



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



In the matter of:)	
)	
)	ISCR Case No. 09-08287
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

April 19, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline G, Alcohol Consumption. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On December 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G. 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 January 3, 2011, and requested a hearing before an administrative judge. The case was assigned to me on February 1,

2011. DOHA issued a Notice of Hearing on February 9, 2011. I convened the hearing as scheduled on March 14, 2011. The Government offered Exhibits (GE) 1 through 5. Applicant did not object and they were admitted into evidence.¹ Applicant testified and did not offer any exhibits. DOHA received the hearing transcript (Tr.) on March 21, 2011.

Findings of Fact

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

Applicant is 39 years old. He married in January 2011 and has no children. Applicant graduated from high school in 1989. He enlisted in the U.S. Marine Corps, but was medically discharged before completing boot camp. He attended college and needs six credits to earn a bachelor's degree. He has worked for his current employer since 2007.²

Sometime around 1993, Applicant began drinking alcohol. He stated he was earning a low wage and drank alcohol whenever he had the money. He estimated that he then drank alcohol four to five times a week, usually at parties.³

In 1993, Applicant was arrested and convicted of driving under the influence of alcohol (DUI) and driving while his license was suspended or revoked. Applicant pled guilty and received a fine, probation, and court costs. Applicant did not recall the specifics of the arrest. He remembers failing a field sobriety test and spending the night in jail.⁴

Applicant stated he stopped drinking for six years after this conviction. He decided he needed to make a change in his life. Consuming alcohol had impacted his finances because instead of paying his bills he was spending money on alcohol. He decided to attend Alcoholics Anonymous (AA). He did not know if he had an alcohol problem at the time. He attended AA weekly for four and a half years. He stopped attending because he moved and did not find an AA group that he liked in his new location. He last attended AA in 2000. Applicant stated he does not think he has a

¹ Tr. 11; Department Counsel amended the SOR ¶ 1.d, changing the date November 28, 2009 to November 28, 2008. Applicant had no objection, was offered an opportunity to request additional time to prepare his case, and agreed to proceed, waiving his right for additional time.

² Tr. 19-21, 24, 75.

³ Tr. 25-27.

⁴ Tr. 27-29.

problem with alcohol. He thought AA helped him with his personality and showed him that drinking was not everything.⁵

Applicant stated he did not consume alcohol from 1993 until approximately 1998 or 1999, when as part of his job responsibilities, he had to entertain clients. Part of the entertainment was to take clients to sporting events and happy hours where they consumed alcohol. He felt pressure from work to entertain the clients. He indicated that from 2000 to 2008 he drank alcohol sporadically. Sometimes he would drink four times a week and other times not at all. At his hearing, he indicated he last had a drink a couple of days ago and consumed about four or five drinks.⁶

In September 2008, Applicant went to a friend's bar to help him celebrate. While there, he had between four and six shots of alcohol. He left the bar and drove to a restaurant. He saw friends he knew in the parking lot so he decided to show off with his vehicle and drove it up on a curb. He then went into the restaurant and sat down. A waitress told him that the police were called. He left the restaurant before the police arrived and was driving when he was stopped by them. He failed the field sobriety test and had a breathalyzer reading of .16%. He was charged with DUI and failure to drive right of center. He pled guilty to the offenses in January 2009, and received a fine, court costs, and probation for a year.⁷

Applicant explained he previously had a hearing at the Department of Motor Vehicles regarding his driver's license. He stated this hearing was before his criminal trial. He had the choice of having his license suspended for 90 days or having an ignition interlock placed on his car for a year. He chose the interlock. In a statement made to the Office of Personnel Management (OPM) investigator on March 23, 2009, Applicant indicated that he had an interlock violation in about November 2008, before his criminal trial, and being ordered to abstain from alcohol consumption. Applicant told the investigator he had two beers when he attempted to drive. At his hearing, Applicant stated he never told the OPM investigator that he had an interlock violation. He stated he never told the investigator that he had two beers before attempting to drive when he used the ignition interlock. At his hearing, he stated that he had instances where he used mouthwash and that would cause a false positive. He had no explanation for why the OPM investigator indicated that Applicant stated that he had said he had two beers when he attempted to drive. When asked why he signed a document confirming the summary of his OPM interview was correct when he now disputes its contents, he explained he had a lot of papers to sign. When asked why then did he take time to write responses to specific questions on the summary, he indicated that he just signed the papers. He stated he did not consume alcohol from the time he was arrested in

⁵ Tr. 17-18, 21, 29-33.

⁶ Tr. 22, 33-36.

⁷ Tr. 36, 49-61, 76-83.

September 2008 to when he went to court sometime in January 2009. Applicant's testimony was not credible and lacked candor.⁸

At the suggestion of his attorney, Applicant attended alcohol-related counseling from November 2008 to April 2009. He did not believe he was diagnosed as alcohol dependent. When he completed the forms for admission to the alcohol counseling, he failed to list his first DUI. He stated he forgot about it, and at his court hearing, his attorney reminded him.⁹

Applicant indicated that his DUI convictions have had a financial impact on him because he had to pay for legal fees, fines, and probation costs. He stated that the only time after his 1993 conviction for DUI that he drove after drinking was when he was arrested for DUI in 2008. He believed he was sentenced to probation for a year, and remembers he had to report to his probation officer monthly. He could not recall exactly when his probation expired, but believed it was around July 2010. He was to abstain from alcohol consumption during his probation. He did not drink while he was on probation and complied with the other terms. He could not recall many of the specific facts around his 2008 DUI arrest or conviction. He considers himself a generally responsible drinker. He is always concerned that his clients do not drink and drive so he is the designated driver. He does not believe he has any problem with alcohol. Applicant continues to consume alcohol and intends to do so in the future.¹⁰

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

⁸ GE 2; Tr. 36-61, 83-89.

⁹ Tr. 32-33, 61, 64.

¹⁰ Tr. 18, 36-41, 66-75.

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.

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 for 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 especially considered 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.

Applicant has two DUI convictions. He had an ignition interlock on his vehicle and attempted to drive after consuming alcohol. He received alcohol-related counseling from November 2008 to April 2009. The above disqualifying condition applies.

I have considered all of the mitigating conditions under AG ¶ 23 and especially considered the following:

(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

(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).

Applicant has two DUI convictions, the most recent in January 2009. He attended AA in the past. He does not believe he is alcohol-dependent. He consumed alcohol from 1993 to the present, and has had long periods of abstinence during that time. He completed alcohol counseling from November 2008 to April 2009. It has been more than two years since his last DUI conviction and he completed the terms of his sentence. Applicant plans to continue to drink alcohol, but stated he will do so responsibly. Applicant attributes his alcohol consumption before his latest DUI to having to entertain clients as part of employment. After Applicant's 2008 arrest, and before he went to trial for DUI offense, he had an ignition interlock on his car. In his statement to the OPM investigator, he indicated he failed the ignition test after he had consumed two beers. At his hearing, he indicated he failed the test because he had used mouthwash. These inconsistent statements are a concern. I do not believe Applicant was candid about his alcohol consumption and I have a concern that he attempted to drive after consuming alcohol while awaiting his trial for DUI, when he failed the ignition test. I am not convinced Applicant's past problems with alcohol are unlikely to recur and I find it casts doubt on his good judgment and trustworthiness. Applicant does not believe he has a problem with alcohol. Not enough time has lapsed since his past DUI and his attempt to drive after consuming alcohol when the ignition interlock device prevented him from doing so. I find the above mitigating conditions do 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. Applicant was convicted of DUI in 1993 and 2009. He consumed alcohol from 1993 to the present, and has had long periods of abstinence, including from 1993 to 1998. He continues to drink alcohol and intends to do so in the future. He attempted to and was prevented from driving when the ignition interlock denied him access to the vehicle. He attempted to drive after consuming alcohol two months after his arrest for DUI and before the offense was adjudicated. His testimony at his hearing was inconsistent with the statement he made to the OPM investigator. I did not find his hearing testimony credible. At this juncture, it is too early to conclude that Applicant's behavior is unlikely to recur. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guideline for Alcohol Consumption.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraphs 1.f:	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