



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



In the matter of:)
)
) ISCR Case No. 18-01822
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq.

11/05/2019

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the alcohol-related and criminal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On October 15, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). The action was taken under Executive Order (Exec. Or.) 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on November 13, 2018, and elected to have a hearing before an administrative judge. The case was assigned to me on March 7, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on April 5, 2019, scheduling the hearing for May 7, 2019. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified, called two witnesses, and submitted Applicant's Exhibits (AE) A through E, which were admitted in evidence without objection. I marked as Hearing Exhibit (HE) II counsel's written brief for Applicant. DOHA received the hearing transcript (Tr.) on May 21, 2019.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated in my findings of fact. He is 29 years old, single, and does not have any children. (Answer; GE 1; AE A).

Applicant graduated from high school in 2008 and earned a bachelor's degree in 2013. As of the date of the hearing, he had been pursuing his master's degree since late 2015. He has worked as an engineer for his current employer, a DOD contractor, since 2013, when he was also first granted a security clearance. (Tr. at 5-6, 19-22, 41-42, 58; GE 1; AE A, B).

Applicant testified that a number of his college friends remained in the vicinity of their college after graduation but he moved away. As he traveled for work one to two weeks monthly, there was "no social aspect of drinking." In approximately October 2016, when he moved back to the area in which his college friends lived, he consumed alcohol weekly to monthly at social events. (Tr. at 22-59; GE 1, 3; AE B).

Within the first weekend of his move, Applicant was arrested and charged with driving while intoxicated (DWI), first offense. He had consumed eight to ten beers and mixed drinks throughout the course of the day with his college friends while watching football. He acknowledged that his decision to drive was "completely irresponsible" since he was drunk, but he thought "I'm right down the corner . . . I made the mistake of thinking I could make it." He testified that he got a flat tire and attempted to pull over to the side of the road when he was pulled over by the police, questioned, and arrested. He denied that he had been swerving or of having being told such by the officer. He acknowledged that he initially denied that he had consumed alcohol that evening because he was "scared," but he then admitted to having done so upon further questioning by the officer. His blood alcohol content (BAC) was .26%. (Tr. at 22-59; GE 1-5, 7; AE A, B, E).

Applicant was convicted and sentenced to 180 days confinement with 165 days suspended, his driver's license was suspended for 12 months with restricted use permitted, he was fined \$500, and he was ordered to attend and complete an alcohol and substance abuse program (ASAP). In December 2016, during pre-trial, he underwent a voluntary substance abuse evaluation as recommended by his DWI attorney. The licensed professional counselor (LPC) noted that Applicant expressed genuine concern and regret regarding his DWI, and seemed to be a "responsible individual who has accomplished his educational goals and maintains an established career." She concluded that he did not meet the criteria for any alcohol-related diagnosis. She recommended that he remain abstinent from alcohol and complete a 24-

session alcohol treatment plan due to her concern that he attempted to drive with a significant BAC. He testified that he remained abstinent throughout the duration of ASAP, he completed ASAP in approximately January 2018, and the LPC made no further recommendations upon his ASAP completion. (Tr. at 22-59; GE 1-5, 7; AE A, B, D, E).

As a result of his DWI, Applicant had an ignition interlock device installed in his car in approximately April 2017. Between then and July 2017, he registered a total of three violations. He testified that he believed two of the three violations were false positives. He believed the device was triggered on these occasions by the banana and protein shake he consumed for breakfast during his 1.5 hour commute to work, as he would test at a .00% BAC when he would blow into the device again five minutes later. (Tr. at 22-59; GE 2, 5-7; AE A, B).

The night before his third violation, Applicant testified that he consumed one to two beers between 5:00 pm and 9:00 pm. He set the device off after he ate a banana and drank a protein shake during his commute to work that morning. He did not believe that the two beers he consumed the previous night were sufficient to trigger the device. He testified that he pulled over to the side of the road, blew into the device again, and registered a .00% BAC. (Tr. at 22-59; GE 2, 5-7; AE A, B).

Applicant was charged with ASAP non-compliance as a result of his three violations. He pled guilty. His suspended confinement for his DWI conviction was reduced to 157 days, he was ordered to eight days confinement, which was reduced to four for good behavior, 50 hours of community service, and his probation was extended for one year. He was permitted to retain his restricted driver's license. He testified that he would have worked remotely from home if he had reason to believe he would trigger his ignition interlock device, and he did not intentionally trigger it and thereby violate his probation. (Tr. at 22-59; GE 2, 5-7; AE A, B).

Applicant completed probation in early 2018. These were his only alcohol and criminal-related offenses, and he has not since had any further such incidents. In April 2019, he voluntarily underwent another substance abuse assessment. The assessment coordinator noted that he did not meet the diagnostic criteria for a current or past substance use disorder, and no further recommendations for treatment services were necessary. (Tr. at 22-60; GE 2, 7; AE A, B, D).

Applicant testified that his family, friends, boss, and security office are aware of his alcohol-related incidents. As of the date of the hearing, he testified that he had not consumed alcohol for several months, he limits himself to one alcoholic drink during special occasions, and he no longer consumes alcohol to socialize because "it has lost a majority of its appeal." He testified that he moved out of the area where his college friends live, and he disassociated from those who have "the same drinking patterns as they always have;" he has a long-time girlfriend who consumes alcohol responsibly; and he realigned his social groups with individuals who share his same hobbies, to include golf, fishing, and outdoor activities. He testified that he learned from his mistakes, he

has no desire to find himself in the same situation again, and has no future intentions of consuming alcohol and driving. (Tr. at 22-60; GE 2, 7; AE A, B, D).

Applicant's first witness, a former member of the U.S. military, testified that he has known Applicant since Applicant came to work for his group in 2013. He testified that he was aware of Applicant's DWI and interlock violations. He testified that Applicant was promoted in December 2018, becoming one of two senior engineers on a team of 10 to 12. He testified that Applicant has served as a mentor and group leader, responsible for training new team members. He described Applicant as a model employee and his "go-to-guy" in the office and on temporary duty overseas. He testified that he has socialized with Applicant after work and he described Applicant as a "professional" during these occasions. (Tr. at 20, 42-43, 60-78; AE A, C, E).

Applicant's second witness, a security engineer for a DOD contractor and Applicant's high-school friend, testified that he, too, was aware of Applicant's DWI and interlock violations. He described Applicant as an upstanding person and believed Applicant has since matured. Numerous character references attested to Applicant's trustworthiness and reliability. (Tr. at 20, 42-43, 60-78; AE A, C, E).

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, 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(a), 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 Exec. Or. 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* Exec. Or. 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 conditions that could raise security concerns under AG ¶ 22. The disqualifying conditions potentially applicable in this case include:

(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

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

Applicant was convicted of DWI and ASAP non-compliance stemming from his ignition interlock violations. AG ¶¶ 22(a) and 22(c) are applicable.

AG ¶ 23 provides the following relevant condition that could mitigate 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 judgment.

Applicant's convictions for DWI and ASAP non-compliance are isolated incidents. These were his first and only alcohol- and criminal-related offenses. Three years have passed since his DWI, his interlock violations occurred nearly two and a half years ago, and it has been almost two years since he completed probation. He credibly testified that he has since matured, as demonstrated by his December 2018 promotion to one of two senior engineers on a team of 10 to 12; his decision to curtail his alcohol consumption; and his disassociation from friends who continue to consume alcohol excessively. He credibly testified that he has no future intentions of driving after consuming alcohol. I find that AG ¶ 23(a) is established.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct as: "[c]riminal 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. I considered the following relevant: "(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 was convicted of DWI and ASAP non-compliance stemming from his ignition interlock violations. AG ¶ 31(b) is established.

I have considered all of the mitigating conditions under AG ¶ 32 and considered the following relevant:

(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.

For the same reasons as set forth above in my Guideline G analysis, AG ¶¶ 32(a) and 32(d) 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 Guidelines G and J in my whole-person analysis. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the 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: Subparagraphs 1.a - 1.b:	FOR APPLICANT For Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	FOR APPLICANT For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's continued eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge