



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-02619
)	
Applicant for Security Clearance)	

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: *Pro se*

05/31/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 21, 2016. On August 10, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline G. 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) published 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 hearing before an administrative judge. Department Counsel was ready to proceed on October 30, 2017, and the case was assigned to me on January 16, 2018. On February 8, 2018, the Defense

Office of Hearings and Appeals (DOHA) notified Applicant that his hearing was scheduled for March 2, 2018. I conducted the hearing as scheduled. Department Counsel submitted Government Exhibits (GX) 1 through 8, which were admitted without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. DOHA receipt the hearing transcript (Tr.) on March 12, 2018.

Findings of Fact¹

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

Applicant is a field service technician employed by a defense contractor since March 2016. He has been employed by the same defense contractor since October 2008. He has never held a security clearance.

Applicant attended a community college from October 2008 to September 2011. He did not receive a degree, but he received a maritime technology certificate. He has lived with a cohabitant, now his wife, since September 2015. (Tr. 16.) They were married in June 2016 and are expecting their first child. (Tr. 18.)

In October 2006, Applicant was cited for public intoxication. He testified that he was arrested after consuming about ten drinks and then walked outside with a beer in his hand. He was fined \$60. (Tr. 21.)

In August 2008, Applicant was arrested and charged with driving while intoxicated (DWI). He pleaded *nolo contendere*, was convicted, and was sentenced to 365 days in jail, with 360 days suspended, and unsupervised probation for three years. His driver's license was restricted for one year. (GX 2; GX 3.) He was driving home from a bar when he was stopped for driving the wrong way on a one-way street. At the hearing, he denied being on the one-way street at issue, but he admitted that his blood-alcohol content (BAC) was .14%. (Tr. 23-24.)

In September 2008, Applicant was arrested and charged with disturbing the peace, public intoxication, and obstruction of justice. He pleaded not guilty to disturbing the peace and obstruction of justice. He prepaid a \$25 fine for public intoxication. He was convicted of disturbing the peace, fined \$100, and placed on unsupervised probation for 12 months. The charge of obstruction of justice was dismissed. (GX 4; GX 5; GX 6.) This incident occurred when Applicant was drinking with friends in a bar when he heard a heavily intoxicated man outside the bar cursing and acting belligerently toward a woman with whom Applicant was acquainted. Applicant went outside to tell the man to stop talking belligerently and profanely to the woman. The intoxicated man then cursed and moved aggressively toward Applicant. Applicant punched the man in the face, knocked him

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

down, and repeatedly hit him until he was unconscious. When Applicant saw the police approaching, he ran away, giving rise to the charge of obstructing justice. (Tr. 24-25.)

In August 2012, Applicant was arrested and charged with public intoxication. He prepaid a \$25 fine. (GX 7.) This incident occurred after Applicant and some friends left a club and decided to ride their bicycles to Applicant's house. According to Applicant, a policeman stopped him, accused him of throwing his bicycle under a bus, and Applicant responded by calling the policeman a rookie. At that point, the policeman arrested Applicant and took him to the station. Applicant testified that he had only one drink at the club and was not intoxicated. (Tr. 28-29.)

In June 2013, Applicant was arrested and charged with resisting arrest, trespassing, and public intoxication. Applicant prepaid the \$25 fine for public intoxication. The remaining charges were dismissed. (GX 2 at 3.) Applicant had been in a bar for about five hours, during which time he consumed about ten drinks. He went across the street to a convenience store and purchased a pizza. While at the convenience store, he invited some young women to come back to the bar with him. A security guard, dressed in shabby clothing, told Applicant to leave the store. Applicant refused to leave, the police were called, and they arrested him. (Tr. 31-33.)

In August 2015, Applicant was arrested and charged with public intoxication. He pleaded not guilty, and was convicted. He prepaid a \$25 fine. (GX 7.) He testified that he rode his bicycle home after consuming about 15 drinks. He parked his bicycle in the front yard of his home and fell asleep on the grass. The police awakened him and arrested him for public intoxication. (Tr. 35.)

In August 2016, Applicant was arrested and charged with drinking in a public place. He pleaded not guilty, but the record does not reflect the disposition of the charges. (GX 2 at 3; GX 8.) Applicant testified that he and his wife attended a house-warming party. His wife left early because she was not feeling well, but Applicant stayed until he "started getting a little tipsy," at around 9:30 p.m. He decided to leave, and he called an Uber. While waiting outside, he needed to use the bathroom, and he tried to walk into an adjacent house that looked like his friend's house. The occupant of the adjacent house called the police. After Applicant could not get into the house, he fell asleep in the front yard. The police arrested him for drinking in a public place. (Tr. 38-39.)

Applicant attributed his alcohol problems to living in a beach community and self-medicating because of an earlier troubled relationship with another woman before he met his wife. (Tr. 17.) He also believed that he was more frequently targeted by police, including the one he called a rookie, because they recognized him when he was among tourists. (Tr. 17.)

Applicant testified that he completed a two-year treatment program after the September 2008 incident, as a condition for being hired, and he completed the program "with flying colors." However, he was unable to provide any documentation of this treatment. (Tr. 48-49.)

Applicant testified that after his marriage, he stopped going to the bars and clubs in the beach area, although he still lives in the same house. He has made new friends through his wife, and socializes with them instead of his old drinking friends. (Tr. 52.) He testified that he continues to consume alcohol, and there have been incidents where he has been intoxicated, but no further incidents where he has had encounters with the police. (Tr. 53.)

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 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 AG. 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.” See 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. 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 ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

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 history of alcohol-related incidents establishes the following potentially disqualifying conditions under this guideline:

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; and

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.

The following mitigating conditions are potentially relevant:

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 to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

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; and

AG ¶ 23(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.

AG ¶ 23(a) is not established. Applicant's most recent alcohol-related incident was about nineteen months ago. There are no "bright line" rules for determining when conduct is mitigated by the passage of time. The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Applicant's most recent alcohol-related incident occurred after he submitted his SCA, when he should have known that his conduct would receive careful scrutiny. Since receiving the SOR, he has been under pressure to retain his security clearance and his job. Nevertheless, he continues to consume alcohol, sometimes to the point of intoxication. I conclude that his alcohol-related incidents are not mitigated by the passage of time, were frequent, and did not occur under unique circumstances making them unlikely to recur.

AG ¶¶ 23(b), 23(c), and 23(c) are not established. Applicant has acknowledged that his past alcohol consumption has been excessive, but he submitted no evidence of counseling, treatment, or other actions to overcome the problem. Instead, he attributed many of his problems to being targeted by the police. He testified that his recent marriage and the imminent birth of a child have caused him to change his behavior, but the record reflects that the two most recent incidents occurred after he began cohabitating with his wife, and the most recent incident occurred after they were married.

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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 Guideline G in my whole-person analysis, and I have considered the factors in AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guideline G, 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. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest 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 G:	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge