



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



In the matter of:)
)
) ISCR Case No. 09-08743
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

April 15, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated alcohol consumption and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G, alcohol consumption. The action was taken under Executive Order (EO) 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on December 21, 2010, and requested a hearing before an administrative judge. On February 1, 2011, DOHA amended the SOR to add allegations under Guideline J, criminal conduct. The case was assigned to me on February 7, 2011. Applicant answered the amended SOR on February 14, 2011.

DOHA issued a notice of hearing on March 2, 2011, and the hearing was convened as scheduled on March 24, 2011. The Government offered exhibits (GE) 1 through 12. GE 1 through 4 and 6 through 12 were admitted without objection. GE 5 was admitted over Applicant's objection. Applicant testified and called two witnesses, but he did not submit any documentary evidence. The record was held open until April 8, 2011, for Applicant to submit additional information. Applicant timely submitted a document that was marked exhibit (AE) A and admitted without objection. Department Counsel's memorandum forwarding Applicant's exhibit is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on April 1, 2011.

Findings of Fact

Applicant is a 28-year-old employee of a defense contractor. He seeks to retain a security clearance that he has held for several years. He attends college and is in his third year. He is married but separated. He has two children.¹

Applicant was charged in 2003 with marijuana possession and possession of drug paraphernalia. He received a deferred prosecution. The charges were dismissed in 2009. Applicant admits that he possessed marijuana and drug paraphernalia. He has not used illegal drugs since 2003.²

In January 2008, Applicant met a friend after work for some drinks. He estimated that he drank about 16 beers and six shots before he attempted to drive home. He drove through a stop sign and entangled his vehicle in a fence. He was stopped by the police after he untangled his vehicle. He was given a breathalyzer test. He believes his blood alcohol concentration (BAC) was .23%. He was arrested and charged with driving under the influence of alcohol (DUI), first offense; DUI, with BAC of .08 or more, first offense; and driving under the extreme influence of alcohol with BAC of .15 or more, first offense. He was convicted of the first charge and sentenced to 10 days in jail, and he was ordered to attend DUI counseling. The remaining charges were dismissed. The conviction was set aside in May 2009.³

Applicant's wife went for a "girls' night out" in August 2008. The following evening, Applicant found inappropriate pictures on her digital camera. He had been drinking, and they argued. She said something to the effect that he should just put a bullet in his head. Applicant's brother was staying with them at the time. Applicant took his brother's revolver and went to the back yard. The gun had one bullet in it. Applicant placed the gun to his head. His wife called the police. Applicant had the gun to his head when the police arrived. There was a stand-off for about 45 minutes, while the police attempted to convince him to put the gun down. Applicant eventually pulled the trigger seven times. The police used non-lethal force to subdue him. Applicant admitted that it "may have been one of the dumbest things [he had] ever done in [his] life." He stated

¹ Tr. at 35-36, 65; GE 1.

² Applicant's response to amended SOR; GE 1, 3, 11, 12.

³ Tr. at 36-42; Applicant's response to SOR; GE 2, 3, 9.

that he had no intention to kill himself. He stated he placed the gun to his head so that the police would not harm or blame his brother and his wife. He stated that he ensured that the bullet was not in a position to be fired each time he pulled the trigger. After he pulled the trigger five times, he moved the cylinder to again place the bullet away from the hammer when he pulled the trigger the sixth and seventh time.⁴

Applicant received inpatient treatment for six days following the revolver incident. He was diagnosed with depression, not otherwise specified (NOS), and alcohol dependence. The medical records containing the diagnosis were signed by a nurse practitioner (N.P.). His discharge plan included recommendations that he continue in counseling, seek anger management support, and attend Alcoholics Anonymous (AA) meetings. Applicant continued to drink alcohol after he was discharged.⁵ In February 2010, Applicant responded to DOHA interrogatories, noting:

I have made a few mistakes in my life that I don't necessarily regret. We have to make mistakes in life to learn valuable lessons, and sometimes those mistakes come with severe penalties. I personally think that I am an honest and trustworthy person. Since my DUI, I have made every effort to not drink to the point of intoxication and I always have a designated driver or call a cab if I do drink any amount of alcohol.⁶

On July 17, 2010, Applicant was playing poker with some friends. He stated that he had two drinks. After the poker game, he went to a bar with his friends. The bar had a special in which a gallon of beer was sold. Applicant stated that he drank about 75% of the gallon of beer. At about 2:30 in the morning, he attempted to drive home on an interstate highway. He was falling asleep and attempted to pull off the highway and sleep in his pick-up truck. He fell asleep before he could park the truck. His truck hit a metal pole and two trees. Two travel trailers were also damaged when they were struck by the trees. Applicant's airbag deployed during the accident. Applicant was transported to the hospital with head lacerations. He was treated for his injuries and diagnosed with acute alcohol intoxication.⁷

Applicant was evaluated on July 22, 2010, by a psychotherapist. He was diagnosed with alcohol dependence (moderated) and anxiety disorder NOS.⁸

In October 2010, Applicant was charged for the July 2010 crash with DUI with one prior DUI conviction within 84 months; DUI with BAC of .08 or more, with one prior DUI conviction within 84 months; driving under the extreme influence of alcohol with

⁴ Tr. at 42-50; Applicant's response to SOR; GE 2, 3.

⁵ Tr. at 46, 50-52; GE 4, 5.

⁶ GE 2.

⁷ Tr. at 31-32, 52-59; Applicant's response to SOR; GE 3.

⁸ Tr. at 60; GE 6.

BAC of .15 or more, with one prior DUI conviction within 84 months; driving under the extreme influence of alcohol with BAC of .20 or more, with one prior DUI conviction within 84 months; and criminal damage. The charges are still pending. Applicant has a court date in May 2011.⁹

Applicant stated that he has not drunk any alcohol since the July 2010 crash, and he does not plan to drink in the future. He attended faith-based alcohol counseling from September 2010 through February 2011. He completed 36 hours of a state-approved DUI/alcohol education and treatment program on March 5, 2011. He attends AA meetings. He stated that he has “turned [his] entire life around.” He acknowledges that he has had alcohol problems, but he does not believe he is alcohol dependent or an alcoholic. He stated that he had a strong urge to drink several weeks before the hearing. He points to the fact that he did not drink as proof that he is not an alcoholic.¹⁰

Two of Applicant’s supervisors testified to Applicant’s excellent job performance and his reliability at work.¹¹

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 to be 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, administrative judges apply the guidelines 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is

⁹ Tr. at 33, 61-65; Applicant’s response to SOR; GE 7.

¹⁰ Tr. at 31-34, 60-61; GE 3; AE A.

¹¹ Tr. at 66-71.

responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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 EO 10865 provides that adverse 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

The security concern for alcohol consumption is set out in AG ¶ 21:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this 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 had DUIs in 2008 and 2010. In 2008, he was intoxicated and involved in a police stand-off. His alcohol-related incidents and pattern of alcohol consumption are sufficient to raise AG ¶¶ 22(a) and 22(c).

Applicant was diagnosed as alcohol dependent in 2008 and in 2010. The Appeal Board has stated that an administrative judge should take an expansive view of what constitutes a duly qualified medical professional.¹² AG ¶ 22(d) is applicable.

SOR ¶¶ 1.b and 1.e both allege that Applicant was diagnosed as alcohol dependent. When the same conduct or facts are alleged in separate allegations under the same guideline, one allegation must be concluded for the Applicant. SOR ¶ 1.e is concluded for Applicant as a duplication.

SOR ¶¶ 1.d and 1.f. allege the same conduct. SOR ¶ 1.d is concluded for Applicant as a duplication.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. 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);
- (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; 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 most recent alcohol-related incident occurred in July 2010. He is pending trial for the charges related to that incident. That incident is recent, did not happen under unusual circumstances, and I am unable to determine that it is unlikely to

¹² ISCR Case No. 07-00558 at 5 (App. Bd. Apr. 7, 2008).

recur. Applicant's alcohol consumption continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 23(a) is not applicable.

Applicant has not had a drink of alcohol since July 2010. He attended faith-based alcohol counseling from September 2010 through February 2011; he completed 36 hours of a state-approved DUI/alcohol education and treatment program on March 5, 2011; and he attends AA meetings. The remaining mitigating conditions have some applicability. However, I am concerned that Applicant does not yet appear to accept the severity of his alcohol problems, he is pending trial for his latest DUI, and he has been sober for less than a year. I find that alcohol consumption security concerns remain despite the presence of some mitigation.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged in 2003 with marijuana possession and possession of drug paraphernalia. He admits that he possessed marijuana and drug paraphernalia. He received a deferred prosecution, and the charges were dismissed in 2009. He was convicted of DUI after a January 2008 arrest. The conviction was set aside in May 2009. In July 2010, he was drunk and hit a metal pole and two trees with his pick-up truck after he fell asleep. He is pending a court date for the charges resulting from that incident. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

- (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's most recent criminal incident occurred in July 2010. He is pending trial for the charges related to that incident. No criminal conduct mitigating conditions are applicable under the same rationale discussed above in the alcohol consumption discussion.

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 relevant 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 Guidelines 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.

I considered the favorable character evidence presented by Applicant's supervisors. Applicant has three serious alcohol-related incidents. On the second occasion, he was drunk and held a revolver loaded with a bullet to his head while involved in a police stand-off. In July 2010, he drove his pickup truck on a highway in the early morning hours while drunk. He fell asleep and hit a metal pole and two trees causing damage to two trailers located close to the trees. He is pending a court date on the charges generated by that action. Despite the three alcohol-related incidents, the likelihood of incarceration, and two diagnoses of alcohol dependence, Applicant does not appear to accept the seriousness of his alcohol problems. He feels that he is in control of his problem, and he points to the fact that he was able to resist the urge to drink as proof that he is not an alcoholic. Applicant and those around him were lucky that no one was seriously harmed in the three incidents. I am not convinced that alcohol-related problems will not recur.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated alcohol consumption and criminal conduct security concerns.

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.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge