



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



In the matter of:)
)
) ISCR Case No. 18-01532
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: Tokay T. Hackett, Esq.

01/10/2019

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct, alcohol consumption, and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 3, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct), G (alcohol consumption), and J (criminal conduct). Applicant responded to the SOR on August 14, 2018, and requested a hearing before an administrative judge.

The case was assigned to me on November 1, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 19, 2018, scheduling the hearing for December 14, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 6 were admitted in evidence without objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection.

Findings of Fact

Applicant is a 38-year-old employee of a defense contractor. He has worked for his current employer since 2015. He seeks to retain a security clearance. He has a bachelor's degree, which was awarded in 2003. He has never married, and he has no children.¹

Applicant was involved in several alcohol-related criminal incidents. He was cited in 1998 for minor in possession of alcohol. He was 18 years old at the time. He pleaded guilty and paid a fine. Applicant testified that he was at a party when the police arrived. He stated that he was not drinking, but there was alcohol at the party. He pleaded guilty because his parents told him to accept responsibility.²

Applicant was arrested in 2008 and charged with driving while impaired by alcohol (DWI). He pleaded guilty and received probation before judgment for one year and a \$500 fine. The charge was dismissed after he successfully completed the terms of his probation.³

Applicant testified that he had two beers with dinner over the course of about two to three hours. He thought that he was fine to drive. He stated that he did well on the field sobriety test, but there was a malfunction with the breathalyzer, so there were no blood alcohol concentration (BAC) results. He followed his attorney's advice and accepted the guilty plea and probation before judgment with the knowledge that the charge would be dismissed if he completed the terms of the probation.⁴

Applicant submitted Questionnaires for National Security Positions (SF 86) in 2009 and 2014. He reported the above two incidents in both SF 86s. He wrote that a DUI "will not happen again."⁵

Applicant was arrested in May 2017 and charged with driving under the influence of alcohol (DUI). In November 2017, he pleaded guilty to DWI, and the DUI charge was dismissed. He was sentenced to 60 days in the county detention center, with all 60 days suspended, and supervised probation for 18 months. As part of his probation, he was ordered to attend a victim impact panel. His state required him to install an interlock system on his car's ignition for one year, which he successfully completed without any violations. He will remain on probation until May 2019.⁶

¹ Tr. at 38, 45-46, 71-72; GE 1, 2; AE A.

² Tr. at 46-48, 62-63; Applicant's response to SOR; GE 1, 2; AE D.

³ Tr. at 48-51; Applicant's response to SOR; GE 4; AE D.

⁴ Tr. at 48-51, 61; Applicant's response to SOR; AE D.

⁵ Tr. at 63; GE 1, 2.

⁶ Tr. at 51-56, 65-66; GE 5, 6; Applicant's response to SOR; AE B-D.

Applicant testified that he went to dinner with a friend, and he had two large shots of tequila over the course of a long evening. He again felt that he was fine to drive. He was stopped after making a right turn while at a red light. He stated that he did not see that there was a no turn on red sign. He believes he passed the field sobriety test, but he refused to take a breathalyzer. He testified that he had friends who were lawyers who advised him that if he was ever stopped by the police, he should refuse the breathalyzer.⁷

Applicant attended and completed alcohol counseling from June 2017 to November 2017. He completed 26 sessions, which included group and individual sessions. His counselor, a licensed clinical social worker (LCSW), reported that Applicant showed marked improvement throughout the course of treatment, and that Applicant “showed sincere remorse and shame about the fact that he did not learn from his first offense which led to his second arrest.”⁸ The LCSW concluded:

As with any human behavior, no one person has a crystal ball. The best we can do is look for sustained improvement in behavior and judgment. It is in my professional opinion that [Applicant] not only successfully completed treatment but went on to demonstrate to me that he has learned from his mistakes and genuinely expresses sincere motivation to continue in his commitment to sobriety.⁹

Applicant informed his supervisor at work that he was arrested for DUI. Applicant testified that he benefited greatly from the counseling. He decided to completely abstain from alcohol. He has not had a drink since January 2018. He assures that he has learned from his mistakes, and the conduct will not be repeated.¹⁰

Applicant is highly regarded, as reported by three witnesses. He is praised for his excellent job performance, trustworthiness, responsibility, work ethic, and integrity. The witnesses recommended that he retain his security clearance¹¹

Policies

This case is adjudicated under Executive Order (EO) 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 June 8, 2017.

⁷ Tr. at 51-55, 64-65; Applicant’s response to SOR; AE D.

⁸ Tr. at 56-58; Applicant’s response to SOR; AE D.

⁹ AE D.

¹⁰ Tr. at 24, 56-60, 66-71; Applicant’s response to SOR; GE 6; AE D.

¹¹ Tr. at 14-44.

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, administrative judges apply the guidelines 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 AG ¶ 2(c), 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, 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant 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 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G, Alcohol Consumption

The security concern 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. The following is potentially applicable in this case:

(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.

Applicant was cited in 1998 for minor in possession of alcohol, and he had two alcohol-related driving offenses. AG ¶ 22(a) is applicable.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

(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; 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 completed alcohol counseling in 2017. His LCSW opined that Applicant successfully completed treatment, learned from his mistakes, and expressed sincere motivation to continue in his commitment to sobriety. Applicant has abstained from alcohol since January 2018. He assures that he has learned from his mistakes, and the conduct will not be repeated.

Applicant appears to be sincere, but I believe he was also sincere in 2009 and 2014 when he wrote that a DUI “will not happen again.” He remains on probation until May 2019. I find that Applicant’s conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 23(a) is not applicable. AG ¶¶ 23(b) and 23(d) have some applicability, but they are insufficient to overcome concerns about his alcohol-related criminal conduct.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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. The following are potentially applicable:

(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; and

(c) individual is currently on parole or probation.

Applicant’s two alcohol-related driving offenses were cross-alleged under criminal conduct. He will be on probation until May 2019. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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; 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 has a strong work record and favorable character evidence. However, he is still on probation for his most recent offense. I have unmitigated concerns under the same rationale discussed in the alcohol consumption analysis.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, 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.

Applicant's alcohol-related criminal conduct is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the alcohol consumption and criminal conduct guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) 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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant informed his supervisor at work that he was arrested for DUI. That eliminated his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) is applicable. However, concerns about his reliability, trustworthiness, and good judgment remain. Personal conduct security concerns are not mitigated under the same rationale discussed in the alcohol consumption analysis.

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 Guidelines E, G, and J in my whole-person analysis. I also considered Applicant's excellent character evidence, but he has two alcohol-related driving offenses, and he remains on probation until May 2019.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct, alcohol consumption, and criminal conduct security concerns.

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
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge