



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-02307
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

02/22/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

History of the Case

Applicant submitted a security clearance application on March 13, 2015. On July 31, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The DOD acted under Executive Order (Exec. Or.) 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 adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on August 24, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case

on September 21, 2017. On September 22, 2017, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence.¹ He received the FORM on October 1, 2017, and he submitted three documents, which have been admitted as Applicant's Exhibits (AX) A, B, and C. The case was assigned to me on January 30, 2018.

Findings of Fact²

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 49-year-old graphic designer employed since February 2015 by a contractor providing services for another government agency.³ He received a DOD security clearance in January 1997, but his application for a public trust position was denied by another government agency in 2013, because he had been terminated from a job for being underqualified and working at home without permission.

Applicant earned an associate's degree in 1989 and a bachelor's degree in 1994. He married in December 2003 and divorced in January 2005. He began cohabiting with his future second wife in June 2013. They married in May 2016 and divorced after less than a year of marriage. He has an adult son who was born in 1990.

On December 20, 2016, Applicant was arrested and charged with driving while intoxicated (DWI) (first offense), refusal to take a blood or breath tests, and running a stop sign. In January 2017, he was convicted of DWI and sentenced to 30 days in jail (suspended), fined \$250 plus court costs, and placed on unsupervised probation for three years. His driver's license was suspended for 12 months. The other charges were disposed of by *nolle prosequi*. (Item 4.) During a security interview in February 2017, Applicant admitted that he was belligerent toward the officer who stopped him and refused to take a breathalyzer test. He explained that he was upset because he had been "fighting" with his wife. (Item 6 at 5.)

¹ The FORM included Item 6, a summary of a personal subject interviews (PSI) conducted on February 15 and March 27, 2017. The PSI summaries were not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the PSI summary; make any corrections, additions, deletions or updates; or object to consideration of the PSI on the ground that it was not authenticated. Applicant responded to the FORM and submitted additional evidence, but he did not comment on the accuracy or completeness of the PSI summaries, nor did he object to them. I conclude that he waived any objections to the PSI summaries. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016).

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

³ By mutual agreement, DOD adjudicates applications for security clearances for other government agencies pursuant to Directive ¶ 2.2.

On March 30, 2017, three days after a follow-up telephonic interview with a security investigator, Applicant was charged with public swearing and intoxication. In May 2017, he was convicted and fined \$25 plus court costs. (Item 5.) The record contains no information about the circumstances of this arrest and conviction.

Applicant consumed alcohol in college at social events on weekends. He stopped consuming alcohol on a date not reflected in the record and had not consumed alcohol for several years before his DWI arrest in December 2016. (Item 6 at 7.) He used marijuana about 24 times and heroin 3-4 times in January to March 1999, when he was involved with a girlfriend who was a recovering drug addict. He held a DOD security clearance at the time. He received counseling for drug use, but the record does not reflect any details about the counseling. (Item 6 at 6-7.)⁴

Applicant attributed his excessive drinking in December 2016 and March 2017 to a “difficult separation” from his second wife, whom he recently divorced. He began attending Alcoholics Anonymous (AA) meetings in June 2017 and has a sponsor. He has not consumed alcohol since June 15, 2017. He entered an alcohol safety action program (ASAP) in August 2017, and the intake clinician recommended that he complete the AA 12-step program, attend weekly community support groups, and obtain weekly individual therapy. (FORM Response at 4.)

Applicant began seeing a therapist in October 2016 for “couples therapy” and relationship distress. He self-referred to the same therapist after his alcohol-related arrest in March 2017. In October 2017, his therapist diagnosed him with “alcohol use disorder, moderate, in early remission.” The therapist’s prognosis was “excellent.” (FORM Response at 3.)

Applicant’s AA sponsor submitted a letter stating, “Compared to others I have seen in early sobriety, [Applicant] is earnest, thorough, and honest.” (Item 2 at 4.) Applicant’s immediate supervisor submitted a letter urging reinstatement of his clearance because of his valuable contributions to the agency. (FORM Response at 2.)

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

⁴ Applicant’s drug use while holding a security clearance was not alleged in the SOR and may not be an independent basis for denying his application for a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the evidence of Applicant’s drug use for these limited purposes.

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.

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, 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.” 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline G, Alcohol Consumption

The SOR alleges that Applicant was arrested in March 2017 for public intoxication and swearing and that he was convicted and fined \$25 (SOR ¶ 1.a). It also alleges that he was arrested in December 2016 and charged with DWI, refusing a blood or breath test, and running a stop sign; and that, in January 2017, he was convicted of DWI, sentenced to 30 days in jail (suspended), fined \$250, and placed on unsupervised probation for three years. (SOR ¶ 1.b).

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. Applicant's admissions and the documentary evidence in the FORM establish the following potentially disqualifying conditions:

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; and

AG ¶ 22(d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

The following mitigating conditions are potentially applicable:

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;

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; and

AG ¶ 23(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.

AG ¶ 23(a) is not established. Applicant's most recent alcohol-related misconduct was less than a year ago. He will be on unsupervised probation until January 2020. His conduct was not "infrequent" and did not occur under circumstances making recurrence unlikely.

AG ¶ 23(b) is not fully established. Applicant has acknowledged his conduct, voluntarily sought counseling, and is participating in AA. However, insufficient time has passed to establish a "clear and established" pattern of abstinence. His therapist described him as "in early remission," and his AA sponsor described him as "in early sobriety."

AG ¶ 23(c) is established. Applicant has not previously received counseling for alcohol abuse. He has received counseling for drug abuse, and has not relapsed. His therapist believes that he is making satisfactory progress and gave him an "excellent" prognosis.

Guideline J, Criminal Conduct

The SOR cross-alleges the Guideline G conduct listed above under this guideline (SOR ¶ 2.a). 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." Applicant's admissions and the documentary evidence in the FORM establish the following potentially disqualifying conditions:

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 (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

AG ¶ 31(c): individual is currently on parole or probation.

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.

Neither mitigating condition is established. Insufficient time has passed to demonstrate successful rehabilitation.

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 and applying the adjudicative factors in AG ¶ 2(d).⁵

I have incorporated my comments under Guideline G and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant is a mature, well-educated adult, and he is taking positive steps to prevent recurrence of his alcohol-related conduct. On the other hand, he has a history of troubled relationships that resulted in substance abuse, and insufficient time has passed to demonstrate rehabilitation. Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his alcohol consumption and criminal conduct.

Formal Findings

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

Paragraph 1, Guideline G (Alcohol Use):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

⁵ The factors are: (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.

Conclusion

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

LeRoy F. Foreman
Administrative Judge