



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



In the matter of:)	
)	
-----)	ISCR Case No. 18-01588
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Price, Esquire, Department Counsel
For Applicant: Stephen C. Glassman, Esquire

06/11/2019

Decision

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

Statement of the Case

On September 19, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal 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 October 11, 2018, Applicant timely submitted a response in which both allegations under Guideline G were admitted, the sole allegation raised under Guideline J was denied, and a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA) was requested.

On January 16, 2019, I was assigned the case. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 12, 2019, setting the hearing for March 28, 2019. The hearing was convened as scheduled.

The Government offered four documents, accepted without objection as exhibits (Exs.) 1-4, as well as two hearing exhibits, noted as Exs I-II. Applicant offered testimony

and four documents, accepted without objection as Exs. A-D. On April 3, 2019, one additional document was submitted by Applicant. It was accepted into the record without objection as Ex. E The transcript (Tr.) was received on April 11, 2019, and 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 32-year-old video-conference technician who has been in that position working for the same employer for over five years. He is a high school graduate who was enrolled in community college from 2004 to 2006, until his education was interrupted by a debilitating accident. Applicant has, however, pursued and received multiple post-secondary certifications. He is single and has no children. He applied for a security clearance in 2016. The results of the subsequent investigation led to the SOR.

In late June 2013, Applicant attended a pool party, arriving around 3:00 p.m. The party was “byob” - bring your own bottle or booze – so liquor was available. Although the party began to unwind around dusk, Applicant decided to stay behind because he had been drinking vodka mixed with juice. (Tr. 17-19) Around 10:00 p.m., he decided to leave the party with a friend. He planned to run an errand, then drop the friend off on his way home. Applicant was pulled over for speeding around 1:00 a.m. During the stop, he registered a .11 blood alcohol content (BAC) on a breathalyzer and failed a field sobriety test. (Tr. 22) In late September 2013, Applicant entered into a plea agreement with the prosecutor under advice of counsel. (Tr. 24) Pleading guilty, Applicant was found guilty of driving under the influence of alcohol (DUI). He was sentenced to 60 days confinement (suspended), agreed to two years of probation, had his driver’s license suspended for 60 days, and paid a \$500 fine plus court costs. He successfully completed his probation period in September 2015.

In early November 2016, a couple of months after applying for a security clearance, Applicant left a dance bar after consuming two rum drinks. They were served either straight or with mixer, over the course of about two hours. (Tr. 29-31) He did not feel so impaired he should not drive a vehicle. (Tr. 48-49) Heading home in his automobile with his girlfriend, who was then visiting from out-of-town, he was stopped for speeding at around 1:00 or 2:00 am. As the officer prepared to conduct sobriety and breathalyzer testing, Applicant curtailed his participation in the examination. (Tr. 27-28, 36) He does not recall if he understood that in declining to submit to a breathalyzer, his driver’s license would be automatically suspended. (Tr. 28)

Ultimately, in February 2017, Applicant appeared before a judge and pled guilty to driving while intoxicated (DWI). He was again sentenced to 60 days confinement, but this time he served seven days in prison and paid both a \$200 fine plus court costs. Although two years of supervised probation were ordered, he met the criteria for early abatement in April 2018 and was transferred to unsupervised probation through mid-February 2019. (Ex. D) In the interim, he completed alcohol and drug testing and, from

February to April 2017, he attended Alcoholics Anonymous (AA) about twice a week. (Tr. 41, 53, 56-57)

Since the DUI, Applicant has had no additional brushes with the law. He recognizes that his troubles were based on poor judgment that needed to be improved. During counseling, he totally refrained from alcohol, but he now limits his alcohol consumption to two to three glasses of alcohol per month. (Tr. 42-46) Since April 2018, he has considered himself a “social drinker.” (Tr. 50-51) This is an overall reduction in his alcohol consumption compared to his earlier patterns before the DWI. (Tr. 53)

Applicant’s driving privilege has been restored. He no longer drives his own sporty vehicle, which is presently on blocks in his driveway. When he needs to drive, he uses his girlfriend’s utilitarian automobile. (Tr. 57) Otherwise, having purposefully relocated to a home near public transportation where he now cohabitates with his girlfriend, he relies on that mode of transportation or hires either Uber or Lyft. (Tr. 57)

Applicant does not drive if he has been imbibing. (Tr. 63) He has also had to monitor his alcohol consumption due to a form of eczema wherein alcohol “was ruining” his skin. (Tr. 68) His personal circle of friends has been reduced and he no longer socializes as much with those with whom he used to once abuse alcohol, preferring to associate with a more professional crowd. (Tr. 68) At present, he is excelling at work and looking to aspire to a more challenging and more lucrative position.

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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 DUI in 2013 and DWI in 2016 demonstrate his excessive use of alcohol and related poor judgment. 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 was twice cited for drinking and driving within a three year period, with his second period of unsupervised probation only ending about three months ago. Both were the result of attending activities where it could be presumed alcohol would be imbibed, and predicted that driving home would conclude the evening. Applicant acknowledges his poor judgment and takes responsibility for his actions. He has completed an alcohol and drug program and, for a few months, benefitted from AA attendance.

Applicant now drinks alcohol to a lesser degree and has foresworn drinking and driving going forward. To that end, he has relocated to a home near public transportation, has altered his circle of friends, and is more cognizant of the amount of alcohol he consumes. These efforts show promise. With his period of probation now over for only a short three months, however, insufficient time has passed to demonstrate a clear and established pattern of modified alcohol consumption. At least a year free of probation seems to be a reasonable period or benchmark upon which to best assess that Applicant is fully in control of his use of alcohol and capable of superior judgment. At best, AG ¶(d) applies in part.

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 drinking and driving convictions in 2013 and 2016 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 6 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.

The security concerns raised under this guideline have been mitigated by the following applicable factor:

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.

Here, Applicant is genuinely contrite over his past criminal offenses. He has completed appropriate alcohol and drug counseling, attended AA for a notable period, changed his professional focus and personal circle of friends, relocated near public transportation in order to obviate his reliance on driving, reduced his alcohol consumption, matured, and foresworn driving after drinking. Besides these achievements, Applicant no longer drives his sporty car, relying instead on his girlfriend's less seductive auto, Uber, or Lyft. He is genuinely contrite over his past criminal offenses. He has settled down with his girlfriend. Applicant completed the periods of probation sentenced after both his DUI and DWI convictions. He now aspires to a more challenging and lucrative employment position. Such accomplishments demonstrate that he is now ready to go willingly go forward living his life in compliance with laws and regulations.

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 two

applicable guidelines in my whole-person analysis. I also considered Applicant's highly credible testimony, background, age, behavioral changes, and subsequent maturation.

Overall, the record evidence leaves me with questions or doubts about Applicant's eligibility and suitability for a security clearance vis-à-vis alcohol consumption. The evidence persuades me that he has matured sufficiently to comport his behavior with applicable laws and regulations in general. Since Applicant has chosen to continue to imbibe, however, more time than a couple of months since the end of his last alcohol-related probation is needed to demonstrate that he is fully capable of independently monitoring his behavior with regard to his alcohol use and driving, and to exhibit appropriate reliability and judgment. Consequently, I conclude alcohol 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:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For 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