



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



In the matter of:)
)
) ISCR Case No. 20-03052
)
Applicant for Security Clearance)

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel
For Applicant: *Pro se*

04/25/2023

Decision

Dorsey, Benjamin R., Administrative Judge:

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

Statement of the Case

On March 17, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G, alcohol consumption, Guideline J, criminal conduct, and Guideline E, personal conduct. On March 18, 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 January 20, 2023. 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 January 26, 2023. As of March 13, 2023, he had not responded. The case was assigned to me on April 18,

2023. The Government exhibits included in the FORM (Items 1-10) are admitted in evidence.

Findings of Fact

Applicant is a 25-year-old employee of a defense contractor for whom he has worked since June 2019. He received a high school diploma in 2015. He has never been married and has no children. He served on active duty with the Army from April 2016 until May 2019 when he received a general discharge for misconduct. (Items 3, 10)

Within the last five years, Applicant began having issues with alcohol. When he returned from Army deployments, he was finishing a bottle of tequila in one or two days to deal with stress. In June or July 2018, after speaking about his alcohol use with his non-commissioned officer (NCO), he enrolled in the Army's Substance Use Disorder Clinical Care (SUDCC). His NCO gave him the choice of self-enrolling in SUDCC, or his NCO would refer him. While he was enrolled in SUDCC, he was required to abstain from consuming alcohol. He met with his SUDCC counselor once every two weeks from June or July 2018 until he stopped his SUDCC treatment in May 2019 when he was discharged from the Army. He provided no evidence that he has undergone any alcohol-related treatment since May 2019. He did not complete the SUDCC treatment program, but in October 2018, he completed a portion of that treatment called Prime for Life. There is no evidence as to what treatment or counseling the Prime for Life portion of the SUDCC entailed. (Items 2, 3, 6, 9, 10)

In about November 2018, while he was attending SUDCC treatment and was required to abstain from alcohol, Applicant was arrested and charged with driving under the influence of alcohol (DUI) in State A. He had been consuming wine, tequila, and rum at a social gathering until he blacked out. While he was blacked out from being intoxicated, he drove his car and "wrecked the car between a tree and a boat dock near a lake." Police gave him a breathalyzer test some hours after he had stopped drinking and he had a .13 blood alcohol content (BAC) percentage. He spent two days in jail. As part of a plea agreement, he pleaded guilty to a lesser charge of reckless driving. Applicant paid fines and attended a court-ordered Mothers Against Drunk Driving (MADD) meeting. He also received an official memorandum of reprimand from his Army command. He continued to attend treatment with SUDCC after his November 2018 arrest, when he was again required to abstain from alcohol. (Items 2-6, 9, 10)

In about March 2019, while Applicant was undergoing SUDCC treatment and required to abstain from alcohol, he was arrested and charged with DUI in State B. He had been drinking alcohol at a cookout the day before his arrest. He claimed that he initially did not know the punch he was drinking at the cookout was laced with alcohol, but he acknowledged that he realized it had alcohol in it that night when he became intoxicated. The next morning, he drove to work on base and was stopped by military police for swerving. He claimed that he was trying to avoid potholes because he was driving a friend's car. He failed field sobriety tests and was issued a breathalyzer test at about 9:00 a.m., the results of which were a .13 BAC percentage. He pleaded guilty to

DUI. The court sentenced him to 12 months of probation, suspended his driver's license in State B, and ordered him to perform 24 hours of community service. Because he was intoxicated while on duty, the Army charged him under Article 112 of the Uniform Code of Military Justice (UCMJ). On April 9, 2019, he was found guilty of that UCMJ charge. As a result of his failure to follow SUDCC requirements, his DUIs, and his UCMJ charges, he was administratively separated from the Army in May 2019 for misconduct. Despite being alleged in the SOR, there is no evidence that Applicant's March 2019 DUI involved personal injury. (Items 2, 3, 7-10)

In his response to the SOR, Applicant admitted that he was diagnosed with alcohol use disorder (moderate) and that the treatment providers at SUDCC advised him to abstain from alcohol. In February 2020, he stated that he planned to remove drinking (alcohol) from his life. Notwithstanding this diagnosis, the SUDCC recommendation, and his earlier plans to abstain from alcohol, in his response to the SOR, he stated that he believes that he can continue consuming alcohol in a modified manner because quitting "cold turkey" is not the best option for everyone. Applicant claimed that he drinks beer about two to three times per month. He has also claimed that he drinks about one or two beers two to three times every two weeks. He claimed that he tries to stay away from liquor. He cites to his three years of not having alcohol-related legal issues as evidence that his modified consumption plan is working. He also claimed that he was named employee of the month at his job, he has been able to buy a house, and he has no financial problems. (Items 2, 9, 10)

In about August 2018, Applicant was charged with larceny in State B when he took an audio cable from a store without paying for it. He claimed he attached the cable to see if it fit his phone while he was in the store, accidentally put the cable in his pocket when he was done using it, forgot that the cable was in his pocket, and then walked out of the store without paying for it. The charges against him were ultimately dropped. Applicant failed to disclose this larceny charge on his July 2019 Electronic Questionnaires for Investigations Processing (e-QIP), despite being required to do so. He claimed that he did not think he needed to include it on his e-QIP because the charges were dismissed. He divulged other derogatory information on his e-QIP, such as his two DUIs. (Items 2, 10)

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

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;

(b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, 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 has two DUI arrests. Despite being convicted of DUI on only one of those occasions, he was driving while intoxicated both times. The second time he was arrested for DUI, he was on military duty. During his SUDCC treatment, he was diagnosed with an alcohol use disorder and was advised that he should abstain from alcohol consumption. As evidenced by his continued alcohol consumption, he has not followed that treatment recommendation. The above disqualifying conditions are established, thereby shifting the burden to Applicant to provide evidence in mitigation.

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

While Applicant has not had an alcohol-related incident in almost four years, he continues to consume alcohol, which is against the treatment advice that the SUDCC provided him. His alcohol consumption issues are recurring. AG ¶ 23(a) does not apply.

While Applicant has taken steps to acknowledge and correct his problem with alcohol by modifying his consumption, he continues to consume alcohol in contravention of his treatment recommendation. He has not provided sufficient evidence of a clear and established pattern of abstinence. AG ¶ 23(b) does not apply.

Applicant is not in an alcohol-treatment program. He was enrolled in the SUDCC but did not complete that program. While undergoing treatment in the SUDCC program, he twice was intoxicated while driving despite being required to abstain from alcohol. AG ¶ 23(c) and AG ¶ 23(d) do not apply.

Applicant has not provided sufficient evidence to show that any of the Guideline G mitigating conditions fully apply. The alcohol consumption security concerns are not mitigated.

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 engaged in DUI in 2018 and 2019. In 2019, he was intoxicated while on duty and was charged under the UCMJ. He was also charged with larceny of an audio cable in 2018. The evidence is sufficient to raise the above disqualifying conditions, thereby shifting the burden to Applicant to provide evidence in mitigation.

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.

It has been almost four years since Applicant last engaged in criminal behavior. However, much of his criminal behavior was alcohol related. He continues to drink alcohol despite a treatment recommendation that he should abstain. Given his history of criminal issues that are alcohol related, while he continues to consume alcohol, I cannot find that he has provided sufficient evidence that his criminal behavior is unlikely to recur. AG ¶ 32(a) does not apply.

There is reliable evidence in the form of police reports and military and court records to support that Applicant committed the offenses alleged in the SOR except for the larceny charge alleged in SOR ¶ 2.b. With respect to that larceny charge, there is evidence that Applicant put the audio cable he had not paid for in his pocket and was charged with a crime. The charges were dropped and there is no evidence in the record as to what the elements are of larceny in State B. For example, there is no evidence in the record as to whether a particular intent is required or whether the act of putting the cable in his pocket was inherently illegal. Without more, there is insufficient evidence of the crime of larceny and AG ¶ 32(c) applies with respect to SOR ¶ 2.b. I find in Applicant's favor with respect to SOR ¶ 2.b.

Applicant claimed that he has a good employment record and that he has complied with the terms of his DUI conviction and his charges under the UCMJ. However, because he continues to consume alcohol in contravention of his treatment recommendation, and because most of his criminal behavior involved alcohol, I cannot find that enough time has passed to show that there is sufficient evidence of successful rehabilitation. AG ¶ 32(d) does not apply.

Except for the allegations in SOR ¶ 2.b, Applicant has not provided sufficient evidence to show that any of the Guideline J mitigating conditions fully apply. The criminal conduct security concerns are not mitigated.

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 are potentially applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(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;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations.

Applicant's military discharge for misconduct and his UCMJ conviction for DUI while on duty are explicitly covered under Guideline J and are sufficient for an adverse finding under that guideline. AG ¶ 16(c) and AG ¶ 16(d) are not established.

While Applicant did not divulge his 2018 shoplifting charge in his e-QIP, this charge was dismissed, and he claimed that he did not understand that he was required to list charges that had been dismissed. I find this explanation to be a reasonable one. I also note that Applicant listed other, more serious derogatory criminal information on his e-QIP. This action undermines the notion that Applicant was deliberately attempting to hide derogatory criminal information. Given these considerations, I find there is insufficient evidence that he deliberately provided false information or concealed or omitted relevant information. AG ¶ 16(a) is not established. For these reasons, the personal conduct security concerns are 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, J, and E in my whole-person analysis. I have also considered Applicant's military service, notwithstanding his discharge for misconduct.

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 alcohol consumption and criminal conduct security concerns, but the personal conduct security concerns were not established.

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 G:

AGAINST APPLICANT

Subparagraphs 1.a-1.e:	Against Applicant (with the exception of the allegation in subparagraph 1.b that there was personal injury involved in the March 2019 DUI criminal charge)
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant (with the exception of the allegation that there was personal injury involved in the March 2019 DUI criminal charge)
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline E:	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