



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



In the matter of:)
)
-----) ISCR Case No. 18-01792
)
Applicant for Security Clearance)

Appearances

For Government: Daniel O'Reilley, Esquire, Department Counsel
For Applicant: Troy L. Nussbaum, Esquire

03/31/2020

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On September 7, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). The action was taken 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) effective within the DOD on or after June 8, 2017. On December 21, 2018, Applicant timely submitted a response to the allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). His response included what was pre-marked as exhibits A-L.

On April 30, 2019, I was assigned the case. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 16, 2019, setting the hearing for June 26, 2019. The hearing was convened as scheduled.

The Government offered four documents, accepted without objection as exhibits (Exs.) 1-4; no objection was posed to Applicant's previously submitted documents A-L.

Applicant offered testimony, two witnesses, and six additional documents, accepted without objection as Exs. C, D, G, I, M, and N to supplement or update his previously submitted materials, as described in the transcript (Tr.), received on July 8, 2019, at Tr. 14-15. Upon receipt of the transcript, the record was closed. Based on the exhibits, testimony, and record as a whole, I find Applicant failed to mitigate the alcohol consumption security concerns raised.

Findings of Fact

Applicant is a 30-year-old solid state technician who has served in the same capacity for over five years. He first received a security clearance in 2016. He has earned an associate's degree and working toward a bachelor's degree. He is single and has no children. One colleague described him as "confident, a thoughtful guy, he's [a] reliable, good worker," who has not been seen as under the influence of alcohol at work. (Tr. 20) Applicant has been imbibing alcohol since he was a teen. Overall, his family does not drink, although his father and a grandfather have been known to consume alcohol on occasions. (Tr. 76)

In March 2010, Applicant was out with co-workers drinking "probably a beer an hour for multiple hours." (Tr. 40) He got in his car to drive home, then realized he should not be driving. He pulled off the road and decided to "sleep it off." (Tr. 40) A passing officer woke Applicant and assessed the situation. Applicant was charged with Driving/ Attempting to Drive Vehicle while under the influence of alcohol (DADV). He was offered probation before judgment, with six months of probation completed successfully, and he completed a 12-week alcohol and drug outpatient program.

In April 2012, Applicant was with a group of friends drinking beer on a parking lot near an apartment building. He was cited with Possession of an alcoholic beverage in an open container. Applicant then continued the evening imbibing with his friends. (Tr. 61) The outcome of the citation was that Applicant was asked to perform 16 hours of community service, which he completed successfully. (Tr. 39)

In September 2015, Applicant spent the day socializing with friends at a bar. After a late meal, he left the venue and was stopped by the police for swerving. (Tr. 36) The officer smelled alcohol and Applicant admitted he had been imbibing. Applicant now believes he had consumed six or seven beers. (Tr. 34) He was given a field sobriety test, which he passed, then administered a breathalyzer, the results of which were not disclosed to him. Later, at the station, he refused a second breathalyzer. (Tr. 64) Ultimately, he was arrested and charged with Driving Vehicle Under the Influence of Alcohol (DUI). At a bench trial, the judge found Applicant not guilty, noting that the issue should have been settled when he passed the field sobriety test. Today, Applicant maintains his innocence in the matter, but agrees "it was unwise for [him] to put [himself] in that position. If [he] hadn't been drinking all that day, [he] would have never raised the officer's suspicion. And it was just not a smart move to even put [himself] at a vulnerable state like that." (Tr. 35)

In mid-January 2018, Applicant spent the day at a bar for a going-away party. (Tr. 68) He got a ride to his grandmother's house, but later decided to retrieve his automobile from the bar. After a field sobriety test, Applicant was arrested and charged with Driving While Impaired by Alcohol (DWIA). He was pulled over for a headlight issue, and the officer suspected he was under the influence. Looking back at the incident, he now recognizes that he was intoxicated at the time. (Tr. 29-30) In court, Applicant was found guilty, sentenced to 60 days in jail, suspended 60 days, and placed on probation until late 2019. He became subject to an interlock system on his vehicle. (Tr. 72) His probation was terminated early, in December 2018, on petition after he finished all other court-ordered requirements. (Tr. 31) He was initially advised by an attorney to cease using alcohol, then ordered to stop drinking by the court as part of his probation. As of May 2018, he had not committed to remaining sober. (Tr. 73) As of the time of the hearing, however, he feels committed to remaining sober. (Tr. 74)

Although he has does not follow the program's steps, has no sponsor, and does not subscribe to the program's religious underpinnings, Applicant has attended over 140 Alcoholics Anonymous (AA) meetings, which he still attends. (Tr. 74-75, 79; Ex. M) He attended a one weekend inpatient program, finished 26 weeks of aftercare counseling, and completed a 16-hour on-line drug and alcohol education course. (see Ex. C, Ex. M, and Ex. N; Tr. 42) There, it was determined he had a "moderate drinking problem that . . . [had the] potential to be way worse if [he did not] get it in check." (Tr. 42) Elsewhere, he was noted as a "moderate to high-risk" drinker. (Tr. 43) Applicant described his past pattern of drinking as being "more consistent with binge drinking." (Tr. 56)

This experience and subsequent rehabilitation have changed Applicant's attitude toward alcohol abuse, and it is his intent to endeavor to remain sober and not return to alcohol "for the foreseeable future." (Tr. 77) He no longer needs alcohol to have fun, and he recognizes that it adversely affects his judgment. Alcohol-free, he is enjoying new hobbies, outdoor activities, and working on more fulfilling relationships. He is currently dating, but not cohabitating with, a woman who infrequently drinks alcohol. (Tr. 51, 89) She is a caring individual who supports his sobriety and acknowledges that alcohol was adversely affecting Applicant's life. (Tr. 88) She encouraged him to make changes in his life regarding alcohol. (Tr. 88) When they do move in together, they will most likely keep alcohol in the home. (Tr. 51) Applicant stays away from all-day sports viewing in bars with his friends. (Tr. 77) He is contrite concerning his past alcohol abuse. (Tr. 53-54)

Policies

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 used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. They are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to the AG, the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person in making a decision. The protection of the national security is the paramount consideration. The AG requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."

Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.

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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline G - Alcohol Consumption

The Alcohol Consumption 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 alcohol-related citation and arrests raise serious questions concerning his reliability, trustworthiness, and judgment in terms of alcohol, judgment, and self-control. They, therefore, establish 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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The security concerns raised under this guideline could potentially be mitigated by the following applicable factors:

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 judgment;

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and

AG ¶ 23(d): the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant acknowledged that he was deemed a high level to moderate drinker, and he self-described as a binge imbiber. It was sometime after May 2018 that he decided to remain sober - for the "foreseeable future." He has completed live and on-line treatment, coursework, and counseling. He has followed aftercare recommendations. Although he does not follow the steps and sponsorship at the heart of AA, he does attend its meetings. While he has remained sober for the past two years since his most recent alcohol-related incident from the 2010s, he has not done so without equivocation (choosing to comport his behavior for the "foreseeable future"). However, his abstinence to date shows that he is capable of sobriety or self-control, although only time will tell whether his current pattern is sustainable. However, sufficient facts have been raised to invoke AG ¶ 23(b) and AG ¶ 23(d).

Guideline J – Criminal Conduct

The concern raised by criminal conduct is set out in AG ¶ 30:

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 four alcohol-related arrests and citation over the past decade are sufficient to establish the following disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Here, Applicant is contrite over his past criminal offenses. For many of the same reasons noted under Guideline G, he has demonstrated rehabilitation over the past two years by remaining sober and not committing any more recent alcohol-related criminal conduct. He has also completed his period of probation from his most recent conviction for driving while intoxicated. What remains a serious consideration in this particular matter, however, is how successful his rehabilitation has been in terms of the length of time he has demonstrated self-control or sobriety.

Applicant decided to comport his conduct sometime between May 2018 and the June 2019 hearing. It is not unreasonable to expect a time passage for demonstrating change to be as long, if not longer, than the space of time between cited incidents of criminal conduct. Here, approximately two-and-a-half years passed between Applicant's 2015 arrest and his most recent criminal charge in 2018. Therefore, a period of at least three years since his 2018 arrest would prove a clearer gauge of his behavioral comportment in terms of criminal conduct. Given his successful completion of probation and his continued participation in AA, however, I find AG ¶ 31(d) applies, in part:

AG ¶ 31(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Guideline E - Personal Conduct

The security concern 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 or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Here, Applicant was cited four times during the 2010s of alcohol-related misconduct that jeopardized both his safety and the safety of others, and violated prevailing laws, rules, or regulations. This is sufficient to raise disqualifying conditions:

AG ¶ 16(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicting that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . and (2) any disruptive, violent, or other inappropriate behavior, and

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

This guideline provides seven potential mitigating conditions under AG ¶ 17. One is potentially applicable under these facts:

AG ¶ 17(d): 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant was granted a security clearance in 2016. Two years later, he spent the day drinking with friends and knew he was inebriated, but he decided to take control of an automobile. In doing so, he showed very poor judgment and reckless behavior.

This was the most recent and last incident at issue. Applicant has acknowledged his past personal conduct in terms of alcohol-related criminal conduct and poor judgment, and he has received appropriate counseling. For just over two years he has been practicing sobriety. This condition, however, relies on a conclusion that Applicant's past behavior is unlikely to recur. Despite his sincerity and contrition, Applicant did not make his decision to move forward sober until May 2018. When he did so, it was a decision limited to the "foreseeable future," leaving room for doubt regarding the depth of his current commitment and regarding his ability otherwise to proceed in the future as a cautious imbibor.

Applicant's most recent arrest and charge for driving while impaired was just over two years ago. It was his fourth alcohol-related citation in the past decade, and followed his last charge by about two-and-a-half years. Indeed, in the past 10 years, Applicant's drinking and the law have collided about every two-and-a-half years. A demonstrated period of sobriety, or even moderate alcohol use, should extend beyond the two-and-a-half year window that has resulted in pitfalls for the past decade in order

to glean whether relapse to his old way is unlikely to recur. Based on the two periods discussed, that determination now would be premature. AG ¶ 17(d) does not apply.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under the applicable guidelines in my whole-person analysis. I also considered Applicant's credible testimony, the testimony of his witnesses, his background, age, education, behavioral changes, and intervening maturation.

Overall, the record evidence leaves me with questions doubts about Applicant's eligibility and suitability for a security clearance vis-à-vis his personal conduct. The evidence persuades me that Applicant has matured sufficiently to comport his behavior with applicable laws and regulations in general and, with the right incentive, to monitor his drinking. Since Applicant has chosen to continue his present sobriety for only the foreseeable future, however, I conclude more time is needed to demonstrate that he is fully capable of independently monitoring his behavior with regard to his judgment and personal conduct. Evidence that he has been able to break his regularly recurring cycle of committing some criminal or alcohol-related misconduct would go a long way to demonstrate his maturation and improved judgment. Consequently, I conclude personal consumption security concerns are not mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

Arthur E. Marshall, Jr.
Administrative Judge