



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 19-01400

Appearances

For Government:
Tara Karoian, Esquire, Department Counsel

For Applicant:
Mark Myers, Esquire
The Edmunds Law Firm

March 12, 2020

Decision

ROSS, Wilford H., Administrative Judge:

Applicant had four alcohol-related arrests between 1987 and 2018. He is currently on probation for the last offense, and stopped drinking only one month before the record closed. Based on a review of the pleadings, testimony, and exhibits, national security eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on July 1, 2014. (Government Exhibit 1.) On June 26, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline G (Alcohol

Consumption). An “Amendment to the Statement of Reasons” (Amendment) was submitted to Applicant by Department Counsel in this case on September 30, 2019. The actions were taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the initial SOR in writing (Answer) with attachments on August 6, 2019, and requested a hearing before an administrative judge. He answered the Amendment on October 7, 2019. Department Counsel was prepared to proceed on September 30, 2019. The case was assigned to me on October 4, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on October 4, 2019. I convened the hearing as scheduled on November 7, 2019. The Government offered Government Exhibits 1 through 9, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A and B (originally attached to his Answer), which were also admitted without objection. Applicant requested that the record remain open for the receipt of additional documentation. No additional information was submitted. DOHA received the transcript of the hearing (Tr.) on November 19, 2019.

Findings of Fact

Applicant is 55, and widowed. He does not have any children. Applicant has a Bachelor of Science degree and is employed by a defense contractor as a software engineer. He is seeking to retain a national security eligibility in connection with his work with the DoD.

Paragraph 1 (Guideline G: Alcohol Consumption)

The Government alleged in this paragraph that Applicant is ineligible for clearance because he uses intoxicants to excess. Applicant admitted allegations 1.a through 1.d in the SOR under this guideline, with explanations. He denied allegation 1.e. Allegations 1.a through 1.d will be discussed in chronological order:

1.d. Applicant was first arrested for Driving Under the Influence (DUI) on June 29, 1987. He was 23 at that time. Applicant pled guilty to a misdemeanor and was sentenced to three years of probation, a fine, to serve a suspended jail sentence, and was ordered to attend a first conviction program. Applicant was fulfilling the requirements of his sentence when he was arrested for DUI a second time, as set forth below. (Government Exhibits 8 and 9; Tr. 44-45.)

1.c. Applicant was arrested for a DUI on December 12, 1988. He pled guilty to DUI with a prior conviction. His sentence included five years of probation, his driver’s license was restricted for one year, a fine and jail time. Applicant successfully completed all the

terms of this sentence. His probation ended in approximately March 1994. Applicant did not drink during his time on probation. (Government Exhibits 7 and 9; Tr. 40, 45-47.)

1.b. Applicant was arrested a third time for DUI in August 1995. He plead guilty to DUI. His sentence included seven years of probation, a fine, community service, his driver's license was suspended for eighteen months, and he had to attend an eighteen-month alcohol awareness class. Applicant successfully completed all of the requirements. (Government Exhibits 6 and 9; Tr. 47.)

Applicant met his wife in 1998. They were together until her death on July 8, 2017. During that time Applicant continued to drink alcohol, but he stated his use was primarily restricted to home and sporting events with friends. Applicant's alcohol use increased after her death, as he would drink when he got home to help him sleep. His alcohol use continued at sporting events. He also had a heart attack a short time after his wife died. After about a year Applicant decided he needed to get out and socialize. This resulted in his fourth DUI arrest, described below. (Tr. 30-31, 47-50.)

1.a. Applicant was arrested for DUI on August 19, 2018. Applicant had been out at an event and had too much to drink. On the way home he decided to park his truck and sleep it off, but left his engine running. Police woke him up and arrested him after receiving a report from a concerned citizen. According to court records, Applicant's blood alcohol level was 0.14%. He plea guilty and was sentenced to five years of summary probation, and fined. He was also required to attend a first conviction program that included several types of counseling, and a Mothers Against Drunk Drivers (MADD) program. Applicant remains on probation until 2023, but has completed the rest of the sentencing requirements. Applicant stated that he will never drink and drive again. (Government Exhibits 3 and 5; Applicant Exhibit A; Tr. 19-29, 51-60, 64, 67.)

1.e. Applicant has been a habitual alcohol user for many years, starting in approximately 1982. Applicant continued to drink after his most recent arrest, primarily on social occasions, occasionally to excess and intoxication. He testified that he last used alcohol when he drank approximately five glasses of whiskey at a football game about a month before the hearing in this case. Applicant's testimony about his future use of alcohol was unclear. He appeared to state that he had stopped drinking completely. Yet, Applicant also testified, "I hope that I'm trending towards not drinking, but I'm not there yet." He also stated that his goal was to stop drinking irresponsibly. He is not currently attending any alcohol treatment, including Alcoholics Anonymous (AA). (Government Exhibit 3; Tr. 37-39, 43-44, 60-62.)

Paragraph 2 (Guideline J: Criminal Conduct)

2.a. The Government alleged in this paragraph that Applicant is ineligible for national security eligibility because he will remain on probation until approximately October 2023 as a result of the conviction set forth under allegation 1.a. Applicant admitted this allegation.

Mitigation

Applicant has had a successful career, as shown by his resume. (Applicant Exhibit B.)

Policies

When evaluating an applicant's national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under

this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline G: Alcohol Consumption)

The security concern relating to the guideline 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 at AG ¶ 22 contains seven disqualifying conditions that could raise a security concern and may be disqualifying. Two conditions possibly apply to the facts 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; 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 has a long history of drinking to excess, as shown by the four alcohol-related incidents set forth in the SOR and discussed above. The last incident was in August 2018, one year before the record closed in this case. Applicant stated he last drank alcohol about a month before the record closed. He is on probation until 2023. Both of the cited conditions apply.

The guideline at AG ¶ 23 contains four conditions that could mitigate alcohol consumption 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;

(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.

None of the mitigating conditions were established in this case. Applicant had four alcohol-related arrests, the last in August 2018. As stated, Applicant will be on probation until 2023, and continued to drink until one month before his hearing. He appears to have made recent strides towards sobriety, but his problem is of long duration, and he has not participated in any formal alcohol counseling or treatment programs. Considering all the available evidence, I find that not enough time has passed without an incident to establish confidence that he will not resume drinking and acting irresponsibly while under the influence. The Alcohol Consumption guideline is found against Applicant.

Paragraph 2 (Guideline J: Criminal Conduct)

The security concern relating to the guideline for 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.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. One condition was alleged in the SOR Amendment to apply to this case:

(c) individual is currently on parole or probation.

Applicant is on probation until 2023 for his last DUI conviction.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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 had gone about a year without an alcohol-related criminal incident as of the date of his hearing. However, as stated above, he has only recently made the decision to stop drinking. Based on the available record, it is not possible to say with any certainty that alcohol-related criminal incidents will not happen in the future. Of particular concern is the fact that this recent period of good behavior occurred while he remains on probation and potential revocation of his national security eligibility is pending. Not enough time has passed to make a positive decision concerning Applicant's judgment, reliability and trustworthiness. Guideline J is found against Applicant.

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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has not mitigated the security significance of his alcohol use and related criminal conduct. The recent death of Applicant's wife was a terrible blow, and has been considered in this case as a possible mitigating factor. However, the evidence shows that Applicant is not yet ready to acknowledge the long-term adverse effects of his drinking. Not enough time has passed to establish confidence that recurrence is unlikely. Overall, the record evidence does create substantial doubt as to Applicant's present suitability for national security eligibility for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a through 1.e:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge