



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 09-03946
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)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro se*

September 28, 2010

Decision

MALONE, Matthew E., Administrative Judge:

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

On December 29, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain or renew a security clearance required for his job with a defense contractor. After reviewing the results of Applicant’s background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories to Applicant to clarify or augment information in his background.¹ After reviewing the results of the background investigation and Applicant’s responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative

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

finding² that it is clearly consistent with the national interest to grant or continue Applicant's access to classified information. On March 30, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if established, would raise security concerns addressed in the adjudicative guidelines (AG)³ under Guideline G (alcohol consumption) and Guideline J (criminal conduct).

On April 13, 2010, Applicant responded to the SOR through a notarized statement and requested a decision without a hearing. On July 8, 2010, Department Counsel prepared a File of Relevant Material (FORM)⁴ in support of the Government's preliminary decision. Applicant received the FORM on July 16, 2010, and was given 30 days to file a response to the FORM. On August 16, 2010, Department Counsel forwarded Applicant's timely response to the FORM⁵ without objection. The case was assigned to me on September 1, 2010.

Findings of Fact

Under Guideline G, the Government alleged that Applicant consumed alcohol, at times to excess, from about 1999 until at least January 2009 (SOR 1.a); that in August 2001, he was charged with, and fined for being drunk in public (SOR 1.b); that in May 2003, he was charged with, and fined for being drunk in public (SOR 1.c); that in September 2003, after consuming alcohol, he was arrested for trespassing and resisting arrest without violence, and that the charges were nolle prosequi (SOR 1.d); that in November 2004, he was arrested and charged with being drunk in public, disorderly conduct, and harassment, and that the charges were dismissed after he completed counseling (SOR 1.e); that in September 2005, he was arrested and charged with driving under the influence of alcohol (DUI), and that he entered an "Accelerated Rehabilitative Disposition Program" (SOR 1.f); that in December 2005, he was intoxicated when he was arrested and charged with trespassing, for which he was fined (SOR 1.g); and that in January 2008, he was charged with, and fined for being drunk in public and disorderly conduct (SOR 1.h). Applicant denied the SOR 1.a allegation. He averred that his excessive drinking ceased in January 2008, citing to his remarks in response to e-QIP question 23. (FORM, Item 2) He admitted the SOR 1.b - 1.h allegations.

Under Guideline J, the Government cross-alleged the alcohol-related criminal conduct detailed in SOR 1.b - 1.h (SOR 2.a). Applicant admitted this allegation. In

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

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included 14 documents (Items 1 - 14) proffered in support of the Government's case.

⁵ Applicant submitted a two-page memorandum, dated August 4, 2010, with an attached two-page letter of recommendation.

addition to the facts established by Applicant's admissions, I make the following findings of relevant fact.

Applicant is 31 years old and has been employed as an engineer for a defense contractor since October 2008. He requires a security clearance for his work. In May 2008, Applicant received a bachelor of science degree in engineering from a well-known university. Thereafter, he worked as a research assistant at that university before entering the workforce. (FORM, Item 4)

In his e-QIP, Applicant disclosed that he had completed alcohol-related counseling in February 2005, and that he had been arrested for or charged with numerous alcohol-related offenses. The circumstances of his arrests and his history of alcohol use were discussed in detail during a subject interview with a Government investigator on January 26, 2009. (FORM, Item 5) Applicant first consumed alcohol at about age 21, and was soon consuming about 12 beers in a single sitting each week. When he was arrested for public drunkenness around midnight on January 13, 2008, he claimed he had consumed 12 beers at a bar earlier in the evening, but had fallen asleep on a park bench because he got tired while walking home. (Id.) The related police report indicated that he was lying face down on the ground and was "passed out" with a strong odor of alcohol about him. When the police rolled him over, he took a swing at the officer and had to be restrained. Accordingly, he was arrested and charged with public drunkenness and disorderly conduct. (FORM, Item 7)

When he was arrested and charged with DUI in September 2005, Applicant had consumed about 12 beers and two shots of liquor over a 10-hour period. Police administered a field sobriety test, which he failed. When he was arrested for public drunkenness in November 2004, he had consumed half of a bottle of vodka before getting into a fight with his brother. (FORM, Items 5 and 10)

In his subject interview, Applicant told the investigator that, regarding his arrest for public drunkenness in May 2003, he had consumed two beers and seven shots of liquor at a local bar. He further stated that he was not aware of a problem before police came and took him out of the bar. (FORM, Item 5) The related police report indicated that police responded to a report of someone causing a disturbance in the bar. Applicant was drunk and became belligerent to the bartender and other customers after the bartender refused to serve him any more alcohol. Applicant also refused to cooperate with the police when they arrived. (FORM, Item 13)

Applicant was arrested on two other occasions for refusing to leave a bar after he was drunk and was asked to leave. In describing the arrests during his subject interview, Applicant did not acknowledge that he had refused to leave on each occasion, or that he had refused to cooperate with the police. (FORM, Item 5)

In January and February 2005, Applicant attended court-ordered counseling after his November 2004 arrest for public drunkenness. He disclosed that he used alcohol regularly, but denied that he had a substance abuse problem. He also disclosed that he had been drinking a fifth of alcohol each week for about five years. (FORM, Item 5)

During his subject interview, Applicant stated that he had he no longer drank to excess. (Id.) In his e-QIP and in response to the SOR, he stated that the last time he was intoxicated was when he was arrested in January 2008. (FORM, Items 2 and 4) In response to the FORM, Applicant acknowledged that, although he has not been diagnosed as an alcoholic, he has abused alcohol. He further claimed that he has abstained from alcohol, with the rare exception of having a beer if he goes on a date. He claimed that he now leads a lifestyle supportive of sobriety, as shown by the completion of his engineering degree after his last arrest. Applicant cited improved relationships with his family, and he provided a positive recommendation from the commanding officer of the military facility where he works.

Procedural Issue

Applicant denied SOR 1.a, and averred that he has not abused alcohol since January 2008, as opposed to January 2009, as alleged. Thus, Department Counsel was required to present information to support this allegation.⁶ Having reviewed all of the available information probative of SOR 1.a, I have *sua sponte* amended the SOR to conform to the evidence presented by the FORM and Applicant's response thereto.⁷ Specifically, SOR 1.a is amended by changing "2009" to "2008."

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines.⁸ 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 determinative of a conclusion for or against an applicant. 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.

⁶ Directive, E3.1.14.

⁷ Directive, E3.1.17.

⁸ Directive, 6.3.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁹ for an applicant to either receive or continue to have access to classified information. 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.¹⁰ 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 national interest.¹¹

Analysis

Alcohol Consumption

The Government's information support's the factual allegations under Guideline G (SOR 1.a - 1.h). Applicant has abused alcohol for most of the past ten years. His conduct in this regard has led to numerous arrests and has hindered his relations with his family. These facts raise a security concern about Applicant's use of alcohol, which, 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.

More specifically, Applicant's admitted abuse of alcohol and the adverse conduct stemming therefrom 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 claimed that he has not been intoxicated since his last known alcohol-related arrest in January 2008. He also claimed that he has largely

⁹ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁰ See *Egan*, 484 U.S. at 528, 531.

¹¹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

abstained from alcohol since then, and that he now lives a lifestyle supportive of continued sobriety. Such information requires consideration of the mitigating conditions at 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 AG ¶ 23(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)*). However, these factors do not apply because the only evidence in support of their application is Applicant's statements in his e-QIP and in response to the SOR and the FORM. In assessing the persuasive value of those claims of sobriety, I have also considered his statements about his alcohol-related conduct and arrests to a Government investigator during his January 2009 subject interview. Those statements indicated that Applicant was not candid about that information and was trying to minimize the scope of his conduct when he was drinking. Department Counsel presented sufficient reliable information to support the SOR allegations under Guideline G. Thus, it fell to the Applicant to present sufficient information to refute, extenuate, or mitigate the security concerns raised by the Government's information. When compared with his subject interview statements, Applicant's reliance on his claims of sobriety since January 2008 are insufficient to meet his burden of persuasion. He has failed to mitigate the security concerns about his alcohol consumption.

Criminal Conduct

The Government submitted sufficient reliable information to support the factual allegations under Guideline J (SOR 2.a). Applicant has been arrested for or charged with numerous criminal offenses since 2001. The fact that he may not have been convicted for some of them, given all of the available information about his conduct, does not lessen the security significance of his arrest record. Available information raises a security concern about his criminal conduct, which, as stated in AG ¶ 30, is that:

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.

The facts established herein further require application of the 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*).

By contrast, all of Applicant's criminal conduct has been alcohol-related. As discussed under Guideline G, above, concerns persist about his alcohol abuse. His last arrest was in January 2008. However, given the scope of his drinking problem, the passage of time since his last offense does not indicate that his criminal conduct is no longer a concern. In summary, available information militates against the application of any of the AG ¶ 32 mitigating conditions. Applicant has failed to mitigate, refute, or extenuate the security concerns raised by the Government's information.

Whole-Person

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines G and J. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant, a 31-year-old employee of a defense contractor, has significantly abused alcohol, which has led to numerous instances of criminal conduct since at least 1999. Since his last arrest in 2008, Applicant has obtained his college degree. His job performance has impressed a senior military officer, whom Applicant supports through his defense contractor position. However, the letter from that officer does not reflect any knowledge of the alcohol-related incidents in Applicant's background, and it appears that Applicant tried to minimize the full scope of his adverse conduct when he spoke to an investigator during his background investigation. Applicant has not established that the conduct in his background will not recur. Accordingly, the positive information in his background is not sufficient to overcome the adverse security inferences drawn from his extensive alcohol abuse and his inconsistent statements to the Government about that conduct. A fair and commonsense assessment of this record shows that significant doubts remain about Applicant's suitability for access to classified information. Because protection of the national interest is paramount in these determinations, those doubts must be resolved for the Government.

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.h:	Against Applicant
Paragraph 2 Guideline J:	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 Applicant's request for a security clearance. Eligibility for access to classified information is denied.

MATTHEW E. MALONE
Administrative Judge