest were fairly consistent. Both times, he averred that the charge was dismissed. This was erroneous. In fact, the DWI charge was *nolle prosequi*, but he pleaded guilty to DUI, and received PBJ and a fine.

Applicant has not had any alcohol-related offenses since his December 2012 accident and DUI, about five-and-a-half years before the hearing. He documented that he completed an alcohol counseling and education program successfully, in early 2013. Since then, Applicant also altered his drinking habits, and no longer drinks if he might be driving. He does not drink to intoxication. AG ¶¶ 23(a) and 23(b) apply. Applicant provided sufficient evidence to mitigate the alcohol involvement security concerns.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern for 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. The following disqualifying conditions are potentially applicable:

(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.

Applicant's three alcohol-related offenses are cross-alleged as criminal conduct under SOR ¶ 2.a. AG ¶¶ 31(a) and 31(b) apply to them.

The remaining allegations (SOR ¶¶ 2.b, 2.c, and 2.d) all occurred more recently, between July 2015 and March 2017. Like the DUIs, all of them involved misconduct while driving, though none of them involved alcohol. Applicant failed to pay the November 2016 speeding ticket, so his license was suspended. These citations, with the prior DUIs, establish a pattern of questionable judgment and inability to comply with rules and regulations. AG ¶ 31(a) is therefore satisfied, even though the fines on their 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." They also satisfy AG ¶ 31(b), given Applicant's admissions and the other record evidence.

The following mitigating conditions for criminal conduct are potentially applicable, under 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

(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.

As discussed above, I found the alcohol-offenses mitigated under Guideline G. However, though I no longer have security concerns about Applicant's current alcohol consumption, that does not end the analysis. As the Appeal Board has noted, "an Applicant's security-related conduct can be alleged under more than one Guideline, and, in an appropriate case, can be given independent weight by an administrative judge under different Guidelines."⁶ Such is the case here. I must also consider the total pattern of Applicant's behavior, not just in a piecemeal fashion as a series of unrelated incidents.⁷

In that regard, all of the allegations have several things in common. They all involve instances of poor judgment and lack of impulse control when Applicant was driving. (A possible exception is the 2010 DUI offense, in which Applicant stated that his cohabitant had been driving when his car broke down. Nevertheless, it was he who pleaded guilty to the DUI charge). Two of the incidents involve altercations or disputes with other drivers. More generally, all of the incidents, and Applicant's reaction to them, involve his failure to follow rules and regulations, whether related to alcohol or not.

⁶ ISCR Case No. 04-09251 at 3 (App. Bd. Mar. 27. 2007).

⁷ See, e.g., ISCR Case No. 03-22563 at 4 (App. Bd. Mar. 8, 2006) (regarding the need to avoid a piecemeal analysis).

On multiple occasions (some alleged, some not), Applicant's license was also suspended because he failed to pay the ticket in a timely manner. On one occasion, in 2012, he was driving on an expired license (again, not alleged).⁸

Given the relative similarity of Applicant's various driving offenses, as well as their recency, I cannot conclude that they are unlikely to recur and no longer cast doubt on his reliability, trustworthiness, or good judgment. AG ¶ 32(a) does not apply.

Applicant has not established a sufficient record of rehabilitation, to include passage of time without recurrence. He also provided no independent evidence of his good employment record or constructive community involvement to be considered in weighing rehabilitation, mitigation, or under the whole person concept. I cannot conclude that AG ¶ 32(d) should apply. Applicant did not meet his burden to establish that the criminal conduct security concerns are mitigated.

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(c):

(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 Guideline G and Guideline J in my whole-person analysis. While the security concerns over Applicant's alcohol consumption are mitigated, Applicant did not provide sufficient evidence to mitigate the criminal conduct security concerns, all of which arise from his repeated instances of poor judgment, lack of impulse control, and failure to follow rules and regulations when he gets behind the wheel of a car. Overall, the record evidence leaves me with questions and doubts as to Applicant's continued eligibility for a security clearance. Eligibility for access to classified information is denied.

⁸ Where conduct is not alleged in the SOR, I cannot consider such evidence as disqualifying conduct. However, I can consider that evidence in weighing mitigation or changed circumstances, whether Applicant has demonstrated sufficient rehabilitation, under the whole person concept, and in weighing Applicant's credibility. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

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:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant Applicant continued eligibility for a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge