



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case: 18-00278 |
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| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

January 28, 2019

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Statement of the Case

On November 30, 2016, Applicant submitted a security clearance application (e-QIP). On March 29, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline J, Criminal Conduct and Guideline G, Alcohol Consumption. The action was taken 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) effective after June 8, 2017.

Applicant answered the SOR on May 14, 2018, and requested a hearing before an administrative judge. The case was assigned to me on September 10, 2018. The Defense Office of Hearings and Appeals issued a notice of hearing on October 22, 2018, and the hearing was convened as scheduled on November 27, 2018. The Government offered three exhibits, referred to as Government Exhibits 1 through 3, which were admitted without objection. The Applicant offered no exhibits. Applicant

testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on December 7, 2018.

Findings of Fact

Applicant is 40 years old, and is married with five children. He has a high school diploma. He is employed by a defense contractor as an Engineer Technician Level IV. He is seeking to retain a security clearance in connection with his employment. Applicant began working for his current employer in November 2005.

Guideline J – Criminal Conduct

The Government alleges that the Applicant has engaged in criminal activity that creates doubt about a person's judgment, reliability, and trustworthiness.

Guideline G – Alcohol Consumption

The Government alleges that the Applicant has engaged in excessive alcohol consumption, which 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 has a history of alcohol abuse. On three occasions over the past twenty years, he has been arrested for Driving Under the Influence of Alcohol (DUI). Two of the arrests involved car accidents caused by the Applicant as a result of his impairment. During his personal subject interview on November 9, 2017, Applicant told the investigator that he continues to consume alcohol and then operates motor vehicles while impaired.

Applicant stated that he began consuming alcohol at the young age of 14. When he started, he was drinking maybe four or five beers on the weekend. (Tr. p. 18.) By age 18, through his mid-20's, he was consuming alcohol once or twice a week, and each time he drank to the point of intoxication.

In September 1997, Applicant was first arrested and charged with DUI. Applicant was arrested after he struck a parked vehicle. His blood alcohol level was .18. Applicant states that he was leaving a gathering with some friends and had consumed about 16 beers over a period of 6 hours. He smashed the front passenger side of his vehicle. After he was arrested, he was taken to jail. His license was suspended and he was fined approximately \$700. He was also required to complete a driver's education class. (Tr. p. 21.) Applicant states that following this DUI, he stopped drinking for about a month. He then returned to his regular drinking pattern.

In January 2001, Applicant was arrested and charged with DUI. This time he rear ended another vehicle at a stop light. At the time of his arrest, Applicant blood alcohol level was .2. Applicant explained that he was coming from a co-workers house where he had consumed about 20 beers over a period of six hours. Applicant was found guilty of the charge. His driver's license was suspended for a year, he was fined \$1,300 that he completed with community service, he was required to attend 20 Alcoholics Anonymous meetings, and also a driver's education class. Applicant states that he completed all of the courts requirements. (Tr. p. 24.) Following this arrest, Applicant stopped drinking for about two months. (Tr. p. 25.)

In November 2009, Applicant was arrested and charged with DUI a third time. Applicant was pulled over for speeding and the police smelled alcohol on his breath. Applicant was tested for DUI and had a blood alcohol level of .09. He was coming from a friend's house where he had consumed between six and eight beers. Applicant states that because the police officer moved and could not testify in court the matter was dismissed on a technicality. (Tr. p. 27.) He admits that he was intoxicated at the time of the arrest. When Applicant was asked by the Department Counsel, why drink and still get behind the wheel? Applicant responded that, "Just – I just feel sometimes I gotta -- I gotta go. And I just - - and I just go." (Tr. p. 27.)

Applicant testified that the last time he drank and got behind the wheel to drive was within the last six months before the hearing. (Tr. p. 29.) Applicant states that he does not plan on ruling out his drinking in the future, but because there are other options available such as Lyft service he plans to use that more to keep himself from drinking and driving. (Tr. p. 30.)

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables 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 decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in 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.

Analysis

Guideline J – Criminal Conduct

AG ¶ 30 expresses the security concerns pertaining to criminal conduct:

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 conditions that could raise a security concern and may be disqualifying in this case:

(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

(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;

Applicant has been arrested and charged on three separate occasions with DUI, and continues to drink and drive. This evidence is sufficient to raise the above disqualifications.

The conditions set forth under AG ¶ 32 could mitigate security concerns arising from Applicant's criminal conduct:

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

(c) no reliable evidence to support that the individual committed the offense; and

(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.

Applicant's history of alcohol abuse involving three arrests for DUI, and the fact that he continues to drink and drive, the last time occurring just six months before the hearing, indicates that he does not show the required good judgment and trustworthiness necessary to be eligible for access to classified information. Although his DUI's occurred more than nine years ago, Applicant has continued to drink and drive and has simply been lucky not to have been arrested. He has not produced sufficient evidence to establish that future criminal problems are unlikely. He has not established mitigation under AG ¶ 32.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

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 ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The disqualifying conditions raised by the evidence are:

- (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
- (b) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The evidence shows that Applicant incurred three arrests and charges for DUI. These incidents raise security concerns under AG ¶¶ 22(a) and 22(c).

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns:

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (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;
- (c) the individual is participating in counseling or a treatment program, has no previous history of treatment or relapse, and is making satisfactory progress in a treatment program; and
- (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 failed to introduce sufficient evidence of rehabilitation. Although it has not been determined if he is an alcoholic or is alcohol dependent, he has had three alcohol-related incidents, two involving serious car accidents that he caused. He continues to consume alcohol to excess. His conduct has been irresponsible and dangerous. Following each DUI arrest, he has tried to stop drinking. On each occasion, after a short period, he resumed his previous pattern of drinking. Given the

extensive nature of his drinking problem, and the fact that he continues to drink and drive, Applicant has not shown the requisite good judgment and reliability necessary to access classified information. ¶ 32 does not provide mitigation.

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 Guideline G in my whole-person analysis. Applicant continues to consume alcohol to excess even after being arrested on three occasions for DUI. At this time, there is no strong evidence in the record to show that he will remain sober for any sustained period. He has failed to present sufficient evidence of rehabilitation to overcome his heavy burden to mitigate his alcohol abuse. Overall, the record evidence raises doubts about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from the cited adjudicative guidelines.

Formal Findings

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

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| Paragraph 1, Guideline J: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | Against Applicant |

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| Paragraph 2, Guideline G: | 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 the national interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge