



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



In the matter of:)	
)	
)	ISCR Case No. 09-03797
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: Stephen W. Fung, Esq.

January 5, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

On August 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G, E, 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 September 21, 2010, and requested a hearing before an administrative judge. The case was assigned to me on November 2,

2010. Applicant's counsel requested the case be scheduled for November 22, 2010. The request was granted, and DOHA issued a Notice of Hearing on November 10, 2010. I convened the hearing as scheduled. Applicant waived the 15-day notice requirement. The Government offered Exhibits (GE) 1 through 9. Applicant did not object and they were admitted. Applicant and one witness testified. Applicant offered Exhibits (AE) A and B, which were admitted without objections. DOHA received the hearing transcript (Tr.) on November 29, 2010.

Findings of Fact

Applicant admitted, with explanations, all of the allegations in the SOR except ¶¶ 1.c and 2.c. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 43 years old. She served in the Air Force from 1984 to 1989, and was honorably discharged as a sergeant (E-4). She married in 1986 and separated from her husband in 1989. They divorced in 1994. She has no children from the marriage. She has a 13-year-old son from a relationship. Applicant earned her bachelor's degree and her master's in business administration. She has held a Top Secret security clearance since 1997. She began working for her current employer in January 2007.¹

Applicant had her first drink of alcohol when she was nine years old. She had a babysitter who was five years older and introduced her to it. She consumed it on an irregular basis, but increased her consumption somewhat when she was in middle school. When she was in high school, she drank alcohol on the weekends. Her alcohol use increased and became more regular after she enlisted in the Air Force. She estimated she drank about three times a week, sometimes to intoxication. Her alcohol consumption increased to daily use after she was discharged from the Air Force. She estimated she would have a couple of beers on a daily basis.²

From 1991 to 2008, Applicant had four alcohol-related arrests. In November 1991, she consumed alcohol with friends while they were bowling. As she was driving home, she was stopped by police. She was charged with driving while intoxicated (DWI). She pled guilty in January 1992, was given a fine, her license was restricted for a year, and she was ordered to attend an alcohol safety awareness program (ASAP). She completed the terms of her sentence.³

On December 23, 1994, Applicant was arrested after drinking alcohol with friends. She was charged with driving under the influence of alcohol (DUI), second

¹ Tr. 74-77, 147, 162.

² Tr. 77-82.

³ Tr. 83-85; Department Counsel conceded that SOR ¶¶ 1.a and 1.b are the same offense. Applicant was arrested in November 1991 and that charge was adjudicated in January 1992. They are not separate offenses.

offense. She pled guilty and was sentenced to 90 days in jail, which was suspended, a \$250 fine, and her driver's license was suspended for one year. She was ordered to attend ASAP. Applicant stated she likely did not drink alcohol while attending ASAP, but resumed later.⁴

On August 5, 2001, Applicant was driving home after consuming alcohol at a friend's house. She crossed the median and hit a car head on. The driver and passenger of the other car sustained broken bones. Applicant broke her arm and had a collapsed lung. A blood test was conducted and recorded a blood alcohol level of .13%. She was charged with DWI, second offense in ten years. She pled guilty and was sentenced to 180 days in jail, all of which was suspended, fined \$1,000 of which \$500 was suspended, court costs, and her driver's license was suspended for 36 months. She was ordered to attend ASAP. Her driver's license suspension was reduced to a restricted license after four months, for the remaining term. Applicant completed the terms of her sentence.⁵

On February 1, 2008, Applicant was arrested for DUI, second offense within five to ten years. Her breathalyzer result was .22%, She pled guilty on May 21, 2008, and was sentenced to 360 days in jail, with 350 days suspended for three years, fined \$2,500 with \$1,500 suspended, court costs, and her driver's license was suspended for 36 months. She was required to have installed an ignition interlock system on her vehicle for 36 months. On October 22, 2008, Applicant was given a restricted driver's license and was permitted to travel for work, health care services, probation programs, and school for her son. Applicant is on supervised probation until May 2011. Applicant was also required to abstain from alcohol consumption. When she reported to her probation officer she would honestly disclose her failures to abstain.⁶

After her last arrest, Applicant was seen by a doctor. Applicant referred herself to an alcohol treatment program. The previous ASAP programs she attended were primarily educational. She received one-week inpatient treatment. She then attended outpatient treatment. The inpatient treatment was primarily a detoxification program. She attended outpatient treatment two to three days a week for three hour sessions. She remained abstinent while in the program for about six months. There were three phases of the outpatient program; early recovery, relapse prevention, and sober living. Applicant completed the first two phases, and chose to stay longer in phase two than required. She stopped attending the treatment program in March 2009 and did not complete the final stage of the program. The group had people coming in and going out. Because of the group's instability she did not think she was getting anything out of it, so she discontinued attending. During the later stage of the outpatient treatment, Applicant

⁴ Tr. 85-88.

⁵ Tr. 87-91, 95, 119-122.

⁶ Tr. 91-110, 122-125, 131.

began individual counseling in November 2008, on a weekly basis, which continues to the present. Applicant acknowledges she is an alcoholic.⁷

Applicant's counselor testified on her behalf. She is a licensed professional counselor, who conducts group and individual therapy for patients suffering from trauma and addiction. She is certified by the National Board of Certified Counselors. She has been involved in Applicant's recovery since late 2008. Applicant first participated in group therapy. Because of her specific issues, she began individual therapy. Applicant was experiencing depression and anxiety along with her alcohol addiction. The counselor believes Applicant is progressing in her recovery. Applicant is committed to her therapy treatment. Applicant has reported to her counselor in the past when she suffered a relapse. Her counselor is now confident that Applicant can abstain from alcohol consumption, because she is more stable, has the tools to be successful, and has a strong support system, which she is now willing to use. She has been more willing to discuss her underlying problems with her counselor, which she was not willing to do before. The counselor confirmed Applicant's previous diagnosis, by her psychiatrist, as being alcohol dependent. Applicant has been in individual counseling since January 2009 and continues to see the counselor weekly.⁸

After Applicant's last arrest in February 2008, she also began seeing a doctor and was diagnosed as alcohol dependent. Later she saw another doctor and was diagnosed as bipolar and alcohol dependent.⁹ Different medications were prescribed to control her condition. She was clinically depressed, had difficulty sleeping, and had anxiety. Applicant stated that it was not until May 2010, that the right type of medication was prescribed to help her, and she feels like her bipolar condition is under control.¹⁰

Applicant has had periods of abstaining from alcohol consumption since her last arrest in 2008, but estimated she relapsed approximately five times or less from February 2008 to March 2009, when she left the outpatient treatment program. Since meeting with her counselor from November 2009 to June 2010, she estimated she relapsed about three to four times. She reported her relapses to her counselor. She believed that her relapses were partially caused by her uncontrolled bipolar condition. Now that her bipolar condition is under control, she believes she will be able to maintain abstaining from alcohol use. She also believes she is now able to recognize the triggers that cause her to drink and the related consequences. She has not consumed alcohol since June 2010. She stated her life is better and manageable without alcohol. She feels she is finally in control of her life and has a stable support system.¹¹

⁷ Tr. 91-110.

⁸ Tr. 23-72, 136-138, 156-158.

⁹ GE 4.

¹⁰ Tr. 42-43, 57, 148-157.

¹¹ Tr. 103-110, 131-135.

Applicant stated that she never reported to work late due to her alcohol use. She never reported to work intoxicated. She occasionally consumed one to two beers at lunch. Her alcohol problem never affected her work. She acknowledged she likely engaged in binge drinking in high school. She admitted her past consumption of alcohol was habitual.¹²

When completing her security clearance application (SCA) on May 8, 2008, Applicant disclosed in questions 23(c) and (d) that she had charges pending against her and that she had been charged or convicted of alcohol-related offenses. However, she did not list the specific offense that was pending or her other prior offenses as required under question 23(e). Applicant had previously disclosed on her SCA dated March 27, 1997, her two earlier DUI charges. She did not believe she had to list these convictions because she believed she had to only list those offenses that occurred in the past seven years. She listed the 2001 DUI charge on her 2008 SCA and she disclosed that another charge was pending, but she did not list the specifics. She credibly testified that her omission was an oversight and she was not hiding information, as evidenced by her response that she had a pending charge. I find Applicant did not intentionally or deliberately fail to disclose information on her SCA.¹³

Applicant is committed to remaining sober and feels now that her bipolar condition is under control she will be able to abstain from drinking alcohol. She is stronger mentally and emotionally. She provided a character letter from her direct supervisor who describes her as trustworthy, hardworking, dedicated and reliable. Her alcohol problem has not impacted her work performance. She now avoids work situations that involve alcohol. Her supervisor believes she is very determined in her sobriety.¹⁴

A joint letter was provided by the former president and chief executive officer of the company where Applicant works.¹⁵ Applicant informed them of her arrest in February 2008, the day after it occurred, and advised them that she would be attending treatment. They described Applicant as remorseful and embarrassed, but she continued to diligently perform her duties. She is a valuable member of the team. They noted that over the past year, they observed that Applicant has gained greater confidence in her abilities and decision-making and has taken on increased responsibilities for independent actions. She has never had any work-related alcohol incidents. Applicant has avoided social events at work that serve alcohol. She received excellent

¹² Tr. 115-118, 144-145.

¹³ Tr. 110-112, 141-143.

¹⁴ Tr. 113; AE A.

¹⁵ The company Applicant works for was bought by another company. The character letter is provided by the former president and chief executive officer of the company before it was purchased. They are now vice-presidents in the newly acquired company.

performance appraisals. They have complete confidence in her and fully endorse her for a security clearance and position of trust.¹⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 extrapolation of potential, rather than actual, risk of compromise of classified information.

¹⁶ AE B.

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 and conclude the following are potentially applicable:

(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;

(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; and

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

Applicant has a history of alcohol use to the point of intoxication from 1976 to 2010. She has four DUI/DWI convictions. She was diagnosed by a medical doctor as alcohol dependant. She habitually used alcohol and was directed to abstain from alcohol consumption by the court after her last conviction and she failed to comply. AG ¶¶ 22 (a), (c), (d) and (g) apply.

I have considered all of the mitigating conditions under AG ¶ 23 and conclude the following are potentially applicable:

(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 a treatment recommendation, such as participation in meeting of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical profession or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant acknowledges her problems with alcohol and admits she is an alcoholic. She is addressing other mental health issues that have impacted her recovery. She is in counseling with an addiction counselor. She is motivated to remove alcohol from her life permanently. However, she has had setbacks in her ability to abstain from alcohol consumption. She did not complete the alcohol rehabilitation treatment program, but is addressing her problems with a counselor. She has been honest about her missteps. She last consumed alcohol in June 2010. At this juncture there is an insufficient period of sobriety to conclude that Applicant will remain sober for good. She is applauded for her honesty in addressing her problem, but her repeated lapses are a cause of concern. Until she can establish a sustained period of sobriety, it is too early to conclude her alcohol consumption is not a security concern. Therefore, at this time none of the mitigating conditions under AG ¶ 23 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 the following are potentially applicable:

(a) a single serious crime or multiple lesser offense;

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

(d) individual is currently on parole or probation.

Applicant has four DUI/DWI convictions. She is on probation until May 2011. The court ordered her to abstain from consuming alcohol and she has relapsed several times. I find the above disqualifying conditions apply.

I have considered the following mitigating conditions for criminal conduct under 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

(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 four DUI/DWI convictions. She remains on probation until May 2011. She is participating in counseling regarding her alcoholism. Although she appears committed to abstaining from alcohol, which is the cause of her criminal problems, it is too early to conclude that her rehabilitation is successful. Therefore, I find the above mitigating conditions do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

I have considered Applicant's testimony and other evidence and conclude that she did not deliberately or intentionally fail to disclose her prior convictions and charges pending against her for her alcohol-related offenses. She disclosed she had charges

pending and that she had alcohol-related convictions. She listed the conviction that fell within the seven-year period. She did not list those beyond the seven-year period, but had previously listed those in an earlier SCA. I find Applicant did not intentionally or deliberately attempt to conceal information sought by the Government. I find the above disqualifying condition does not 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 Guideline 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 has a long history of alcohol problems. Her criminal convictions are related to her alcohol problems. She has four convictions for DUI/DWI. She is being treated by an addiction counselor. She appears to be motivated to remove alcohol from her life, but has had setbacks. She has an outstanding work history and her supervisors praise her performance. She served her country in the Air Force and was honorably discharged. She appears to be on the road to recovery, but is not there yet. She is completing the terms of her probation and a longer period of abstinence is necessary to conclude that her alcohol problems are no longer a security concern and she is successfully rehabilitated. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant mitigated the security concerns under Guideline E, Personal Conduct, but failed to mitigate the security concerns arising under the Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct.

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
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraphs 3.a-3.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 interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge