



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-06103
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: *Pro se*

July 26, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on November 27, 2006. On October 29, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines G, J, and H. DOHA acted under Executive Order 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on November 2, 2009; answered it on December 11, 2009; and requested an administrative determination on the record without a hearing. On January 19, 2010, Department Counsel requested a hearing. (Tr. 24.) Department Counsel was ready to proceed on February 25, 2010, and the case was assigned to me on March 8, 2010. DOHA issued a notice of hearing on March 17, 2010, scheduling the hearing for April 14, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified, but presented no witnesses or documents. DOHA received the transcript (Tr.) on April 22, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.c. He admitted SOR ¶ 1.d in part and denied it in part. He admitted SOR ¶¶ 1.e-1.f, 2.a, 2.b, 3.a, and 3.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 47-year-old welder employed by a defense contractor. He has worked for his current employer since 1983 and held a security clearance since February 1985. He submitted his security clearance application in November 2006 to continue his access to classified information.

Applicant was arrested for driving under the influence (DUI) in 1979, and his driver's license was suspended. (GX 1 at 4.) He told a security investigator he was arrested for DUI on three other occasions before he began working for his current employer, but he could not remember the dates. (GX 3 at 1; Tr. 44.)

In July 2005, Applicant was arrested and charged with assault and battery on his two children. The charges arose after he slapped his daughter, then 16 years old, because he suspected her of shoplifting and she denied it. (Tr. 30.) His son, then 18 years old, came to the defense of his sister, and an altercation ensued between Applicant and his son. Applicant testified he had been drinking before this incident but was not intoxicated. (Tr. 49.) He spent three days in jail before the charges were disposed of by nolle prosequi. (GX 3 at 2-3; GX 5 at 1-4.)

In the summer of 2006, Applicant was arrested for public intoxication at a fashion show. He was held in jail for about six hours and released on his own recognizance. He pleaded guilty and paid a \$15 fine. (GX 3 at 4; GX 5 at 15-16.)

Applicant was arrested in June 2007 for (1) disregarding a law enforcement command or eluding (a felony), (2) driving while intoxicated, (3) refusing to take a blood or breath test, and (4) reckless driving. After the first charge was reduced to a misdemeanor, he pleaded guilty to the first two charges. He was sentenced to 180 days in jail (suspended), placed on probation for one year, ordered to attend a 16-week Alcohol Safety Action Program (ASAP), and fined. His driver's license was suspended

for 12 months. The blood-test refusal was disposed of by nolle prosequi, and the reckless driving charge was dismissed. (GX 5 at 5-12; Tr. 54-56.)

During intake processing for the ASAP program, Applicant was diagnosed with alcohol dependence and cannabis abuse. The record does not reflect the medical credentials of the person making the diagnosis. The ASAP records reflect the names of the individuals involved in Applicant's treatment, followed by initials "CM" and "BSW," but those abbreviations are not defined. Applicant attended all the counseling sessions and attended Alcoholics Anonymous meetings during his treatment period. (Tr. 37.) His prognosis upon discharge from the program was "good." (GX 4 at 1, 4.)

Applicant responded to DOHA interrogatories in June 2007, stating that he currently used controlled substances and intended to continue using them. (GX 2 at 2.) When asked to identify the controlled substance he used, he listed his prescription drugs for arthritis and back pain. His response indicates that he did not understand that the inquiry pertained to his use of marijuana, not his lawful use of prescription drugs. His response to SOR ¶ 3.b, alleging that he was treated for cannabis abuse, indicates that he also misunderstood this allegation, because he responded to it by admitting that he used prescription drugs for chronic arthritis and back pain.

On his security clearance application, Applicant disclosed that he used marijuana four times in July 2005, and he commented that he was enrolling in a drug treatment program. (GX 1 at 5.) In his response to SOR ¶ 3.c, alleging use of marijuana after receiving a security clearance, he stated he used it only once a year, had not used it for two years, and did not intend to use it again. At the hearing, he testified that he had smoked marijuana with other family members on special occasions, but that he does not like marijuana and does not intend to use it in the future. (Tr. 58, 61.) He denied having a "marijuana problem." (Tr. 57.)

Applicant was arrested in July 2007 for assault and battery on his daughter's boyfriend. This arrest occurred shortly after he responded to the DOHA interrogatories but before he began his ASAP counseling. Applicant testified that he had been drinking before this incident. He could not remember what caused the altercation. (Tr. 50.) The charges were disposed of by nolle prosequi at the request of the victim. (GX 5 at 13-14; Tr. 49-51.)

Applicant testified he found the ASAP counseling helpful, and he believes he has changed as a result of it. He and his wife have a better relationship, and his family has grown closer. (Tr. 37-38.)

Applicant attributed his violent behavior and substance abuse between 2005 and 2007 to family stress. His spouse was working outside the home and he was working a shift that left his two children unsupervised after they came home from school. (Answer to SOR; Tr. 30-31, 48-50.) After the 2007 incident, he changed his work schedule to allow more time with his family. His son is now an adult living away from home. His

daughter apparently is behaving responsibly and is about to graduate from a community college. (Tr. 37, 41-42.)

Applicant testified that he does not drink every day, but when he drinks he consumes three to six beers a day. He testified that the frequency and amount of his drinking depends on his mood. He drinks only at home to avoid the risk of DUI arrests. (Tr. 63-65.) He works nights and holidays because he stays out of trouble when he is working. (Tr. 62.)

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 and modified.

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, these guidelines are applied 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, 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 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 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 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 Applicant consumed alcohol, "at times to excess and to the point of intoxication," from about 1979 to at least October 2008 (SOR ¶ 1.a); he was arrested for DUI in 1979 (SOR ¶ 1.b); he was arrested in 2006 for public intoxication (SOR ¶ 1.c); he was arrested for several offenses, including DUI, in June 2007 and pleaded guilty (SOR ¶ 1.d); he was treated for alcohol dependence from August 2007 to November 2007 (SOR ¶ 1.e); and he continued to consume alcohol after his treatment for alcohol dependence (SOR ¶ 1.f). Applicant's admissions, corroborated by the Government's evidence, establish all these allegations.

The security concern under this guideline is set out in AG ¶ 21 as follows: "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 evidence raises 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; and

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.

A disqualifying condition also may be raised by "diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence," by "evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program," or by "relapse after diagnosis of alcohol abuse or dependence and

completion of an alcohol rehabilitation program.” AG ¶ 22(d), (e), and (f). Although Applicant was diagnosed as alcohol dependent upon his entry into ASAP counseling, these three disqualifying conditions are not established because the evidence does not establish the credentials of the person who diagnosed Applicant.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 22(a) and (c), the burden shifted to Applicant to produce evidence 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).

Security concerns under this guideline may be mitigated if “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(a). The first prong of this mitigating condition (“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 totality 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).

At the time of the hearing, almost three years had passed since Applicant's last alcohol-related arrest. Three years is a “significant period of time.” However, Applicant has continued to consume alcohol, sometimes to excess and to the point of intoxication, and he has no intention of stopping. He admitted at the hearing that he had an “alcohol problem” in the past, but he believes it has been resolved. He has wisely confined his alcohol consumption to his home. He has learned to avoid detection, but I am not convinced that he is rehabilitated. I conclude AG ¶ 23(a) is not established.

Security concerns also may be mitigated if “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).” AG ¶ 23(b). Applicant has acknowledged his past alcohol problems, and successfully completed a 16-week counseling program. He admits that he has not abstained from alcohol use since completing the ASAP counseling. He contends that he has moderated his consumption, but he admits he regularly consumes three to six beers a day, depending on his mood. I conclude AG ¶ 23(b) is not established.

Finally, AG ¶ 23(d) provides that security concerns under this guideline may be mitigated if --

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.

I conclude that AG ¶ 23(d) is not established. Although Applicant successfully completed the ASAP counseling and received a favorable prognosis upon discharge, the credentials of the person making the prognosis are not reflected in the record. Furthermore, Applicant has not abstained from alcohol or established a pattern of modified consumption since completing the program.

Guideline J (Criminal Conduct)

The SOR alleges Applicant was arrested for two counts of assault and battery on a family member in 2005 (SOR ¶ 2.a), and arrested in July 2007 for assault and battery on his daughter's boyfriend (SOR ¶ 2.b). These allegations are established by Applicant's admissions and the corroborating evidence. The alcohol-related arrests alleged in SOR ¶¶ 1.b and 1.c were not cross-alleged under this guideline.

The concern raised by criminal conduct is set out in AG ¶ 30 as follows: "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 arrests for assaulting his children in 2005 and his daughter's boyfriend in 2007 are sufficient to raise two disqualifying conditions under this guideline: AG ¶ 31(a) ("a single serious crime or multiple lesser offenses") and AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted").

Security concerns under this guideline may be mitigated by evidence that "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." AG ¶ 32(a). Applicant's assault on his children was five years ago and the assault on his daughter's boyfriend was three years ago. There is no evidence of violent behavior before or after these two incidents. He has changed his work schedule to allow more time with his family, thereby removing a major source of family tension. His son is an adult, living away from home. His daughter apparently has matured and is about to graduate from a community college. I am satisfied that further violent behavior is unlikely. I conclude AG ¶ 32(a) is established.

Security concerns raised by criminal conduct may be mitigated if "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." AG ¶

32(d). Applicant has expressed remorse and has not been involved in further acts of violence. I conclude that AG ¶ 32(d) is established.

Guideline H (Drug Involvement)

The SOR alleges Applicant used marijuana with varying frequency from July 2005 to at least July 2007 (SOR ¶ 3.a), received treatment for cannabis abuse from August 2007 to November 2007 (SOR ¶ 3.b), and used marijuana after being granted a security clearance (SOR ¶ 3.c). Applicant admitted SOR ¶¶ 3.a and 3.c, and his admissions are corroborated by the evidence.

Applicant denied SOR ¶ 3.b, and he testified that his treatment was only for alcohol abuse, not illegal drug use. His testimony is plausible, because the program was named “Alcohol Safety Action Program.” I conclude that SOR ¶¶ 3.a and 3.c are supported by substantial evidence, but SOR ¶ 3.b is not. I resolve SOR ¶ 3.b in Applicant’s favor.

The concern under this guideline is as follows: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.” AG ¶ 24. Guideline H encompasses “drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).” AG ¶ 24(a)(1).

The evidence raises the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction;

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): any illegal drug use after being granted a security clearance.

AG ¶ 25(h) (expressed intent to continue illegal drug use) is not raised by Applicant’s declaration, in response to DOHA interrogatories, that he intended to continue using controlled substances. I am satisfied he was referring to his prescription drugs for arthritis and back pain when he stated that he intended to continue using controlled substances. He testified at the hearing that he did not enjoy marijuana and did not intend to use it again. Although AG ¶ 26(h) is not raised, the evidence raising AG ¶¶ 25(a), (c), and (g) shifted the burden to Applicant to explain, refute, or mitigate the facts.

Security concerns under this guideline may be mitigated if “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.” AG ¶ 26(a). Applicant’s use of marijuana was infrequent, and it last occurred more than two years ago. However, his use of marijuana while holding a clearance was a serious breach of trust that casts doubt on his current reliability, trustworthiness, and good judgment. Thus, I conclude AG ¶ 26(a) is not established.

Security concerns also may be mitigated by “a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b). Applicant’s marijuana use was with family members. Although he has not disassociated himself from his family, he has decided to avoid family gatherings at which marijuana use is likely, and he has abstained from marijuana use for more than two years. I conclude that AG ¶¶ 26(b)(2) and 26(b)(3) are established, but AG ¶¶ 26(b)(1) and 26(b)(4) are not established.

Security concerns also may be mitigated by “satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.” AG ¶ 26(d). This mitigating condition is not established because the ASAP counseling was focused on alcohol use rather than drug use, and Applicant’s favorable prognosis was from a person of unknown medical credentials.

Whole-Person Concept

Under 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 the 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.

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 have incorporated my

comments under Guidelines G, J, and H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult with a long record of service as a contractor employee. He has held a clearance for about 25 years. He was granted a clearance notwithstanding his early alcohol-related criminal conduct, but he violated the trust placed in him by the Government when he used marijuana while holding a clearance. He has decided to continue consuming alcohol, in a quantity and frequency determined by his moods, notwithstanding his history of alcohol problems. He has been under the pressure of retaining his clearance since November 2006, when he submitted his current application. He has opted to avoid detection by drinking at home.

After weighing the disqualifying and mitigating conditions under Guidelines G, J, and H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his criminal conduct, but he has not mitigated the security concerns based on alcohol consumption and drug involvement. 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.f:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	Against Applicant

Conclusion

In light of all of the circumstances, 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