



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-06032
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and E (Personal Conduct). Applicant refuted the personal conduct allegation, but he has not mitigated the concerns raised by his alcohol consumption. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 7, 2013. On February 26, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and E. The DOD acted under Executive Order 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 adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant received the SOR on March 9, 2015; answered it on March 12, 2015; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 5, 2015, and the case was assigned to me on May 7, 2015.

On May 8, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 3, 2015. When I convened the hearing, Applicant was absent. When contacted by Department Counsel, Applicant stated that he had misread the hearing notice and thought the hearing was scheduled for June 8, 2015. I continued the case until June 5, 2015. When I resumed the hearing on June 5, 2015, Applicant was present. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A and B, which were admitted without objection. DOHA received the transcript of the first session on June 11, 2015, and transcript of the second session on June 17, 2015. All citations to the transcript in this decision refer to the transcript (Tr.) of the second session.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a, 1.c, 1.d, and 1.e. He denied SOR ¶¶ 1.b and 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 53-year-old locksmith employed by a federal contractor since April 2013. He received a security clearance from the DOD in October 2008 and from another government agency in January 2009

Applicant served on active duty in the U.S. Army from May 1979 to November 1984, and he received an honorable discharge. He served on active duty in the U.S. Navy from April 1986 to September 2002, when he retired.

Applicant worked as a sales associate for a home-improvement store from September 2001 to February 2003, when he left for a better job. He worked as a contractor for another government agency from February 2003 to September 2005, and he left the job by mutual agreement because his supervisors considered his management style too militaristic. (GX 2 at 7.) He worked as a car salesman from September 2005 to May 2006. He worked as an armed driver and guard for an armored-car company from May 2006 to August 2007. He worked for a contractor for another government agency from August 2007 to September 2008, when the contract expired. He was unemployed until April 2009. He worked as a security guard for a private company from April 2009 to October 2009, and as an armed security guard for a private company from October 2009 to August 2010, when he was fired for falling asleep on duty. He was unemployed until October 2011. He worked for a defense contractor until January 2012, when he was terminated for "no reason given." (GX 1 at 18.) His termination occurred after a disagreement between Applicant and a co-worker about a subordinate's duty assignment. He was informed by his supervisor that he was terminated because the company wanted to "go in a different direction." (GX 2 at 22.) He was unemployed until May 2012. He worked as a casino security officer from May 2012 until he began his current employment.

In April 2002, Applicant received a diploma in computer and electronics repair. In December 2010, he received a bachelor's degree in information systems and homeland security. (GX 2 at 4.)

Applicant married in July 1983 and divorced in November 1990. He married again in October 1995 and separated in June 2009. His second wife left him because of his infidelity. Applicant told a security investigator that he has attempted to reconcile with his wife, but she intends to divorce him. (GX 2 at 26.) He has two adult children.

In November 1995, Applicant was arrested for driving under the influence (DUI), as he was driving home from fishing and drinking beer. He pleaded guilty, was fined, and was required to attend alcohol-education classes. His driver's license was restricted for one year. (GX 2 at 11.)

In November 1997, Applicant was arrested for DUI as he was returning from a family cookout. He pleaded guilty and received the same punishment as he received for the 1995 DUI. (GX 2 at 11-12.)

The SOR alleges three DUIs during the 1995-1997 time frame, but Applicant insisted during a personal subject interview, his response to the SOR, and at the hearing that he had only two DUI's during that period. (GX 2 at 11-12; Tr. 20-22.)

On December 12, 2012, Applicant sought inpatient mental health treatment. (Tr. 33.) At admission, he stated that he was "just trying to get [his] life back on track and hopefully resolve things with [his] wife." He reported that he had consumed alcohol since age 14, with increasing tolerance and amounts consumed. In December 2012, he was drinking up to a pint of liquor and a twelve-pack of beer daily. He reported that he had a history of a depressive disorder treated with an antidepressant and outpatient psychiatry. He was discharged from the facility on January 11, 2013. His psychiatrist diagnosed him as alcohol dependent and nicotine dependent, with psychosocial and environment problems related to lack of sober support, living environment deficiency, marital relationship stress, financial concerns, and bereavement.¹ His global assessment of functioning (GAF) was 50 on discharge, as compared to a GAF of 44 on admission. A GAF of 50 means "serious symptoms or any serious impairment in social, occupational or school functioning." *Diagnostic and Statistical Manual of Mental Disorders*, (4th Ed., Text Revision) (DSM-IV-TR) at 34.

Applicant's psychiatrist recommended Alcoholics Anonymous/Narcotics Anonymous (AA/NA) attendance at 90 meetings in 90 days with frequent sponsor contact, follow-up by his primary care physician for ongoing medical issues, a follow-up appointment with a licensed clinical social worker, and a follow-up appointment with a psychiatrist. The psychiatrist's prognosis was "guarded." (GX 4.) At the hearing, Applicant testified that he did not disagree with the psychiatrist's diagnosis "at that time." (Tr. 33-34.)

¹ The basis for the reference to bereavement is not clear from the record.

Applicant testified that he attended “a couple meetings” and then starting seeing a licensed clinical social worker (LCSW) for family counseling. However, he moved to another location and did not complete the family counseling.

Applicant testified that he occasionally drinks a beer in the evening or while mowing the lawn or cleaning his car. He does not drink away from home and does not drive after drinking. He believes that his drinking is under control, even though he has not completely abstained from alcohol. (Tr. 34-37.)

When Applicant submitted his SCA in August 2013, he answered “No” to a question whether, in the last seven years, he had consulted with a health care professional regarding an emotional or mental health condition or had been hospitalized for such a condition. He did not disclose his treatment from December 2012 to January 2013. The instructions accompanying this question instructed him to answer “No” if the counseling was not court-ordered and was for “strictly marital, family, grief not related to violence by you; or strictly related to adjustments from service in a military combat environment.” (GX 1 at 43.) He answered “Yes” to a question whether he had ever voluntarily sought counseling or treatment as a result of his use of alcohol. (GX 1 at 46.) In his answer to the SOR and at the hearing, he denied falsifying his SCA, explaining that he believed his counseling was for “family matters.” (Tr. 37.) After Applicant testified about his family counseling, Department Counsel elected to not pursue the allegation of falsification. (Tr. 45.)

Applicant’s current supervisor describes him as honest, trustworthy, and dependable. He states that “[Applicant’s] calmness is certainly one of his strong points.” (AX A.) An educator at a school where Applicant performs charity work states, “Everyone that encounters [Applicant] finds him authentic, compassionate, genuine, dedicated, mature, effective, respectful, responsible, trustworthy, honorable, and the list goes on.” (AX B.)

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 SOR alleges three instances of DUI, in November 1995 (SOR ¶ 1.a), September 1996 (SOR ¶ 1.b), and November 1997 (SOR ¶ 1.c). It also alleges that Applicant was treated and diagnosed with alcohol dependence in January 2013 (SOR ¶

1.d), and that he continues to consume alcohol despite the diagnosis of alcohol dependence (SOR ¶ 1.e).

Applicant admitted the DUIs in November 1995 and November 1997, but denied the September 1996 DUI. He has adamantly insisted that there were only two DUIs. The SOR is based on his admissions during a personal subject interview (PSI) in September 2013 and documentary evidence of his arrest for DUI in November 1996. He has admitted only two DUIs, including the November 1996 DUI. I conclude that SOR ¶¶ 1.a and 1.c are established by his admissions and the documentary evidence of the warrant for his arrest, but SOR ¶ 1.b is not established. SOR ¶¶ 1.d and 1.e are established by Applicant's admissions and the documentary evidence of his treatment and diagnosis.

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 of his treatment and diagnosis established the following 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and

AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

AG ¶ 22(a) is established by Applicant's two DUI convictions. AG ¶ 22(c) is established by his admissions to his psychiatrist. AG ¶ 22(d) is established by his psychiatrist's diagnosis of alcohol dependence. AG ¶ 22(f) is established by Applicant's continued consumption of alcohol after being diagnosed as alcohol dependent and completing a treatment program. Applicant's treatment program was broader than an "alcohol rehabilitation" program, but it encompassed his excessive alcohol consumption, and the psychiatrist's diagnosis and recommendations were directed toward alcohol rehabilitation.

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 good judgment;

AG ¶ 23(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

AG ¶ 23(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.

The first prong of AG ¶ 23(a) (“so much time has passed”) focuses on whether the conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the evidence. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s last DUI arrest was more than 18 years ago, and the record reflects no alcohol-related misconduct since that arrest. Thus, I conclude that the alcohol-related misconduct alleged in SOR ¶¶ 1.a-1.c is not “recent.” However, Applicant has not been rehabilitated, because he continues to consume alcohol despite the diagnosis of alcohol dependence. He believed that his psychiatrist’s diagnosis of alcohol dependence was accurate “at the time,” but he has not provided a more recent diagnosis to support his belief that his alcohol dependence is under control. As noted by his psychiatrist, he lacks a support structure for continued sobriety. I conclude that AG ¶ 23(a) is not established.

AG ¶ 23(b) is partially established, because Applicant has acknowledged that he has an alcohol problem. However, he has not established the pattern of abstinence required to mitigate the evidence of alcohol dependence.

AG ¶ 23(d) is not fully established. Applicant completed the inpatient treatment program. It is not clear that he fully complied with the aftercare requirement for AA or

NA attendance. He has not established a pattern of abstinence. His psychiatrist's prognosis is "guarded," which falls short of the "favorable prognosis" required under this mitigating condition.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified Section 21 of his SCA by failing to disclose his inpatient mental health counseling alleged in SOR ¶ 1.d. The concern under this guideline is set out in AG ¶ 15:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." The evidence shows that Applicant sought inpatient medical treatment because of concern about his alcohol consumption. When he was admitted into the program, he also expressed concern about reconciling with his wife. After he completed the inpatient portion of his treatment, he sought and received family counseling from a LCSW. He disclosed his treatment for alcohol consumption in Section 24 of the SCA. I conclude that AG ¶ 16(a) is not established. No other disqualifying conditions under this guideline are established.

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 Guidelines G and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant was candid and sincere at the hearing. He served honorably in the U.S. Army and U.S. Navy for many years. He has held clearances since October 2008. He self-reported his excessive alcohol use, sought treatment in December 2012, and has avoided further DUI convictions or other alcohol-related misconduct. On the other hand, he has disregarded his psychiatrist's diagnosis of alcohol dependence, has not established a support structure to avoid further alcohol problems, and has not sought an updated medical evaluation to support his belief that his alcohol use is under control. See Directive ¶ E3.1.37-E3.1.40 (reapplication authorized after one year).

After weighing the disqualifying and mitigating conditions under Guidelines G and E, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has refuted the allegation that he falsified his SCA, but he 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 continue his eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Subparagraphs 1.d-1.e:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge