



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



In the matter of:)	
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-----)	ISCR Case No. 14-01446
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: Jeremy M. Tempel, Esq.

4/30/2015

Decision

HOWE, Philip S., Administrative Judge:

On November 8, 2013, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On June 9, 2014, the Department of Defense Consolidated Adjudications Facility (DODCAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and G (Alcohol Consumption). 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 Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on June 18, 2014. Applicant answered the SOR in writing in an undated Answer and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 4, 2014, and I received the case assignment on November 10, 2014. DOHA issued a Notice of Hearing on January 26, 2015, for a video teleconference hearing on February

11, 2015. That hearing was cancelled because of video equipment problems and on February 19, 2015, another Notice of Hearing was issued. I convened the hearing as scheduled on February 27, 2015. The Government offered Exhibits 1 and 2, which were admitted without objection. Applicant testified and submitted Exhibits A through C, without objection. DOHA received the transcript of the hearing (Tr.) on March 10, 2015.

I granted Applicant's request to keep the record open until March 13, 2015, to submit additional matters. He did not submit any documents by that date. On April 10, 2015, his counsel requested additional time to submit verification of Applicant's participation in an alcohol support group. There was no objection and I granted the request. On April 16, 2015, he submitted Exhibit D, without objection. The record closed on April 16, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR Applicant admitted the factual allegations in ¶¶ 1.a through 1.d, and denied 1.e of the SOR, with explanations. He made the same answers to the factual allegations in ¶ 2.a of the SOR because they form the same factual basis for the criminal acts alleged in Paragraph 1. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 36 years old. He is not married but has a fiancé. He works for a defense contractor. He has worked there for six years, since 2008. His field of expertise allowed him to be employed for the past 15 years after graduating with an Associate's Degree in optics. Applicant has a good work record and has not received any reprimands or other disciplinary actions. He has never received a complaint about his work record. (Tr. 13, 14, 30, 37, 63; Exhibit 1)

Applicant supports himself and his fiancé, gives money to his unemployed brother, and helps his sister's family with financial support. He is also involved in his community by working in charity events. He lives in a small town and everyone knows each other. (Tr. 21, 31, 32, 61)

Applicant obtained his security clearance in December 2003. The record does not contain any evidence of any security violations during the term of his clearance. Applicant went to Afghanistan as part of his civilian job. He does not see himself as a security risk. (Tr. 14, 37; Exhibit 1)

Applicant was arrested in July 1999 when he was 19 years old and charged with theft and receiving stolen property. He was also charged with possession of alcohol by a minor (Subparagraph 1.a). Applicant admitted this allegation. It involved a friend and his motorcycle. Applicant's friend convinced him that the friend was buying the motorcycle. He gave his friend a ride ostensibly to pick up the motorcycle. They put the motorcycle in Applicant's truck. Originally Applicant told the government investigator that he stole the motorcycle for a friend. Now, at the hearing he claims he could not

recall what happened with the motorcycle back in 1999. He could not explain the difference in the two statements. Applicant received a \$2,500 fine and was ordered to perform 500 hours of community service, which was every weekend for two years. (Tr. 15, 16, 38, 39, 40; Exhibit 2)

Applicant was arrested in August 2009 on charges of criminal mischief, damages or defacing property of another without consent, and public intoxication (Subparagraph 1.b). Applicant admitted this allegation. Applicant stated he tripped into a mirror while walking away from a verbal altercation with another bar patron. However, the investigative report states he got into a fight with a bar patron and hit a picture hanging on the wall. (Tr. 16, 38, 40; Exhibit 2)

In June 2011 Applicant was arrested and charged with public intoxication (Subparagraph 1.c). Applicant admitted this allegation. He had just returned from Afghanistan and attended a concert. He got into an argument with his girlfriend in a parking garage at the concert venue. Some policemen saw the verbal altercation and arrested Applicant for being publically intoxicated. (Tr. 17; Exhibit 2)

Applicant was arrested March 2012 on a charge of public intoxication (Subparagraph 1.d). Applicant admitted this allegation. He was a passenger in a car that was involved in a crash. Applicant denied ever driving while under the influence of alcohol. His fiancé was supposed to be the “designated driver,” but she drank and had the accident. While the police were investigating the accident, they saw Applicant nearby and intoxicated. They arrested him for being intoxicated in public. (Tr. 18, 19; Exhibit 2)

Applicant was arrested in March 2011 on charges of public intoxication (Subparagraph 1.e). Applicant denied this allegation because he testified it was incorrect and a duplicate of the allegation in Subparagraph 1.d. He claimed there were only four arrests involving him, those being the first four allegations in the SOR. (Tr. 42; Exhibit 2)

Applicant testified he has never had any alcohol-related incidents at work. He only drank on weekends. He used to drink Coke and whiskey, and now only has an occasional glass of wine on weekends. The last time he drank heavily was three years ago in March 2012. He realized that excessive alcohol consumption cost him money and made him feel tired. After he received the SOR in June 2014, he started attending an alcohol-support group with some friends. He stated his purpose was to help support them. He goes to the meetings every other Saturday. His attendance was verified by a friend who has also attended the self-help sessions since July 2014. Applicant does not consider himself an alcoholic, alcohol dependent, and has never been evaluated or diagnosed by a licensed medical professional or an appropriate professional in an alcohol treatment program. Applicant admitted he made mistakes in his life and thinks he has learned from them. (Tr. 20, 22-26, 35, 42, 44, 47, 49, 50, 55; Exhibits 2, A)

Applicant submitted three character reference letters from two policemen in his home town whom he knows personally, and a co-worker on their business projects. They write favorable recommendations for Applicant based on their knowledge of him personally and professionally. Applicant has never been arrested in the town in which he lives. His arrests occurred in larger cities within his state where he went with friends for social activities, including attending bars to drink. (Tr. 57; Exhibits 2, A-C)

Applicant's attorney asserts that the state changed the law regarding public intoxication. He contends that if Applicant performed the acts as listed in the SOR now, he would not be arrested because the new law requires harm to himself or someone else, not just the status of being publically intoxicated with no other overt act. He did not provide copies of any statutes to support his contention.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 (AG ¶ 2(a)). 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 avoided drawing 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of 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 J, Criminal Conduct

AG ¶ 30 expresses the security concerns pertaining to criminal conduct:

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.

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant committed four offenses from 1999 to 2012, three of which involved alcohol and a motorcycle theft in the fourth offense. Applicant admitted all of these offenses. Both AG ¶ 31 (a) and (c) are established.

AG ¶ 32 provides conditions that could mitigate security concerns. Two conditions may potentially apply:

(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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's offenses occurred between three and 16 years ago. Since then he earned a community college degree, started his current job six years ago, became engaged, and is involved in community charity events. Applicant testified he does not drink like he did when he was younger and has learned his lesson. AG ¶ 32 (a) and (d) are established.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concerns pertaining to alcohol consumption:

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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. Two conditions apply:

(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; and

(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;

Applicant has four alcohol-related arrests away from work. Three arrests involve public intoxication and disturbing the peace. The fourth arrest occurred in 1999 when Applicant was charged with being a minor in possession of alcohol and receiving stolen property. AG ¶ 22 (a) is established.

Applicant admitted he consumed large amounts of alcohol to the point of impairment in the incidents cited in the SOR. After doing so, he got into trouble with the police in one or more towns. The habitual or binge consumption of alcohol impaired his judgement. Applicant does not have a diagnosis as an alcohol abuser or being alcohol dependent. AG ¶ 22 (c) is established.

AG ¶ 23 provides conditions that could mitigate security concerns. Three conditions apply:

(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;

(b) the individual acknowledges his alcoholism or issues of alcohol abuse,

provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (it alcohol dependent) or responsible use (if an alcohol abuser); and

(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..

Applicant's last offense occurred three years ago. Since then he only consumes alcohol at home, and has significantly reduced his consumption to save money and avoid problems with the police or his family. The time between Applicant's 1999 arrest and the next one was 10 years. He then had two more arrests. The arrests were infrequent, with a number of years having passed between them and since the last one. His work performance is considered good where he has been employed at his current job for six years. The totality of his conduct does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 23 (a) is established.

Applicant has participated in an alcohol support group since July 2014. He testified he went to the program every other weekend to support his friends who are in it. His consistent attendance is beneficial. He submitted a supporting letter from another program participant. He has moderated his alcohol use and does not travel to other communities to consume alcohol in substantial quantities as he did when the SOR incidents occurred. He has established a pattern of responsible use. His desire to buy a house and get married is also a moderating influence on his behavior regarding alcohol, attending bars, and the tendency to get into legal trouble when he is in those situations. He is making satisfactory progress as evidenced by the lack of any incidents in the past three years. AG ¶ 23 (b) and (c) are 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 an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 facts and circumstances surrounding this case. Applicant admitted his past problems, and explained they were committed under a state law now modified to remove the offense of public intoxication without harm to the perpetrator or a member of the public. Applicant is older and more mature since committing the last offense three years ago. In that incident he was the passenger in a car driven by his fiancé who lost control of the car and crashed. The police arrested Applicant for the offense of being publically intoxicated without any other actions on his part.

Applicant stated he learned his lesson. He is no longer interested in experiencing the physical symptoms that excessive alcohol consumption gives him nor spending money on court fines. He made permanent behavioral changes. There is no likelihood of recurrence of such conduct and arrests. The passage of at least three years also mitigates these offenses.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct and alcohol consumption. I conclude the whole-person concept for Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraphs 1.a to 1.e:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

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.

PHILIP S. HOWE
Administrative Judge

