



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



In the matter of:)
)
) ISCR Case No. 19-01435
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

11/15/2019

Decision

HEINTZELMAN, Caroline E., Administrative Judge

Applicant failed to mitigate security concerns raised under Guidelines G and J. He had three alcohol arrests between 1994 and 2018, while holding a security clearance. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted security clearance applications (SCA) on September 8, 2010 and February 5, 2016. On May 24, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). Applicant answered the SOR on June 14, 2019, and requested a hearing before an administrative judge (Answer). The Government was ready to proceed on August 5, 2019, and the case was assigned to me on August 9, 2019. On August 22, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 26, 2019, and I convened the hearing as scheduled. Government Exhibits (GE) 1 through 8 were admitted without objection, and Applicant testified. I received the completed transcript (Tr.) on October 11, 2019, and the record closed.

Findings of Fact

Applicant, 47, is married, and has two minor children. He received a bachelor's degree in 2000. He served in the U.S. Navy from 1994 until 2007, and was separated with a General Discharge. He has held a security clearance for almost 25 years, and he currently holds a top secret clearance with sensitive compartmented information access (TS/SCI). He has worked for a defense contractor since he left the Navy, and he has been a capture manager since January 2019. (GE 1; GE 2; Tr. 9-13)

In 1994, while on active duty, Applicant was arrested and charged with driving while intoxicated (DWI). He held a TS/SCI security clearance at the time of the incident. Applicant does not remember the amount of alcohol he consumed or his blood alcohol content (BAC) level, but he remembers failing the field sobriety tests. He pled no contest to the charges and received fines. (GE 6 at 6; Tr. 12, 26-30)

In January 2009, Applicant was arrested and charged with DWI. He had been drinking at home with a friend and decided to run an errand. During his drive home, he was pulled over for speeding. He was required to take field sobriety tests and his BAC level was .15 percent. He plead guilty to the reduced charge of reckless driving. Applicant was sentenced to six months of probation, his license was restricted for six months, he was ordered to pay a \$500 fine and court costs, attend an alcohol safety action program (ASAP), and a ten-week alcohol-related class. In ASAP, Applicant was not diagnosed with an alcohol use disorder. At the time of this incident he held a TS/SCI security clearance. (GE 1 at 27; GE 2 at 47; GE 3 at 1-2; GE 5; Tr. 32-40)

At the time of the 2009 arrest, Applicant consumed two to three alcoholic drinks twice a month. After the arrest, he reported the incident to his facility security officer (FSO) and abstained from alcohol for two to three years. Applicant admittedly did not take the 2009 arrest seriously enough and only made the changes that were required due to the court requirements. (Tr. 40-44, 53-54)

In August 2018, Applicant was arrested and charged with DWI and refusal of blood or breath test. Applicant's wife and children were not home at the time of this incident. He testified that he was driving to his home at about 11:00 at night after running an errand. While he was attempting to use his car's hands-free system, he drifted into a parked car in his neighborhood. The owner of the vehicle was home and witnessed the incident. The owner of the vehicle and Applicant exchanged words, and the situation escalated. When he left the scene of the accident to drive home, he was aware the woman intended to call the police. (GE 3 at 2-3; GE 7; Tr. 45-48, 61-62)

According to Applicant, he did not consume any alcohol prior to the incident. After he arrived home, he consumed two large beers to calm his nerves. The police arrived at Applicant's home within 15 minutes, and the police officer could smell alcohol on Applicant. Applicant refused to take field sobriety tests and a breathalyzer; therefore, he was arrested and taken to jail. The next day when he was released, Applicant contacted his FSO and reported the incident. Upon advice from his attorney, he pled guilty to DWI, and as a result, the refusal charge was dismissed. Applicant was ordered

to pay a \$250 fine and \$216 court costs. He was required to have an interlock device installed in his vehicle for six months and attend an ASAP class. Finally, his license was restricted for a year from January 9, 2019. All the terms of this conviction were satisfied, but his license remains restricted. (GE 3 at 2-3; GE 4; GE 7; GE 8; Tr. 48-53, 63-67)

At the time of the August 2018 DWI arrest, Applicant was unhappy at work, which was causing stress in his personal life. He admittedly used alcohol to cope with his unhappiness, and at the hearing he described his prior alcohol consumption as “maladaptive”. The last time Applicant consumed alcohol was the night of his August 2018 arrest. (Tr. 51-57, 68)

Applicant provided several letters of recommendation in his Answer to the SOR. He is described as a dedicated family man, professional, and trustworthy. In his 2017 and 2018 performance evaluations, his work and management was described him as accountable, available, responsive, professional, successful, and compliant. Applicant is heavily involved with coaching his sons’ baseball teams. (Answer; Tr. 56, 60)

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.

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

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.

Applicant's admissions and the documentary evidence establish one disqualifying condition under 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

AG ¶ 23 provides conditions that could mitigate security concerns raised under this guideline. Two 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 good judgment; and

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and

established a pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant had three alcohol-related incidents between 1994 and August 2018. All of the arrests were for driving a vehicle while intoxicated, and they occurred while he held a security clearance. Applicant denied consuming alcohol prior to the August 2018 incident, and claimed he drank two beers in the fifteen-minute period between arriving home and the policeman's arrival to question him. Given his history of DWIs while holding a clearance, his claims lack credibility and are self-serving. Additionally, his testimony that he drank beer to calm his nerves belies a reliance on alcohol that he did not acknowledge. Regardless of whether Applicant consumed alcohol before or after he hit a parked vehicle with his car, the subsequent passage of time since the incident is insufficient to mitigate the underlying concerns.

Applicant's abstinence since August 2018 is not sufficient to mitigate his behavior given his history of alcohol-related incidents while holding a security clearance. Although, Applicant was not diagnosed with an alcohol-related disorder, he did not seek counseling or treatment after the DUI arrests beyond his court-ordered classes and programs. AG ¶¶ 23(a) and 23(b) do not apply.

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. Two are potentially applicable 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's three arrests between 1994 and 2018 establish the above conditions. AG ¶ 32 provides conditions that could mitigate security concerns raised in this case. The following two 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.

It has been only about 14 months since Applicant's last DWI arrest and less than a year since his conviction. His license remains restricted. Applicant's history of DWI arrests, while holding a security clearance, indicate a failure to follow rules and regulations, and demonstrate a lack of responsible behavior. Given the seriousness of the convictions and the ongoing nature of his restricted license, mitigation under AG ¶¶ 32(a) and 32(d) is not established.

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. I also considered Applicant's favorable character evidence.

Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

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, Alcohol Consumption:	AGAINST Applicant
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Criminal Conduct:	AGAINST Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge