



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



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 18-01470
)
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Applicant for Security Clearance)

Appearances

For Government: Aubrey DeAngelis, Esq., Department Counsel
For Applicant: *Pro se*

04/08/2019

Decision

MALONE, Matthew E., Administrative Judge:

Since 2012, Applicant has been arrested three times for driving under the influence of alcohol. Additionally, he did not comply with the terms of his probation by consuming alcohol and failing to complete court-ordered alcohol counseling. He did not present sufficient information to mitigate the security concerns about his alcohol consumption. His request for a security clearance is denied.

Statement of the Case

On June 22, 2018, Department of Defense (DOD) adjudicators, having been unable to determine from available information that it is clearly consistent with the interests of national security for Applicant to have a security clearance,¹ issued a

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guideline for alcohol consumption (Guideline G).² Applicant timely responded to the SOR (Answer) and requested a decision without a hearing; however, on August 17, 2018, Department Counsel requested a hearing, as provided for by paragraph E3.1.7 of the Directive.

I received the case on September 19, 2018, and convened the requested hearing on December 11, 2018. The parties appeared as scheduled. Department Counsel proffered Government Exhibits (GX) 1 – 10, all of which were admitted into evidence.³ Applicant testified on his own behalf. I received a transcript of the hearing (Tr.) on January 2, 2019.

Findings of Fact

Under Guideline G, the Government alleged that in August 2012, Applicant was charged with driving under the influence (DUI) of alcohol (SOR 1.a); that in June 2016 he again was charged with DUI, and that because he failed to comply with the terms of his sentence, warrants for his arrest were issued in July 2016 and May 2017 (SOR 1.b); and that in July 2017, he was arrested for DUI (SOR 1.c). In response, Applicant admitted, with explanations, each of the allegations. (Answer) In addition to the facts established by Applicant's admissions, I make the following additional findings of fact.

Applicant is 37 years old. Since June 2015, he has worked in an information technology position for a large defense contractor. Between September 2007 and June 2015, he held similar positions with several other companies in both the defense industry and the private sector. Applicant served in the U.S. Air Force from October 1999 until being honorably discharged in September 2007. Applicant was married from March 2009 until divorcing his wife in June 2013. They have two children, ages 9 and 13, together. Applicant has a bachelor's degree in computer science and is working toward a master's degree in the same field. (GX 1; GX 2; Tr. 6)

Applicant first consumed alcohol at age 19 while stationed overseas with the Air Force. At that time, he would drink socially at least once a week, consuming two or three mixed drinks each time. After returning to the United States in early 2002, he did not consume alcohol again until he turned 21 in 2003. His drinking then moderated, occurring only about once or twice monthly. Applicant's drink of choice was a mixed drink of whiskey and a soft drink. He claims he has not consumed any alcohol since May 2017. He has described himself as a "problem drinker" in response to a questionnaire he completed during alcohol counseling in 2013. (GX 2; Tr. 34 – 36, 47 – 48, 59)

² The adjudicative guidelines were issued by the Director of National Intelligence on December 10, 2016, and made effective for all adjudications on or after June 8, 2017.

³ GX 7 and GX 10 were admitted over Applicant's objections. (Tr. 24 – 26, 28 – 29)

Applicant's first arrest for DUI occurred on August 17, 2012. He had been out at a club where he consumed at least five shots of alcohol. On the way home, his car hit a curb and one of his tires went flat. As he was trying to change the tire, police arrived and determined that he was intoxicated. Applicant testified he believed a blood test taken when he was arrested revealed he had a .87 blood alcohol content (BAC). Applicant later pleaded guilty to DUI and was sentenced to two years of probation, with leave to petition for early release from probation after one year if in compliance with the terms of his probation, which began on June 18, 2013. Those terms included completion of 52 hours of alcohol counseling and 48 hours of community service within 10 months of sentencing. Applicant also was ordered to abstain from alcohol during probation. Applicant completed his probation in June 2015. (Answer; GX 1; GX 2; GX 4; Tr. 36 – 40)

On June 25, 2016, Applicant was again arrested and charged with DUI. Applicant claimed he had been at a friend's house that evening and had two beers, which he normally would not drink and resulted in an upset stomach. He stated that as he drove home, he had no cell service and became lost as he was unfamiliar with the area where his friend lived. He decided to pull off the road and sleep in his vehicle until it became light out and he could get his bearings. Police later arrived and woke him up. Applicant averred that they smelled alcohol on his breath only because he had vomited earlier in the evening. He also denied being intoxicated when police arrived, and he claimed the police told him he had passed the field sobriety test they administered before arresting him. (Answer; GX 1; GX 2; Tr. 40 – 43)

According to a police report about his arrest, police found Applicant asleep in his vehicle in the middle of a private one-lane road. They had difficulty waking him up and there was vomit on the driver's side door. Applicant appeared disoriented and could not provide cogent answers to their questions about his understanding of where he was or how he wound up there. After Applicant refused a roadside sobriety test, he was placed under arrest and transported to a police station where he was given a breathalyzer test. The results of that test showed that, more than an hour after police took him into custody, he had a BAC of .158. The record does not reflect what time he last consumed alcohol. After initially pleading not guilty to DUI, Applicant pleaded guilty. On January 5, 2017, Applicant was sentenced to 10 days in jail (with credit for one day already served when he was first arrested) to be served by February 17, 2017. He also was placed on supervised probation for two years, was assessed \$2,200 in fines and court costs, ordered to complete a drug and alcohol evaluation, and complete any alcohol counseling as directed in his drug and alcohol evaluation, and complete 48 hours of community service. Applicant was also ordered to abstain from alcohol during his term of probation. (GX 4; GX 9)

Applicant's probation requirements also included regular urinalysis testing. In May 2017, Applicant tested positive for alcohol. He claims that he advised his probation officer the day after he consumed champagne while celebrating a recreational sports victory with his friends. Further, on July 26, 2017, Applicant was arrested and charged with DUI. Applicant has denied consuming any alcohol that evening, and that he was acting as the

designated driver for two intoxicated friends who were in the car with him when he was stopped for speeding. They and the driver of a second car traveling with Applicant's were out celebrating a birthday. According to the police reports of his arrest, Applicant failed a field sobriety test and was taken into custody. After refusing a breathalyzer at the scene, he was transported to a nearby hospital and blood was drawn over an hour after he was arrested. That blood sample showed Applicant had a .091 BAC, which exceeded the legal limit for alcohol. (Answer; GX 2; GX 7; Tr. 43)

Applicant was charged with DUI; however, on December 15, 2017, the charge was dismissed. On the night of Applicant's arrest, police also stopped the other car driven by another friend with whom they had been out celebrating. That person also was suspected of DUI but had a lower BAC. A prosecutor mistakenly based his decision to enter Applicant's charge as *nolle prosequi* on the other driver's information. Nonetheless, in July 2017, Applicant's probation was revoked because he had consumed alcohol in May 2017, and because he had not yet completed the terms of his sentence for the June 2016 DUI conviction. Specifically, Applicant had not completed his jail sentence, and he had not completed his alcohol counseling. Applicant was ordered to jail on July 7, 2017. After his release from jail, Applicant was returned to probation; however, in September 2017, another probation revocation hearing was held because he had not yet completed required counseling and pending the outcome of his July 2017 charges, which occurred in a different jurisdiction. Applicant was returned to probation on March 8, 2018. At his hearing in this matter, Applicant disclosed that he has yet to complete court-ordered alcohol counseling and will remain on probation until he does so. (Answer; GX 2; GX 7; GX 10; Tr. 44 – 52, 56)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

⁴ See Directive. 6.3.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Alcohol Consumption

Available information shows that Applicant has been arrested three times for DUI and that he has, at times, consumed alcohol to excess. He has described himself as a "problem drinker" and he is still on probation for his 2016 DUI conviction because he has not yet completed court-ordered alcohol counseling. This information reasonably raises a security concern about alcohol consumption that is expressed at 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 facts and circumstances of this case require application of the following AG ¶ 22 disqualifying conditions:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

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

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

I also have considered the following mitigating conditions available to Applicant under 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;

(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 and 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 claims he has not consumed alcohol since May 2017, when he tested positive for alcohol through a urinalysis test administered by his probation officer; however, a blood test two months later showed he had consumed more than the legal limit before he was pulled over in July 2017 and charged with DUI. The dismissal of that charge does not negate the security significance of available information about his use of alcohol on that occasion. Additionally, the significance of Applicant's current abstinence is attenuated by the likelihood he will be jailed should he be found to have consumed alcohol because he is still on probation for his 2016 DUI conviction. Indeed, his only significant periods of sobriety in the last six years have occurred while he has been under court orders to abstain from alcohol. Additionally, despite Applicant's first DUI conviction in 2013, Applicant repeated his conduct twice over the next four years. All of the foregoing undermines any confidence that Applicant will not again engage in alcohol-related misconduct or that his use of alcohol is no longer of concern. Applicant did not meet his burden of persuasion in response to the Government's information. None of the AG ¶ 22 mitigating conditions apply and the security concerns about his use of alcohol have not been resolved.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). I note that Applicant served honorably in the United States Air Force and that he has been gainfully employed in the information technology industry since leaving the military. Nonetheless, this information, without a showing that Applicant's use of alcohol no longer is a security concern, is not sufficient to resolve the doubts raised by the Government's information. Because protection of the interests of national security is the principal focus of these adjudications, any remaining doubts must be resolved against the granting of access to classified information.

Formal Findings

Formal findings 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
Subparagraphs 1.a – 1.c:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge