



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



In the matter of:

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ISCR Case No. 17-04005

Applicant for Security Clearance

Appearances

For Government: David Hayes, Esq., Department Counsel

For Applicant: *Pro se*

10/16/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate security concerns regarding his alcohol consumption and criminal conduct. Eligibility to access classified information is denied.

History of the Case

On December 27, 2017, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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); Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4).

Applicant responded to the SOR on January 24, 2018, and requested a hearing. The case was assigned to another judge on March 20, 2018, and was reassigned to me on May 24, 2018. The Government's case consisted of three exhibits that were admitted without objection (GEs 1-3). Applicant relied on one witness (himself) and two exhibits that were admitted without objection (AEs A-B). The transcript of the proceedings (Tr.) was received on June 12, 2018.

Summary of Pleadings

Under Guideline G, Applicant allegedly was arrested and charged with four alcohol-related offenses between June 2004 and December 2015. Allegedly, he was arrested for DUI in June 2004, December 2004, August 2009, and December 2015. Under Guideline J, Applicant was allegedly arrested for various traffic and no proof of insurance violations between August 2009 and November 2015.

In his response to the SOR, Applicant admitted each of the alcohol-related and traffic incidents with explanations. He claimed the DUI charges related to his December 2015 incident were dismissed. He claimed also that he did not have his insurance card with him when he was arrested in November 2015 for no proof of insurance and assorted traffic violations.

Findings of Fact

Applicant is a 53 year-old electrician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in September 1986 and divorced in April 1988. (GE 1) He remarried the same woman in December 1992 and divorced her in 2001 due to cited irreconcilable differences. (GEs 1-2; Tr. 27-29) He has three adult children (ages 27, 25, and 21) from his first marriage. (GEs 1-2; Tr. 30-31) He earned a high school diploma in May 1983 and reported some post-high school education credits. (GEs 1-2; Tr. 32) Applicant enlisted in the Navy in February 1985 and served over 14 years of active duty. (GEs 1-2; Tr. 33-34) He received an honorable discharge in April 1999. (GE 1) He has held security clearances while employed by DoD. (GE 2)

Since March 2016, Applicant has been employed by his current defense contractor. (GEs 1-2) Previously, he worked for other employers, interspersed with periods of unemployment. (GEs 1-2; Tr. 39-40)

Alcohol-history

Applicant has some history of excessive drinking while in the Navy. He confirmed that in 1995, while he was on active-duty Navy status, he was detained by Navy security personnel for public drunkenness in a bar. (Tr. 34) He was subsequently

charged with public drunkenness and awarded non-judicial punishment (NJP). His NJP punishment consisted of restriction, extra duty, forfeiture of one-half of a month's pay for two months, and reduction in rank. (Tr. 35) Applicant was also counseled by Navy substance abuse counselors and characterized as an alcohol abuser. (Tr. 37) For several weeks following his diagnosis, he quit drinking, but thereafter resumed his consumption of alcohol. (Tr. 37-38)

Between June 2004 and December 2015, Applicant consumed alcohol regularly, and at times in excess, and was arrested on four occasions and charged with DUI offenses. (GEs 1-3; Tr. 27) Records document that he was first arrested and charged with DUI in June 2004. (GE 2) He had run a road block and was stopped by police officers. (GE 2) At the scene, he was administered a breathalyzer and recorded a blood-alcohol content (BAC) of .2%. (GEs 1-2; Tr. 43-44) Applicant pleaded guilty to the DUI offense and was placed on probation. As a part of his probation conditions, he was court-ordered to attend a one-week alcohol education course, which he completed. (Tr. 43)

In December 2004, Applicant was arrested and charged with DUI and probation violation after consuming a few beers with friends. (GE 3; Tr. 44-45) At the scene, he registered a 1.1 % BAC by arresting police. (Tr. 45) Appearing in court in March 2005, he was court-ordered to complete a 42-day inpatient abuse treatment program. He could not recall what diagnosis he was given, but acknowledged being advised not to consume alcohol. (Tr. 47) After completing his 42-day inpatient stay in April 2005, he quit drinking for six months before resuming his alcohol consumption in contravention to the advice he received from his counselors. (Tr. 48)

Applicant was arrested again in August 2009 and charged with DUI, speeding, failure to yield, and no proof of insurance. (GEs 1-3; Tr. 42, 49-50) He pleaded guilty, had his license suspended, and was ordered to attend a seven-day state approved alcohol safety action program (ASAP). (Tr. 51-52) He continued to consume alcohol after his 2009 incident, but generally not to excess. (GE 2; Tr. 51-53) Applicant is credited with completing his ASAP.

In December 2015, Applicant was cited for DUI, failure to yield, improper equipment, no proof of insurance, and fleeing arrest. (GEs 1-2; Tr. 54-55) He pleaded guilty to the cited traffic offenses and was fined. The DUI charges, in turn, were dismissed in December 2016. (GEs 1-2 and AE A; Tr. 55-57) Following his last alcohol-related incident, Applicant has continued to drink at light to moderate levels. (Tr. 57-60) He provided proof of insurance on his vehicle (effective December 2015). (AE B)

Endorsements

Applicant did not provide any character references. Nor did he furnish any evidence of performance evaluations, achievement awards and certificates, or civic and community contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns."

The AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(d) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Alcohol consumption

The concern: 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.

Criminal Conduct

The Concern: 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.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant comes to these proceedings with a considerable history of alcohol-related incidents (four in all, not including his acknowledged 1995 alcohol-related incident while in active-duty military status) over an extended period of time spanning June 2004 and December 2015. Principal security issues raised in this case center on Applicant's history of alcohol-related offenses. Additional security concerns are also raised concerning his cited traffic-related offenses.

Alcohol consumption concerns

Applicant's problems with recurrent alcohol-related incidents over an 11-year period raise concerns over his risk of future alcohol abuse. On the strength of the

evidence presented, one disqualifying condition (DCs) of the AGs for alcohol consumption (AG ¶ 21) may be applied: DC ¶ 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 abuse disorder.”

Applicant’s completion of his previously ordered counseling and inpatient programs in 2004 and 2009 and generally light to moderate drinking since his December 2015 DUI arrest entitle him to partial application of MC ¶ 23(a) of Guideline G, “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.” Applicant’s completion of his ordered counseling programs, in addition to his maintenance of a generally light to moderate rate of alcohol consumption for the past three years, are not enough at this time, however, to facilitate safe predictions that he will avoid any abusive drinking in the foreseeable future. His assurances alone are not sufficient to warrant the full application of MC ¶ 23(a).

Criminal conduct concerns

Security concerns are also raised with respect to Applicant’s cited traffic offenses. Disqualifying conditions applicable to Applicant’s traffic-related citations covered by Guideline J (criminal conduct) are twofold: DC ¶¶ 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,” and 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.” None of these cited offenses are cross-referenced under Guideline G and are not considered to be alcohol-related for purposes of Guideline J analysis.

Applicable mitigating conditions covering Applicant’s cited traffic-related offenses under Guideline J are as follows: MC ¶¶ 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 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.” Passage of time since Applicant’s last traffic offense exceeds three years and provide enough time to mitigate these non-alcohol related offenses.

Whole-person assessment

Applicant’s Navy service is both respected and appreciated. His service alone, however, is not enough to dispel concerns about risks of recurrent abusive drinking

Considering his lengthy history of alcohol-related arrests and continued drinking against the advice he received from his counselors, too much risk still exists over the potential for recurrent abusive drinking to facilitate safe predictions about his ability to avoid alcohol-related incidents in the foreseeable future. By contrast, Applicant's covered traffic-related offenses are mitigated by time.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE G (ALCOHOL CONSUMPTION): AGAINST APPLICANT

Subparagraphs 1.a through 1.d: Against Applicant

GUIDELINE J (CRIMINAL CONDUCT) : FOR APPLICANT

Subparagraphs 1.a through 1.h: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

