



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



In the matter of:

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ISCR Case No. 09-06190

Applicant for Security Clearance

Appearances

For Government: James F. Duffy, Esq., Department Counsel

For Applicant: Michael J. Harrington, Esq.

August 19, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has failed to mitigate the security concerns raised under the guideline for alcohol consumption. Accordingly, his request for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) dated March 5, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were

unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On February 17, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline G (Alcohol Consumption) of the Adjudicative Guidelines (AG).² Applicant signed his notarized Answer to the SOR on March 12, 2010, in which he admitted to all the SOR allegations. Applicant requested a decision before an administrative judge. Department Counsel was prepared to proceed on March 30, 2010, and the case was assigned to me on April 5, 2010. DOHA issued a Notice of Hearing on April 23, 2010, and I convened the hearing as scheduled on May 24, 2010.

During the hearing, Department Counsel offered 12 exhibits, marked as Government Exhibits (GE) 1 through 12, which were admitted without objection. Applicant testified and offered two exhibits, marked as Applicant Exhibits (AE) A and B, which were also admitted without objection. DOHA received the transcript (Tr.) on June 2, 2010.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 57 years old, attended one year of college. He was married for 15 years, until his wife died in 1996. He married his present wife in 1999. He has two daughters, 28 and 34 years of age. Applicant served in the National Guard from 1972 to 1978 and was honorably discharged as a specialist 4th class (E-4). He first held a security clearance while serving in the military. He has worked for his current employer, a defense contractor, since 2003. His position is quality control inspector. He was granted a secret security clearance in 2004. (GE 1, 2; Tr. 18-22)

Applicant started consuming alcohol when he was 16 or 17 years of age. He drank socially while in college. Applicant first married in 1978. He testified that, during the marriage, he drank moderately on weekends, usually beer. In his February 2004 sworn statement, he described his consumption during his marriage as "3 beers each night during the week and a 12-pack of beer on the weekends." After his wife's death in

¹ Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Adjudicative Guidelines that were implemented by the Department of Defense on September 1, 2006. The Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

1996, his drinking increased. In 2000, he began to drink heavily and to drink more liquor. (GE 11; Tr. 23-25)

In July 2000, while living in state A, Applicant drove while intoxicated. His daughter, son-in-law, and two grandchildren were in the car with him. He had drunk approximately one-third of a “fifth” of vodka, resulting in a blood alcohol (BA) of 0.24. He collided with another car that was turning; no one was injured. He did not hold a security clearance at the time. He was arrested and charged with Driving Under the Influence: Alcohol/Drugs. Applicant pled guilty and was sentenced to 15 days commitment (reduced to eight days, to be served on weekends); pay fines and costs totaling \$1,394; attend First Offender DUI educational program; and serve three years of unsupervised probation (January 26, 2001 – January 26, 2004). He attended 16 weeks of alcohol counseling, which included attendance at Alcoholics Anonymous (AA). Applicant testified that he attended 21 weekly meetings of AA. He abstained from alcohol for approximately six months after the DUI in 2000. (GE 3, 6, 11, 12; Tr. 26-30)

In his sworn statement, Applicant said that after his DUI in 2000, he “felt bad” about his drinking. However, he resumed drinking in about 2001 because he believed he could control his consumption. In January 2002, Applicant was laid off from his job. He was drinking a half-pint to one pint of alcohol per day. He considered himself a habitual drinker at that point. In August 2002, he stopped drinking for a few days and felt ill. He went to an emergency room. The hospital report shows that Applicant had been “drinking heavily up to 12-15 beers a day over the last month,” and includes a clinical impression of “Alcoholism with early alcohol withdrawal syndrome and alcoholic hepatitis.” As a result of the diagnosis, Applicant testified that “I felt that I was putting myself in danger by drinking the way I was drinking.” (GE 4, 11; Tr. 30-32, 69)

Applicant abstained for a few weeks after his hospital treatment, but then resumed drinking. In February 2003, he moved to state B and began a new job. His father was seriously ill and Applicant was depressed. On March 20, 2004, he bought alcohol and was drinking when he went through a traffic light and hit another car; no one was injured. At the hearing, Applicant was unsure of his BA, but testified that he believed it was 0.20. He was charged with DUI, 2d Offense in 5 Years. He pled guilty to a reduced charge of DWI, 1st Offense. He was fined and sentenced to 90 days incarceration (85 suspended); one year of driver’s license suspension;³ mandatory rehabilitation; three years probation; and installation of an ignition interlock on his car. He complied with the requirements of the court order. He testified that the experience of five days in jail was very unpleasant. (GE 7, 12; Tr. 32-36, 63-67, 72)

Following his 2004 DUI, Applicant attended a state alcohol safety and awareness program (ASAP). He attended weekly alcohol counseling and group lectures from April to September 2004. He was also required to attend a five-week education course and 20 AA meetings. He attended AA twice per week but did not obtain a sponsor or engage in the 12-Step program. He did not consider himself an alcoholic at that time. He abstained from alcohol during the six-month duration of the program. He remained under ASAP

³ Applicant testified that his license was restricted. (Tr. 65)

probation for the term of his restricted license, which ended May 10, 2005. (GE 2, 5; Tr. 36-39, 66-69)

After the program concluded, Applicant returned to drinking alcohol because he "...just enjoyed drinking..." On January 11, 2009, he and his grandchildren were in his truck. He had not had any alcohol, but decided to go off-road for fun. The truck became stuck in mud. He and his grandchildren walked home, and then he returned to dig the truck out. While he dug, he drank approximately five mini-bottles of rum, each containing about two ounces. The police stopped to investigate, and gave Applicant a field sobriety test, which he failed. He was arrested and subsequent testing showed a BA of 0.24. Applicant was charged with Driving While Intoxicated, 2d Offense Within 5 Years. (GE 2, 6, 8, 12; Tr. 39-43)

Applicant reported his DUI to his supervisor and security officer. On January 21, 2009, his security officer's adverse information report noted that Applicant had "his second driving under the influence (DUI) offense while possessing a security clearance." At his court hearing on the DUI charge, Applicant pled guilty to a reduced charge of Driving While Intoxicated, 1st Offense. He was fined and sentenced to three months incarceration (80 days suspended; 5 days mandatory minimum); one year probation; attendance at the state alcohol education program; suspension of his driver's license for one year; and installation of an ignition interlock system on his car. (GE 6, 8, 12; Tr. 39-43)

About six weeks later, on March 8, 2009, Applicant was drinking beer at home, and decided to take a ride on his motorcycle. He stopped abruptly at a traffic light, tipped the motorcycle, and the police were summoned. He was arrested and charged with (1) Driving Under the Influence of Alcohol, 3d Offense, a felony; and (2) Refused Blood Test. He testified that his BA was approximately 0.20. On July 31, 2009, Applicant pled guilty to a reduced charge of Driving While Intoxicated, 2d Offense, a misdemeanor, and the second charge was not prosecuted. He was fined and sentenced to 12 months incarceration (9 months suspended, 15 days mandatory minimum); three years probation; attendance at the state alcohol education program; suspension of his driver's license for three years; and installation of an ignition interlock system on his car. Applicant testified that the sentences from his January and March convictions were combined, and that the probation terms run concurrently. He spent approximately one month in jail, an experience that had a significant impact. It caused him to accept that he did have an alcohol problem, that it was affecting his life and that of his wife and family, and he had to change his life and become sober. (GE 9, 10, 12; Tr. 43-46, 73-76)

Currently, Applicant is on unsupervised probation, which requires him to abstain from alcohol. If the sentences for the two DUIs are concurrent as Applicant testified, both his probation and his driver's license suspension will end in 2012.⁴ Because of

⁴ Applicant believes that his license is suspended for one year, after which he can apply for a restricted license combined with installation of an ignition interlock. The court documents show that Applicant was sentenced to one year suspension for the January 2009 DUI, and three years suspension for the March 2009 DUI. If they run concurrently, the suspension runs for three years. (GE 2)

Applicant's three DUIs, the state B Motor Vehicle Administration (MVA) has suspended his driver's license indefinitely. It advised Applicant that he can petition the court for a restricted license after three years. (GE 2; Tr. 46-48)

Following his March 2009 DUI charge, Applicant enrolled in a three-month residential alcohol treatment program from April through June 2009.⁵ He was diagnosed with alcohol dependence. He enrolled in a one-year intensive outpatient program. He attended three-hour sessions of lectures and discussions, three times per week. The next phase required two nights per week, then one hour per week, and then one hour per month. He completed the outpatient program one week before his security clearance hearing. His counselor reported that Applicant embraced abstinence, showed improved participation in group and individual counseling sessions and, as of October 2009, was in early full remission. He expected that the Diagnostic and Statistical Manual-IV (DSM-IV) specifier would become "sustained full remission" after Applicant completed one year without displaying criteria for dependence or abuse. (GE 5; Tr. 48-53)

Applicant retained the services of two licensed clinical psychologists in May 2010 in order to "provide more information about [applicant's] personality functioning as it pertains to his security clearance." Their evaluation was based on psychological tests; a personal history questionnaire; review of documents from Applicant's security investigation file; two letters confirming Applicant's participation in the 2009 treatment;⁶ and a clinical interview with Applicant. The psychologists spoke with Applicant's counselor from the 2009 treatment program, who stated that Applicant has maintained sobriety and has not drunk when exposed to potential relapse triggers. The counselor also noted that Applicant can never drink again, and that he will need ongoing substance abuse treatment. The psychologists noted that Applicant's drinking was, in part, a way to manage stress, which may recur in the future. They emphasized that he must continue attending AA, and also recommended individual counseling. They reported that Applicant "has demonstrated absolute sobriety for over fourteen months since he last used." Their diagnostic impression was Mood Disorder, Not Otherwise Specified (DSM-IV 296.90), with a secondary impression of Alcohol Dependence with Physiological Dependence (Sustained Full Remission) (DSM-IV 303.90). In their opinions, the likelihood of relapse is low. (AE B)

Applicant has incurred significant costs associated with his arrests. As of June 2009, he owed approximately \$10,000 in attorney fees and \$20,000 for the cost of his 2009 alcohol treatment program. Applicant's mother has provided financial assistance at times. As of June 2009, none of these debts were delinquent. (GE 2; AE B)

⁵ The evidence does not include documents from Applicant's 2009 treatment other than a letter confirming compliance and a letter from Applicant's counselor, which describes the diagnosis and treatment. It does not include the credentials of the professional who diagnosed Applicant with alcohol dependence. Applicant's counselor holds a master of science degree and is certified by NCC (National Certification Commission for Addiction Counselors). (GE 5)

⁶ It appears from the psychologists' report that they did not have the opportunity to review Applicant's 2009 treatment record or details regarding his diagnosis.

Currently, Applicant attends AA meetings two to three times per week. His sponsor submitted a letter confirming Applicant's attendance at AA meetings. He stated that Applicant "exhibits all of the recovery behavior that I have observed in others during my recovery of more than 23 years." As of the hearing date, he had reached step 12 of the 12-Step program. He opined that Applicant "will be successful in long term recovery from alcoholism." (GE 2; AE A Tr. 52-54)

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 AG.⁷ Decisions must reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the Guidelines.

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 are 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 the cited guideline.

A security clearance decision resolves only the question of whether it is clearly consistent with the national interest⁸ 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 an 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.⁹

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interests as his or his 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.¹⁰

⁷ Directive. 6.3.

⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

The security concern about alcohol consumption 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.” AG ¶ 22 includes the following disqualifying conditions that are relevant to this facts of the case:

- (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 consumed alcohol to the point of intoxication on numerous occasions during his first marriage in the 1980s and 1990s. He drove after becoming intoxicated and was subsequently arrested and convicted in 2000. He was diagnosed by a physician with alcoholism and alcoholic hepatitis in 2002. His next DUI conviction was in 2004, after which he attended approximately six months of court-ordered alcohol counseling at an ASAP program. He had two DUI convictions in 2009. He received three months of inpatient treatment for alcohol dependence following the second 2009 DUI. These facts support application of AG ¶¶ 22 (a), (c), and (d).

AG ¶ 23 provides the following relevant factors that can mitigate security concerns:

- (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's alcohol-related behavior was frequent: he drank heavily for decades, often to the point of intoxication. He not only became intoxicated, but used poor judgment by driving after becoming intoxicated. A significant amount of time has not passed since his last DUI in March 2009. As of the date of the hearing, he had been abstinent only 14 months. Although his decision to abstain reflects well on his current judgment, his negative alcohol-related conduct was both frequent and recent. Only partial mitigation is available under AG ¶ 23(a).

Applicant acknowledges that he has an alcohol problem and that he must remain sober. He completed a three-month residential alcohol treatment program in June 2009, followed by a one-year outpatient program. He was diagnosed as alcohol-dependent. He participated in AA, and as of the date of the hearing, he had not had alcohol for approximately 14 months. AG ¶ 23(b) applies. He was also evaluated by two licensed clinical psychologists and received a diagnosis of alcohol dependence in sustained full remission.¹¹ Based on Applicant's one year of sobriety, they believe that the likelihood of relapse is low. Applicant receives some mitigation under AG ¶ 23(d). However, other factors must also be considered, because the psychologists' report included caveats. They noted that Applicant's drinking was, in part, a way to manage stress, and stress will undoubtedly occur in the future. They emphasized that he must continue with AA. They also recommended individual counseling, although there is no record evidence that Applicant has taken this suggestion. His counselor at the 2009 alcohol rehabilitation program also stated that Applicant needs ongoing substance abuse treatment. Finally, Applicant has abstained from alcohol during probationary periods in the past, only to return to drinking. These factors raise questions as to whether he will maintain sobriety when his probation is over, or repeat his past pattern. Taking all the facts and circumstances together, including the short duration of his abstinence compared to the length of his negative alcohol history, the mitigation available is insufficient to overcome the disqualifying conditions.

¹¹ The Appeal Board has held that the term "medical professional" should not be construed narrowly. I find that the licensed clinical psychologists are qualified to provide a prognosis. See, ISCR Case No. 07-00558 at 5 (App. Bd. Apr. 7, 2008).

Whole-Person Analysis

Under the whole-person concept, an 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.

AG ¶ 2(c) requires that 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. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

The record contains mitigating evidence, specifically that Applicant had abstained from alcohol for 14 months as of the date of the hearing, and that his AA participation appears more sincere than previously. However, Applicant has abstained from alcohol numerous times in the past, usually when court-ordered during a probationary period. His current abstinence is required under the terms of his probation, which ends in 2012.

Applicant's 14 months of sobriety must be compared to the decades that he persisted in abusing alcohol. He continued despite the negative effects on his family and his own health. Applicant's conduct posed a danger to himself and others. Only after four convictions, several incarcerations, and at least \$30,000 in legal and medical costs did Applicant acknowledge his alcohol problem. At this point in time, I cannot conclude that Applicant's relatively short period of abstinence will overcome his long history of alcohol abuse and dependence, and his pattern of returning to alcohol use after abstaining. Finally, it is particularly troubling that Applicant repeatedly engaged in excessive drinking and was convicted of DUI three times, while he held a security clearance. His conduct raises serious questions about his willingness to comply with the rules and obligations inherent in holding access to classified information.

Applicant has not mitigated the security concerns arising from the alcohol consumption guideline. Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance.

Formal Findings

Paragraph 1, Guideline G AGAINST Applicant

Subparagraphs 1.a. - 1.h. Against Applicant

Conclusion

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

RITA C. O'BRIEN
Administrative Judge