



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-02723

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

July 2, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On November 26, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ to clarify or augment information about potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

consistent with the national interest to grant Applicant's request for access to classified information. On October 28, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guideline (AG)³ for alcohol consumption (Guideline G) and personal conduct (Guideline E).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on February 5, 2010. Pursuant to a Notice of Hearing issued the same day, I convened a hearing in this matter on February 23, 2010. Applicant appeared as scheduled, but he requested the hearing be continued because he did not receive the Notice of Hearing until the day before. He also averred that, because he did not receive timely notice, he was unable to arrange to have his lawyer present at the hearing. I granted Applicant's request for a continuance.

Pursuant to a Notice of Hearing issued on April 6, 2010, I re-convened Applicant's hearing on April 28, 2010. The parties appeared as scheduled. The Government presented four exhibits admitted without objection as Government's Exhibits (Gx.) 1 - 4. Applicant testified in his own behalf. I left the record open after the hearing to give Applicant time to submit additional relevant information. The record closed on May 6, 2010, when I received Applicant's 19-page post-hearing submission, which is included in the record without objection as Applicant's Exhibit (Ax.) A. DOHA received a transcript (Tr.) of the hearing the same day.⁴

Findings of Fact

Under Guideline G, the Government alleged that Applicant consumed alcohol, at times to excess and to the point of intoxication, from 2003 until at least February 2009. (SOR 1.a) Applicant admitted this allegation. The Government also alleged that Applicant was arrested and charged with driving under the influence of alcohol (DUI) in November 2003, a charge to which he pleaded guilty. (SOR 1.b) Applicant admitted this allegation. The Government also alleged that, in January 2007, Applicant was arrested for and pleaded guilty to DUI. (SOR 1.c) Applicant admitted this allegation. Finally, the Government alleged that, in February 2008, Applicant was arrested and charged with DUI, that he was found guilty, was fined, and that his driver's license was suspended. (SOR 1.d) Applicant denied this allegation. The lawyer who represented him in that case submitted a letter (attached to Applicant's answer to the SOR) that states Applicant's case is on appeal in his county's circuit court. Also on appeal is the suspension of Applicant's driver's license, which the lawyer opined should be valid.

Under Guideline E, the Government alleged that Applicant drove "on multiple occasions" on a suspended driver's license after he was convicted of DUI in 2008.

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ On March 3, 2010, DOHA received a 13-page transcript of the February 23, 2010, hearing. All that was discussed at that hearing was Applicant's request for continuance.

(SOR 2.a) Applicant admitted this allegation. Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 29 years old and employed by a defense contractor in a position that requires a security clearance. Applicant has worked for his current employer as an advanced engineer technician since October 2005. His performance evaluations are excellent and his supervisor, co-workers, and other associates speak highly of his reliability, work ethic, and trustworthiness. (Gx. 1; Ax. A)

When he submitted his e-QIP, Applicant disclosed the DUI arrests alleged in the SOR. (Gx. 1) In response to interrogatories, he stated that the case from his 2008 DUI was still pending, but he also stated that his driver's license was suspended. (Gx. 2) At the hearing, Applicant acknowledged that his driver's license was revoked, that he was still driving at least 150 miles to and from work every day, and that he had previously driven when his license was suspended following his 2007 DUI arrest. (Gx. 2; Tr. 24 - 25, 45, 47)

When Applicant was interviewed during his background investigation, he stated that when he was arrested for DUI in 2003, he was pulled over after leaving a bonfire where he had consumed several beers. He was on his way to a bar to celebrate a friend's birthday when he was stopped. During his subject interview with a Government investigator, Applicant acknowledged that he should not have been driving after drinking so much. When he was arrested for DUI in 2007, he had consumed about 11 beers in five hours while bowling. His driver's license was suspended after he pleaded guilty to that charge, but he drove on several occasions anyway. (Gx. 3; Tr. 24 - 25)

Applicant usually drinks every weekend. Beer is his drink of choice, and it is not unusual for him to drink 12 beers in one sitting. He estimates it takes about 18 beers for him to become intoxicated. He defines intoxication as being unable to stand or speak properly. His blood alcohol content (BAC) when he was arrested for DUI in 2008 was .17, more than twice the legal limit in his state. (Gx. 3) Applicant stopped drinking for a few months after his 2007 and 2008 DUI arrests, but gradually returned to his old drinking patterns. (Gx. 3)

As to the current status of Applicant's 2008 DUI charge, his lawyer's letter stated that the case was on appeal to circuit court. This implies the case was heard in a lower court, and that Applicant was found guilty. Additionally, Applicant submitted with his response to interrogatories documents that show he was convicted in district court, that his driver's license was revoked, that he was sentenced to 90 days in jail (suspended), and that he is, in fact, appealing to the circuit court. (Gx. 3) His driver's license was still invalid when he appeared to challenge the SOR. (Tr. 24 - 25, 47)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 21 (Alcohol Consumption) and AG ¶ 15 (Personal Conduct).

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁸

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ Directive. 6.3.

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Analysis

Alcohol Consumption

The security concern about Applicant's use of alcohol, as stated in AG 21, is that:

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 Government presented sufficient reliable information to show, as alleged in SOR 1.b - 1.d, that Applicant has been arrested and convicted of DUI three times in the past seven years. Available information also shows, as alleged in SOR 1.a, that since 2003 he has consumed alcohol, at times to excess and to the point of intoxication. It is not unusual for Applicant to drink 12 beers in one day. Applicant has engaged in abusive binge drinking, regardless of whether he drives while intoxicated. Available information requires application of the disqualifying conditions at AG ¶ 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*) and AG ¶ 22(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*).

By contrast, Applicant did not present any information that supports application of the mitigating conditions listed at AG ¶ 23. His alcohol-related incidents occurred three times in the past seven years. Four years after his first DUI arrest in 2003, Applicant was arrested for a second DUI charge. He was arrested a third time, less than a year after being convicted for his second DUI offense. He still consumes alcohol and has not demonstrated that he is unlikely to change his use of alcohol anytime soon. He stopped drinking after his 2007 and 2008 arrests, but returned to his old patterns of alcohol use a few months later. On balance, Applicant has not mitigated the security concerns raised by his excessive use of alcohol and his three alcohol-related arrests.

Personal Conduct

The Government alleged (SOR 2.a) as adverse personal conduct that Applicant continued to drive despite the fact that his driver's license was revoked after his 2008 DUI arrest and conviction. Applicant admitted this allegation and acknowledged that he had also continued to drive after his license was suspended following his 2007 DUI. The security concern raised by this information, as stated at AG ¶ 15, is that:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's conduct does not fall within any specific AG ¶ 16 disqualifying condition. His conduct constitutes a criminal offense each time he drives in violation of the court order that revoked his driving privileges. Such conduct is addressed by the Guideline J (criminal conduct) disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). As such, the Guideline E disqualifying condition at AG ¶ 16(d) (*credible adverse information that is **not explicitly covered under any other guideline** and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources*) (emphasis added) does not apply.

Nonetheless, Applicant's knowing and repeated disregard for the court's order (that he not be allowed to drive because of his history of driving while intoxicated) is sufficient to invoke the general security concern under AG ¶ 15. Applicant demonstrated an "unwillingness to comply with rules and regulations" by driving without a license. In response, he has not presented information that would support application of any mitigating conditions at AG ¶ 17. Accordingly, he has not mitigated the security concerns about his personal conduct.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and G. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 29 years old and presumed to be a mature adult. However, he is either unwilling or unable to change his use of alcohol so as to avoid future alcohol-related incidents. His willingness to violate the law by ignoring a state-imposed sanction after his most recent conviction undermines any confidence that he is a suitable risk for access to classified information. A fair and commonsense assessment⁹ of all available information bearing on Applicant's past and current circumstances shows he has not addressed satisfactorily the government's doubts about his ability or willingness to protect the government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the Government.¹⁰

⁹ See footnote 6, *supra*.

¹⁰ See footnote 8, *supra*.

Formal Findings

Formal findings 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.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge