



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



In the matter of:)	
)	
)	ISCR Case No. 21-02607
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Carl Marrone, Esq.

04/12/2023

Decision

DORSEY, Benjamin R., Administrative Judge:

Applicant mitigated the alcohol consumption and criminal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On May 4, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G (alcohol consumption) and Guideline J (criminal conduct). Applicant provided a response to the SOR (Answer) on May 11, 2022, and he requested a hearing before an administrative judge. The case was assigned to me on November 15, 2022.

The hearing was convened as scheduled on February 22, 2023. I admitted Government Exhibits (GE) 1 through 6 and Applicant Exhibits (AE) A through P without objection. Applicant and two other witnesses that he called testified at hearing. I received a transcript (Tr.) of the hearing on March 1, 2023.

Findings of Fact

Applicant is a 27-year-old employee of a government contractor, for whom he has worked since May 2019. He earned a bachelor's degree in December 2018. As of August 2022, he is enrolled in a program to obtain a master's degree. He has never been married and has no children. He has yet to hold a security clearance. (Tr. 20-21, 90; Answer; GE 1 and 2; AE B, M)

In April 2013, on his 18th birthday, police arrested Applicant in State A and charged him with driving while intoxicated (DWI) after they found him asleep in the driver's seat of his vehicle. He had been drinking at a party that his friends threw for him for his birthday. He drank beer and had at least four shots of whiskey. He blacked out because of his alcohol consumption. The last thing he remembered from that night was taking shots of whiskey. The next thing he remembered was waking up in jail the next morning. He pleaded guilty to misdemeanor DWI. The court sentenced him to 90 days of confinement (all suspended), placed him on probation for 15 months, and ordered him to pay fines and costs. He did not undergo any alcohol counseling or treatment after this incident. He claimed that his probation officer determined that he did not need to take any alcohol counseling after going over his history with alcohol. (Tr. 25-32, 90-91; Answer; GE 1-4; AE B, C)

In May 2016, police in State A arrested Applicant and charged him with DWI, second and assault, causes bodily injury. He had been consuming beer all day, first on a boat, and later with his stepbrother at the house where his stepbrother lived. Applicant's stepbrother has a criminal record and, at the time of the hearing, was in prison for selling drugs. At some point during the evening, he and his stepbrother got into a verbal altercation that became physical. He and his stepbrother were intoxicated when they fought. It is unclear from the record whether Applicant or his stepbrother started the physical portion of the fight. What is clear is that Applicant got the better of the fight. As a result of the fight, Applicant drove his vehicle away from the house while he was intoxicated, and his vehicle became stuck in the mud. He claimed that he drove away in his vehicle because his stepbrother would not stop attacking him. Police responded to his stepbrother's house and to the location where Applicant's vehicle was stuck in the mud. (Tr. 32-67, 93-96, 102-104, 111-112; Answer; GE 1-3, 5; AE B, D, P)

Police reported that while they were investigating the incident, they had to tase Applicant multiple times because he was combative and non-compliant. Applicant claimed that the police used unnecessary and excessive force. He refused a blood draw and breathalyzer, but police obtained a warrant to draw his blood and test it for alcohol. The result of his blood test was that he had a .18% blood alcohol content (BAC). The prosecutor dropped the assault charge. In October 2018, Applicant pleaded guilty to a lesser DWI charge. The court sentenced him to one day in jail and required him to pay a \$500 fine. He claimed that he has had no contact with his stepbrother in six years and has no plans to interact with him again. (Tr. 32-67, 93-96, 102-104, 111-112; Answer; GE 1-3, 5; AE B, D, P)

In June 2020, Applicant was arrested and charged with a class c liquor violation. He had been drinking alcohol and cooking out most of the day with his girlfriend. By about 11:00 p.m., he had consumed about nine alcoholic beverages and was intoxicated. He claimed his girlfriend ordered food from a delivery service and then went and sat in her car that was parked on the street outside his house. She was listening to music at a high volume while she sat in the car. He claimed that he thought the music was too loud, so he went to the car to ask her to turn it down. While he was in the public street, he was met by the police, who had received a noise complaint. Applicant claimed that he apologized for the noise and said that he told the police that he was heading inside for the night. The police report indicated that Applicant initially told the police that he had just gotten home after driving to a fast-food restaurant to get food. They claimed that he later changed his story to having food delivered to his house after he admitted to them that he had been drinking. The police asked him for his identification and gave him and his girlfriend a field sobriety test, which they both failed. As they were intoxicated on a public street, police arrested them. As a result of an error by his defense attorney, he failed to appear at his arraignment and the court found him guilty for the liquor violation in his absence. The court fined him, and he paid the fine. (Tr. 67-78, 97-98, 105-106, 116-117; Answer; GE 2, 3, 6; AE B, E)

In March 2015, Applicant was charged with misdemeanor possession of marijuana after police found it in his car during a traffic stop. He pleaded no contest to the charge and was convicted. He paid about \$900 in court costs and fines. He used marijuana socially one to two times per week while he was in college from 2014 until his March 2015 arrest. He stopped using marijuana after his 2015 arrest because he realized that using it had a negative impact on his life. He has not used illegal drugs since that arrest. He also transferred to a different college and stopped associating with the individuals with whom he used marijuana. The Government did not allege this marijuana possession arrest or use in the SOR. Any adverse information not alleged in the SOR, such as his marijuana use or conviction for marijuana possession, will not be considered for disqualification purposes; however, it may be considered in assessing an applicant's credibility; in evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; in considering whether the applicant has demonstrated successful rehabilitation; and in applying the whole-person concept. (ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017)). (Tr. 90-93, 104; GE 1-3)

Applicant admitted that he has a problem with alcohol, and he believes that he is an alcoholic. Between the time he turned 18 until about May 2022, Applicant would consume about three to four pints of beer one to three times per week while watching football with friends at a friend's house or a sports bar. He claimed that he rarely became intoxicated after these three to four pints because of his larger size and because he was eating food. He claimed that after his alcohol-related incidents, he has decided to change his drinking habits and abstain from alcohol. He is more focused on his career and realizes that alcohol has negative effects on his life. From August 2022 until December 2022, he attended and completed an outpatient alcohol counseling program. He attended group therapy twice per week and individual counseling with a psychiatrist once per month. In June 2022, while attending this treatment program, a licensed chemical dependency counselor diagnosed him as having an alcohol use

disorder. Beginning in July 2022, he has also attended Alcoholics Anonymous (AA) meetings. He attended AA meetings daily for 43 days straight and then has attended them weekly. He has an AA sponsor with whom he also meets weekly. His sponsor, who has been sober for 22 years, believes that Applicant can successfully remain sober. He has completed the AA 12-step program. He acknowledged that the possibility of not being awarded a security clearance motivated him to seek help with his alcohol issues. However, he claimed that his alcohol consumption's impact on his security clearance was only one of several factors that led him to seek professional assistance and abstain from alcohol. He has not consumed alcohol since May 2022 and plans to remain abstinent indefinitely. (Tr. 21-25, 79-87, 98-102, 104-105, 112, 120-124; Answer; AE B, F-J, O)

Applicant's father and his AA sponsor testified that they are there as a support system for him should he ever have issues with his sobriety. They also attested to his good character, as well as his sincerity and commitment to his sobriety. He submitted letters attesting to his good character, reliability, and dedication. His employment performance reviews are positive, and he has earned several monetary awards, certificates of appreciation, and a training certificate. He volunteers weekly at a food pantry and attends church with his grandparents every week. (Tr. 88-89, 110-115, 122-124; AE K-O)

Policies

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; 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 two DWI convictions and was convicted of a liquor violation for public intoxication. All three of these alcohol-related criminal charges are sufficiently corroborated by testimony and police records. Applicant acknowledged that he is an alcoholic, that he drank too often and too much, and that he often made poor decisions while he was drinking. 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.

I find that there is insufficient evidence to show that Applicant assaulted his stepbrother. While there is some evidence of this allegation, there is equally compelling evidence that he acted in self defense after his stepbrother assaulted him. While police reports indicate that he assaulted his stepbrother, those reports rely on his stepbrother's account of events without providing a reasonable basis for believing that account over Applicant's version of events. Moreover, the prosecutor dropped the assault charge against him.

Applicant acknowledged that he has a problem with alcohol. He completed an outpatient alcohol-treatment program and is active in AA. He decided to abstain from alcohol in May 2022 because of the negative effect it was having on his personal and professional life. He has not consumed alcohol since then. His decision to abstain accords with his treatment recommendations. He has not had a relapse since he participated in his alcohol-treatment program or since he began attending AA meetings. He testified that he would remain abstinent, and his AA sponsor also believes that he will. He has demonstrated a clear and established pattern of abstinence. These factors also lead me to believe that his alcohol-related incidents are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and judgment. All the mitigating conditions apply. Applicant has mitigated the alcohol consumption security concerns.

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.

There is sufficient evidence through police reports and Applicant's testimony that he engaged in DWI on two occasions, and he was intoxicated in public on another. The evidence is sufficient to raise the above disqualifying condition, thereby shifting the burden to Applicant to provide evidence in mitigation. As I analyzed under Guideline G, there is insufficient evidence that he assaulted his stepbrother. I find in Applicant's favor with respect to that portion of the SOR allegation under Guideline J.

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; 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 about three years since Applicant last engaged in criminal behavior. Most of his established criminal offenses were alcohol related. He completed treatment for his alcohol problems and still attends AA meetings. He has abstained from alcohol for almost a year. As his alcohol use was the root cause of his criminal activity and that cause is no longer present, I find that his criminal behavior is unlikely to recur. After his last criminal incident in 2020, he enrolled in school to continue his education. He has been involved in volunteer activities and has a good employment record. There is sufficient evidence of his successful rehabilitation from engaging in criminal behavior. AG ¶ 32(a) and AG ¶ 32(d) apply. I find that he has mitigated the criminal behavior concerns.

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 have incorporated my comments under Guidelines G and J in my whole-person analysis. I have considered his positive character references.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the alcohol consumption and criminal conduct 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 G:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Benjamin R. Dorsey
Administrative Judge