



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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Applicant for Security Clearance)

ISCR Case No. 19-02089

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Troy Nussbaum, Esq.

12/01/2020

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct. National security eligibility for access to classified information is denied.

Statement of the Case

On December 6, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, Criminal Conduct, and G, Alcohol Consumption. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on January 2, 2020. He requested a hearing before an administrative judge. The case was assigned to me on March 10, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing

on October 2, 2020 for a hearing on October 28, 2020. I convened the hearing as scheduled.

The Government offered Government Exhibits 1 through 7, which were admitted without objection. Applicant testified on his own behalf, presented two witnesses, and submitted Applicant Exhibits (AX) A through C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 13, 2020.

Findings of Fact

Applicant is 40 years old. He is a process management team lead for a defense contractor. He is divorced and has three children. He obtained his undergraduate degree in 2012. (Tr.33) He has been with his current employer since March 2020. He has held his current clearance since 2004. (GX 1) He completed his most recent security clearance application in March 2016.

The Statement of Reasons alleges under Guideline G, SOR 1.a, in June 2009, Applicant was arrested and charged with Driving Under the Influence (DUI); 1.b, in March 2014, Applicant was arrested and charged with DUI; and 1.c, in January 2018, arrested and charged with DUI. In addition, the SOR alleges under Guideline J, 2.a, information as set forth under paragraph one.

Alcohol Consumption

Applicant has been a social drinker since the age of sixteen while in high school. He would typically drink rum and coke. He stated that he would have two drinks in a sitting once per week to three times per month. In a 2010 subject interview, Applicant stated has never had any problem reducing his consumption. (GX 3) Within the past ten years he has been arrested in alcohol-related-vehicular incidents three times. Applicant admitted the allegations and provided explanations. (Answer to SOR)

As to SOR 1.a, Applicant admitted that he showed poor judgment and immaturity by overindulging in alcohol. He was with friends at a restaurant and had several drinks. He had a friend drive him to his car. He sat in the driver's side, the engine was running and he fell asleep in the parked car. He stated that he was waiting for another friend to arrive to drive him home. He claimed that he was tired but not intoxicated. A police officer knocked on his car window and asked Applicant to step out of the car. Applicant does not remember if he was administered a sobriety test. The case disposition was Nolle Prosequi. (GX 5)

As to SOR 1.b, Applicant admitted that again he showed poor judgment and immaturity. In 2014, he was returning from a happy hour after he had consumed alcohol. In his interview he stated that he should not have been driving, but at the time he underestimated the influence of alcohol on his driving. He drove to a fast-food restaurant, and when he left the parking lot, he found himself driving the wrong way on the highway.

(Tr. 77) He was pulled over by the police and was administered a sobriety test. He failed the test and was arrested and charged with DUI. At the court date, the arresting officer did not appear. The court later dropped charges and he was acquitted. (GX 3; GX 6)

As to SOR 1.c, Applicant was arrested in January 2018, and charged with DUI. He pled guilty and was placed on probation before judgment (PBJ). He completed his probation in May 2020. He completed a 12-hour drug and alcohol awareness class on October 15, 2020. (AX A) He also completed a 20-week classroom alcohol and drug treatment program on August 10, 2018. An ignition interlock was placed on his vehicle in 2018, and there were no reported violations. (Tr. 88)

Applicant continues to drink about once every few months. (Tr. 93). He drinks a glass of wine or a bourbon and coke. (Tr. 93) He recalls drinking about a month ago. The amounts are sometimes a half glass of wine or a sip of a drink. Since September 2020, he has participated in weekly therapy sessions, with a focus on how his misuse of alcohol has been detrimental to him in the past, and family counseling. (Tr.90). In an October 2020 report, his therapist notes that there is no indication that he is making unhealthy choices. (AX B) Applicant believes the 2018 conviction was a wake-up call. (Tr. 96) He was emphatic that he was told not to drink and drive, but he was never told not to drink in the future. (Tr.107) He has never attended AA meetings. (Tr.111)

A friend of Applicant, who has known him since childhood, testified at the hearing that she knew the reason for the hearing and that Applicant told her about his arrests for DUI. (Tr.20) She understands that Applicant is still consuming alcohol. (Tr. 21) She does not believe that he has a problem with alcohol. The witness testified that she recommends Applicant for a security clearance because she believes that he would not put himself in a situation that might result in an alcohol-related incident. (Tr. 23)

Another witness testified that she has been dating Applicant for about two years. They are in a serious relationship. She is aware of Applicant's DUI's and the reason for the security clearance hearing. (Tr. 120) She claims that he does not drink at all and then supplemented that with maybe once a month. She stated that he wants to remain healthy and be a role model for his children. The witness stated that Applicant is trustworthy and exemplifies good character.

Applicant submitted five letters of reference. Each letter attests to Applicant's work integrity, professionalism, and responsibility. His program manager believes Applicant encompasses every quality that a person who holds a security clearance should possess. (AX C)

Criminal Conduct

The SOR (2.a) cross-alleges the information alleged in 1.a through 1.c. Applicant admitted to all SOR allegations in paragraph 1.

Applicant admitted his 2009, 2014 and 2018 arrests for DUI charges. He completed his probation for the 2018 conviction in May 2020.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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. 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. 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "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 access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, 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

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 conditions that could raise a security concern and may be disqualifying. Five conditions may apply:

(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;

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

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;

(e) the failure to follow treatment advice once diagnosed; and

(f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

Applicant admitted that he overindulged in alcohol and showed poor judgment in 2009 and 2014, but provided explanations that either he was not driving or that he has learned from the time that has passed. In January 2018, he received a PBJ, which he completed in May 2020. These incidents that involved drinking are cross-alleged under Guideline J. Applicant admits he misused alcohol but completed alcohol treatment in 2018. These facts establish *prima facie* support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline at AG ¶ 23 contains four conditions that could mitigate security concerns. Three conditions may apply:

(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; 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.

Applicant acknowledges that alcohol was causing problems in his life. He has had three alcohol-related incidents in nine years. He completed probation in 2020 and complied with the alcohol-education programs. However, he was not allowed to drink after the 2018 incident and has recently completed the probation . He still consumes some alcohol, although he has modified the amount and frequency. He was vague about when and how much he drinks. He submitted information from his therapist, who states that he is attending family counseling with some focus on alcohol. He does not attend AA meetings. It is too early to know if there is an established track record of responsible alcohol use that would not lead to another occurrence. The therapist's report stated that Applicant admitted how alcohol has affected his life, but she also stated that it has been a short time in which they have discussed the impact of the counseling. The fact that he continues to drink and asserts that he was never told that he could not drink, is reason to raise doubt about an established pattern of modified consumption of alcohol. His latest incident was in January 2018. He has not mitigated the security concern under the alcohol guideline.

Guideline J: Criminal Conduct

AG ¶ 30 sets forth 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 three conditions that could raise a security concern and may be disqualifying 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;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

As discussed under Alcohol Consumption, Applicant has three alcohol-related vehicular incidents. The latest was in 2018 and he has recently completed probation. The evidence establishes the above two disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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.

Applicant has not mitigated the criminal conduct concerns. His pattern of every few years and his various explanations do not convince me of successful rehabilitation. He has been addressing his alcohol disorder but it is not unreasonable to expect a longer period of time to show that he has fully mitigated the concerns under this guideline. He receives partial credit for his treatment and his good efforts. He has a good recommendation from his employer, but his 2018 involvement in an alcohol-related incident negates full mitigation.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility by considering the totality of the applicant's conduct and all the 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 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 is respected by those that know him. He performs well at work. He has worked at his current employment and received awards. He has held a security clearance since 2004. He has excellent letters of recommendation. He admitted and obtained help for his alcohol problems. He acknowledged that he is not the same person as before. He successfully completed outpatient programs. He is described as a good father.

Applicant however has had alcohol incidents in 2009, 2014, and 2018. He tried to distance himself from the first two due to circumstances. Every few years, he has found himself in a similar situation. He states that he can drink and has changed his habits and would not drink and drive. He has made great strides, but the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant has not mitigated the security concerns under Guidelines G and J.

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-c:	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 Applicant access to classified information. National security eligibility is denied.

Noreen A. Lynch
Administrative Judge