



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



In the matter of:)
)
-----) ISCR Case No. 07-07208
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: B. Daniel Lynch, Esquire

February 21, 2008

Decision

BRAEMAN, Kathryn M., Administrative Judge:

History of the Case

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 28, 2007. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.¹ The SOR alleges specific concerns over alcohol consumption (Guideline G) based on the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant responded to these SOR allegations in an Answer dated November 13, 2007, where he admitted all the allegations and requested a hearing for which he retained counsel on December 18, 2007. As discussed below, Applicant established his case in mitigation; clearance is granted.

¹ This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended and revised.

Department Counsel on December 20, 2007, indicated the case was ready to proceed. The matter was assigned to me on December 20, 2007. Subsequently, a mutually convenient date for hearing was agreed to. A Notice of Hearing, issued on January 2, 2008, set the hearing for January 25, 2008, at a location near where Applicant works and lives.

At the hearing the Government offered three exhibits (Exhibit 1-3), which were admitted without objection. Applicant's counsel offered seven exhibits (Exhibits A through G) which were admitted without objection, and called four witnesses including Applicant. The transcript (TR) was received on February 4, 2008.

Findings of Fact

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following findings of fact:

Applicant, who is 37 years old, has been employed as a software consultant by a defense contractor from March 2000 to present. He currently is doing product management and software sales engineering. He completed a Security Clearance Application (SF-86), signed in December 2005. He reported he previously was granted a Top Secret clearance and Sensitive Compartmented Information (SCI) access in 2001 and had a Secret clearance granted in 1990. He served in the Reserve Officers Training Corps (ROTC) from 1988 to August 1989. (Exhibit 1; TR 66)

Applicant was granted a degree in mechanical engineering from a university in June 1993. (TR 67) He married in July 1997. (Exhibit 1)

Alcohol Consumption

Applicant is now abstinent from alcohol consumption, but acknowledges he was an alcoholic because of his history of having difficulty stopping his drinking and having no control over alcohol. (TR 67) He has only one alcohol-related arrest when he was arrested for Driving under the Influence (DWI) in 1992. He then was found guilty and fined \$500; he was sentenced to one month in jail, suspended, and required to attend an alcohol safety awareness class. He successfully completed the program and probation. (SOR 1.a.) Applicant has not had any subsequent alcohol-related incidents. (Exhibits 1, 3; TR 88-89)

Applicant subsequently resumed his use of alcohol to excess which led to excessive absences from a job. He was terminated from this position because of the absences. He recognized that he needed to address his alcohol issues as he was drinking four to five times a week. From 1998 to 1999, he voluntarily sought treatment from Dr. H, a medical doctor (M.D.) who is certified in addiction medicine. (SOR 1.b.) (Exhibit 1, Answer; TR 69-71; 76-78) Dr. H diagnosed Applicant as alcohol dependent and recommended abstinence. After that treatment Applicant remained abstinent and attended some Alcoholics Anonymous (AA) meetings for approximately a year. (TR 70-71; 78-80)

In December 2000 he went to a celebration and had three or four drinks. (TR 70-71; 78-80) After he resumed drinking alcohol, he drank usually in moderation, but at times to excess from late 2004 to September 2006. He drank almost exclusively at home, but he began to notice the adverse physical effects of alcohol. For example, drinking contributed to him being physically exhausted. (TR 71-72; 82-88; 90)

Applicant's concerns over his use of alcohol led him to decide voluntarily again to consult Dr. H in August 2006. Dr. H diagnosed him with alcohol dependence and recommended total abstinence. Also, Dr. H recommended a hospital comprehensive alcohol treatment services (CATS) program. Applicant had his last drink of alcohol in September 2006 when he voluntarily sought alcohol detoxification at a hospital. He then began outpatient treatment at the hospital for alcohol dependence in September 2006. He attended some AA meetings. (SOR 1.c.) However, his office travel schedule did not allow him to attend aftercare consistently, so he returned to seeing Dr. H on a monthly basis from October 2006 to present. (SOR 1.d.) At the recommendation of Dr. H, Applicant and his wife also received psychotherapy from a licensed clinical social worker (LCSW) for alcoholism beginning in May 2007 for six months. Dr. H concluded that the family counseling with Applicant and his wife accomplished its purpose and is no longer needed. (SOR 1.e.) Applicant also completed his counseling with the LCSW. Applicant expressed his intention to remain abstinent. Nevertheless, Applicant has voluntarily remained in treatment with Dr. H. This doctor monitors Applicant to ensure compliance with his abstinence and provides support for him to continue his abstinence. (Exhibits 2, 3; Answer; TR 72-76; 86-89; 91-94; Exhibit E) Applicant has attested that since quitting alcohol in September 2006, his life and health have improved dramatically. His compensation at work has gone up to recognize his improved performance. He is happy with and committed to his sobriety. (Answer) In sum, Applicant has acknowledged his alcoholism, taken actions to overcome this problem, and has established a consistent pattern of abstinence for sixteen months. (Exhibit E)

Expert Opinion and Prognosis

Dr. H was accepted as an expert in alcohol treatment as he has substantial expertise and over 20 years experience in treating patients with alcohol addiction. As indicated previously, his credentials include a M.D. degree; and he is certified in addiction medicine. As an addictionologist, he has a comprehensive approach to treatment. (Exhibit E; TR 97-98)

Dr. H established that Applicant now was "entirely abstinent from alcohol" and is determined to remain so. He confirmed that Applicant voluntarily sought treatment -- initially from April 1998 to April 1999 and again from August 2006 to present. He offered his professional opinion that Applicant's "prognosis is good because he has fully accepted and is comfortable with diagnosis of the disease of addiction to alcohol." He confirmed that Applicant continues to "work his program of recovery." He concluded

that Applicant is “entirely able to comply with the requirements of a holder of a security clearance.”²

References

Applicant’s friend since 2002 is a policy analyst for a state legislature. He and Applicant met at an athletic meet, and they became friends. He only observed Applicant intoxicated one time in 2006; subsequently, Applicant told him he consulted a doctor because of his concern over his drinking to excess. Since that time, he has never seen Applicant drink alcohol. He considers Applicant reliable, trustworthy, and supportive. (TR 21-27; 28-34)

Applicant’s former supervisor, Mr. S, now with a different company, testified on his behalf and recommended him for a security clearance. He was the manager who reviewed Applicant’s software analysis work from 2004 to 2006. All of the customers were happy with Applicant’s work. This supervisor knows their views as he surveyed them to make sure the employees were delivering quality work. Also, Applicant provided weekly status reports. He assessed Applicant’s judgment as being very good; and he was very reliable and trustworthy. Applicant consulted with this manager before he entered the alcohol treatment program. This supervisor had never seen any

² Dr. H’s opinion concerning Applicant’s diagnosis and prognosis is admissible because such information is applicable in AG ¶¶ 21 and 22. However, his opinion and the opinions of his character witnesses about whether Applicant should have a security clearance receives minimal weight. I have carefully applied the Appeal Board’s instructive comments in ISCR Case No. 03-22167 at 5 (App. Bd. Dec. 6, 2006) in my conclusions and whole person analysis. The Appeal Board in ISCR Case No. 03-22167 at 5 (App. Bd. Dec. 6, 2006) states:

Expert opinion as to witness credibility is generally inadmissible in judicial proceedings subject to the Federal Rules of Evidence. *See, for example, United States v. Schaffer*, 523 U.S. 303, 317 (1998); *Nimely v. City of New York*, 414 F.2d 381, 398 (2d Cir 2005)(“[E]xpert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible . . .”); *United States v. Solomonson*, 908 F.2d 358, 362 (8th Cir. 1990); *Morris v. Burnett*, 319 F.3d 1254, 1276 (10th Cir. 2003). The reason for this rule is that evaluation of witness credibility is the exclusive provenance of the finder of fact. *See Nimely* at 397. Although the Federal Rules of Evidence do not strictly apply in hearings conducted in accordance with the Directive, they do serve as a guide. Directive ¶ E3.1.19. Because factual findings are the responsibility of the Administrative Judge, we conclude that it was improper for her to rely on this aspect of the expert’s testimony. In doing so, she appeared to substitute the expert’s opinion for her own duty to identify and analyze those facts which support her credibility determination. This does not mean that the Administrative Judge should discount the expert’s testimony *in toto*, insofar as the expert did testify as to his personal observations of Applicant’s demeanor. Nor does it mean that an expert is precluded from testifying as to his or her opinion as to a witness’s character for truthfulness. However, we conclude that the Judge’s deferral to the expert witness on the issue of Applicant’s credibility with respect to the arrests was arbitrary, capricious, and contrary to law. In totality, the record does not contain sufficient credible evidence to permit the Judge to make a finding of fact supporting Applicant’s credibility that satisfies the substantial evidence test. *See ISCR Case No. 02-02892 at 5-6 (App. Bd. June 28, 2004).*

indications of an alcohol abuse issue at work and had never even seen Applicant take a drink. Mr. S continues to view Applicant as a friend and has continued to see him since he moved to a different company. (TR 35-44; 45-51)

Applicant's mother-in-law, who herself has had a top secret clearance, testified on his behalf. She sees him a couple of times a month and on special occasions. In the 14 years she has known him, she has seen him drink alcoholic beverages but never seen him intoxicated. He has been "a little tipsy" on a handful of occasions and did not drive in that condition. She assessed Applicant as a reliable person with good judgment and recommended him for a security clearance. (TR 53-58; 58-59) She has never seen him drink alcohol since September 2006. (TR 58-60)

His supervisor for ten months, Mr. W, who has known Applicant for three years, praised Applicant's "sincerity, integrity, and his innate sensitivity" to company proprietary and government classified information. While he observed some problem with absences which he later learned were related to Applicant's alcohol consumption, he had no indication of an alcohol issue while Applicant was under his supervision. (Exhibit A)

The father of one of Applicant's high school friends who has know Applicant since 1984 assessed him as "a very responsible and loyal citizen" who should be entrusted with classified information. He never observed Applicant abuse alcohol. (Exhibit B)

A family friend who has known Applicant's father since their joint military service in 1962 praised Applicant's integrity, honesty and level of intelligence. He views Applicant as "a responsible human being whose honesty, integrity, diligent work habits and moral character are above reproach." He observed Applicant in 2007 when he did not drink any alcohol. Having experience in the intelligence community, he assessed Applicant as someone who should be permitted to retain his security clearance. (Exhibit C)

Mr. B, the president of a company, has known Applicant since 2001 when he was hired to work on a project with Mr. B. He worked with him on a daily basis from 2001 to 2003. He described Applicant in that period as having a professional approach to technical aspects of the project as well as in his dealings with the people involved. He maintains contact with him several times a year. He recommends he be able to maintain his clearance. (Exhibit D)

His brother-in-law who has known Applicant for more than a decade was aware of Applicant's struggle with alcoholism. However, Applicant's "challenges with alcohol never interfered with his dedication to his family and his professionalism." He respected Applicant's willingness to recognize the "problem independently" and to deal with it "proactively." He recommended him for a security clearance. (Exhibit E)

A friend of Applicant's since 1984 (which has continued from high school, to college, to their adult lives) evaluates Applicant as a person of integrity and fidelity who

has a strong work ethic. He confirmed that Applicant had been abstinent for 18 months. He recommended him for a security clearance. (Exhibit F)

Policies

As set forth in the regulation, every recommended personnel security decision must be a fair and impartial overall common sense decision based on all available evidence, both favorable and unfavorable. The decision must be arrived at by applying the standard that the grant or continuance of a security clearance or access to classified information is clearly within the interests of national security.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In all adjudications, national security is the paramount consideration. Any doubt concerning personnel being considered for access to classified information must 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts by "substantial evidence,"^{3[1]} demonstrating that it is not clearly consistent with the national interest to grant or continue an Appellant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Appellant to produce evidence to rebut, explain, extenuate, or mitigate facts. Ultimately, Appellant has the burden of persuasion to obtain a favorable clearance decision.

Analysis

Guideline G (Alcohol Consumption)

AG ¶ 21 raises the Government's concern about alcohol consumption stating, "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment

³"Substantial evidence" is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[1]

or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." Seven Alcohol Consumption disqualifying conditions may raise a security concern and may be disqualifying. AG ¶¶ 22(a) - 22(g) provide:

- (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;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (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;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
- (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;
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and,
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶ 22(a) applies as Appellant was found guilty of one DUI in 1993. AG ¶ 22(b) applies because alcohol use led to excessive absences from work, and eventually he was terminated from his position due to the absences. AG ¶ 22(c) applies as he engaged in habitual moderate to binge drinking from 2000 to 2006. AG ¶ 22(d) applies because a physician diagnosed him as alcohol dependent. AG ¶ 22(e) does not apply because the Licensed Clinical Social Worker did not provide a diagnosis, however, if one were solicited she would have provided a diagnosis of alcohol dependence. AG ¶ 22(f) applies because he had a relapse after completing treatment with Dr. H in 1999. AG ¶ does not apply because he did not violate any court orders.

All four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-(d) potentially apply to mitigate the Aggravating Conditions listed above:

- (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 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.

To his credit Applicant voluntarily sought treatment from 1998 to 1999. However, he began to drink again in 2000 and continued to drink to excess until September 2006. Again, he voluntarily sought and completed his treatment program in 2006. Indeed, he now has sixteen months of abstinence from alcohol. The expert addictionologist, an M.D., reported that Applicant voluntarily sought help both in 1998-1999 and again from 2006 to present. He diagnosed Applicant as alcohol dependent [AG ¶ 22(d)]. Applicant has chosen not to drink and drive since he completed the September 2006 treatment program as he subsequently chose abstinence. After successfully completing the treatment program, he has chosen to continue to receive treatment for his alcoholism. Clearly, all mitigating conditions except for AG ¶ 22(c) apply. AG ¶ 22(c) does not apply because Applicant has a "previous treatment and relapse," although as indicated previously he is making satisfactory progress.

In sum, Applicant's expert gave him a favorable prognosis and highly commended Applicant's commitment to sobriety. Applicant's supervisors never saw any indications of alcohol abuse at work and attested to his trustworthiness and reliability. His supervisors praise the quality of his work. To his credit Applicant voluntarily addressed his alcohol issues. For over fifteen years he has not driven after consuming alcohol. He has not had any alcohol-related incidents whatsoever since July 1992, over fifteen years ago. He has demonstrated he has significantly changed his consumption of alcohol and now has a commitment to sobriety and abstinence for over sixteen months. Because of his extensive efforts at rehabilitation, his alcoholism "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 22 (a).

Whole Person

I considered the specific factors listed in AG ¶ 2: “(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 was 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” of the conduct at issue.

Applicant’s 1992 DUI (15 years ago) was a misdemeanor. This is the sole criminal offense resulting from his alcoholism. He also lost a job because of alcohol abuse. He received treatment in 1999 and then had a relapse, as he continued to consume alcohol, occasionally to excess.

In 2006, Applicant acknowledged his problem with alcohol and voluntarily sought treatment which he is still continuing. Although he successfully completed his treatment program, he continues to attend treatment in order to reinforce sobriety. He has alleviated the circumstances or factors to reduce or eliminate his vulnerability to exploitation, manipulation, or duress with respect to committing DUIs and other alcohol-related problems. He has completely abstained from alcohol consumption. He provided a solid presentation of his character and loyalty in the endorsements of his supervisors and other family friends and relatives who have known him over a substantial period of time. With his ongoing support from his treating physician, it is very unlikely he will have another DUI or lose his abstinence. He focused his efforts and made substantial progress on correction of his alcohol abuse. Having reviewed the guidelines and assessed him as a “whole person” in order to evaluate Appellant’s risk and vulnerability in protecting our national interests, I find Appellant has mitigated all security concerns.

Formal Findings

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

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

KATHRYN MOEN BRAEMAN
Administrative Judge