



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



In the matter of:)
)
) ISCR Case No. 14-01735
)
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: James W. Zirkle, Esq.

11/13/2014

Decision

CURRY, Marc E., Administrative Judge:

Applicant has only consumed alcohol once in the past year, and is remorseful about his alcohol-related misconduct. However, given the recency and severity of his last offense, I am unable to conclude that he has mitigated the security concerns. Clearance is denied.

Statement of the Case

On June 6, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines G, alcohol consumption, and 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) as promulgated by the President on September 1, 2006.

Applicant answered the SOR on June 26, 2014, admitting the allegations and requesting a hearing. On September 16, 2014, a notice of hearing was issued scheduling the case for September 26, 2014. At the hearing, I received three Government exhibits marked as Government Exhibits (GE) 1 through 3. Also, I considered Applicant's testimony. The transcript (Tr.) was received on October 7, 2014.

Findings of Fact

Applicant is a 27-year-old single man. He graduated from college in 2012, majoring in liberal arts. Since April 2013, he has worked for a defense contractor as a security assistant. He primarily serves as a courier who delivers both classified and unclassified information. (Tr. 23, 27)

Applicant is a good employee. His supervisor characterized him as "a hard worker, customer-focused, and a very strong and reliable member of [their] department." (Answer, Attachment 1)

In July 2007, Applicant, then 19 years old, was charged with driving after illegal consumption of alcohol and underage purchase/possession of alcohol. (Tr. 12, 34) He was convicted of the first charge and placed on one year of probation. As part of his probation, he attended ten, three-hour, alcohol-education sessions. (Tr. 34)

Applicant began consuming alcohol in approximately 2002 when he was 15 years old. From 2002 to 2010, he drank approximately a 12-pack of beer per week. (GE 2 at 14)

In August 2007, Applicant, while standing on the deck, drinking a beer and talking on a cell phone at a party, was issued a citation for attending a party with unlawful consumption of alcohol, and possession of a malt beverage/unfortified wine by a 19/20 year old. These charges were later dismissed. (Tr. 36, 12)

One evening In August 2009, Applicant, while carousing with friends and walking across a college campus with a beer in his hand, was stopped by police and charged with possessing an open container of alcohol. He was later found guilty and fined \$91. (GE 3 at 5) He had graduated from college three months before this episode. (GE 1 at 15)

In October 2010, Applicant was stopped by police for driving with an expired license tag. (Tr. 14) The police officer smelled alcohol on his breath and ordered him to perform a field sobriety test. Applicant failed,¹ leading to his arrest for driving while under the influence of alcohol (DWI). After arresting Applicant, the police officer conducted a search of his vehicle and discovered a marijuana pipe. (GE 2 at 14) He then charged Applicant with possession of marijuana. Applicant pleaded guilty to both

¹His blood/alcohol content was greater than .20%. (GE 3 at 7)

charges, and was placed on 12 months of probation. (Tr. 41) Also, Applicant's license was restricted for one year, and he was fined \$2,000. (GE 2 at 14)

In June 2013, Applicant was interviewed by a security investigator. (GE 2 at 11) They discussed his history of alcohol-related misconduct. Applicant noted that since the 2010 arrest, he had decreased his alcohol consumption from a 12-pack per week to a 6-pack per week. (GE 2 at 14)

In August 2013, two months after Applicant's subject interview, he was arrested and charged with DWI (second offense), and driving with a blood/alcohol content greater than .20 percent, after accidentally driving his car into the back of a police car. Applicant was extremely intoxicated at the time and cannot remember getting into the car before the accident. (Tr. 15) After a pre-trial agreement, the prosecution reduced the DWI charge to a first-offense charge, whereupon Applicant pleaded guilty.² He was sentenced to 360 days imprisonment (350 days suspended), and one year of supervised probation. As part of Applicant's probation, he was required to attend an alcohol safety and education class, an ignition interlock was placed on his automobile, and his license was restricted for use during working hours and for medically necessary travel. (Tr. 16; GE 3 at 12) Applicant's probation expires on November 17, 2014. (GE 3 at 12)

After the August 2013 alcohol-related arrest, Applicant realized that he "had a serious problem . . . that not only threatened [his] life, but the lives of people around him." (Answer at 2) Subsequently, he reported the incident to his company's facility security officer and voluntarily enrolled in the company's employee assistance program (EAP). (Answer at 2) The EAP counselor referred Applicant to a licensed social worker, who subsequently began providing therapy services. Applicant attended eight sessions between September 11, 2013 and December 4, 2013. (Answer at 2) The first four sessions were once per week, and the last four sessions were every other week. (GE 2 at 7)

On June 26, 2014, Applicant's counselor wrote a letter to the court. (Answer, attachment 2) She did not make a formal assessment of alcohol abuse or dependence. She did, however, refer to Applicant's problem as an addiction. Also, she told him that abstinence from alcohol is the best option for his condition. (Answer at 2) Ultimately, she concluded that Applicant has "gained knowledge of his addiction and insights regarding his own alcohol misuse," and "was making consistent efforts" at maintaining sobriety. (Answer, attachment 2)

At or about the time Applicant began counseling, he started attending Alcoholics Anonymous (AA). (Tr. 49) His attendance was voluntary. (Tr. 48, 61) He attended approximately once a week through February 2014. He stopped going, and did not begin the 12-step program. (Tr. 50) He felt that he "learned a lot through [his] sponsor,

²The second charge was not amended.

and through talking with everybody else there, and . . . was ready . . . to try doing it [himself].” (Tr. 50)

With the exception of a glass of champagne on New Year’s Day, 2014, Applicant has not consumed any more alcohol since the August 2013 episode. (Tr. 17-18, 59) He has no plans for drinking alcohol in the future. (Tr. 60)

Policies

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a security clearance.

Analysis

Guideline G, Alcohol Consumption

Under this guideline, “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 ¶ 21). Applicant’s history of alcohol-related criminal conduct triggers the application of AG ¶¶ 22(a), “alcohol-related incidents away from work, such as driving while under the influence . . . or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” and 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.”

Applicant’s therapist did not explicitly characterize him as alcohol dependent. She did, however, characterize his problem as an addiction, and she advised him to abstain from drinking alcohol. AG ¶ 22(e), “evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program,” applies.

The following mitigating conditions under AG ¶ 23 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 good judgment;

(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);

(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

(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 AA or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical worker who is a staff member of a recognized alcohol treatment program.

As of the issuance of this decision, Applicant was on supervised probation for the August 2013 DWI. Although Applicant's probation is set to expire on November 17, 2014, his status as a probationer is of paramount importance because it signifies that the state court that convicted him is so concerned about the possibility that Applicant may commit another alcohol-related offense that it has placed restrictions on his ability to start his car and on where he can drive. Under these circumstances, AG ¶ 23(a) does not apply.

Shortly after Applicant's August 2013 DWI, he began receiving counseling from his therapist and attending AA. He worked with his therapist for two months and he went to AA meetings for five months. Recently, in June 2014, his therapist provided a positive update.

Applicant has only consumed one alcoholic beverage in the past year. However, given his therapist's admonition that he abstain from alcohol, I cannot credit him with the four-month period of abstinence that preceded the drink that he consumed on New Year's Day 2014. Nevertheless, the eight months of abstinence since New Year's Day 2014, together with Applicant's acknowledgement of the problem and his steps of actions to overcome the problem are sufficient to apply AG ¶ 23(b).

Other than court-ordered alcohol education classes, Applicant had not attended any therapy sessions before August 2013. Although he is not currently working with his therapist, he visited her in June 2014 and she gave him a positive update. Also, Applicant attended AA sessions for five months after the August 2013 episode. AG ¶ 23(d) applies.

Applicant testified insightfully about his alcohol problem, and he appears well on his way toward maintaining sobriety. However, his status as a probationer generates doubt about his security clearance worthiness, and any such doubt must be resolved in favor of national security. (AG ¶ 2(b)) Applicant has not mitigated the alcohol consumption security concern.

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness [and] by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations” (AG ¶ 30). Applicant has a history of alcohol-related criminal conduct spanning from 2007 to 2013. He remains on probation for his most recent offense. AG ¶ 31(a), “a single serious crime or multiple lesser offenses,” and AG ¶ 31(d), “the individual is currently on parole or probation,” apply.

The following mitigating conditions under AG ¶ 32 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 . . . remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Over the past year, Applicant has received treatment with a therapist and attended several AA sessions. His therapist gave him a positive assessment. Applicant testified insightfully about the nature of his problem and his commitment to confronting it. His job performance is good. These factors are sufficient to trigger the application of AG ¶ 32(d).

Applicant remains on supervised probation, and he remains closely monitored, as his ability to start his car is restricted by an ignition interlock device, and his license is restricted to travel to and from work and to medically necessary appointments. These are serious restrictions and are still in place as part of his probation that has yet to expire. Moreover, this most recent offense occurred not only after Applicant completed his security clearance application, but after he underwent his subject interview. The crime itself was significant, as Applicant’s blood/alcohol level exceeded .20 percent, he could not remember getting behind the wheel of his car, and he collided with a police car. Under these circumstances, AG ¶ 32(a) does not apply.

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 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.

There is a significant presence of rehabilitation. However, it is outweighed by the nature, seriousness, and recency of the latest offense. Under these circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. In reaching this decision, I was particularly concerned about Applicant's history of alcohol-related driving offenses, as his job duties include driving.

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
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

MARC E. CURRY
Administrative Judge

