



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



In the matter of:)	
)	
)	ISCR Case No. 09-01454
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

November 30, 2009

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Adjudicative Guideline (AG) G, Alcohol Consumption. For reasons discussed in the body of this decision, I conclude that drafting flaws obscured the substance of the security concerns alleged under AG J, Criminal Conduct. Applicant’s eligibility for a security clearance is denied.

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on October 10, 2008. On June 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under AG G, Alcohol Involvement and AG 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 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 July 22, 2009, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. On August 26, 2009, the Government compiled its File of Relevant Material (FORM). The FORM contained documents identified as Items 1 through 8. By letter dated August 27, 2009, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the FORM on August 31, 2009. His response was due on September 30, 2009. He did not file additional information within the required time period. On November 3, 2009, the case was assigned to me for a decision.

Procedural Matters

SOR ¶ 2.a. alleges that disqualifying conduct alleged under Guideline G, Alcohol Involvement, as “set forth in subparagraphs 1.a-1.f. above” also constitutes disqualifying conduct under Guideline J, Criminal Conduct. The SOR lists five, and not six, allegations of disqualifying conduct under Guideline G. Accordingly, *sua sponte*, I amend the SOR allegation at ¶ 2.a. by deleting the reference to SOR subparagraph 1.f., which does not exist.

Findings of Fact

The SOR contains five allegations of disqualifying conduct under AG G, Alcohol Involvement (SOR ¶¶ 1.a. through 1.e.) and one allegation of disqualifying conduct under Guideline J, Criminal Conduct (SOR ¶ 2.a.). In his Answer to the SOR, Applicant admitted the five Guideline G allegations and did not respond to the Guideline J allegation. Applicant’s admissions of the five Guideline G allegations are admitted herein as findings of fact. (Item 1; Item 3.)

Applicant is 25 years old, never married, and employed as a business analyst by a federal contractor. In 2006, he received a Bachelor of Science degree in Financial Services. He has worked for his current employer since October 2008. He has not previously held a security clearance. (Item 4.)

Applicant began drinking alcohol when he was in high school. He attended college from August 2002 until his graduation in May 2006. In April 2003, while an underage college student, he was cited for A Minor in Possession of a Malt Beverage. He appeared in court with an attorney his parents hired to represent him. He was fined and sentenced to 24 hours of community service. (SOR ¶ 1.a.; Item 5 at 6.)

In June 2004, Applicant was still not old enough to legally purchase alcohol. However, he purchased a case of beer and, to complete the transaction, provided the clerk with a picture identification card that falsified his date of birth to show that he was of legal age to purchase alcohol. He was stopped by police, who impounded the case of beer, and cited him with Minor in Possession of Alcoholic (Malt) Beverage. He was sentenced to 32 hours of community service and paid a fine. After he completed the community service and paid the required fine, the charge was dismissed. (Item 5 at 7.)

The SOR alleged in ¶ 1.b. that Applicant was charged with Obtain Alcohol with False Driver's License. Although Applicant admitted he used a false driver's license to purchase alcohol in June 2004, the record establishes that the only citation issued to him at that time was Minor in Possession of Alcoholic (Malt) Beverage. (Item 5 at 6-8.)

Applicant graduated from college in May 2006. After graduation, he held a variety of jobs. From January 2007 until July 2008, he was employed as an accounting coordinator with a government contractor. In June 2007, he was arrested and charged with Driving While Intoxicated (DWI). He was found guilty of a reduced charge of Reckless Driving and sentenced to 30 days in jail (suspended). Additionally, he paid a fine of \$300, plus court costs, was directed to take an alcohol education program, and his driver's license was suspended for six months. (SOR ¶ 1.c.; Item 3; Item 5 at 2; Item 7; Item 8.)

In August 2008, Applicant was arrested and charged with (I) Driving Under the Influence of Alcohol and (II) Driving with a Blood Alcohol Content of 0.08% or Higher. Applicant pled No Contest to Count I and was fined \$1,912. Charge II was stricken. Applicant's driver's license was suspended from November 19, 2008 through January 9, 2009. He was placed on five years of summary probation, ordered to complete nine days of public service, attend a one-time Mothers Against Drunk Driving victim impact panel presentation, and complete a nine-month alcohol education program. In April 2009, his alcohol education counselor reported that he was attending the alcohol education program as required. (SOR ¶ 1.d.; Item 6 at 2, 5-15, 17; Item 8.)

Applicant drinks alcohol to lose his inhibitions and to improve his social contacts with others. He reports that when he drinks alcohol, he becomes happy and more sociable. He denies that his use of alcohol raises behavioral problems that would require him to stop alcohol use. In response to DOHA interrogatories, Applicant reported that he drank beer two to three times a month. On those occasions, he drinks three to eight 12-ounce cans of beer. He drinks to intoxication "once every month or two." He intends to continue to drink alcoholic beverages. (SOR ¶ 1.e.; Item 5 at 5; Item 6 at 1-2.)

Applicant's two alcohol-related arrests were reported in October 2008 by the Criminal Justice Information Services Division of the Federal Bureau of Investigation (FBI). (Item 8.)

Applicant did not respond to the Criminal Conduct allegation of the SOR. No reason is given in the record for his lack of response.

As noted under Procedural Matters, *supra.*, SOR allegation 2.a referenced one allegation (SOR ¶ 1.f.) that did not exist as a SOR allegation under Guideline G. Additionally, allegation 2.a. alleged that all Guideline G allegations constituted criminal conduct under Guideline J. As previously noted in this decision, there was insufficient record evidence to establish that Applicant was charged with Obtain Alcohol With False Driver's License, as alleged in SOR ¶ 1.b. Moreover, in allegation 2.a., the Government

alleged under Guideline J that Applicant's use of alcohol and his enrollment in an alcohol education program, as alleged in SOR ¶ 1.e., constituted criminal conduct.

Section 3(1) of Enclosure 1 of the Directive requires that an Applicant be provided "[a] written statement of reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits."

Section E3.1.3. of Enclosure 3 of the Directive states, in pertinent part: "An unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as the national security permits."

Section E3.1.4. of Enclosure 3 of the Directive states, in pertinent part: "The applicant must submit a detailed written answer to the SOR under oath or affirmation that shall admit or deny each listed allegation. A general denial or other similar answer is insufficient."

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an 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, the administrative judge applies these guidelines 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. 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

Guideline G, Alcohol Consumption, applies in this case to a determination of eligibility for access to classified information. Under Guideline G, “[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.”

I have considered all of the Alcohol Consumption Disqualifying Conditions. I have especially considered AG ¶¶ 22(a) and 22(c). AG ¶ 22(a) reads: “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.” AG ¶ 22(c) reads: “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.”

In 2003 and 2004, Applicant was cited for possession of alcohol as a minor. In 2007 and 2008, he was arrested for alcohol-related driving offenses. His most recent alcohol-related driving offense occurred fifteen months ago, in August 2008. He is a habitual consumer of alcohol. He drinks to intoxication “once every month or two.” Nothing in the record suggests he has been diagnosed as an abuser of alcohol or as alcohol dependent. However, despite two arrests for driving under the influence of alcohol, he continues to drink alcohol and intends to drink alcohol in the future. He has participated in alcohol awareness education, and he is presumably aware of the serious consequences to himself and to others of driving under the influence of alcohol. These facts raise security concerns under AG ¶¶ 22(a) and 22(c).

The Guideline G disqualifying conduct could be mitigated under AG ¶ 23(a) if “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.” The disqualifying conduct could also be mitigated under AG ¶ 23(b) if “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).” If “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,” then AG ¶ 23(c) might apply. Finally, mitigation might be possible under AG ¶ 23 (d) if “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.”

Applicant is now 25 years old. He admitted alcohol-related conduct in high school, in college, and as a post-college professional. His most recent arrest for driving under the influence of alcohol occurred in August 2008 and is therefore recent. He has participated in alcohol awareness education. He has not been diagnosed as alcohol dependent or as an alcohol abuser. He continues to drink alcohol to intoxication, and he intends to drink alcohol in the future. Accordingly, I conclude that none of the Guideline G mitigating conditions fully applies to the facts of Applicant’s case.

Guideline J, Criminal Conduct

Under the Criminal Conduct guideline “[c]riminal 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.” AG ¶ 30.

Section 3(1) of Enclosure 1 of the Directive requires that the Government provide an applicant with a written SOR which is “as comprehensive and detailed as the national security permits.” Additionally, Section E 3.1.4. of Enclosure 3 requires an applicant to “submit a detailed written answer to the SOR under oath or affirmation that shall admit or deny each listed allegation.”

In the SOR, the Government alleged that all of the Guideline G allegations also constituted criminal conduct under Guideline J. While Applicant answered the Guideline G allegations in the SOR, he did not answer the Guideline J allegation, and no reason was provided for his failure to do so. However, the Government’s Guideline J allegation was poorly framed, inaccurate, and misleading, three reasons why an applicant untrained in legal proceedings and pleadings might find it confusing, intimidating, and difficult or impossible to answer.

Section E3.1.3. of Enclosure 3 of the Directive states that “an unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as the national security permits.”

The SOR in this case provided Applicant with detailed and comprehensive information supporting the Guideline G allegations, and Applicant provided written answers to all Guideline G allegations. However, the Government failed to provide Applicant with coherent and detailed information sufficient to establish an allegation of criminal conduct under Guideline J. Accordingly, I conclude the Guideline J allegation in this case for Applicant.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of an 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 the facts and circumstances surrounding this case. Applicant is a young adult who is well educated and skilled. His employer has entrusted him with fiduciary and analytic responsibilities.

At the same time, Applicant has been arrested twice for driving a vehicle while under the influence of alcohol. After his first arrest in 2007, he was ordered to take a course in alcohol education. Even after being made aware of the dangers of drinking and driving, he was again arrested for driving under the influence in 2008. He continues to drink alcohol and drinks to intoxication once every one or two months. Applicant's conduct raises questions about his current trustworthiness and reliability.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed 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 section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	For Applicant
Subparagraphs 1.c. through 1.e:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	For 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.

Joan Caton Anthony
Administrative Judge