



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



In the matter of:)
)
) ISCR Case No. 09-06621
)
)
Applicant for Security Clearance)

Appearances

For Government: William T. O’Neil, Esq., Department Counsel

For Applicant: *Pro se*

February 14, 2011

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 guidelines for alcohol consumption and criminal conduct. Accordingly, his request for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) signed on April 23, 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.

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

On June 10, 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) and Guideline J (Criminal Conduct) of the Adjudicative Guidelines (AG).² Applicant submitted an Answer to the SOR dated June 24, 2010, in which he admitted all the SOR allegations. Applicant requested a decision before an administrative judge. Department Counsel was prepared to proceed on August 4, 2010, and the case was assigned to me on October 8, 2010. DOHA issued a Notice of Hearing on October 19, 2010, and I convened the hearing as scheduled on November 9, 2010.

During the hearing, I admitted six exhibits offered by Department Counsel and identified as Government Exhibits (GE) 1 through 6. I also admitted six exhibits offered by Applicant, identified as Applicant Exhibits (AE) A through F. I held the record open to allow Applicant to submit further documentation. He timely submitted two documents, which I admitted as AE G and H. DOHA received the transcript (Tr.) on November 17, 2010.

Procedural Matters

Notice was issued originally on September 22, 2010, for a hearing to be held in another state, where Applicant was on temporary duty. Based on his request of October 1, 2010, the hearing was cancelled on October 4, 2010. The case was transferred to me so that the hearing could be held in his state of residence.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated 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, 36 years old, recently received a bachelor of science degree in professional aeronautics. He maintained a strong average, often achieving placement on the Honor Roll and Dean's List. He is about to begin studies for a master's degree. He married in 2004, separated in 2008, and is now divorced. He has three children who are eight, four and three years old. He served in the Navy from 1999 to 2003, and was honorably discharged at pay grade E4. He has worked for his current employer, a defense contractor, since 2007 as a flight operations mechanic. Applicant received a secret security clearance in 2008. (GE 1, 5; AE F; Tr. 35, 60-66)

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.

Applicant has been consuming alcohol since he was in high school, usually having one or two beers once or twice per month. Starting at about age 21, he drank four or five beers once per month at a bar. He feels the effects of the alcohol after about three beers. (GE 6)

In 2002, when he was 28 years old, Applicant was deployed with the Navy in Greece. In November 2002, he was in the port with a group of service members in a van, when it was involved in an accident. He was not driving. All the members involved received non-judicial punishment; all were demoted. Applicant was reduced in rank from E4 to E3. It was the only negative incident in his military career. The Good Conduct Award in April 2002 was awarded before the van incident. The Letter of Commendation was awarded for performance after this incident. (GE 1, 4; AE E; Tr. 26-27, 51-55)

In October 2003, in state A, Applicant was arguing with his ex-girlfriend, the mother of his oldest daughter. She was talking with a friend on the telephone. He tried to grab the telephone. Her friend heard the argument and called the police. Applicant was arrested for Assault 4th Degree – Domestic Violence. Applicant testified that alcohol was not involved in this incident. The court ordered Applicant to have no contact with the victim from October 2003 to October 2005. Applicant's ex-girlfriend wrote a letter to the state's attorney's office indicating that Applicant was not at fault. The charge was dismissed by the prosecution. (GE 1, 4, 6; Tr. 25-26, 50)

While living in state A in April 2007, Applicant drank four or five beers at home one afternoon after work. He then drove to a store to buy baby formula. On the way home, police stopped him for speeding. He was charged with Driving under the Influence of Alcohol; Speeding (25 mph over limit); and Negligent Driving 1st Degree. Applicant does not believe he was speeding. He failed the field sobriety test. His blood alcohol tests at the site and at the police station registered a blood-alcohol content (BAC) of 0.07. The speeding charge was dismissed. The charge of driving while under the influence of alcohol was amended to the lesser charge of negligent driving because his BAC was under the state's limit of 0.08 for the charge of driving under the influence of alcohol. (GE 2, 4, 6; Tr. 24-25, 44, 55-56)

On July 6, 2007, Applicant was sentenced to 90 days jail (suspended); \$685 in fines; two years probation, to end July 2009; prohibited to drive with a BAC of 0.08 or more or to refuse a BAC test; required to attend a Victims' Panel within 60 days; attend an alcohol assessment within 60 days; and prohibited to engage in any alcohol or drug-related violations, which would result in reinstatement of incarceration. Applicant was assessed by a medical doctor in August 2007. The doctor determined that Applicant did not abuse alcohol, nor was he alcohol dependent. He required Applicant to attend a one-day alcohol awareness class, which Applicant did. (GE 6) Applicant's court record notes that he complied with all court orders, and jurisdiction expired July 24, 2009. (GE 2; AE H; Tr. 62-64)

In the fall of 2007, Applicant and his family moved from state A to state B so that he could change his career focus from commercial aircraft maintenance to military aircraft maintenance. Applicant went through a difficult period, including financial problems concerning his house in state A, adjusting to his new job, and disagreeing with his wife about their move. In April 2008, she moved back to state A with their children. Applicant testified that he "kind of lost grasp of the right thing to do at that time." (Tr. 21-24, 39)

On March 14, 2009, Applicant was arrested in state B. He had gone to a bar to play pool with a friend. He did not plan to drink alcohol because of the distance of the bar from his home. However, he drank beer and three shots of liquor. After leaving the bar, Applicant was stopped by police for speeding. When tested at the police station, Applicant's BAC was 0.19, more than twice state B's legal limit. He was ultimately charged with seven counts, including driving under the influence of alcohol, driving while impaired, and negligent driving. This arrest occurred while he was still on probation from the DUI in state A. Applicant did not report his drunk-driving arrest to the probation office in state A. (GE 6; Tr. 44, 68)

On April 4, 2009, Applicant was evaluated at an alcohol and drug counseling center. He believed an evaluation would help him during his July court appearance. The assessment consisted of two addiction tests, consideration of criteria in the Diagnostic and Statistical Manual, Fourth Edition (DMS-IV), and Applicant's self-reporting. Applicant did not meet any criteria on the DSM-IV for alcohol abuse or dependence. The certified addiction counselor (CSC-AD) recommended 90 days of substance abuse group counseling; random urinalyses; and weekly breathalyzer tests. Applicant was informed that the 90-day program was advised because of the high level of alcohol in his blood when he was arrested. He entered treatment on April 22, 2009, attended 11 group sessions, and submitted three negative urinalyses. He successfully completed the program on July 23, 2009. He did not drink during his treatment. He began drinking alcohol again in December 2009. Applicant also attended counseling in June 2009, but it focused on his marital rather than alcohol issues. He expressed a desire to continue, but was financially unable to do so. (GE 6; AE A, C, B; Tr. 23, 41, 46, 50, 57-58)

At his court appearance on July 30, 2009, Applicant accepted a plea agreement in which he pled guilty to driving while impaired by alcohol, and the remaining charges were dismissed. Applicant was fined \$315; sentenced to 30 days incarceration (suspended); and one year of unsupervised probation. Applicant was not required to abstain from alcohol. He drank alcohol during his probation, approximately one weekend per month. Applicant's probation ran from July 2009 to July 2010. As a condition of his probation, a breathalyzer was installed in his car. It prevented him from driving if he had consumed alcohol. If it detected alcohol, his jail sentence would be reinstated. It was removed in July 2009. (GE 3, 4, 6; Tr. 41, 43)

Applicant believes that the two DUI events were isolated incidents and were uncharacteristic of his usual behavior. He continues to drink since his 2009 DUI,

consuming approximately three to four beers when he goes to a bar one weekend per month. He does not drive after drinking; he drinks at locations within walking distance of his home, or takes a cab home. His counselors have not recommended that he stop drinking, but he has considered it. He testified that he does not know how to stop, but will probably seek professional help. (GE 6; Tr. 39-40, 65-67) He also stated,

Well, I feel like I need to stop because it has gotten me trouble and I don't want it to happen again. But I also mentioned that maybe I should go see a counselor and ask for help to--not to have that four beers a month anymore. (Tr. 67)

Seven of Applicant's co-workers signed a joint statement lauding Applicant's character. The letter describes Applicant as a dedicated worker who is conscientious, dependable, and takes his work with classified information seriously. Applicant submitted evidence that he received an undated company award for his accomplishments. (AE D, G)

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.³ 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 guidelines.

A security clearance decision resolves only the question of whether it is clearly consistent with the national interest⁴ 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

³ Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁵

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 that applicants possess the requisite judgment, reliability, and trustworthiness to protect the national interests as their 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.⁶

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." I have considered the disqualifying conditions under Guideline G, AG ¶ 22, especially the following:

(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

(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.

Applicant consumed alcohol to the point of intoxication at times since his teenage years. On at least two occasions, he drove after becoming intoxicated and was subsequently arrested. He was convicted of a lesser offense of negligent driving in 2007. In 2009, he was convicted of driving while impaired. He participated in an alcohol treatment program following the 2009 DWI. These facts support application of AG ¶¶ 22 (a) and (c).

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

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

(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 use does not rise to the level of alcohol abuse; however, it does have security relevance. He has been drinking alcohol for years, and it has resulted in criminal conduct. Although the 2007 alcohol offense is almost four years in the past, his 2009 offense is recent. In addition, his most recent offense is also his most serious offense. In 2009, his BAC was so high that the 90 days of counseling was based on that fact. Applicant continues to drink alcohol, in approximately the same pattern as when he had his 2009 drunk-driving arrest. Applicant demonstrated extremely poor judgment by driving after becoming intoxicated. As Applicant's circumstances have not significantly changed--he is still drinking alcohol--I cannot conclude that alcohol-related criminal conduct will not recur. AG ¶ 23(a) does not apply.

Applicant is ambivalent about his alcohol use. On the one hand, he believes that the two offenses do not represent his usual behavior. On the other hand, he believes he may need professional help to assist him in ending his alcohol use. He has not taken any steps to obtain such assistance. AG ¶ 23(b) does not apply.

Applicant completed a three-month alcohol treatment program in 2009. He has been evaluated, and has not been diagnosed as either an alcohol abuser or alcohol dependent. He abstained from alcohol during the program, though it was not required. He resumed drinking alcohol a few months after completing the program, and currently drinks alcohol in about the same pattern as he has in the past. However, he is ambivalent about whether he should end his consumption,

and has not sought professional assistance in resolving the situation. AG ¶ 23 (d) applies in part. However, the partial mitigation is insufficient to overcome the disqualifying conditions.

Guideline J, Criminal Conduct

The security concern under this guideline is that

Criminal conduct 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).

I have considered all of the disqualifying conditions under AG ¶ 31, and especially the following:

- (a) a single serious crime or multiple lesser offenses; and
- (d) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant was arrested three times on criminal charges between 2003 and 2009. He also received non-judicial punishment because of involvement in a vehicle accident in 2002. His decision to drive after becoming intoxicated in 2007 and 2009 show a serious disregard for rules, and for the public safety. In 2007, Applicant was sentenced in state A to two years of probation, which ran from July 2007 to July 2009. During that period, Applicant was arrested in state B for driving under the influence of alcohol. Applicant's conduct violated his probation in state A, and, if reported, would have resulted in reinstatement of his jail sentence. AG ¶ 31(a) and (d) apply.

Guideline J includes two relevant mitigating conditions 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.

AG ¶ 32(a) mitigates the conduct alleged in subparagraphs 2.b. and 2.c. Many years have passed since Applicant engaged in the conduct of 2002 and

2003. The state withdrew the 2003 charge in the domestic violence case. Moreover, the 2002 conduct listed at allegation 2.c. is not criminal in nature.

However, Applicant engaged in serious criminal conduct in 2007 and 2009. These two offenses involving driving after drinking alcohol are both serious and recent. Both reflect poorly on his judgment. As neither of them occurred in unusual circumstances, and Applicant continues to drink alcohol, it is possible that such conduct may occur in the future. Applicant's conduct casts serious doubt on his trustworthiness and good judgment. AG ¶ 32(a) does not apply to allegation 2.a.

AG ¶ 32(d) applies partially, because Applicant demonstrated some rehabilitation by attending counseling in 2009. He receives positive recommendations from his co-workers, and has received a company award. However, as noted previously, Applicant continues to drink in the manner that he did before his alcohol offenses. Though he recognizes he may have a problem, he has not taken steps to deal with it. In addition, insufficient time has passed since Applicant's most recent criminal conduct in 2009 to support a conclusion that it will not recur. Only partial mitigation is available under AG ¶ 32(d).

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.

Applicant currently maintains the same drinking pattern as when he was arrested. He has been arrested on drunk-driving charges twice in the past three years. Moreover, his 2009 arrest occurred while he held a security clearance. In the past, he continued to drink alcohol despite the negative effects it caused.

Applicant's decisions to drink and drive posed a danger to himself and others. He believes he would benefit from help in ending his alcohol use, but has not entered such counseling, or attended any support groups that might assist him in doing so. His most recent probation ended only months ago, in 2010. He demonstrated a lack of trustworthiness when he failed to report his probation violation to his state A probation officer. At this point in time, I cannot conclude that Applicant will not be involved again in alcohol-related negative conduct in the future.

Applicant has not mitigated the security concerns arising from the alcohol consumption and criminal conduct guidelines. 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.e.	Against Applicant
Paragraph 2, Guideline J	AGAINST Applicant
Subparagraphs 2.a.	Against Applicant
Subparagraphs 2.b. – 2.c.	For Applicant

Conclusion

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

RITA C. O'BRIEN
Administrative Judge