



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



In the matter of:)
)
) ISCR Case No. 09-02897
)
)
Applicant for Security Clearance)

Appearances

For Government: Nicole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

May 20, 2010

Decision

CREAN, Thomas M., Administrative Judge:

On October 30, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) as part of his employment with a defense contractor. On November 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for criminal conduct and alcohol consumption, Guidelines G and J respectively. 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 in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on November 23, 2009.

Applicant answered the SOR on January 10, 2010. He admitted all of the 13 allegations of alcohol consumption under Guideline G, and the one allegation of criminal conduct under Guideline J. He provided a detailed explanation and documentation concerning his conduct. He requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on February 17, 2010, and the case was assigned to me on February 22, 2010. DOHA issued a Notice of Hearing on March 10, 2010, for a hearing on April 6, 2010. I convened the hearing as scheduled. The Government offered six exhibits, marked Government exhibits (Gov. Ex.) 1 through 6, which were received without objection. Applicant testified on his behalf and offered 19 exhibits marked Applicant Exhibit (App. Ex.) A through S, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on April 14, 2010. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted all the allegations under both alcohol consumption and criminal conduct. His admissions are included in my findings of fact.

Applicant is 34 years old and has worked for his defense contractor employer for more than two years as a systems analyst and computer programmer. He has a Bachelor of Science degree in computer science and systems information. Applicant met his wife in 2003 and they married in 2006. He has two stepchildren, one with special needs. (Tr. 40-44, 49-50; Gov. Ex. 1, e-QIP, dated October 30, 2009)

Applicant has a history of alcohol abuse dating back to 1989. He was in high school from 1989 until 1993. He started drinking alcohol in his freshman year with his classmates and friends. His alcohol consumption increased in intensity until in his senior year, he was intoxicated once or twice a month. After high school, he worked from 1994 until 1997 and again was intoxicated a few times a month. He started college full time in 1997, graduating in 2000. He worked as a cook in a pub while in college. He would drink seven or eight beers after work and walk home. Since he walked to class, work, and home, he did not have any alcohol-related driving offenses while in college. As he got older, his pattern of drinking alcohol slowed down. However, Applicant admits that he consumed alcohol to excess and to the point of intoxication from approximately 1991 until December 2009. (SOR 1.a; Tr. 44-49, 71-72)

In 1993, when he was 18 years of age, he was arrested for possession of alcohol and possession of marijuana. (SOR 1.b) Applicant was at a party when police arrived because of complaints concerning noise. The police found marijuana and alcohol in a common area. Everyone at the residence, including Applicant, was charged with possession of alcohol and marijuana since the marijuana and alcohol were found in a common area. The charges were dismissed after Applicant performed community service. (Gov. Ex. 2, Answer to Interrogatories, Testimonies, dated December 8, 2008 - December 30, 2008 at 7; Gov. Ex. 3 and 4, FBI Criminal Justice Information Reports; App. Ex. D, Police Report , dated July 11, 1993)

Applicant was arrested for driving while intoxicated in 1997 (SOR 1.c). He worked over 16 hours at two restaurants when he stopped at a third restaurant to inquire about a job. He had a beer while waiting for the owner to talk to him. When he left the restaurant, he was stopped by the police. He refused a breathalyzer test because he had consumed the beer and felt the test would not accurately reflect his alcohol level. Applicant pled guilty to, and was found guilty of, reckless driving and paid a fine and completed an alcohol counseling course. (Tr. 53-55; Gov. Ex 3, Answer to Interrogatories, Testimonies, dated December 8, 2008 - December 30, 2008, at 3; Response to SOR, Attorney's Letter, dated January 7, 2010, at 1)

Applicant was arrested for driving while intoxicated in June 2001 in the same jurisdiction as the 1997 offense. (SOR 1.d) He had graduated from college about six months earlier, and was drinking heavily at the time. He was stopped by police early in the morning. The police officer noticed a strong smell of alcohol and Applicant's red eyes. Applicant refused a roadside field sobriety test and a breathalyzer test at the police station. He again pled guilty to reckless driving and paid a fine. (Tr. 55-58; Gov. Ex. 3, FBI Criminal Justice Information; Gov. Ex. 5, Booking Report, dated June 9, 2001; Response to SOR, Attorney's Letter, dated January 7, 2010)

Applicant was arrested for driving while intoxicated in a neighboring state in March 2002. (SOR 1.e) Applicant was at a restaurant visiting a female friend. He drank alcohol and become intoxicated. On the way home, he was stopped by the police. He was found guilty of driving while intoxicated, was ordered to pay a fine, and to attend and complete an alcohol counseling class. (Tr. 58-59; Gov. Ex 4, FBI Criminal Justice Information; Gov. Ex. 3, Answers to Interrogatories, Testimonies, dated December 8, 2008 until December 30, 2008 at 3-4) Applicant paid the fine, completed community service, and completed an alcohol class at a nearby treatment center. (SOR 1.f; App. Ex. E, Letter, dated February 17, 2010; App. Ex. F, Certificate, dated October 21, 2002)

In June 2003, Applicant was scheduled to be interviewed by security investigators concerning his application for a security clearance. Applicant was late for the interview. When he arrived, he smelled of alcohol and looked intoxicated to both the security investigator and the facility security officer. The interview was terminated and processing of the background investigation was discontinued. (SOR 1.g; Gov. Ex. 6, Memorandum, dated June 13, 2003) Applicant was referred for treatment of alcohol abuse by his employer. He attended and completed the required treatments from December 2003 until April 2004. He also attended the required 90 Alcoholic Anonymous (AA) sessions in 90 days. He believes the counselor may have diagnosed him as an alcoholic. He remembers her telling him that rarely can a person go back to social drinking when they have become an alcoholic. (Gov. Ex. 2, Answer to Interrogatories, Testimony, dated December 3, 2008 - December 30, 2008, at 8; App. Ex. G, Letter, dated December 2, 2003; App. Ex. H, AA Log, December 2003 until March 2004; App. Ex. I, Letter, dated undated)

Applicant was arrested for driving while intoxicated in September 2003. (SOR 1.h) Applicant had previously injured his ankle and could not successfully perform a field

sobriety test. He had been drinking alcohol that night but did not believe he was intoxicated. He pled guilty to reckless driving and paid a fine. (Tr. 59-60; Gov. Ex. 3, FBI Criminal Justice Information; Answer to SOR, Attorney's Letter, dated January 7, 2010; App. Ex. J, Doctor's Report on ankle, dated October 7, 2003)

Applicant was arrested for assault and battery in February 2005 after an altercation with his wife, who at the time of the incident was his girlfriend. (SOR1.i) The couple had been drinking that night at a neighbor's house and his girlfriend went home early. Applicant returned to their house later and was intoxicated. There was an argument and the girlfriend slapped Applicant. As Applicant left the room, the girlfriend threw a dog bone at Applicant. He responded by picking up the dog bone and throwing it at the girlfriend hitting her in the head and causing bleeding. Police arrived and the girlfriend was taken to the hospital. Applicant completed an outpatient alcohol treatment program that was mainly classroom work and counseling. (SOR 1.j). Applicant believes he was diagnosed as an alcoholic but his prognosis was good. His girlfriend requested the charges be dropped. The charges were dismissed and the charges expunged from the record. (Tr. 60; Gov. Ex. 2, Answers to Interrogatories, Testimonies, dated December 8, 2008 - December 30, 2008 at 5; Answer to SOR, Attorney's Letter, dated January 7, 2010; App. Ex. K, Expungement Order, dated August 23, 2005)

In 2008, Applicant was arrested for driving while intoxicated, resisting arrest, and disobeying a police officer in another state where he was then working on temporary duty for the defense contractor. Applicant had been drinking and pulled into a gas station to get gas and call a taxicab since his ability to drive was impaired. While he was waiting for the taxicab to arrive, he was arrested for driving while intoxicated since he was intoxicated and drove to the gas station. Applicant was drinking alcohol because his wife left the area to attend to the special needs child at their home location. Applicant started drinking to overcome his anxiety and depression. Applicant was found guilty on March 3, 2008, and sentenced to complete a multiple offender program, ordered to pay a fine, and his driver's license was suspended for two years. (SOR 1.i)

Applicant started to see a psychologist after this offense. (SOR 1.k) There is no information to show he was told to not drink alcohol. Applicant started attending AA meetings. He was unable to complete an in-residence alcohol offender program because his flight back to the area was cancelled and he arrived late for the treatment. Before Applicant could be rescheduled, the program was terminated for budget reasons. Applicant had also by this time been transferred by his employer back to his home state. Applicant is now enrolled in a multiple offender alcohol counseling program which he should complete soon and receive his driver's license back (Tr. 60-61; Gov. Ex. 2, Answer to Interrogatories, Testimonies, December 2, 2008 - December 30, 2008, at 1-2; App. Ex. L, AA Log, March 2002 to May 2008; App. Ex. M, Cancelled Airline Ticket; App. Ex. N, Article on Alcohol Program cancellation, dated October 20, 2009)

Applicant was arrested four days after the above incident on March 7, 2008, for criminal trespass and simple assault. (SOR 1.m) Applicant was in a pool hall and got into a confrontation with two other men. Based on the statements of witnesses, he was

arrested for simple assault and trespass. He consumed alcohol prior to his arrest. He does not remember the incident clearly since he believes he was knocked unconscious. He had a head wound and was taken to the hospital. The charges were reduced to simple assault and he was fined \$250. He paid the fine. (Gov. Ex. 2, Answers to Interrogatories, Testimony, dated December 3, 2008 - December 3, 2008 at 4-5)

Applicant's last drink of alcohol was New Year's Eve 2010. He was last intoxicated in December 2009. He had not been attending AA meetings until he returned to meetings in January 2010 after an argument with his wife. His wife still consumes alcohol, sometimes at their house. Every time in the past that he stopped drinking, it was his wife who brought alcohol back to the house and he started consuming alcohol. This time he started attending AA meetings rather than drink alcohol. Applicant and his wife do some AA activities together. He admits he is probably an alcoholic. He has been seeing an alcohol counselor for the last month, and attending and participating in an alcohol rehabilitation program. He has a sponsor and has received AA chips for his participation. (Tr. 61-75; App. Ex. O, Card; App. Ex. P, AA Log February/March 2010; App. Ex. Q, AA Contract, undated)

Applicant is highly regarded by all of his employers. Prior to his employment with the defense contractor, Applicant was a computer lab assistant from September 1998 to November 1998. His supervisor noted that he was a dependable and responsible employee. His work ethic was excellent and he was consistently on time. He was trusted with projects requiring follow-up and correspondence. (App. Ex. A, Letter, undated) Applicant received commendations for his work as a college student on a conference presentation concerning math, computer science, and science education. (App. Ex. B, Letter, dated April 6, 2000) He was also commended for his outstanding research in this area. (App. Ex. C, Certificate, dated March 31, 2000) He was a co-author on a scientific paper published in the Journal of Molecular Neuroscience. (App. Ex. G, Article, dated October 2001) Applicant's present supervisor stated he has known Applicant for over 18 months. Applicant has been one of the company's key developers of software programs. He considers Applicant to be a man of integrity who honors his commitments. (App. Ex. R, Letter, dated January 5, 2010)

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 must be considered 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, 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 for 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 about potential, rather than actual, risk of compromise of classified information.

Analysis

Alcohol Consumption and Criminal Conduct

Applicant admitted the 14 alcohol consumption security concerns. Eight of the alcohol consumption concerns resulted in criminal charges and raise the Criminal Conduct Security concerns. Both alcohol consumption and criminal conduct raise similar security concerns and will be discussed together. Excessive alcohol consumption is a security concern because it 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 ¶ 21) 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. (AG ¶ 30)

Applicant's arrests for driving under the influence of alcohol, possession of alcohol as a minor, assault and battery involving alcohol consumption, and reporting to a security investigation intoxicated and smelling of alcohol raise Alcohol Consumption

Disqualifying Conditions (AC DC) 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), AC DC AG ¶ 22(b) (alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent); AC DC 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 abuse or alcohol dependent).

Applicant has seen a number of medical professionals for counseling and treatment of his alcohol consumption. Applicant believes some of them have diagnosed him as an alcoholic, raising AD DC 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).

Applicant's multiple arrests for driving while intoxicated and conviction of some of these offenses, his underage possession of alcohol, and assault and battery involving alcohol raise Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (a single serious crime or multiple lesser offenses), and CD DC AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted).

I considered Alcohol Consumption Mitigating Condition (AC MC) AG ¶ 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 or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) and determine that it does not apply. Applicant admits drinking to the point of intoxication from his early high school years in approximately 1991 until just six months ago in December 2009. There were nine incidents involving alcohol consumption at work, away from work, and in the community from 1993 until 2008. Applicant drank alcohol freely and willingly so none of these incidents happened under unusual circumstances. His alcohol consumption is recent since the last time he was intoxicated was only six months ago. He has a long history of alcohol-related problems covering almost half his life. Applicant willingly drank alcohol and his willingness to drink alcohol could lead to more alcohol-related future incidents.

I also considered AC MC AG ¶ 23(b) (the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of action taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)). The mitigating condition does have some application to Applicant. Applicant has recently acknowledged that he has an alcohol problem. His wife drinks alcohol and brings it to their house. But Applicant decided to attend alcohol counseling and AA meetings rather than drink. However, he has exhibited this conduct for only the last few months. AC MC AG ¶ 23(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 AC MC AG ¶ 23(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 meeting of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program) does not apply. Applicant attended alcohol counseling and treatment because it was part of his sentence for alcohol-related offenses. While Applicant successfully the programs in the past, he has continued to drink alcohol. He only recently started to attend AA meetings again and is seeing an alcohol counselor. While it is too soon in his treatment to determine if his attendance at meetings and his counseling will be successful, the allegation against Applicant is that he attended counseling on three separate occasions. As noted, he successfully completed that counseling and treatment. I find for Applicant on these three allegations (SOR 1.f, 1.j, and 1.k). Applicant receives credit for attending and completing the counseling.

In total, Applicant has not presented sufficient information to meet his burden to establish that his past alcohol use is under control and his alcohol consumption does not reflect now on his reliability, trustworthiness, and good judgment. Appellant has not mitigated security concerns for alcohol consumption.

I have considered all of the mitigating conditions under criminal conduct. Applicant raised by his testimony Criminal Conduct Mitigating Conditions (CC MC) AG ¶ 32(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 CC MC AG ¶ 32(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). There was a pattern of alcohol-related criminal conduct from as early as 1993. In some years, there was more than one offense. The criminal offenses did not happen under unusual or unique circumstances, but were the end result of Applicant's excessive alcohol consumption. Similar criminal incidents are likely to recur because Applicant's abstinence from alcohol is only recent, his wife is still an alcohol consumer in their house, and he has only recently again started attending AA and alcohol counseling. He could easily decide to start drinking alcohol again. Applicant has not presented sufficient information to mitigate security concerns for criminal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 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 that Applicant is a good employee and has done excellent work in the past. I considered that Applicant has been attending AA meetings recently and has been seeing an alcohol counselor. However, Applicant was an excessive user of alcohol for over 17 years. He was in and out of alcohol counseling and programs only because the counseling and programs were a part of his sentence from alcohol-related driving offenses. His last alcohol-related incident was in 2008. He was last intoxicated in December 2009, and his last drink of alcohol was on New Year's Eve 2009/2010. Sufficient time without alcohol-related incidents, adequate and sufficient alcohol counseling, a sufficient period of time to indicate rehabilitation, and an adequate period of AA meeting attendance has not passed to mitigate alcohol consumption issues given Applicant's long history of alcohol use and abuse. His alcohol-related actions indicate poor self control, lack of judgment, and unwillingness to abide by rules and regulations. I find for Applicant on the three allegations for attending counseling and alcohol treatment. Overall, on balance 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 has not mitigated the security concerns arising from his criminal conduct and 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.e: | Against Applicant |
| Subparagraph 1.f: | For Applicant |
| Subparagraphs 1.g - 1.i: | Against Applicant |
| Subparagraphs 1.j - 1.k: | For Applicant |
| Subparagraphs 1.l - 1.m: | Against Applicant |

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge