



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 12-04843
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

06/12/2014

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the personal conduct concerns, but failed to mitigate the security concerns arising from his history of excessive alcohol use and criminal conduct. He is currently on probation following his second serious DUI conviction in the past seven years. Both DUIs involved motor vehicle accidents. Applicant continues to drink alcohol in violation of the terms of his court-mandated alcohol treatment program. Applicant's history of alcohol-related criminal conduct and unwillingness to comply with the terms of his court-mandated treatment program raises doubts about his ability and willingness to follow rules and regulations regarding the proper handling and safeguarding of classified information. Clearance is denied.

Statement of the Case

On February 28, 2014, the Department of Defense (DOD), in accordance with DOD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under the alcohol consumption, criminal conduct, and personal conduct guidelines (Guidelines G, J, and E). On March 27, 2014, Applicant answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

On April 21, 2014, Department Counsel notified the Hearing Office that the Government was ready to proceed with a hearing. On April 25, 2014, a notice of hearing (NOH) was issued setting the hearing for May 13, 2014.¹ The hearing was held as scheduled. Government Exhibits (Gx.) 1 – 8 and Applicant's Exhibits (Ax.) A and B were admitted into evidence without objection. Applicant and his wife testified. I granted Applicant's request for additional time to submit documents after the hearing. He elected not to submit any post-hearing matters. The hearing transcript (Tr.) was received on May 22, 2014, and the record closed on May 23, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:²

Applicant is in early forties. He is a high school graduate and works as an electrician for a defense contractor. He has been working for his current employer since February 2011. He divorced his first wife in 2004, and married his current wife in 2012. (Tr. at 9-10, 62; Gx. 1)

Applicant admits that, over the course of the past 24 years, he has at times consumed alcohol to excess. In 2008, he was arrested for driving under the influence (DUI). He was out drinking with friends, got behind the wheel of his car, and rear ended another car that pulled out in front of him. He was convicted of DUI and sentenced to 30 days in jail (suspended), two years of unsupervised probation, and participation in a court-mandated alcohol treatment program. He complied with the terms of his sentence, including completing 10 to 15 alcohol safety classes that were part of the alcohol treatment program. (Tr. at 42-43; Answer; Gx. 1 at 26-30; Gx. 4; Gx. 6)

In July 2011, Applicant was arrested for DUI. He consumed about two six packs of beer before getting behind the wheel of his car. He was unable to control the car, ran off the road, and flipped the car into a ditch. When arrested, Applicant's blood alcohol content (BAC) was measured at .20. (Tr. at 43-44; Gx. 1 at 9; Gx. 6) Applicant's wife was called to the scene and she reported the arrest to his supervisor. The supervisor told Applicant's wife that, as long as Applicant showed up to work on his next scheduled work day, the DUI arrest would not affect his job status. (Tr. at 43-45, 78-82, 85-86)

Applicant was subsequently convicted of DUI. He was sentenced to 12 months in jail (all but 40 days suspended), three years of unsupervised probation, and participation in a court-mandated alcohol treatment program. He is currently on probation. He completed a alcohol safety course and an outpatient substance abuse program, which were requirements of his court-mandated alcohol treatment program.

¹ Applicant confirmed that he was provided actual notice of the hearing at least 15 days in advance of the hearing. Tr. at 8. See *a/so*, Hearing Exhibit (Hx.) I (confirmation of express delivery of NOH).

² I have made only those reasonable inferences supported by the evidence and, where necessary, resolved any potential conflict raised by the evidence.

He is currently in the treatment program's probationary monitoring phase. (Tr. at 40; Gx. 5 – 6; Ax. A)

Applicant has not driven since his 2011 DUI arrest. His wife and friends drive him to and from work and other appointments. Applicant admits that he currently drinks beer on the weekends to unwind. He further admits that his drinking is a violation of the terms of his court-mandated treatment program. He does not believe his drinking is a problem because he no longer drives. He is not participating in alcoholics anonymous (AA) or other such program because it is not a requirement of his court sentence or probation. (Tr. at 34-40, 63-65; Gx. 7; Ax. A)

In September 2011, Applicant was arrested for domestic assault. He was involved in a verbal and physical altercation with his brother. Applicant agreed to a pretrial agreement, whereby he was placed on probation for six months and the charge would then be dismissed. In about April 2012, the domestic assault charge was dismissed. (Tr. at 46-48, 77-82; Answer; Gx. 6)

In January 2012, Applicant submitted a security clearance application (SCA) in connection with his job as a defense contractor. He was asked about his criminal record and any adverse alcohol-related incidents, to include whether in the past seven years he had been arrested, was currently awaiting trial on criminal charges, or had ever been charged with an offense involving alcohol. Applicant disclosed his 2008 DUI conviction, but did not disclose his DUI or domestic assault arrests from 2011. Applicant also did not disclose the delinquent debts he had at the time. (Gx. 1)

Applicant denies he falsified his SCA. He consulted his wife regarding the application. They were both confused as to whether Applicant needed to list his recent arrests and debts. They contacted the attorney's office that was handling the criminal cases and were advised that Applicant was not required to list his arrests. They then consulted Applicant's supervisor, who advised them that Applicant was not required to list his recent arrests or delinquent debts. (Tr. at 48-62, 73-76)

In March 2012, Applicant voluntarily sat down for a security clearance background interview. The investigator prepared a contemporaneous summary of the interview and writes that Applicant "volunteered" the information about his 2011 DUI and domestic assault arrests. The interviewer also notes that Applicant "volunteered" information about several past-due debts that he had at the time. (Gx. 6) Applicant resolved those debts about a week after the clearance interview. (Tr. at 61-62; Ax. B)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.³

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. 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 an 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.⁴

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant did not meet the strict guidelines established for determining eligibility for access to classified information.

³ See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) ("Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.")

⁴ See, ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance determinations require administrative judges to make predictive judgments).

Analysis

Guideline G, Alcohol Consumption

The security concern regarding excessive alcohol consumption is explained 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.

Applicant's long history of excessive alcohol use that culminated in two serious DUI offenses raises this concern. This history, as well as Applicant's violation of the terms of his court-mandated treatment program, also establishes the following disqualifying conditions:

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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

AG ¶ 22(g): failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

An applicant may mitigate the excessive alcohol consumption concern by establishing one or more of the following mitigating conditions:

AG ¶ 23(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 good judgment;

AG ¶ 23(b): the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

AG ¶ 23(c): the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

AG ¶ 23(d): the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

None of the mitigating conditions apply. Applicant refuses to acknowledge that he has an alcohol problem. His recent DUI occurred just three years after his first DUI involving a car accident. Following the first DUI conviction, Applicant attended and completed court-mandated alcohol safety classes. Yet, the accident, conviction, sentence, and alcohol safety classes had no demonstrable positive effect, as Applicant continued to abuse alcohol and was involved in another DUI involving a car accident. Applicant has again completed an alcohol safety course and an outpatient substance abuse program, but continues to consume alcohol in violation of the terms of his court-mandated treatment program. He did not submit evidence of a favorable prognosis. He does not participate in AA or similar program. In light of Applicant's refusal to confront his alcohol problem and history of significant alcohol-related incidents, the passage of three years since his most recent DUI and completion of a court-mandated substance program do not mitigate the security concerns at issue. Applicant's history of excessive alcohol use continues to raise questions about his judgment and reliability.

Guideline J, Criminal Conduct

The criminal conduct concern is set forth at AG ¶ 30:

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.

Applicant's alcohol-related criminal conduct and recent domestic assault arrest raise this concern. This evidence and Applicant's current probationary status triggers application of the disqualifying conditions at:

AG ¶ 31(a): a single serious crime or multiple lesser offenses;

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

AG ¶ 31(d): individual is currently on parole or probation; and

AG ¶ 31(e): violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The criminal conduct guideline also sets forth a number of conditions that may mitigate the concern. The relevant mitigating conditions in this case are:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's domestic assault arrest was an aberration that has not been repeated. AG ¶ 32(a) applies to the security concerns stemming from said incident.⁵ However, Applicant failed to establish the applicability of any of the mitigating conditions as to his alcohol-related criminal conduct because he has not addressed his underlying alcohol issues. Accordingly, Applicant's past alcohol-related criminal conduct continues to raise a security concern.

Guideline E, Personal Conduct

The personal conduct security concern is addressed 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The SOR alleges that Applicant deliberately falsified his SCA by omitting his recent arrests for DUI and domestic assault, as well as several delinquent debts. Applicant denies the allegations. If said allegations were established by substantial evidence, such conduct would raise the disqualifying condition at AG ¶ 16(a).⁶

⁵ Applicant's domestic assault arrest was alleged in ¶ 2.b and is decided in Applicant's favor. The SOR also alleges, under the criminal conduct guideline in ¶ 2.c, that Applicant allegedly falsified his SCA. For the reasons set forth under Guideline E, this allegation is also decided in Applicant's favor.

⁶ Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form used to . . . determine security clearance eligibility.

It is axiomatic that the security clearance process depends upon the honesty of all applicants and begins with the answers provided in the SCA. However, the omission of material, adverse information standing alone is not enough to establish that an individual intentionally falsified his or her SCA. An omission is not deliberate if the person genuinely forgot the information requested, inadvertently overlooked or misunderstood the question, or sincerely thought the information did not need to be reported. An administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.⁷

Applicant did not intentionally omit the information about his criminal history or past-due debts. Although the questions on the SCA regarding these matters are somewhat straightforward, Applicant was genuinely confused about the information that needed to be listed. He had not filled out a SCA before and turned to his wife, a registered nurse and teacher, to help him complete the application. Applicant's wife, who had also never before completed a SCA, was also confused as to the information that needed to be listed. Applicant then asked his attorney for help and was advised that he was not required to list his recent arrests. Applicant also sought help from his supervisor. The supervisor advised Applicant that he did not need to list his recent arrests or delinquent debts. Two months after submitting his SCA, Applicant sat down with a background investigator who explained to him the extent of the matters that needed to be listed on the SCA. Applicant then volunteered the adverse information about his recent arrests and those debts that he knew were delinquent.⁸

Applicant's candor and level of cooperation during the background interview is inconsistent with the conduct of an individual who is deliberately trying to hide or minimize his criminal past or past-due debts. Furthermore, I had an opportunity to observe Applicant and his wife's demeanor as they testified and found them credible when they described their confusion regarding the SCA questions at issue.⁹ Accordingly, I find that Applicant did not deliberately falsify his SCA.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the

⁷ See *generally*, ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (Appl. Bd. Oct. 15, 2003).

⁸ See, AG 17(a): "the . . . omission ... was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully."

⁹ Applicant's hearing was held in a conference room and he was seated no more than an arms-length away, which allowed me to closely observe his demeanor while testifying.

nine factors listed at AG ¶ 2(a).¹⁰ I have considered all the favorable and extenuating circumstances in this case. I specifically took into account Applicant's honesty during the background interview and at hearing. He volunteered adverse information that could result in the denial of his request for a security clearance, to include admitting he continues to drink alcohol in violation of the terms of the court-mandated alcohol treatment program. Such candor is what is expected of all individuals seeking and holding access to classified information. However, Applicant's honesty does not mitigate the security concerns raised by his history of excessive alcohol use and alcohol-related criminal conduct. Overall, the record evidence continues to raise doubts about Applicant's eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption)	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b – 2.c:	For Applicant
Paragraph 3, Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraphs 3.a – 3.e:	For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹⁰ The non-exhaustive list of adjudicative 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.