



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



In the matter of:)
)
 ---) ISCR Case No. 14-03106
)
 Applicant for Security Clearance)

Appearances

For Government: Adrienne Strzelczyk, Esquire, Department Counsel
For Applicant: *Pro se*

08/07/2015

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding alcohol consumption and personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On January 23, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On October 6, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guidelines G (Alcohol

¹ Item 2 (e-QIP, dated January 23, 2013).

Consumption) and E (Personal Conduct), and detailed reasons why the DOD CAF adjudicators were unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a sworn statement, dated October 9, 2014,² Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant on June 16, 2015, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on June 29, 2015. A response was due by July 29, 2015. On July 14, 2015,³ Applicant submitted information and documentation which addressed the allegations. The case was assigned to me on July 31, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted most of the factual allegations in the SOR pertaining to alcohol consumption (¶¶ 1.a., 1.b., 1.d., a portion of 1.e., and 1.f.) He denied the remaining allegations or portions thereof. He failed to admit or deny the allegations pertaining to personal conduct (¶ 2.a.), except to say: "I reconstructed my past history to the best of my ability and cooperated truthfully to the absolute best of my ability."⁴ Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 58-year-old employee of a defense contractor. He has been serving in various positions with his current employer, during which time there were corporate mergers, since February 1984.⁵ He had been granted a secret security clearance in June 1984, but in August 2003, his clearance was revoked due to his drug involvement.⁶ A 1975 high school graduate,⁷ Applicant received a bachelor of science in mechanical engineering 1983.⁸ He has never served with the U.S. military.⁹ Applicant

² Although Applicant dated his Answer to the SOR as "11/9/14," the Notary's jurat is dated October 9, 2014.

³ Applicant's one-page submission is dated July 14, 2015, but a memorandum to Department Counsel from a legal assistant forwarding the document is dated July 7, 2015.

⁴ Item 1 (Applicant's Answer to the SOR, dated October 9, 2014), at 2.

⁵ Item 2, *supra* note 1, at 11-14; Item 3 (Personal Subject Interview, dated March 26, 2013), at 1.

⁶ Item 2, *supra* note 1, at 45-46.

⁷ Item 3, *supra* note 5, at 1.

⁸ Item 2, *supra* note 1, at 10-11; Item 3, *supra* note 5, at 1.

was married the first time in August 1988 and divorced in June 2002; and married the second time in June 2009.¹⁰ He has no children.

Personal Conduct & Alcohol Consumption

Applicant was a multi-substance abuser. He was a marijuana user while in college. Because of his cocaine abuse while holding a security clearance, in 2003, his secret security clearance was revoked.¹¹ His other substance of choice is alcohol. Applicant first consumed alcohol at the age of 15 when he drank a half bottle of wine at a school dance. He abstained until he was 18 years old, when he resumed his consumption of alcohol by drinking wine and beer. His quantity and frequency from the ages of 18 to 21 were four to five beers at a time about four times per year. With the exception of a period of abstinence from December 1999 until May 2001, from the age of 21 until June 2006, his quantity and frequency increased to six beers at a time one time per week. In June 2006, and continuing until at least March 2013, it decreased to a bottle of wine or six beers two times per month.¹²

Alcohol enables Applicant to relax and become sociable. Applicant acknowledged that it takes four beers for him to become intoxicated, and he admitted he drinks to intoxication two times per month. Nevertheless, Applicant denied that he has a problem with alcohol. He conceded that it “possibly caused disappointment” in his first marriage as well as embarrassment, but he denied that it had any impact on his work, home life, friendships, school, physical or emotional health, reputation, judgment, reliability, financial responsibility, or ability to hold a clearance.¹³ Over a 30-year period, from 1976 to at least 2006, Applicant has been involved in several alcohol-related incidents involving police and judicial authorities.

In June 1976, after consuming four beers, Applicant was arrested and charged with driving under the influence of alcohol (DUI), a misdemeanor, and in November of that same year, he was found guilty, upon his plea, of reckless driving, a misdemeanor. He was fined \$125 and ordered to be on probation for 12 months (SOR ¶ 1.f.).¹⁴

In August 1985, after consuming “one shot” of an unspecified liquor, Applicant was arrested and charged with DUI, a misdemeanor. He was eventually found guilty,

⁹ Item 2, *supra* note 1, at 14.

¹⁰ Item 2, *supra* note 1, at 16-19.

¹¹ Item 2, *supra* note 1, at 42, 46; Item 3, *supra* note 5, at 6-7. It should be noted that Applicant’s cocaine abuse was not alleged in the SOR, but since Applicant raised it in both his e-QIP and during his interview with an investigator from the U.S. Office of Personnel Management (OPM), such drug abuse will be discussed briefly further in my analysis under the Whole-Person Concept below.

¹² Item 3, *supra* note 5, at 7.

¹³ Item 3, *supra* note 5, at 7.

¹⁴ Item 5 (Federal Bureau of Investigation (FBI) Identification Record, dated January 23, 2013), at 3; Item 1, *supra* note 4, at 2; Item 3, *supra* note 5, at 4; Item 2, *supra* note 1, at 35-36.

upon his plea, of a reduced charge of driving while ability impaired (DWAI), a misdemeanor. He was fined an unspecified amount (SOR ¶ 1.e.).¹⁵

In February 1990 or 1992, after consuming “a few beers,” and while looking for a parking spot, Applicant’s vehicle struck another vehicle. He was arrested and charged with DUI, a misdemeanor. He was eventually found guilty, upon his plea, of a reduced charge of DWAI, a misdemeanor. He was fined an unspecified amount, ordered to perform 40 hours of community service, and ordered to attend an alcohol education class (SOR ¶ 1.d.).¹⁶

On or about December 16, 1999, after working a 17-hour day, Applicant returned home to find that his dogs had not been fed. He uttered some harsh comments to no-one in particular, except perhaps his dogs, spoke to his stepson, ate a sandwich, and at about 11 p.m., went to bed without seeing his wife.¹⁷ Applicant’s first wife told a different story. She said that upon arrival at the house, Applicant was intoxicated and started yelling at her. She was afraid to come out of her room, and she felt that he was going to kill her or himself. She also said that her son was afraid that Applicant was going to hurt his mother. In any event, the police were called at about 1 a.m. Applicant was awakened by them and arrested for domestic violence and harassment, both misdemeanors. Bail was set at \$4,000. On January 26, 2000, the charges were dismissed and the bond released, provided Applicant agreed not to consume alcohol for 30 days. Applicant denied that he was ever charged, but the court and FBI records reflect that he was charged. However, there is no evidence that any further actions were taken by the court and there is no evidence that Applicant was convicted of the charges (SOR ¶ 1.c.).¹⁸

On June 24, 2006, after consuming four beers over a period of three and one-half hours at a restaurant, and another two to three beers at a friend’s house over an additional period of two to two and one-half hours, Applicant was stopped by the police after making a left turn on a red arrow. He refused to take any blood, breath, urine, or sobriety tests. He was arrested and charged with DUI, a misdemeanor, and open alcohol container. He was eventually found guilty, upon his plea, of a reduced charge of DWAI, a misdemeanor. He was fined an unspecified amount, ordered to perform 80 hours of community service, sentenced to the county jail for five days, and ordered to attend alcohol classes one time per week for six months. He attended a Mothers

¹⁵ Item 1, *supra* note 4, at 1; Item 3, *supra* note 5, at 4; Item 2, *supra* note 1, at 36-37.

¹⁶ Item 1, *supra* note 4, at 1; Item 3, *supra* note 5, at 5; Item 2, *supra* note 1, at 37-38. The evidence regarding the actual date of the incident is unclear as Applicant estimated it was in 1990, but the OPM investigator contends it was in 1992.

¹⁷ Item 3, *supra* note 5, at 5; Item 2, *supra* note 1, at 38-39.

¹⁸ Item 6 (Court and Police Records, various dates); Item 5, *supra* note 14, at 4; Item 3, *supra* note 5, at 5; Item 2, *supra* note 1, at 38-40.

Against Drunk Driving (MADD) panel and remained on parole for one year (SOR ¶ 1.b.).¹⁹

Other than the MADD and other alcohol educational classes, there is no evidence that Applicant ever received any alcohol education, treatment, or alcohol counseling. There is no evidence that he was ever in an alcohol rehabilitation program, or that he was ever diagnosed with alcohol abuse or alcohol dependence by any duly qualified medical professional, or that he was ever evaluated for such conditions. Applicant said that after his most recent alcohol-related incident with police authorities, he had “finally gotten the message that [he] cannot and will not ever drink and drive again.”²⁰ The situation is made more complicated by the fact that Applicant’s household clearly involves the excessive consumption of alcohol. In March 2013, Applicant’s wife was in a voluntary alcohol rehabilitation program awaiting possible incarceration following her third DUI.²¹

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”²² 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. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”²³

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. The entire process is a conscientious scrutiny of a number of variables

¹⁹ Item 1, *supra* note 4, at 1; Item 3, *supra* note 5, at 3-4; Item 2, *supra* note 1, at 33-34, 40; Item 5, *supra* note 14, at 5.

²⁰ Item 2, *supra* note 1, at 43.

²¹ Item 3, *supra* note 5, at 8.

²² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²³ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

known as the “whole person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”²⁴ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.²⁵

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”²⁶

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”²⁷ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It 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. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

²⁴ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

²⁵ *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁶ *Egan*, 484 U.S. at 531

²⁷ *See* Exec. Or. 10865 § 7.

Analysis

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption 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.”

The guideline notes several conditions that could raise security concerns. Under 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” is potentially disqualifying. In addition, “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,” may apply under AG ¶ 22(c). AG ¶¶ 22(a) and 22(c) have been established by Applicant’s various alcohol-related incidents, his DUI charges, his DWAI convictions, his reckless driving conviction, his domestic violence and harassment charges, and his repeated and continuing consumption of alcohol to the point of intoxication or impaired judgment.

The guidelines also include examples of conditions that could mitigate security concerns arising from alcohol consumption. Under AG ¶ 23(a), the disqualifying condition may be mitigated where “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.” In addition, when “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) may apply.

AG ¶¶ 23(a) and 23(b) minimally apply. Applicant has been involved in several alcohol-related incidents involving police and judicial authorities over the 30-year period from 1976 to at least 2006. Most of the incidents involved drinking and driving, but one incident involved domestic violence. While he conceded that alcohol “possibly caused disappointment” in his first marriage as well as embarrassment, he denied that it had any impact on his work, home life, friendships, school, physical or emotional health, reputation, judgment, reliability, financial responsibility, or ability to hold a clearance. Applicant said that after his most recent alcohol-related incident with police authorities, he had “finally gotten the message that [he] cannot and will not ever drink and drive again.” He acknowledged that it takes four beers for him to become intoxicated, and he admitted he drinks to intoxication two times per month. Yet, he continues to deny that he has a problem with alcohol.

Applicant has consistently minimized the significance of alcohol in his life. Even after several alcohol-related convictions, court-imposed punishment, and several alcohol education classes, including a MADD class, Applicant remains essentially in

denial regarding his relationship with alcohol. He continues to consume alcohol to the point of intoxication or impairment. Accordingly, while he has not been involved in an alcohol-related incident since 2006, given Applicant's continuing relationship with alcohol, it is likely that his alcohol abuse will recur and it does cast doubt on Applicant's current reliability, trustworthiness, or good judgment.

Furthermore, after careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude Applicant's continued alcohol consumption after his alcohol-related convictions and minimizing his alcohol problem indicates he is unwilling or unable to curtail his alcohol consumption. As such, his conduct demonstrates a lack of judgment or a failure to control impulses which is inconsistent with the holder of a security clearance.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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 guideline notes a condition that could raise security concerns. Under AG ¶ 16(e), it is potentially disqualifying if there is "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . ."

AG ¶ 16(e) has been established by Applicant's involvement in several alcohol-related incidents leading to criminal convictions, fines, imprisonment, community service, and mandated attendance at alcohol education classes over the 30-year period from 1976 to at least 2006; his continued consumption of alcohol to the point of intoxication or impairment at least two times per month; and his denial that he has an alcohol problem.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. If "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," AG ¶ 17(c) may apply. Also, AG ¶ 17(d) may apply when "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." Similarly, AG ¶ 17(e)

may apply if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

AG ¶¶ 17(c) and 17(d) do not apply, and ¶ 17(e) minimally applies. Applicant’s alcohol-related criminal conduct, while generally considered to be misdemeanors, cannot be considered minor offenses. While his DUI/DWAs and domestic violence occurred several years apart during the 30-year period, his continuing consumption of alcohol to the point of intoxication or impairment at least two times per month, effectively rule out the application of AG ¶ 17(c). His inability to acknowledge his alcohol problem, despite years of negative experiences because of it and his failure to address his problem through counseling or other positive steps, also effectively rule out the application of AG ¶ 17(d). Applicant’s purported recognition that drinking and driving is unwise is a positive step, but because he continues to become intoxicated two times per month, his steps to reduce his vulnerability are minimized. After becoming intoxicated, he may decide to drive as excessive alcohol consumption often affects judgment and decision-making.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines G and E in my analysis below.

There is some evidence in favor of mitigating Applicant’s conduct. He has been serving in various positions with his current employer, during which time there were corporate mergers, since February 1984. He was granted a secret security clearance in June 1984. He has not been involved in any alcohol-related criminal conduct since 2006. There is no evidence of security violations or alcohol consumption at work. On those occasions when he was involved in various criminal incidents, he has complied with the various mandates of the courts.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was a multi-substance abuser. He was a marijuana user while in college. Although he had been granted a security clearance in June 1984, he subsequently violated the law, policy, and his fiduciary responsibilities by abusing cocaine. Because of that cocaine abuse while holding a security clearance, in 2003 his secret security clearance was revoked. He is also an alcohol abuser with several alcohol-related incidents. He spent time in jail, paid fines, did community service, and attended education classes. Nevertheless, he continued to consume alcohol. He denied having an alcohol problem, but now concedes that he shouldn't drink and drive. He still consumes alcohol to the point of intoxication two times per month. Applicant does not seem to be able to avoid alcohol. The environment in which he resides is affected by it. Applicant's wife has her own alcohol problems.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁸ Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the alcohol consumption and personal conduct security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant

²⁸ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge