



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



In the matter of:)	
)	
)	ISCR Case No. 09-01265
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: Pro Se

January 14, 2010

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on October 8, 2008. On July 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Misconduct and, 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.

On August 7, 2009, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 24, 2009. The case was assigned to me on September 28, 2009. On October 15, 2009, a Notice of Hearing was issued scheduling the hearing for November 3, 2009. The hearing was held as scheduled. The government offered eight exhibits which were admitted as Government Exhibits (Gov) 1 - 8 without objection. Applicant testified, and offered no exhibits. The transcript was received on November 10, 2009. Based upon a

review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Issue

During the hearing, Department Counsel moved to amend the SOR pursuant to ¶ E3.1.17 of the Directive in order to conform with the evidence. Applicant had no objection. The SOR was amended to read as follows:

1.e. You were arrested on or about September 30, 2009, in the District of Columbia and charged with Driving Under the Influence. Your case remains pending as of November 3, 2009.

2.a. Between 1996 and 2006, you were arrested for four alcohol-related charges as set forth in subparagraphs 1.a – 1.e above.

The beginning phrase of SOR ¶ 2.b was changed from “During the fall of the 2007..” to “Some time prior to May 2001...”

Findings of Fact

In his Answer to the SOR, Applicant admits all of the SOR allegations.

Applicant is a 37-year-old financial analyst with a Department of Defense contractor who seeks a security clearance. He has been employed with his company since September 2008. From June 1992 to May 2001, Applicant served on active duty in the United States Army. He received a medical discharge. He separated as an E-5 with an honorable discharge. He previously held a security clearance during his active duty service. He has a bachelor’s degree in business administration and currently takes graduate school classes. He is single and has no children. He pays approximately \$300 a month towards his niece’s private school tuition. (Tr at 5-8, 30-32; Gov 1; Gov 3)

The SOR alleges and Applicant admits that he was arrested and charged with offenses related to driving while intoxicated on four occasions between 1996 and 2005.

In 1996, Applicant was arrested and charged with Driving Under the Influence of Alcohol. He was found guilty, fined \$700, and placed on one year probation. (Tr at 33; Gov 2 at 11; Gov 4; Gov 7 at 2)

On July 24, 1999, Applicant was arrested and charged with Driving Under the Influence of Alcohol, Refusal, Operating After Suspension, Failure to Maintain Control, and Open Container of Alcohol within a Motor Vehicle. After a night of socializing at the club with friends, he was stopped by the military police because of his erratic driving on base. He failed a series of field sobriety tests. He appeared before the U.S. Magistrate and was found guilty of all the charges with the exception of Operating After Suspension. On April 4, 2000, he was sentenced to three years supervised probation

with special conditions. He was ordered to enter and complete ASAP (alcohol awareness counseling), submit to substance abuse testing and treatment, and his license was restricted. (Tr at 37-39; Gov 2 at 11; Gov 5; Gov 8 at 8- 13) On April, 2001, Appellant's probation was revoked as a result of the February 18, 2001 Driving While Intoxicated and Operating After Suspension arrest described in the below paragraph. He served 45 days in jail, his probation was extended one year, and his license was suspended for one year. (Gov 8 at 12-13)

On February 18, 2001, Applicant was arrested and charged with Driving While Intoxicated, Second Offense, and Operating After Suspension. The military police were conducting 100% identification checks at the base gate. They detected a strong odor of alcohol on Applicant's breath when he drove up to the base gate. He was given field sobriety tests. He performed poorly on the tests. Applicant's blood alcohol content test registered 0.17%. On May 15, 2001, he appeared before the U.S. Magistrate, pled and was found guilty of the offenses. On June 12, 2001, he was sentenced to 90 days in jail, one year supervised probation and his driving privileges were suspended for one year. He was given three years probation for the Operation After Suspension charge. He was also sentenced to serve 30 days in jail and ordered to complete an ASAP program. (Tr at 40-42; Gov 2 at 11-12; Gov 6; Gov 7 at 3; Gov 8 at 5-7)

On November 12, 2005, Applicant was arrested and charged with DWI, 3rd Offense, a felony and Refusal to provide a Blood/Breath Test. On September 22, 2006, he pled guilty to DWI, 3rd Offense, a felony. He was sentenced to five years in the penitentiary, with four years, nine months suspended, his driver's license was suspended for 91 years, he was ordered to pay \$1,505 in fines and court costs and placed on five years supervised probation. The Refusal to provide a Blood/Breath test charge was nolle prossed. (Tr at 43-47; Gov 2 at 12; Gov 7 at 4; Gov 8 at 1-4)

Applicant is on probation until July 2011. He is required to check in with his probation officer once a week and is tested for drugs and alcohol on a weekly basis. He claims he has no restrictions on his driver's license even though the court records indicate his driver's license was suspended for 91 years. He is required to abstain from alcohol as part of the terms of his probation. (Tr at 45-47; Gov 2 at 12)

During an October 31, 2008, interview conducted pursuant to his background investigation, Applicant admitted that his use of alcohol has had an impact on his ability to find a job and his relationships with his friends and family members. He began drinking at age 19. He drank on weekends. He occasionally drank alone. He would drink approximately a fifth of whiskey over the weekend. (Gov 2 at 12)

In the late 1990s, Applicant attended a 30-day outpatient alcohol treatment program at a military treatment facility. He was diagnosed as alcohol dependent. He successfully completed the program and was advised to quit drinking alcohol. (Tr at 47-49; Gov 2 at 12-13)

In his answer to the SOR, Applicant admitted to all of the allegations and accepts responsibility for his past careless behavior. He suffers from a chronic illness that may become terminal. While on active duty in the Army, he was diagnosed with depression and was medically discharged. He believes he used alcohol as a means of self-medicating. He is doing his best to show that he is a socially responsible citizen. He believes that he will learn from his history of alcohol abuse. He has set and maintained a new standard of behavior that does not include alcohol or breaking any laws. He does not want depression or alcohol to control him anymore. He is now worthy of holding a security clearance. (Answer to SOR, dated August 7, 2009)

During the hearing, Applicant testified that he is fighting for his life and recently accepted he is an alcoholic and addict. He looks at alcoholism as a disease that can be treated. He attends Alcoholics Anonymous meetings on a regular basis and has a different social network in order to remain clean and sober. (Tr at 26-28)

On September 30, 2009, Applicant was arrested and charged with Driving While Under the Influence. He was stopped by the police for having no headlights on. The police officer smelled alcohol and administered a field sobriety test which Applicant failed. Applicant was taken to jail. When placed in the holding cell, he tried to hang himself with a sock. He woke up in the hospital. He initially claimed that he was not drinking on the night he was arrested. He later admitted that he drank a glass of wine earlier in the day. He admits he was aware that he was required to abstain from alcohol as part of his probation. His next court date was November 25, 2009. (Tr at 51-54, 68)

When questioned, Applicant admitted that he had drank alcohol to intoxication on at least six occasions after his DWI arrest in 2005. (Tr at 55)

On October 4, 2009, Applicant started to attend AA meetings. He did not embrace the concept of AA when he attended AA meetings before. He claims to have attended 60 AA meetings since October 4, 2009. He also attends outpatient treatment at the Veteran's Administration (VA) on a daily basis. The VA is providing treatment for his depression. He takes an anti-depressant and antabuse. He admits it is difficult for him to accept that he has a problem. (Tr at 57-58, 63-65)

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 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 the adjudicative process. 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.

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 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are several Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant’s case, CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). Between

1996 and 2005, Applicant was arrested and convicted for drunk driving offenses on four occasions. Drunk driving is a serious offense. He was charged with a felony offense in relation to his fourth arrest for DWI in March 2005. He had a fifth DWI arrest on September 30, 2009 - less than two months after responding to the SOR.

CC DC ¶ 31(d) (individual is currently on parole or probation) and CC DC ¶ 31(e) (violation of parole or probation, or failure to complete a court-ordered mandated rehabilitation program) apply. Applicant is serving probation until July 2011 for his fourth DWI conviction. Part of the condition of his probation is to abstain from alcohol. He admits that he drank alcohol on several occasions while on probation. He was arrested for his fifth DWI on September 30, 2009. While the charges were pending at the time of Applicant's hearing, his decision to drink alcohol and drive was a violation of his probation.

The government produced substantial evidence by way of exhibits and testimony to raise CC DC ¶¶ 31(a) and 31(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns (Directive ¶E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005).)

The following Criminal Conduct Mitigating Conditions (CC MC) are relevant to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) does not apply. Applicant was arrested for DWI for the fifth time on September 30, 2009. He continued to drink and drive even though he was required to abstain from alcohol as part of his probation and his license was suspended for 91 years. He is on probation until July 2011. He chose to drink and drive even though he was aware that his past alcohol issues raised concerns about his ability to hold a security clearance. While Applicant is struggling with his alcohol issues, not enough time has passed to conclude Applicant's past DWI offenses are no longer an issue.

CC MC ¶ 33(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) does not apply for the reasons mentioned above.

The Criminal Conduct concern is not mitigated.

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

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.

The guideline notes several disqualifying conditions that could raise security concerns. The following disqualifying conditions are relevant to Applicant's case:

Alcohol Consumption Disqualifying Condition (AC DC) ¶ 22(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) applies. Applicant has been arrested and charged with Driving While Under the Influence on five occasions. His most recent DWI arrest occurred about a month prior to his security clearance hearing while he was on probation for his fourth drunk driving offense.

AC DC ¶22(c) (habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the person is diagnosed as an alcohol abuser or alcohol dependent) applies. Applicant's history of DWI arrests indicates that Applicant drinks to the point of impaired judgment. When he attended treatment for alcohol abuse in the late 1990s while in the military, he was diagnosed as alcohol dependent. The credentials of the person providing the diagnosis are unknown. No treatment records are included in the record evidence.

AC DC ¶ 22(g) (failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence) applies. The terms of Applicant's current probation require him to abstain from alcohol. He drank alcohol on several occasions while on probation. He admits that he drank to intoxication on six occasions while on probation. His failure to follow the terms of his probation resulted in his most recent arrest for DWI on September 30, 2009.

The guideline also includes examples of conditions that could mitigate security concerns arising from alcohol consumption.

Alcohol Consumption Mitigating Condition (AC MC) ¶ 23(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 and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) does not apply. Applicant's history of alcohol abuse has resulted in five DWI arrests. He continued to drink and drive after his fourth DWI conviction. He could not refrain from using alcohol even though he was prohibited from drinking alcohol under the terms of his probation. Applicant claims he now attends AA meetings and has embraced the program. However, his past history of

repeated alcohol abuse casts doubt on his current reliability, trustworthiness, and good judgment.

AC MC ¶ 23(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) does not apply. While Applicant acknowledges his alcoholism, he has done so several times in the past but has been unable to maintain a period of abstinence. It is too soon to conclude Applicant has overcome his problems with alcohol.

Applicant did not mitigate the security concerns raised under alcohol consumption. Guideline G is found against Applicant.

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 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 the facts and circumstances surrounding this case. I considered Applicant's active duty service in the United States Army, his medical condition, and his employment history with the defense contractor. Applicant's history of DWI criminal offenses and his alcohol abuse raise serious issues about his ability to protect classified information. He was unable to maintain his sobriety while currently serving probation for his fourth DWI even though a condition of his probation was that he abstain from alcohol. His recent DWI arrest further reinforces that he has not been able to control his alcohol consumption. He continues to exercise bad judgment by drinking and driving. While Applicant claims that he now attends AA meetings on a daily basis, it is too soon to conclude that he demonstrated a track record of sobriety when considering his past history of alcohol abuse. While Applicant is commended for taking steps to get his alcoholism under

control, it is too soon to conclude that he mitigated the concerns raised under criminal conduct and alcohol consumption. Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct, are found against Applicant.

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 J: 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

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

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.

ERIN C. HOGAN
Administrative Judge