



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 14-03336
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Jon D. Levin, Esq.

08/19/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines J (criminal conduct) and G (alcohol consumption). Clearance is granted.

Statement of the Case

On September 5, 2012, Applicant submitted a Questionnaire for National Security Positions (SF 86). On November 18, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant. The action was taken pursuant to 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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines J (criminal conduct) and G (alcohol consumption). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national security to continue a security clearance for

Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On December 11, 2014, Applicant responded to the SOR. On January 30, 2015, Department Counsel indicated he was ready to proceed. On April 8, 2015, the case was assigned to me. On April 22, 2015, DOHA issued a hearing notice, setting the hearing for May 29, 2015. On May 20, 2015, DOHA issued an amended hearing notice, setting the case for May 27, 2015. The hearing was convened as rescheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were admitted without objection. Applicant offered Applicant Exhibit (AE) A, which was admitted without objection. Applicant testified and called two witnesses. I held the record open until June 5, 2015 to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE B and AE C, which were admitted without objection. DOHA received the hearing transcript (Tr.) on June 3, 2015.

Findings of Fact

Applicant admitted the SOR allegations with explanations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 51-year-old senior principal engineer employed by a defense contractor since March 2009. He seeks to retain his secret security clearance as a requirement for his continued employment. (GE 1; Tr. 34-35, 44)

Applicant graduated from high school in June 1982. He was awarded an associate of arts degree in engineering in May 1985, and a bachelor of science degree in electrical engineering in December 1987. (GE 1; Tr. 35-36, 40) Since college, Applicant has primarily worked in the defense industry and was initially granted a security clearance in 1988. (GE 1; Tr. 41-44)

Applicant was married to his first wife from December 1989 to July 2004, and was married to his second wife from August 2004 to August 2010. Both marriages ended by divorce. However, Applicant listed his second wife as a cohabitant stating, “[w]e live like we’re married.” (GE 1; Tr. 36-37) Applicant has no children. He views his second wife’s two adult children, who are independent, as stepchildren. (Tr. 37-38) Applicant did not serve in the armed forces. (GE; Tr. 38)

Criminal Conduct/Alcohol Consumption

Applicant admits the sole SOR allegations alleged under the criminal conduct and alcohol consumption guidelines. The allegation under the criminal conduct guideline states that Applicant was convicted in July 2012 of driving under the influence (DUI), and sentenced to 11 months and 29 days in jail, of which anything beyond 48 hours was

suspended. He was also fined, ordered to pay court costs, ordered to complete DUI school, ordered to complete an alcohol assessment, and placed on probation for one year. Applicant's DUI occurred after he drank too much and was involved in a single car accident. He successfully completed probation in July 2013. (SOR ¶ 1.a; SOR answer; Tr. 44-48, 52-57, 68; GE 2 – GE 4) The allegation under the alcohol consumption guideline stated that after being diagnosed as alcohol dependent during treatment and counseling in October and November 2011, Applicant continued to use alcohol. (SOR ¶ 1.b; SOR answer; Tr. 46-47, 69; GE 4)

Applicant testified that he has not had a drink in "over a year" by following the "zero, one, two, three" rule, a sobriety program. He has not had an alcohol-related incident since his 2012 DUI. Since Applicant quit drinking, he regularly goes to the gym and follows a strict diet adding that he is, "probably in the best shape of [his] life." (Tr. 48-51) Applicant testified that he was unaware that he had been diagnosed as alcohol dependent in 2011, but has since been made aware of that diagnosis as a result of these proceedings. (Tr. 57-64, 67, 69-72)

Applicant submitted an alcohol assessment completed by a licensed professional counselor (LPC)¹ in May 2015. The counselor administered the Substance Abuse Subtle Screen Inventory-3 (SASSI-3), and conducted a clinical interview to include a mental status examination. The test results ruled out the presence of any type of alcohol dependency disorder, past or present. The counselor added that based on his assessment, Applicant would not need any type of follow-up counseling or program because no alcohol-related problem was identified. Applicant is at low risk to repeat any past behavior related to questionable judgment such as drinking and driving. (Tr. 64-67, 70-72; AE A)

Post-hearing, the LPC reviewed Applicant's records from his 2011 treatment and counseling that diagnosed him as alcohol dependent. The LPC stated in reviewing the records from the treatment program, there was a lack of any objective evaluation or assessment which would justify such a diagnosis. He added there was no stated criteria per the Diagnostic Manual IV of the American Psychiatric Association. Based on his clinical impressions and testing, the LPC concluded and was able to rule out the presence of an alcohol dependence disorder. He added that labeling Applicant in 2011 as alcohol dependent may have been premature and possibly inaccurate. (AE B, AE C)

Character Evidence

Applicant's engineering manager supervisor (EM) testified. EM met Applicant approximately 25 years ago when they were working for another defense contractor. He has had an opportunity to observe Applicant on and off the job. EM recruited Applicant

¹ The LPC's resume provides extensive information about his education, background, and experience. The LPC has completed doctorate level education, has professional experience spanning 45 years, was an adjunct faculty member, has provided consulting services, and conducted or held numerous presentations and training during his professional career. The LPC holds professional certificates, is a member of professional organizations, and has awards too numerous to mention. (AE C)

to work for their company approximately six years ago. Applicant has “some very unique skills” that are “critical to the performance of [defense contractor’s] contracts.” Applicant would not be able to perform his duties without a security clearance. Applicant is well respected inside and outside the company and is trustworthy and reliable. EM has held a secret security clearance for approximately 20 years. EM has no reservations or concerns recommending Applicant for a security clearance. (Tr. 18-34)

Applicant’s security manager and facility security officer (FSO) testified. The FSO has known the Applicant since 2009. The FSO stated that there were no security lapses as a result of Applicant’s 2012 DUI, and that Applicant has never been involved in a security violation. (Tr. 74-79)

Applicant spends his discretionary free time with his former wife and cohabitant. They enjoy camping, spending time with their three miniature Yorkies, and are involved with the local animal shelter. (Tr. 40)

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.” *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 applicant’s 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 adjudicative guidelines. 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 “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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about 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.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Criminal Conduct

Under Guideline J, the Government's concern is 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.

AG ¶ 31 describes two potentially Disqualifying Conditions that could raise a security concern:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's criminal conduct is solely based on his 2012 DUI conviction. The Government established its case under Guideline J through Applicant's admissions and evidence presented warranting application of AGs ¶¶ 31(a) and 31(c).

AG ¶ 32 provides four potential Mitigating Conditions:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) 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 ¶¶ 31(a) and (d) are fully applicable. Applicant presented credible evidence of actions taken to overcome his 2012 DUI conviction. He has established that he is not alcohol dependent, and during the infrequent times he consumes alcohol, he does so responsibly. As of his hearing date, Applicant had not consumed alcohol for one year. He is remorseful for his behavior and has initiated positive changes in his lifestyle. Applicant's work behavior has not been indicative of having an alcohol problem. He is a valuable employee, who is reliable, dependable, and professional. His responsible use of alcohol is supported by his testimony and evidence presented. At his hearing, Applicant acknowledged the problems the misuse of alcohol caused him. He demonstrated remorse and a steadfast commitment to continue lifestyle changes consistent with responsible alcohol use. AG ¶¶ 31(b) and (c) are not relevant.

Alcohol Consumption

Under Guideline G (alcohol consumption), the Government's concern is that 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. AG ¶ 21.

At the onset of the case, the Government established its case under Guideline G through Applicant's admissions and evidence presented. Applicant continued to drink after he had purportedly been diagnosed as alcohol dependent in 2011. A discharge evaluation was prepared stating same and Applicant does not deny that such a diagnosis was made. However, he does dispute that the treatment center informed him of the alcohol dependent diagnosis, adding that he only became aware of that diagnosis as a result of these proceedings.

Applicant produced substantial evidence rebutting his 2011 diagnosis. Having carefully reviewed the 2011 and 2015 evaluations, as well as the qualifications of the respective counselors, I find the 2015 diagnosis and evaluation to be more persuasive. Accordingly, I accept the conclusions and diagnosis of Applicant's 2015 evaluation that

he is not alcohol dependent and labeling Applicant in 2011 as alcohol dependent may have been premature and possibly inaccurate. Furthermore, Applicant was not aware of a diagnosis that was later determined to be unsubstantiated. Having reached this conclusion, no further discussion under this concern is necessary.

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) 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. The discussion in the Analysis section under Guideline J is incorporated in this whole-person section. However further comments are warranted.

I was particularly impressed with Applicant's demeanor during his hearing and the apparent effect this process has had on him. Applicant has been willing to do whatever is necessary to recover from his 2012 DUI conviction. The process has been costly for him, not only financially, but also personally and professionally. Applicant has dedicated the majority of his adult working life to the defense industry. He attained a high level of trust and support within his company. He demonstrated the correct attitude and commitment to responsible alcohol consumption.

Also noteworthy is Applicant's past behavior, which serves as a reliable indicator of future behavior. In particular, he has successfully held a security clearance intermittently since 1988. He has been cooperative throughout this process and recognizes the gravity of these proceedings. He made significant and improved lifestyle changes, is a responsible and contributing member of society, and is a valued and trusted employee. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. 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. For the reasons stated, I conclude he is 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 J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline G: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to continue Applicant’s eligibility for a security clearance. Clearance is granted.

ROBERT J. TUIDER
Administrative Judge