



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-06315
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: *Pro se*

January 12, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has failed to mitigate security concerns pertaining to Guideline G (Alcohol Consumption). Clearance is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 19, 2007. On April 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 13, 2009. Applicant answered the SOR in writing on April 30, 2009, and elected to have his case decided at a hearing. DOHA received his response to the SOR on May 4, 2009. Department Counsel was prepared to proceed on July 14, 2009. On July 16, 2009, the case was assigned to me. On July 28, 2009, DOHA issued a notice of hearing scheduling the case for August 27, 2009. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 3, which were received without objection. Applicant offered Applicant Exhibits (AE) A through L, which were received without objection, and he testified on his behalf. DOHA received the hearing transcript (Tr.) on September 4, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the allegations alleged, with explanations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 48-year-old draftsman IV, who has been employed by his current defense contractor employer since August 2008. GE 1, Tr. 21-23. Applicant has held a secret security clearance since April 2001. He seeks to retain his clearance, which is required as a condition of his employment. Tr. 29-32.

Applicant did not graduate from high school, but was awarded a GED (date uncertain). He was awarded an Associate of Applied Science in Architecture and Construction Technology (Architecture) Degree in May 1999. GE 1, AE D, Tr. 27-29. Applicant married in September 2002. He has three stepdaughters, ages 28, 25, 23, and an eight-year-old daughter born during his marriage. GE 1, Tr. 23-27.

Alcohol Consumption

Applicant has a history of episodic alcohol abuse, marked by five alcohol-related arrests spanning a 21-year period from May 1985 to September 2006. His arrests are summarized below:

1. May 1985 – Applicant was arrested and charged with Driving Under the Influence (DUI). He recalls being stopped by the police and told that he was following too close with his bright lights on. When stopped, he admitted that he had been drinking. He passed the sobriety test, but failed the breathalyzer. He does not recall his blood alcohol content (BAC). He spent the night in jail and was released on his own recognizance. When he appeared for his court appearance, he was convicted of Driving While Ability Impaired, fined \$300, ordered to perform 48 hours of community service, and sentenced to 30 days in jail, suspended. Tr. 34-35, GE 2, GE 3. (SOR ¶ 1.a.)

2. October 1988 – Applicant was arrested and charged with DUI. He was drinking at a local pub and was stopped by the police on the way home for speeding and for failure to stop at a stop signal. He was later cited for driving with no insurance. He failed the sobriety test. When he appeared for his court appearance, he was ordered to spend six months in jail, but was released after four months for good behavior. When queried about the length of his jail sentence, Applicant responded:

Q. Were you – did you receive that heavy of a jail sentence because it was a second offense?

A. I believe that in that instance, I was belligerent with the judge during sentencing.

Q. Oh, okay. How were you belligerent with the judge?

A. He asked me what I thought about this, and I frankly told him it's a crock of (expletive deleted). And, he said, "Okay, you can spend six months and think about that." Tr. 35-37, GE 2. (SOR ¶ 1.b.)

3. December 1992 – Applicant was arrested and charged with larceny for taking beer from a liquor store. Applicant does not recall many details about this incident. He knew the owner of the liquor store, and claims he told the liquor store clerk he had a 12 pack of beer and would pay him the next day. The police were subsequently involved and Applicant spent the night in jail. To the best of Applicant's knowledge, the charge was dropped after he paid the owner for the beer. Tr. 37-40. (SOR ¶ 1.c.)

4. May 1995 – Applicant was arrested and charged with DUI. He was drinking at a local pub and was stopped by the police for speeding when following a band member home at a high rate of speed. He failed the sobriety test. When he appeared for his court hearing, he was ordered to spend 30 days in an alcohol treatment facility. When queried about the arrest, Applicant responded:

A. And, I remember this well because the police officer asked me to get out of the truck. And I told him, "No, I really don't think you want me to." And he said, "Yeah, we need you to step out of the truck." And, I opened the door and basically poured out on the pavement.

And he gave me roadside sobriety tests, and I failed miserably. I could hardly stand up at the time, if I remember correctly. Seemed like he invited every police officer on duty that night to come over and re-do the roadside sobriety tests in front of them so they could all get a good laugh.

Ended up going to court over this, and I asked the judge at that time, I asked him, "Can I do some, some, in-house therapy instead of going to jail?" Because now I think I'm having an alcohol problem with this, you

know, seeing I had priors, and so the judge agreed to that. And, I did 30 days inpatient treatment.

Applicant remained sober “eight months, eight, nine months” after completing this treatment program. He resumed drinking because he thought he “could handle it.” He “ended up in detox shortly after that, probably 10, 12 months, I don’t remember how long. It could have been a year or two after that. And I remember I walked out of detox in the morning, and went to the nearest pub I could find, and it was closed.” He continued to drink after this incident, “but not to the same extent.” Tr. 40-44, GE 2. (SOR ¶ 1.d.)

5. September 2006 – Applicant was charged with DUI, and convicted of Driving While Ability Impaired. He stated he began drinking following a disagreement with his wife about her “nagging” him to speak to his ill mother-in-law, who lived with them in their basement. He went for a drive to “chill out” and decided to get a package of cigarettes. At the location where he purchased the cigarettes, he hit someone when pulling out of the driveway and “that really pissed [him] off.” He decided to leave the scene of the accident and go home. He started drinking rum and decided to go back to the accident scene. After visiting the accident scene, he returned home and continued to drink rum. The police showed up at his door, and initially he denied being involved in the accident.

When Applicant was sentenced in April 2007, he was ordered to complete Level II alcohol education and 86 hours of therapy at a state-certified agency no later than August 2008. He was further ordered to complete 24 hours of useful public service, refrain from consuming alcoholic beverages for the period of probation/treatment, pay a \$200 supervision fee and court costs of \$410, serve 150 days home detention with a report date in April 2007, and 30 days in jail (suspended). Additionally, following this incident, his state licensing agency revoked his driving privileges for two years because he had been convicted of a third alcohol-related offense. His driver’s license was reinstated in May 2008. Tr. 44-49, GE 2.

The following is a colloquy between Department Counsel and the Applicant regarding Applicant’s current alcohol consumption:

Q. Now, according to your answer, at the time you filed your answer, you had, you had resumed drinking again, is that correct?

A. Yes. I mean, I stopped drinking once in a while. I can’t say that I totally stopped. You know, my drinking, you know, in my opinion it pretty much stopped. I mean, I only drink maybe three times a year, you know. I mean, since this last incident, I think I’ve drank four times. And, prior to that, it was far and few between.

Q. Well, do you recall telling the OPM investigator back in January, 2008 that your intention was not to drink at all again?

A. Yes.

Q. And, so you've changed your mind since then?

A. No, my intention is still the same.

Q. Your intention is not to drink at all?

A. Yes.

Q. But you do drink?

A. Occasionally. I mean, I don't – when I made that statement, "I don't intend to drink again," I don't intend to ever let myself get out of control, you know, not to totally get blasted there, you know. I mean, I do believe a person can responsibly drink one or two and be considered actually not drinking.

Q. Do you consider yourself an alcoholic?

A. No, I don't. In the past, yes. Not today. Tr. 49-50.

At his hearing, Applicant stated the last time he had a drink was "[t]wo, three months ago." Tr. 51. He also stated that he went to two AA meetings in the week before his hearing. Tr. 52. He added, ". . . I find it offensive, you know, that, that I'm here trying to defend myself." Tr. 53.

Character Evidence

Six character witnesses made statements on Applicant's behalf to include family members and extended family members. Those who testified stated that during the limited times they observed Applicant, he drank responsibly or not at all. His wife did not testify at his hearing. She did submit a character letter, discussed *infra*.

Applicant submitted his most recent security clearance application worksheet listing his September 2006 DUI charge, and stated that he revealed past DUI arrests on previous security clearance applications to show that he has a history of being forthright. Tr. 77-78, AE A, AE B. He submitted a copy of the DSM IV to show he does "not fall under the dependent or abusive categories." Tr. 78-79, AE C. Applicant submitted a copy of his Associate of Applied Science Degree from a community college, discussed *supra*, as well as a Phi Theta Kappa Society certificate for scholastic achievement awarded in November 1996. AE D, AE E. He submitted employee time sheets from February 2006 to August 2009 reflecting steady employment and regular attendance. Tr. 80, AE F, AE G. He submitted a letter dated April 27, 2009 from the Director of the Level II Driving With Care Program reflecting enrollment in the program

on February 2, 2007 and completion of the program on April 8, 2008, discussed *supra*. AE H.

Applicant submitted overtime authorization forms reflecting that he worked overtime at various times in 2006 and 2007. AE I. He submitted five work-related character reference letters. These letters collectively made positive reference to Applicant's work ethic and trustworthiness. AE J. Applicant's wife also submitted a letter stating she was unable to attend the hearing because she had to provide childcare for their youngest child and her two young grandchildren. She stated in her opinion as a college graduate majoring in psychology and after reviewing the DSM-IV, her husband "does not have substance abuse dependency or compulsivity concerning alcohol." She also added that in the 13 years she has been with her husband, she has never observed him to be "belligerent, violent, confused or had a cognitive inability to understand." AE K.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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. The administrative judge's over-arching 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, 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 as to obtaining 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 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 G (Alcohol Consumption)

AG ¶ 21 articulates the Government’s concern concerning alcohol consumption, “[e]xcessive 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.”

There are seven alcohol consumption disqualifying conditions listed under AG ¶¶ 22(a) through 22(g):

- (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.

After reviewing the alcohol consumption disqualifying conditions *supra*, AG ¶ 22(a), is applicable. Applicant's five alcohol-related arrests from 1985 to 2006, spanning a 21-year are not in dispute and clearly warrant application of this disqualifying condition. The government produced substantial evidence supporting this disqualifying condition, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.¹

There are four alcohol consumption mitigating conditions listed under AG ¶¶ 23(a) through 23(d):

(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.

¹See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

AG ¶ 20(a) does not define the sufficiency of the passage of time, and there is no “bright-line” definition of what constitutes “recent” conduct. Based on my evaluation of the record evidence as a whole,² to include Applicant’s 21-year history of five alcohol-related incidents with the 2006 arrest finally being resolved as recently as 2008 when his driver’s license was reinstated, I am unable to apply AG ¶ 20(a).

AG ¶ 20(b) does not fully apply because Applicant does not fully acknowledge his issues of alcohol abuse. He has returned to drinking after completing the Level II Driving with Care Program.

Furthermore, Applicant did not provide sufficient corroborating evidence suggesting he has overcome his problem. The evidence from his witnesses and his testimony that he exercises responsible alcohol use is of limited value absent evidence from qualified medical authority. The fallout from past misuse of alcohol should be evident to him. His history of alcohol-related incidents, current behavior of continuing to drink, and lack of evidence demonstrating that he has overcome his past misuse of alcohol, leaves me with doubts that his alcohol consumption problems are “unlikely to recur.” AG ¶¶ 23(c) and (d) are clearly inapplicable.

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant told an OPM investigator in January 2008 that it was his intention not to drink alcohol again. Yet, at his hearing he stated that he last consumed alcohol “two, three months ago.” He submitted statements of positive work-related references, and personal references supporting the notion that he engages in responsible alcohol use.

²See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT J. TUIDER
Administrative Judge