



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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ISCR Case No. 08-10736

Applicant for Security Clearance

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro se*

February 8, 2011

Decision

WHITE, David M., Administrative Judge:

Applicant committed three separate alcohol-related driving offenses in August 2006, October 2007, and November 2007. He has consumed alcohol, at times to excess and the point of intoxication, since about 1980. He resumed drinking after completing court-ordered alcohol treatment in October 2008, despite meeting the criteria for dependence. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application on April 2, 2008.¹ On April 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline G (Alcohol Consumption).² The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of

¹Item 5.

²Item 1.

Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 20, 2010, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on July 7, 2010. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on July 25, 2010, and returned it to DOHA. He provided no further response to the FORM within the 30-day period, did not request additional time to respond, and expressed no objection to my consideration of the evidence submitted by Department Counsel. I received the case assignment on October 12, 2010.

Findings of Fact

Applicant is a 51-year-old employee of a defense contractor. He has never held a security clearance. He is twice divorced, with two adult children. He has worked for his current employer since January 2006 as a program manager. Prior to that, he worked for 11 years as a consultant in the software and computer information systems field, in which he holds a bachelor of science degree.⁵ In his response to the SOR, he admitted each allegation.⁶ Applicant's admissions, including his responses to DOHA interrogatories and his affidavit to the Office of Personnel Management (OPM),⁷ are incorporated in the following findings.

Applicant began drinking alcohol in approximately 1980, and admittedly continued to do so, at times to excess and to the point of intoxication, until at least June 4, 2010, when he answered the SOR. He said that he had not drunk to the point of intoxication since May 2008, when he entered a court-ordered outpatient treatment program after his third arrest for operating a vehicle while impaired/under the influence of alcohol (OVI) in 16 months.⁸

³Item 4.

⁴The Government submitted 14 Items in support of the SOR allegations.

⁵Item 5.

⁶Item 4.

⁷Items 7 and 8.

⁸Items 4 and 6.

During August 2006, Applicant left a bar at around 1:00 am on a weekend night, after drinking numerous beers and shots of vodka over the preceding eight hours. He realized that he was impaired, but thought he was sober enough to drive. On the way home, he lost control while rounding a curve and his car flipped over into a ditch. He admitted that he had been drinking to the state trooper who responded to the accident scene, and failed a field sobriety test. He took a breathalyzer test that revealed his blood-alcohol concentration (BAC) was 0.25. After initially pleading not guilty on August 14, 2006, he pled guilty to OVI on January 3, 2007, and was sentenced to 180 days in jail (177 days suspended), a fine and costs totaling \$596, suspension of his driver's license for a year, and three years of probation. He was also ordered to complete a three-day alcohol intervention program, which he successfully finished on February 18, 2007. His counselor found no evidence of alcohol dependence, and recommended no further treatment. The court accepted his probation officer's recommendation, and released him from probation on July 20, 2007.⁹

During October 2007, Applicant again left a bar after drinking beer for about six hours. He decided to drive home using back roads, and became lost. He eventually stopped and got out of his car to determine where he was. A passing state trooper stopped to assist him, and detected the odor of alcohol. Applicant admitted that he had been drinking but, after failing a field sobriety test, refused to participate in a breathalyzer test. He stated that this refusal was based on advice from the attorney who assisted him in dealing with his prior OVI conviction. He was arrested, and subsequently found guilty of having physical control of a vehicle while under the influence. He was sentenced in March 2008 to pay a fine and to serve 180 days in jail (177 days suspended) and two years of reporting probation. He was further ordered to cease alcohol consumption, obtain an alcohol evaluation, and comply with any recommended treatment program.¹⁰

On November 21, 2007, shortly after midnight, Applicant left a bar at which he had been drinking during the preceding six hours. He said that he only had three or four beers during that period, and stopped drinking beer several hours before he left to ensure that he was sober enough to drive home. He was pulled over by a state trooper shortly thereafter. When the trooper told him that he failed the field sobriety test, he again refused to submit to a breathalyzer and was arrested. On June 19, 2008, he pled guilty to OVI -Refusal (of the breath test), and was sentenced to 180 days confinement (170 days suspended), fined \$425, three years of unsupervised probation, and an 18-month suspension of his driver's license. He was also ordered to undergo alcohol treatment. On February 6, 2009, the court found that the conditions of his probation had been met, and ordered that he be released from probation effective that date. On August 19, 2008, the court that sentenced Applicant for his October 2007 offense sentenced him to serve the suspended 177 days in jail, but suspended 174 days and gave him credit for the other three served in jail for the November 2007 offense. It

⁹Items 4, 6, 7, 8, and 9.

¹⁰Items 4, 6, 7, 10, and 14.

also ordered him to complete the alcohol counseling program he had begun on May 30, 2008, after which he would be eligible to convert to non-reporting probation.¹¹

Applicant successfully completed his outpatient alcohol counseling and treatment program on October 1, 2008. His counselor, a licensed social worker, provided a discharge summary in which he said that Applicant met the criteria for an alcohol dependence diagnosis, but appeared to be highly functioning and able to carry out normal responsibilities. He further stated, “Although total abstinence is always the preferred course when a substance dependence diagnosis is made, [Applicant] believes he will be able to control his drinking in the future. Therefore, the focus of his recovery plan was on learning to set appropriate limits for his drinking and staying within those limits.”¹² Applicant resumed drinking after completing treatment, although not to the point of intoxication, and intends to continue to consume alcohol on a social basis.¹³

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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 (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the national security.” In reaching this

¹¹Items 4, 6, 7, 10, 11, 13.

¹²Item 12.

¹³Items 4 and 7.

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, “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern 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 DCs supported by the SOR allegations and asserted by Department Counsel are:

(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.

There is also substantial evidence that would support application of two additional DCs under 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; and

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol treatment program.

However, only the first two DCs will be considered here because the FORM did not provide notice of the potential application of these latter provisions.¹⁴ Applicant's three arrests and convictions for OVI and having physical control of a vehicle while under the influence support security concerns under AG ¶ 22(a). Those incidents, together with his admission that he has consumed alcohol, at times to excess and to the point of intoxication since about 1980, support application of AG ¶ 22(c). Accordingly, the burden is shifted to Applicant to mitigate the resulting security concerns.

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns:

(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.

¹⁴To the contrary, Department Counsel expressed in a footnote that the record evidence was not sufficient to establish that Applicant had been diagnosed as alcohol dependent. (FORM at 5.)

Applicant was involved in three alcohol-related driving offenses during a 16-month period, the most recent of which was about three years ago. None of these occurred under unusual circumstances. His choice to resume alcohol consumption, after completing a court-ordered treatment program during which he was found to meet the criteria for alcohol dependence, precludes a finding that such incidents are unlikely to recur. Accordingly, AG ¶ 23(a) does not provide mitigation.

Applicant asserts that he has not consumed alcohol to the point of intoxication since May 2008, but his track record of self-evaluating his level of sobriety is questionable given his three alcohol-related driving arrests. The record evidence suggests that he meets the criteria for alcohol dependence, which he has neither acknowledged nor established a pattern of abstinence. Insufficient time has passed to establish mitigation under AG ¶ 23(b), given the duration and nature of his history of alcohol abuse. Similarly, there is not sufficient evidence to support mitigation under AG ¶¶ 23(c) and (d). Applicant resumed drinking after his most recent alcohol treatment program, and failed to submit documentation of participation in counseling or treatment since then. He provided no current favorable prognosis by a duly qualified medical professional or social worker.

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 relevant 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 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 pertinent facts and circumstances surrounding this case. Applicant is a well-educated, mature, accountable adult who voluntarily chose to engage in the conduct of concern. This conduct has spanned the past thirty years, and continues to date. He committed three alcohol-related driving offenses in 2006 and 2007, and resumed drinking after his 2008 court-ordered alcohol treatment program. The likelihood of continuation or recurrence of irresponsible conduct and the ongoing potential for exploitation or duress

have not been refuted. He did not demonstrate rehabilitation or other permanent behavioral changes.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his alcohol consumption.

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 G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	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.

DAVID M. WHITE
Administrative Judge