



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



In the matter of:)	
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)	ISCR Case No. 14-00920
Applicant for Security Clearance)	

Appearances

For Government: Philip J. Katauskas, Esquire
For Applicant: *Pro se*

04/15/2015

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline G and Guideline J. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On July 30, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense 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 September 1, 2006.

In a letter dated August 18, 2014, Applicant admitted five of the six allegations raised in the SOR under Guideline G, and one of the two allegations raised under Guideline J. Applicant also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on January 12, 2015. DOHA issued a notice of hearing on February 18, 2015, setting the hearing

for March 5, 2015. That hearing was cancelled and rescheduled on March 9, 2015, for March 13, 2015, due to inclement weather. The hearing was convened as scheduled.

The Government offered six documents, which were accepted without objection as exhibits (Exs.) 1-6. The parties agreed to amend allegation 1.a to include the words "In February 2012" to specify the date of the incident described, and to amend allegation 1.b to read "3/16/2010," not "4/16/2010." [See Transcript of the proceedings (Tr.) at 45 and 51] Applicant introduced three witnesses and offered seven documents, which were accepted into the record without objection as Exs. A-G. The transcript was received on March 23, 2015, and the record was closed.

Findings of Fact

Applicant is a 39-year-old lead computer technician who has worked for the same employer in various positions since 1998. He graduated from high school and attended two years of college. Applicant served four years on active duty in the U.S. Marine Corps and for three years in the U.S. Army Reserve. He is the father of one minor child.

One of the oldest of seven siblings, Applicant grew up in a "rough neighborhood" of a large city where many of his peers succumbed to the temptation to commit crimes or use drugs. (Tr. 36-37) Applicant did his best to rise above his surroundings, exercising sound judgment and being responsible. He went into the Marines Corps after high school, where he served with distinction. (Tr. 37-38) During this time, he met his life-partner of 15 years, with whom he has a teenage child. From the military, he went directly to college, then to work for his current employer, where he has held increasingly more challenging positions. (Tr. 38-39)

Despite his achievements, Applicant had issues related to alcohol. In February 2012, Applicant was pulled over by police late at night, after he finished a 15-hour, double bartending shift. He had not been drinking alcohol. He was administered a field sobriety test, which he believed he passed. He felt he was being intimidated by the officers in an attempt to cite him for resisting arrest. (Tr. 48-50) He was arrested and charged with Driver Failure to give Required Signal of Intention to Turn, Driving Vehicle while Impaired by Alcohol (DWI), Failure of Individual Driving on Highway to Display License to Uniformed Police on Demand, Driving Vehicle on Highway with an Expired License, Failure to Display Registration Card Upon Demand by Police officer, and Resist/Interfere with Arrest. To settle the matter, Applicant pled guilty to the lesser DWI charge. He was sentenced to 60 days in jail, of which 50 days were suspended, and fines and costs totaling \$415. All other charges were *Nolle Prosequi*.

On or about March 16, 2010, Applicant was pulled over after working a bartending shift. Applicant had not been drinking and he knew he had passed the sobriety test. Regardless, he was arrested and charged with Driver Failure to give Required Signal of Intention to Turn, Driving Vehicle While Under the Influence of Alcohol (DUI), DWI, Negligent Driving Vehicle in Careless and Imprudent Manner

Endangering Property, Life, and Person (NDV), and Operator Not Restrained by Seatbelt. Knowing there was no evidence showing he had been intoxicated, he pled guilty to NDV. (Tr. 55) The disposition of the case was probation before judgment and a fine of \$165. All other charges were *Nolle Prosequi*.

On or about September 2007, Applicant was cited for DUI after consuming a couple of beers. He concedes that he had consumed alcohol, but believed he was within legal limits (Tr. 57, 62-63) Applicant received a year of unsupervised probation and was directed to take 16 hours of alcohol education, which he did. This was preceded by a 2006 guilty plea for DUI which resulted in a sentence of one day in jail and a year of unsupervised probation. The SOR at 1.e cites to a 2004 DUI, based on a 2009 interview in which Applicant referenced a 2004 DUI, but not a 2006 DUI. (Ex. 2 at 1) There is no state record citing to a 2004 arrest or conviction. SOR allegation 1.e is a duplicate reference to the 2006 plea.

In February 1996, when he was 20 and serving overseas in the military, Applicant received non-judicial punishment for DWI on a Marine Corps base. The following year, in April 1997, he was arrested for Public Indecency for urinating on the side of the road and no public facilities were in sight.

Applicant admits he started drinking alcohol at the age of 19 while in the military. Until he was about 30 years of age in 2005, he would drink up to 12 beers at parties twice a month at parties. He then began moderating his use of alcohol. By 2009, he had reduced his alcohol consumption to "two to four beers once a month." (Ex. 2 at 2) He had also ceased to drive if he consumed any alcohol. He has no intention to ever drink and drive again. He received alcohol education and has never been diagnosed with a drinking problem. Applicant is strongly motivated by the fact that another alcohol-related incident could lead to his being put "in jail for a long time." (Tr. 66) Avoiding expenses related to reckless driving, such as legal fees, court costs, counseling, transportation, and the like is also a major motivator, as is the related stress these situations cause. (Tr. 73) He noted, "(I) try to stay on track, keep life simple . . . and these sort of things make that harder for me. So it's then when I say that it's been pretty stressful, it seriously has . . . So it's like just that in itself is not something that I want to have to deal with on a daily basis." (Tr. 73) He will not again put himself in a situation which would jeopardize his job.

Applicant no longer works as a bartender at his old place of employment. (Tr. 67-68) He no longer interacts with his old bar crowd. (Tr. 68) He now prefers to stay home with his family, infrequently bartending for additional income. (Tr. 68) He had no problem with total abstinence for six months while attending alcohol education. He described his present alcohol consumption as "infrequent," noting that he only consumed alcohol at one event in 2015. (Tr. 70) His wife, a non-drinker, drove to that event. (Tr. 70)

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 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 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 access to classified information will be resolved in favor of 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 not drawn 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. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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.

Section 7 of Executive Order 10865 provides that 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

Excessive alcohol consumption is a security concern because it 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. (AG ¶ 21)

Applicant pled or was found guilty of multiple alcohol-related driving offenses between 1996 and 2012. This is sufficient to raise Alcohol Consumption Disqualifying Condition 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).

I considered Alcohol Consumption 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 action taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)); 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 licensed social worker who is a staff member of a recognized alcohol treatment program), none of which apply under these facts.

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents at issue, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a meaningful period of time has passed without evidence of an alcohol issue, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Here, despite his claims to the contrary, Applicant was ultimately found to have been intoxicated when he was cited for the February 2012 drinking offense. He takes responsibility for it and for the earlier incidents. Since then, he has established a record for both responsible alcohol consumption and driving that has been incident-free for over three years. He is older now. He spends more time with his family and less time around the service industry. His own drinking habits have progressively tamed with age. More importantly, he recognizes and fully appreciates the risks associated with another drinking and driving incident – risks ranging from incarceration, loss of employment, loss

of driver's license, forfeiture of income for high legal and administrative costs, reverting at middle age to public transportation, and undue, unnecessary stress.

There is no evidence Applicant is alcohol dependent. For him, to drink and drive or to drink to excess is ultimately a matter of choice. He has much to risk should he again be caught in an alcohol-related problem. He has no intention of suffering from any of repercussions poised to be inflicted upon him if he fails. He has a long history of succeeding in the face of adversity and for applying himself. Given the potential consequences, I believe Applicant has changed and these past few years evidence that change. I find that Applicant mitigated the security concerns for alcohol consumption and that he will not present a security concern based on his alcohol consumption.

Guideline J - Criminal Conduct

The security concerns for alcohol consumption and criminal conduct are the same. The concerns involve questions of Applicant's reliability, judgment, and trustworthiness. 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 regulation. (AG ¶ 30)

Along with the aforementioned alcohol-related criminal citations, Applicant was cited for public urination nearly 20 years ago while in his early 20s. Taken collectively, Criminal Conduct Disqualifying Conditions AG ¶ 31(a) (a single serious crime or multiple lesser offenses) and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted) apply.

The criminal conduct mitigating conditions involve issues similar to those discussed under alcohol consumption. The issues involve the passage of time, the unusual nature of the action causing security concerns, the likelihood of recurrence, and whether the actions cast doubt on the individual's reliability, trustworthiness, and judgment. The Criminal Conduct mitigating conditions that apply 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 and 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, higher education good employment record, or constructive community involvement). For the same reasons stated above under alcohol consumption, Applicant has mitigated the security concern for criminal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and the relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate

determination of whether to grant 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 considered Applicant's early struggles to succeed under difficult circumstances, and his years of honorable service in the military. I considered that Applicant has worked for his present employer, a defense contractor, for a number of years. I considered his commitment to his long-term partner and child, as well as his educational background.

Despite a track record since youth of striving to better himself, Applicant's early exposure to alcohol led to a decade or so of heavy weekend drinking. Since the age of 30, his alcohol abuse has dissipated and turned him into a moderate drinker. A string of alcohol-related driving incidents has left him at the point where another alcohol or criminal incident will be detrimental to his current life, work, and lifestyle. Applicant recognizes this. He is now at an age where he will no longer engage in risky behavior that might unnecessarily bring him stress. He is committed to moderate drinking and to not driving if he has consumed any alcohol. Applicant has faced multiple challenges in his life and succeeded. I am confident that he will continue his current pattern of responsible drinking and responsible driving, and continue to live life within the law. Consequently, I find that Applicant has mitigated 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: Subparagraphs 1.a - 1.f	FOR APPLICANT For Applicant
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Paragraph 2, Guideline J: Subparagraphs 2.a-2.b:	FOR APPLICANT For Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Arthur E. Marshall, Jr.
Administrative Judge