



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



In the matter of:)	
)	
)	ISCR Case No. 22-00440
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel P. O’Reilley, Esq., Department Counsel
For Applicant: *Pro se*

02/15/2023

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant did not mitigate the personal conduct or criminal conduct security concerns. He mitigated the alcohol consumption security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 16, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct, Guideline J, criminal conduct, and Guideline G, alcohol consumption. On September 29, 2022, Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on November 23, 2022. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on December 5, 2022. He responded to the FORM on December 19, 2022, with a personal narrative and letters of recommendation consisting of nine pages (Form Response). The case was

assigned to me on January 26, 2023. The Government exhibits included in the FORM (Items 1-11) and the Form Response are admitted in evidence without objection.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. He received a high school diploma in 2006 and has taken some undergraduate courses. He was married in 2013 and divorced in December 2019. He has a one-year-old child. He served on active duty with the U.S. Army from 2009 until May 2018 and received a general discharge under honorable conditions. (Items 2-5; Form Response)

On an unspecified date, Applicant paid another individual to pose as Applicant to take an information technology certification exam on his behalf because he did not believe that he could pass it if he took the certification exam himself. The individual that Applicant hired passed the certification exam, and Applicant was awarded the Security+ through COMPTIA certification as a result of his dishonest actions. This certification was either required for Applicant's employment or would enhance his standing with his employer. In April 2021, Applicant reported this conduct to his employer, apologized for his behavior, and resigned from his employment. It is unclear from the record whether he reported this conduct prior to being confronted with it. (Items 1, 2, 6; Response to FORM).

In July 2017, Applicant was driving while intoxicated by alcohol. Military police stopped him after witnessing him fail to stop at a stop sign. They gave Applicant three portable breathalyzer tests. The results showed Applicant had a .116, .102, and .092 blood alcohol content (BAC). Applicant had been drinking at a bar for several hours and drove home to meet base curfew. He was charged with driving while intoxicated (DWI). About three weeks later, because of the DWI, he was disciplined pursuant to the Uniform Code of Military Justice (UCMJ) Article 15. Applicant's rank was reduced, he was sentenced to 45 days of extra duty and 45 days restriction. He was ordered to attend an Army Substance Abuse Program and was administratively separated from the Army with a general discharge under honorable conditions in February 2018. (Items 2-5, 7)

In about September 2017, Applicant physically assaulted his ex-spouse after getting into an argument with her. Applicant's ex-spouse alleged that he body-slammed her, causing her to strike her arm heavily on a dresser and the floor. Applicant claimed that he did not touch his ex-spouse, and that she struck him. Applicant's ex-spouse denied striking him, claiming that she merely knocked his breakfast on the floor. Military police responded to the incident. They noted bruising on Applicant's ex-spouse's arm consistent with her version of events. Applicant claimed that his ex-spouse slipped on a shoe and fell into a dresser. Military police also noted scratches on Applicant's arm. He claimed that his ex-spouse called military police because she thought she would get in trouble for striking him. Applicant was arrested by military police but not formally charged. While he was being questioned by military police, he alleged that he and his ex-spouse had not had domestic abuse issues in the past. However, he acknowledged to a social worker during counseling that he and his ex-spouse had similar incidents in

2013 and February 2017. He claimed that these incidents involved his ex-spouse assaulting him. Regardless, this information is inconsistent with what he told military police about the September 2017 incident being the first. In October 2017, the Army Family Advocacy Program Case Review Committee determined that Applicant's ex-spouse qualified as a victim of physical abuse based upon this incident. In March 2019, the Army authorized payments to Applicant's ex-spouse under a federal law that provides for compensation to family members who have been physically abused by Army servicemembers. These findings tend to corroborate his ex-spouse's version of events. In 2019, Applicant and his (ex) spouse were divorced. (Items 2-5, 7-11)

Applicant underwent outpatient mental health counseling in parts of 2012, 2015, 2016, and from March 2017 until November 2017, while he was in the military. Applicant attended ASAP for approximately three months and a licensed psychologist diagnosed him with an alcohol use disorder-mild. While Applicant was initially told to abstain from alcohol, his treatment records acknowledged that he could eventually consume alcohol again in a modified, lower risk manner. Applicant abstained from alcohol from approximately July 2017 until the end of December 2019, when he began drinking about two glasses of wine two times per week. The last time he was intoxicated was July 2017. He acknowledged formerly having a problem with alcohol. However, he claimed that he now drinks responsibly and no longer has alcohol-related issues. (Items 2-5, 7)

Applicant claimed that he is remorseful for the conduct listed in the SOR. However, he reiterated his claim that he did not physically assault his ex-spouse. He claimed that he is trying to better himself through his college education and making better decisions. He twice made the dean's list at his college. He also claimed that he has learned from his mistakes and that the birth of his one-year-old child has contributed to his desire to be a better person. He provided character reference letters from those who know him who claim that he is trustworthy, responsible, dedicated, shows integrity, and is hard working. Some of the individuals who wrote letters note that he has learned from his mistakes, but it is unclear whether any of these individuals are aware of the allegations in the SOR. (Item 2; Response to FORM)

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 E, Personal Conduct

The security concern for personal conduct is set out in 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. The following is potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information.

Applicant paid another individual to take a certification exam for him that was either required by his employer or would benefit his standing with his employer. He gained the certification under false pretenses. He then resigned from his employment based upon this untrustworthy behavior. This behavior is not explicitly covered under any other guideline, and it constitutes untrustworthy or unreliable behavior. AG ¶ 16(d) is established.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's behavior is not minor. It showed extremely poor judgment and a high level of dishonesty. He engaged in this gross breach of trust only about two years ago. While he reported the behavior, he provided no evidence as to whether he reported it in good faith as opposed to reporting it because he knew he would be caught. He also provided no evidence as to when he engaged in the behavior, so he cannot show that his reporting was prompt. While he acknowledged the behavior, he provided no evidence of counseling after he engaged in the behavior. He has been taking college

courses and has had a child, but he has not shown how these things change the stressors, circumstances, or factors that contributed to his untrustworthy behavior. Given the seriousness of the conduct and its relative recency, I cannot find that it is unlikely to recur. I find that this behavior still casts doubt on Applicant's reliability, trustworthiness, and good judgment. None of the Guideline E mitigating conditions apply.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following is potentially applicable:

(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 ex-spouse made a credible allegation that Applicant physically assaulted her in September 2017. While he was not charged with a crime, the Army determined that his ex-spouse was the victim of physical abuse. Applicant also drove while intoxicated by alcohol in July 2017. The evidence is sufficient to raise the above disqualifying condition.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following 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;

(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.

As it has been about five and one-half years since Applicant physically assaulted his ex-spouse, at first blush, it would appear that a significant amount of time has

passed since he engaged in criminal behavior. However, I found that he physically assaulted his wife, which he continues to deny. I believe he is being untruthful about a material fact relevant to a security clearance adjudication. Falsifying material information in a security clearance adjudication is a criminal offense under 18 U.S.C.A. § 1001. Therefore, Applicant continues to engage in criminal behavior, undercutting his efforts at mitigation under AG ¶ 32(a) and AG ¶ 32(d), which require the passage of time without recurrence of criminal acts. Given the recency of criminal activity, AG ¶ 32(a) and AG ¶ 32(d) do not apply. AG ¶ 32(c) does not apply because there is reliable evidence of criminal conduct in the form of credible allegations, police reports, and the aforementioned finding by the Army. None of the Guideline J mitigating conditions apply. The criminal conduct security concerns are not mitigated.

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 several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable 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;

(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.

In 2017, Applicant drove while intoxicated and was charged and disciplined. Also in 2017, a psychiatrist diagnosed him with alcohol use disorder-mild. AG ¶ 22(a), AG ¶ 22(c), and AG ¶ 22(d) are established. AG ¶ 22(e) and AG ¶ 22(f) are not established. There is no evidence in the record that Applicant was advised to abstain from consuming alcohol indefinitely. The evidence showed that his social worker envisaged

an acceptable, lower risk form of alcohol consumption. Therefore, there is no evidence that his current level of consuming two glasses of wine twice a week is inconsistent with treatment recommendations.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following is 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 judgment.

It has been about five and one-half years since Applicant has had an alcohol-related incident such as those described in AG ¶ 22(a). He also has not been intoxicated since then. This extended length of time without alcohol-related incidents or intoxication provides sufficient evidence that Applicant no longer habitually consumes alcohol or "binges" on alcohol to the extent that it impairs his judgment. The five and one-half years that has elapsed is persuasive evidence that his excessive alcohol consumption is unlikely to recur, and that it no longer casts doubt on his reliability, trustworthiness, and good judgment. The alcohol consumption security concerns are mitigated.

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 E, J, and G in my whole-person analysis. I have also considered Applicant's military service and his positive personal references.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude he did not mitigate the personal conduct or criminal conduct security concerns, but he did mitigate alcohol consumption 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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraphs 3.a-3.b:	For Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin R. Dorsey
Administrative Judge