



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



In the matter of:)
)
) ISCR Case No. 09-02566
)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

August 10, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the security concerns under Guideline J, Criminal Conduct, but failed to mitigate the Government's security concerns under Guideline G, Alcohol Consumption. Applicant's eligibility for a security clearance is denied.

On October 1, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G and J. 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 14, 2009, and requested a hearing before an administrative judge. The case was assigned to me on February 1, 2010. Applicant was working out of the country and the case could not be scheduled until he returned in July 2010. DOHA issued a Notice of Hearing on June 22, 2010. I

convened the hearing as scheduled on July 15, 2010. The Government offered Exhibits (GE) 1 through 5. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through G, which were admitted without objection. DOHA received the hearing transcript (Tr.) on July 21, 2010.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶1.a through 1.g; 2.a through 2.d, and 2.f through 2.i. He denied SOR ¶¶ 2.e and 2.j. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 42 years old. He was married to his first wife from 1988 to 1998. He has a daughter from that marriage who is 17 years old. He remarried in 2003 and was divorced in 2005. He has no children from this marriage. He has a second daughter from a previous relationship, who is five years old. He and his girlfriend lived together from 2005 to 2007. He provides child support for both daughters. He has worked for his current employer, a federal contractor, since September 2009. Applicant served in the Navy for 20 years, retired, and was honorably discharged as an E-5. He held Secret and Top Secret security clearances in the past. He deployed as a contractor in January 2010 and returned in May 2010.¹

Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately 1988 to December 2008. In July 1999, he was charged with assault with a deadly weapon, a felony. He had been drinking alcohol at a farewell party held for him. There was an altercation. The next day the police went to his house, but he was not home. He contacted the police and told them the assault was in self-defense. He was told by the police not to worry about the charge. Unbeknownst to him, the charges were not dismissed and he learned of them when he was stopped by police five years later and there was an outstanding warrant. His commanding officer contacted the district attorney and vouched for Applicant's good character and the charges were dismissed.²

Applicant increased his consumption of alcohol in about March 1998. In November 2000, he was arrested for malicious mischief, a felony, and harassment. He and friends had rented a hotel room and damaged it. He was drinking alcohol. He paid restitution to the hotel and the charges were dismissed.³

In August 2001, Applicant was charged with disorderly conduct. He and his neighbor had a verbal altercation. The neighbor called the police. Applicant could not

¹ Tr. 30, 38-43.

² Tr. 45-53.

³ Tr. 54-55.

recall if he had been drinking alcohol. He was charged with disorderly conduct for using vulgar language.⁴

In March 2006, Applicant was charged with assault, second degree, and reckless endangerment. He and his girlfriend had an argument at a bar where they were drinking alcohol. They returned to their home and the argument continued. He explained "there was some pushing and shoving on both parts."⁵ There was an altercation and his girlfriend called the police. She left the house. He was arrested a couple of days later and released on his own recognizance. He went to court and was advised if he remained out of trouble the charges would be dismissed. The charges were nolle prosequi.⁶

Applicant and his girlfriend were issued verbal Military Protection Orders (MPO) in approximately October 2006.⁷ He could not recall the specific reason why at that time he received the MPO, but believed they had been arguing and there was maybe some pushing. He explained it was nothing harmful and no bruising, but his girlfriend went to the command to report him. The MPO required him to stay away from his girlfriend. In November and December 2006, he violated the MPO three times.⁸

In November 2006, Applicant voluntarily talked to substance abuse rehabilitation personnel and was screened for alcohol dependence. It was recommended he attend an inpatient treatment program. He volunteered to go because he thought it would help his relationship with his girlfriend.⁹

A civilian petition for protection was filed against Applicant on about December 4, 2006, in state court, and a temporary protective order from abuse was granted. The petition was dismissed about December 11, 2006.

Applicant attended inpatient treatment from December 2006 to January 2007. He was diagnosed by a medical doctor as alcohol dependent and with a substance-induced mood disorder. He was encouraged to maintain total abstinence from alcohol consumption, go to Alcoholics Anonymous (AA) for 90 meetings in 90 days, obtain a sponsor, and associate closely with a 12-step recovery group.¹⁰ He had been attending anger management counseling and was advised by his counselor to abstain from

⁴ Tr. 55-57.

⁵ Tr. 59.

⁶ Tr. 57-65.

⁷ Applicant's girlfriend was also on active duty.

⁸ Tr. 84-95.

⁹ Tr. 121-123.

¹⁰ GE 3.

alcohol use. The discharge summary noted Applicant was at risk of relapse. He refused aftercare through the military. He obtained a temporary sponsor, but stated the sponsor was not good. He never obtained a permanent sponsor. He also found an AA home group. Applicant attended AA from the date of his discharge on January 8, 2007, until February 20, 2007. Applicant abstained from alcohol consumption until February 20, 2007.¹¹

In February 2007, Applicant was charged with assault, second degree, reckless endangerment, and alcohol beverage/intoxication. He and his girlfriend had a fight. She grabbed his genitals and caused pain. He admitted he had been drinking alcohol at the time. She left the house. He went to the police station to file charges against her. She retaliated by filing charges against him. The charges were nolle prosequi.¹²

A petition for protection was filed against Applicant in state court in February 2007. The order was granted and remained in effect until November 2007. Applicant was not to have contact with his girlfriend.¹³

Based on Applicant's actions, his command referred charges to be adjudicated at nonjudicial punishment (NJP). Applicant refused to accept NJP, and the charges for violating his commanding officer's MPO and disrespect to a chief petty officer, were referred to a Special Court-Martial in April 2007. He was placed in pretrial confinement because the MPO did not work. He pled guilty to the charges and was sentenced to serve 60 days in confinement, and he was reduced in rank from E-6 to E-5. He did not resume attending AA after he was released from confinement.¹⁴

In October 2007, Applicant had an altercation with a person in his garage. Applicant had been drinking alcohol and grabbed and pushed the person. They were discussing Applicant's girlfriend. He was later summoned by the police. He did not believe he was arrested, but he had been charged. Two weeks after the incident the person asked to borrow \$2,000 from Applicant. He was aware the person had filed charges against him. Applicant lent his accuser the money and was never paid back. Applicant stated it was a loan. He stated that this person did not follow through on pursuing the charges against him and he failed to show for the court proceedings. He stated he did not give the person the money so he would drop the charges.¹⁵

In April 2008, Applicant was charged with public intoxication. He had been drinking alcohol at two bars and was stopped by the police. He paid a fine and court

¹¹ Tr. 33, 121-135.

¹² Tr.33, 66-84, 95-100.

¹³ Tr. 108.

¹⁴ Tr. 32-33, 100-108.

¹⁵ Tr. 109-116.

costs. He admitted he had about four to five drinks at one bar and about one to two at another.¹⁶

Applicant continued to consume alcohol on a weekly basis, from April 2007 to December 2008. He retired from the military in April 2008. He stated that he reduced the amount he drank. He stated he has not consumed alcohol since November 2009, when he learned he was going to deploy overseas. Alcohol was not available where he was located overseas and it was against his employer's rules to drink alcohol while deployed. He stated he has not had any alcohol since he returned from his assignment in May 2010.¹⁷

Applicant is attempting to change his life and does not plan on consuming alcohol in the future. He admitted he made some bad decisions in his life and they have all been alcohol-related. He plans on taking care of his daughters. He is not proud of his past. He did not believe he was alcohol dependent until he went overseas with his job. He is not attending AA.¹⁸

Applicant and his girlfriend are no longer together. She is now married to another person. He asked her to write a statement for him in support of his security clearance application. She described him as a loving and caring father. She admitted to her involvement in the February 2007 incident and she was required to perform community service. She noted that Applicant is a good man who made some bad decisions and he deserves a second chance. Applicant admitted she is concerned about him losing his job and being able to continue to pay child support.¹⁹

In January 2010, as part of Applicant's pre-deployment screening, he saw a psychiatrist one time for around "30 minutes or more."²⁰ He was also required to complete paperwork on his medical background. Applicant was asked a few questions. He stated "I think there was stuff about the alcohol treatment."²¹ He believed the only information the doctor had about his alcohol issues was that which was contained in his military records. He believed the doctor was aware that he went to treatment, but the records were not available to him. He was not asked about his drinking habits.²² The psychiatrist stated:

¹⁶ Tr. 116-119.

¹⁷ Tr.135-147.

¹⁸ Tr. 147-149, 158-161.

¹⁹ Tr. 150-152; AE A.

²⁰ Tr. 155.

²¹ *Id.*

²² Tr. 152-157.

It is in my professional opinion that this patient does not suffer from any psychiatric illness and does not suffer from any emotional illness. This patient does not need to be on any medications at all. After a full evaluation, it is also my professional opinion that this patient is clear for deployment.²³

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 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. 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 safeguard classified information. Such decisions entail a certain degree of legally permissible

²³ AE G.

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

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.

I have considered all of the disqualifying conditions under AG ¶ 22 including:

(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;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and

(f) relapse after diagnosis of alcohol abuse or dependent and completion of an alcohol rehabilitation program.

Applicant had numerous alcohol-related incidents that led to arrests and police involvement. He attended inpatient alcohol rehabilitation treatment and was diagnosed by a medical doctor as alcohol dependent. He was advised to abstain from alcohol consumption and did not. He was arrested twice after his treatment. The above disqualifying conditions apply.

I have also considered all of the mitigating conditions under AG ¶ 23 and especially considered the following:

(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); 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.

Applicant has a long history of alcohol dependence. He completed an inpatient alcohol treatment program on January 8, 2007, and resumed drinking alcohol on February 20, 2007. He continued to have alcohol-related incidents. He did not abstain as recommended. He stated that he has not had any alcohol since November 2009, when he became aware that he would be deploying overseas. He did not follow through on treatment advice received after his inpatient treatment. He was regarded as a high risk for relapse and he did. Applicant did not have alcohol available to him while he was deployed. His long history of alcohol dependence outweighs his short history of nine months from abstaining from alcohol use. I cannot find that his actions occurred under unique circumstances or that they are unlikely to recur. Applicant's lack of commitment to the advice and recommendations he received after his inpatient treatment leads me to believe he continues to be a high risk to resume drinking alcohol. He only recently has accepted that he is alcohol dependent. It is unclear if his recent commitment to abstinence is truly long term or a consequence of his deployment. It is too early to make a definitive conclusion. He has not established a sufficient period of abstinence. Applicant successfully completed an inpatient alcohol treatment program, but did not demonstrate an established pattern of abstinence or follow the aftercare program. He has not received a favorable prognosis by a duly qualified medical professional. Therefore, I find none of the above mitigating conditions apply.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested eight times from July 1999 to October 2007. Many of the charges were dismissed, nolle prosequi, or he paid a fine. He also went to a Special Court-Martial and pled guilty to violating a MPO on three occasions and Disrespect to a Chief Petty Officer. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and especially considered the following:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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.

Applicant has a nine-year history of criminal conduct, the most recent offense occurring in October 2007. All of his criminal problems were alcohol-related. In addition, it appears he had a tumultuous relationship with the mother of his youngest daughter, which was also the source of many of his criminal problems. She is now married to another person and it seems their parental relationship is stable. Applicant appears to have stabilized his life somewhat. He has not had any criminal involvement for over two years. He wants to change his life and appears to be on the road to doing so. He recently returned from a deployment and there is no evidence of problems with his job. I find enough time has elapsed since his last criminal involvement to convince me his criminal conduct is a thing of the past. Applicant is remorseful for his past conduct. Therefore, I find AG ¶ 32 (a) and ¶32 (d) apply.

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 have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant is 42 years old. He retired from the Navy after 20 years of service and received an honorable discharge, but went to a Court-Martial before he was discharged. He has a long history of criminal conduct that was alcohol-related. He went to inpatient alcohol rehabilitation treatment; was diagnosed as alcohol dependent; failed to follow through on the after care recommendations; and he continued to drink alcohol and get in trouble. Applicant continued to drink alcohol until November 2009. He stated he has abstained from alcohol consumption since then and intends to abstain in the future. He does not attend AA or any other support group. It is too early to conclude that alcohol is no longer an issue in Applicant's life. His abstention has been less than a year, and during some of that time he was deployed. Applicant's criminal conduct seems to be a thing of the past, if he continues to abstain from alcohol use. It is too early to conclude that Applicant is committed to abstaining from alcohol. After a sufficient period of abstinence, he may be a viable candidate for a security clearance. However, at this time, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for Criminal Conduct, but failed to mitigate the security concerns under the guideline for 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
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-1.g:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a-2.j:	For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge