



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 19-02249
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Applicant for Security Clearance)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: Jeffrey D. Billett, Esq.

06/09/2020

Decision

MALONE, Matthew E., Administrative Judge:

Applicant was involved in two workplace altercations in 2017. Both involved alcohol. Although the security concerns about his use of alcohol are mitigated, Applicant was unable to refute or mitigate the corresponding concerns about his personal conduct. Accordingly, the security concerns about his personal conduct are not mitigated and his request for a security clearance is denied.

Statement of the Case

On March 6, 2018, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for a security clearance required for his employment with a federal contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the interests of national security for Applicant

to have a security clearance, as required by Security Executive Agent Directive (SEAD) 4, Section E.4, and by DOD Directive 5220.6, as amended (Directive), Section 4.2.

On August 28, 2019, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns articulated in the adjudicative guidelines (AG) issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017. Specifically, this case is governed by Guideline E (Personal Conduct) and Guideline G (Alcohol Consumption).

Applicant timely responded to the SOR (Answer) and requested a hearing. With his response, he proffered Applicant's Exhibits (AX) A – H. I received the case on December 16, 2019, and convened the requested hearing on January 29, 2020. Department Counsel proffered Government Exhibits (GX) 1 – 4. Applicant appeared as scheduled, testified, and proffered two additional exhibits, AX I and J. I received a transcript of the hearing (Tr.) on February 10, 2020.

Procedural Notes

With the exception of GX 4, all exhibits were admitted without objection. Applicant's counsel objected to the admission of GX 4 on grounds that it did not meet the business records exception to the hearsay rule. After hearing from both parties, I sustained Applicant's objection for reasons stated during the hearing (Tr. 19 – 27). I did not consider GX 4 in reaching my decision, and it has been marked for identification purposes and included with the case file. During the hearing, I allowed Department Counsel to ask questions about the exhibit over the objection of Applicant's counsel. In so doing, Department Counsel laid a proper foundation for admission of GX 4 that was not previously established. Nonetheless, Department Counsel did not renew his request for admission of GX 4. (Tr. 82 – 90)

AX H is a report from a licensed clinical social worker (LCSW) who conducted an evaluation by video teleconference (VTC) of Applicant on October 7, 2019. The author also is a certified substance abuse counselor (CSAC), a master addiction counselor (MAC), and a substance abuse professional (SAP). In her report, she made certain clinical findings about Applicant's use of alcohol. In so doing, the LCSW presented certain observations and conclusions about Applicant's suitability for a security clearance. (AX H, at pages 4 and 5) I have considered the author's qualifications and her clinical findings as part of the record evidence as a whole. However, her qualifications do not include experience in the adjudication of DOD security clearance matters. Even had she established such qualifications, in DOHA proceedings the ultimate conclusion about an individual's suitability to have access to sensitive information is the sole province of the administrative judge. Accordingly, I have not considered the author's specific conclusions about Applicant's suitability for access to classified information.

Findings of Fact

Under Guideline E, the Government alleged that in June 2017, Applicant instigated a verbal and physical altercation with defense contractor co-workers and that he had consumed alcohol beforehand (SOR 1.a); and that in November 2017, Applicant instigated a verbal and physical altercation with defense contractor co-workers on board a U.S. Navy ship on which they were working overseas (SOR 1.b). The conduct at SOR 1.a was cross-alleged as alcohol-related misconduct under Guideline G (SOR 2.a). In response to the SOR, Applicant denied, with explanations, both SOR allegations. (Tr. 8 – 9) Based on my review of the record evidence as a whole, I make the following findings of fact.

Applicant is 29 years old and employed since February 2018 as an electrical engineer for a defense contractor. He previously worked as an electrical engineer for another defense contractor (Company A) from July 2014 until February 2018. Applicant graduated from college in May 2014 with a degree in electrical engineering, and was first granted a security clearance not long after he was hired by Company A. (Answer; GX 1; AX A; AX B; Tr. 74)

Between July 2014 and April 2016, Applicant's work with Company A occurred in the United States in direct support of a military aviation electronics program. In April 2016, he transferred to a division of Company A that provided technical support that required him to deploy aboard U.S. Navy ships. Applicant was attracted to that work, in part, because his pay almost doubled from extra pay and benefits he received for being at sea. The extra income enabled him to pay off his student loans by 2017. The ships on which he worked were not front-line combatants; rather, they were commissioned Navy auxiliary ships manned either by a detachment of uniformed Navy personnel and employees of the Military Sealift Command (MSC) or by civilian mariners contracted by DOD. Applicant and his coworkers were working passengers embarked aboard those ships. Applicant began his work aboard Ship 1 in April 2016. In April 2017, he transferred to Ship 2 where the events at issue occurred. On each ship, he and his team of contractors worked at sea for between 30 and 60 days at a time, with periods of leave between voyages. Applicant's last deployment ended in November 2017, after which he took about one month of leave before leaving the company for work with his current employer. His current job does not require him to leave the country and he again is working in support of military aviation electronics missions. (Answer; GX 1; AX A; Tr. 34 – 37, 39, 81, 103)

On June 26, 2017, after 45 days at sea, Applicant and four coworkers went ashore during a brief port visit to shop for provisions and to relax. They eventually found their way to a local restaurant and bar before returning to the ship. After they had something to eat, they had a few drinks and played a few games of pool. After almost two months at sea, they were "letting off a little steam." Sometime that evening, Applicant and another employee (L) got into an argument and a minor physical altercation ensued. L put Applicant in a headlock and Applicant shoved him after he got out of L's grasp. Applicant shouted at L, and then left the bar after another coworker tried to intercede, seeking to

have Applicant and L “hash things out.” Applicant took a taxi back to the ship without further incident. Applicant denies he instigated the altercation, and no disciplinary action was taken by the company. He avers he had four or five beers during the evening, and he acknowledged at hearing that not having consumed alcohol may have produced a different result that evening. (Answer; GX 2; AX F; AX H; Tr. 42 – 54)

In November 2017, while Applicant and his coworkers were nearing the end of another long period at sea. While heading back to port, they were generally in an off-duty status with a lot of time on their hands. On November 4, Applicant was involved in another altercation with L. Again, his coworkers K and R were present. An adverse information report of this incident submitted through the Joint Personnel Adjudications System (JPAS) described Applicant as intoxicated to the point of being sick. It also states that Applicant became violent as L, K and R tried to assist him, yelling obscenities while striking K in the chest and head and grabbing L by his genitals. The event ended when a supervisor (S) arrived and Applicant was returned to his stateroom. Applicant subsequently was assigned to a different work section to be separated from L until the ship arrived in port. Applicant then went on previously scheduled leave for about a month. (Answer; GX2; GX 3; Tr. 62)

Applicant’s version of what happened on November 4 differs markedly from the JPAS report. That report also referred to the June 26 incident and to a March 11, 2017 incident (not addressed in the SOR), all involving altercations with L. Applicant denies that he was involved in a March incident because he was not yet on board Ship 2, the only place he and L worked together. Emails show that Applicant was in the process of arranging a transfer from Ship 1 to Ship 2 in late February 2017 because of a hostile work environment aboard Ship 1. Logistically, it does not appear that Applicant could have arrived at Ship 2 by March 11. The JPAS report also states that Applicant did not require medical attention after his November altercation with L; however, Applicant testified that he asked for medical attention in his stateroom to treat a cut over his eye. He further denies kicking K or grabbing L as described in the report. (Answer; GX 3; AX F; AX H; AX I; Tr. 55 – 72, 79, 98)

Available information shows that alcohol was allowed aboard ship during off-duty hours. Applicant did not affirm or deny that he or others consumed alcohol on November 4; however, it is apparent from all of the information probative of that issue that alcohol was involved in the incident. In response to questions on direct and cross-examination, as well as from the bench, about the details in the JPAS adverse information report -- whether he had vomited and required assistance; whether he was intoxicated; whether anyone was drinking; whether he directed a racial epithet at a coworker -- he provided answers such as “I do not recall” or “I don’t believe so” or “that doesn’t sound familiar to me” or “I have no recollection” or “I don’t have a specific memory.” At the same time, he had a clear recollection of finding empty and partially-filled alcoholic beverage containers in his stateroom after the incident and that he asked S to call for medical assistance. While acknowledging that the only fights he has ever been in were those documented in this case, he could not provide many details of what happened on those two occasions.

Applicant spent several months aboard ship in a unique employment setting, yet he could not say one way or the other whether alcohol use was allowed on board. His answers to questions about whether he used a racial epithet were equivocal at best. In short, I found Applicant's testimony to be evasive and less than credible when pressed on the details of what happened on November 4. (Tr. 58 – 59, 60, 76, 82 – 83, 90 – 91, 93, 95, 97, 101 – 103, 113)

Company A's human resources department investigated the June and November incidents sometime after the ship returned in November 2017. Applicant acknowledged that he has read the statements of L, K, and S that were provided as part that investigation. Applicant also provided a statement as part of that investigation but testified that he does not recall what he said in that statement. No disciplinary action was taken by Company A, and Applicant voluntarily left his position with that employer in February 2018. He did so, in part, because of the two altercations and, in part, because he wanted a job that would allow him to stay in the United States and be closer to his girlfriend. He no longer needed the same income because he had paid off his student loans. (Answer; GX 1; GX 2; Tr. 37 – 39, 63 – 64, 71 – 74)

Applicant denies that he abuses alcohol or that he uses alcohol on other than an infrequent social basis. A clinical evaluation by an LCSW was conducted on October 7, 2019. The VTC evaluation lasted 90 minutes and included several tests to determine if Applicant suffers from any alcohol-related disorder. The LCSW concluded that no such diagnosis is warranted, and that there is no need for Applicant to undergo alcohol-related counseling or to modify his drinking habits. During the evaluation, Applicant recounted the June and November 2017 events at issue here. As to the latter event, Applicant did not indicate that alcohol was involved. (AX G; AX H)

Applicant's on-the-job performance for Company A and for his current employer has been very good. Several character references speak highly of his professionalism, reliability, and technical expertise. His performance evaluations generally have been superior, noting his potential for continued success. Applicant lives a healthy lifestyle and pursues a variety of interests outside of work, including scuba diving, obtaining a private pilot's license, and personal fitness training. (Answer; AX C – E; AX J; Tr. 31 – 34)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (*Department of the Navy v. Egan*, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion. (*See Egan*, 484 U.S. at 528, 531) A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. (*See Egan*; AG ¶ 2(b))

Analysis

Alcohol Consumption

Available information reasonably raised a security concern about Applicant's use of alcohol. That security concern is stated at 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.

More specifically, the June 2017 incident was an off-duty altercation that occurred after Applicant had been drinking. This requires application of the disqualifying condition at 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.

In response to the Government's information, Applicant established that he does not suffer from any alcohol-related disorder and that he has not consumed alcohol to the point of intoxication since 2017. He also showed that he leads a stable, healthy lifestyle that is consistent with sobriety or moderate social drinking. The mitigating condition at AG ¶ 23(a) applies:

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.

The facts and circumstances presented are sufficient to mitigate the security concerns under this guideline.

Personal Conduct

Available information most directly invokes the general security concern about Applicant's judgment and trustworthiness that is stated at AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant displayed poor judgment when he was involved in two workplace incidents in 2017. Accordingly, the Government reasonably sought to examine those incidents to determine whether Applicant currently has the requisite judgment, trustworthiness and reliability for access to classified information. Applicant's apparent

unwillingness to provide clear and accurate answers to questions about his conduct and about what happened, particularly as it relates to the second incident, has hindered the Government's ability to conduct a well-informed assessment of Applicant's suitability.

I also have considered the following AG ¶ 17 mitigating conditions:

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(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.

AG ¶ 17(c) applies, but only insofar as the low probability that Applicant will get into another fight in the workplace. Those events occurred under circumstances (working in close quarters for long periods at sea) that are not likely to recur. Nonetheless, Applicant's obfuscation in his testimony about those events precludes full application of either AG ¶¶ 17(b) or 17(c). The Government presented sufficient information in the form of a JPAS report to support the SOR allegations that Applicant instigated both altercations. In response to the Government's case, Applicant did not successfully refute the Government's information because he did not provide credible testimony in support of his version of events, particularly when it comes to the details of the second incident. These facts are necessary to making a fully informed predictive judgment about Applicant's suitability for continued access to classified information. All of the information probative of what happened in November 2017 indicates that Applicant instigated that altercation, likely while in a state of intoxication. Applicant has not provided sufficient information to alter that conclusion. To the contrary, his testimony served only to cast further doubt on his trustworthiness. This is recent and significant behavior that undermines confidence that Applicant can be relied on to be candid and forthright with the government in his fiduciary duties regarding sensitive information. On balance, the security concerns raised under this guideline are not mitigated.

I also evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). I particularly note the positive information about his professional qualifications and his work in the defense industry, as well as the recommendations of his friends and coworkers. Nonetheless, Applicant's inconsistent testimony about his conduct creates persistent doubts about his judgment and reliability. Because protection of the interests of national security is the principal focus of these adjudications, those doubts must be resolved against the Applicant's request for clearance.

Formal Findings

Formal findings 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

It is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge