



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



In the matter of:)
)
) ADP Case No. 10-02010
)
Applicant for Public Trust Position)

Appearances

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

September 21, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, Personal Conduct, Guideline M, Use of Information Technology Systems, and Guideline G Alcohol Consumption. Applicant’s eligibility for a public trust position is denied.

Statement of the Case

On March 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations. DOHA acted 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on March 11, 2011. On April 11, 2011, Department Counsel issued an amended SOR containing additional allegations under Guideline E, Personal Conduct, and new allegations under Guideline G, Alcohol Consumption.¹ Applicant answered the amended SOR on April 20, 2011. He requested a hearing before an administrative judge. The case was assigned to me on April 20, 2011. DOHA issued a notice of hearing on May 31, 2011, with a hearing date of June 29, 2011. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 8, which were admitted into evidence without any objection. Department Counsel's exhibit index was marked as hearing exhibit (HE) I. Applicant testified, presented three witnesses, and offered exhibits (AE) A through H that were admitted into evidence without any objections. DOHA received the hearing transcript (Tr.) on July 11, 2011.

Procedural Ruling

During the hearing, Department Counsel moved to amend the SOR to conform to the evidence. The motion sought to add ¶ 1.h under Guideline E, alleging Applicant made a false statement in his October 30, 2009 affidavit to defense investigators when he stated that he completely stopped drinking in 2007 and has not had a drink since then. Applicant's testimony indicated that he continued to drink after 2007. Department Counsel also sought to amend the allegation under Guideline G, ¶ 3.a, to reflect March 2011 as the date Applicant's testimony indicated he stopped drinking. The motion was explained to the Applicant, and he was allowed to lodge any objections. None were stated, and the motion was granted.²

Findings of Fact

In Applicant's answer to the SOR and the amended SOR, he admitted all the allegations. Those admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 52 years old. He has been married for four years. This is his second marriage. He has two adult step-children. He currently works for a federal contractor as a contract administrator. He began working for his current employer in July 2009. Before that, he worked for several different federal contractors. He was terminated by a defense contractor, for whom he worked between 1997 and 2005 because he violated the company's policy related to improper Internet and computer use. He holds a bachelor's degree and a master's of business administration (MBA). He served in the active duty Army from 1981 to 1985, and in the Army Reserve from 1985 to 1995. He has held a security clearance in the past.³

¹ The amended SOR incorrectly lists the allegations under Guideline G as ¶¶ 1.a through 1.h., however, they should be listed as ¶¶ 3.a through 3.h and will be referred to as such in this decision.

² Tr. at 114-116.

³ Tr. at 6-7, 85-87; GE 1.

Applicant's conduct raised in the SOR includes: (1) in August 2003, reporting to work under the influence of alcohol resulting in a suspension from work; in September 2005, having his special program access revoked by another government agency (AGA) because of his alcohol abuse; between January and October 2005, viewing thousands of pornographic images while using a company computer in violation of company policy resulting in his termination; in September 1997, failing to report to AGA his alcohol-related conviction and subsequent alcohol-related treatment; making a false statement in his March 25, 2004, security clearance application by failing to disclose his 1994 DUI arrest; in May 2004, making a false statement to a defense investigator concerning his alcohol consumption between May 1997 and August 2003; in October 2009, making a false statement in an affidavit to a defense investigator to the effect that he stopped drinking in 2007 and has not consumed any alcohol since then (SOR ¶¶ 1.a through 1.h); (2) violating his company's policy related to information technology systems by using his office computer to access pornographic material (SOR ¶ 2.a); (3) engaging in excessive alcohol consumption between 1975 and March 2011 resulting in a series of alcohol-related criminal charges, work place issues, and alcohol treatment and counseling over that period (SOR ¶¶ 3.a through 3.h).

Applicant first tried alcohol when he was about 16 years old. He began drinking wine and beer socially, but the more alcohol he consumed, the more he wanted. Eventually, he was drinking as much as a half bottle of bourbon every day from 1997 through 2007. He would get a buzz from drinking, and it helped him feel better.⁴ He believes that alcoholism runs in his family. He had the following related alcohol-related incidents:

1. In 1994 Applicant was arrested and charged with driving under the influence (DUI). The charge was later reduced to reckless driving. He pleaded guilty and was sentenced to six months of jail-time (suspended except for 48 hours). The court also fined him, sentenced him to community service, and directed his attendance to alcohol abuse classes.⁵

2. In either 1994 or 1995, Applicant saw a medical professional, who diagnosed him as alcohol dependant. He also attended alcohol counseling classes. Later in August 1995, Applicant was seen by another medical professional, who diagnosed Applicant with alcoholism. He attended both group and individual counseling sessions through February 1996 and was given an excellent prognosis. He continued psychiatric counseling for alcohol through 2007.⁶

⁴ GE 6.

⁵ *Id.*

⁶ GE 2, 6.

3. In September 2007, Applicant was arrested and charged with DUI. He pleaded guilty to driving while impaired and was sentenced to 180 days of jail time (suspended), a fine, community service, alcohol treatment classes, and one year unsupervised probation.⁷

4. In August 2003, Applicant was sent home from work for having excessive alcohol in his system. He claimed that the drinking was from the night before his work day. He was suspended from work without pay for two weeks, and he received a reprimand.⁸

5. In September 2005, Applicant's access to the special access program, on which he was working for a defense contractor, was revoked by AGA because of the alcohol incidents described above. Additional rationale for revocation included his failure to report his 1997 DUI arrest to his company's security officer.⁹

6. A company investigation revealed from January to October 2005, Applicant accessed over 2000 unauthorized web sites using his company computer. Many of the sites contained pornographic content. Accessing these sites was in violation of company policy, and he was terminated because of his actions. He was aware of the policy. Applicant's company was required to reimburse the Government for the time Applicant spent accessing the unauthorized web sites. Applicant believes his alcohol use contributed to his actions in accessing these unauthorized sites.¹⁰

Applicant completed a security clearance application on March 25, 2004. In that application, he failed to list his 1994 DUI arrest and conviction. He was advised by his attorney who represented him in that DUI case that because the case was pled down to a reckless driving charge, he did not have to list it as an alcohol-related arrest or charge on his security clearance application. However, he admitted providing false information, during an interview with AGA in May 2004. The false information concerned when he stopped drinking alcohol between May 1997 and August 2003. He later admitted he was drinking approximately a half a bottle of bourbon every day during that time frame. He also admitted providing false information in his October 30, 2009 affidavit to a defense investigator about when he stopped drinking alcohol. He admitted in his testimony that he continued to drink alcohol to excess beyond 2007, the date he claimed in the affidavit that he completely stopped drinking alcohol.¹¹

⁷ *Id.*

⁸ *Id.*

⁹ GE 2.

¹⁰ Tr. at 98; GE 4, 5.

¹¹ Tr. at 93, 96-97; GE 2, 6-7.

Applicant's wife testified that she believed Applicant stopped drinking completely in January 2007. She was quite adamant about it, stating in response to a question asking whether his last use of alcohol was in January 2007: "I'm absolutely positive; I would swear to it." Likewise, a close friend of Applicant testified and stated: "I would swear that he hasn't had a drink since (2007)." Applicant admitted in his testimony that he was drinking alcohol up through March 27, 2011. He also admitted when he drinks he does so to the point of intoxication. He further testified that he kept his recent drinking from his wife by drinking away from his home or at home when she was gone.¹²

Applicant's treating physiologist also testified for him. She saw him for seven counseling sessions in 2007. She then did a forensic evaluation of him for this hearing. She saw him three times this year for the purpose of the evaluation. Applicant admitted to her that he continued to drink to excess during the period from 2007 through 2011, confiding that his last use was on March 27, 2011. She diagnosed Applicant as alcohol dependant in 2007 and that diagnosis still applies to him. She related that his longest period of abstinence was a six-month period between January and July 2009. She further testified that any granting of a trustworthiness determination in this case should be conditioned upon a close monitoring of Applicant's alcohol abstinence for one year. Applicant is scheduled to see a different psychologist for future treatment.¹³

Applicant submitted several letters from past employers and his current employer. All indicated that there were no issues about him misusing company computers while he worked at those respective jobs. His current supervisor and a former coworker both attested to his good judgment, honesty, loyalty, integrity, and professionalism.¹⁴

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,

¹² Tr. at 38, 62, 105-106.

¹³ Tr. at 68-79; AE H.

¹⁴ AE A-G.

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, 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's conduct of reporting to work under the influence of alcohol, having his access to sensitive information revoked by AGA, viewing pornographic material on a company computer against company policy, and being terminated for violating company policy all support a whole person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations. His actions also created a vulnerability to his personal standing. AG ¶¶ 16(d) and 16(e) apply. Applicant's admissions to intentionally withholding truthful information about his past driving offenses, about his alcohol-related treatment, and

about when he stopped consuming alcohol during his interview by defense investigators, when he completed his security clearance applications, and when he answered government interrogatories all qualify as deliberate falsifications of relevant facts. AG ¶¶ 16(a) and 16(b) apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and the following potentially apply:

- (b) the omission or concealment was caused by improper advice of legal counsel advising the individual specifically concerning the security clearance process;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

Because Applicant received erroneous advice from an attorney concerning whether he had to report his 1994 DUI arrest on his security clearance application, AG ¶ 17(b) fully applies to SOR ¶ 1.f. However, none of the other listed mitigating factors apply to Applicant's conduct, particularly his false statements to an investigator and in answering interrogatories. His viewing of pornographic images on his company's computer in violation of company policy is not minor, given that he was terminated because of his actions. It is also recent enough to be of concern. The number of images on the computer led to the conclusion that this was not an infrequent activity for Applicant. AG ¶ 17(c) does not apply. Although Applicant sought assistance for his alcohol abuse, he remains a work-in-progress since he consumed alcohol to excess as recently as March 2011. Based upon his recent abuse of alcohol, his trustworthiness and reliability are at issue, and it cannot be concluded that similar behavior will not recur. AG ¶ 17(d) does not apply. Applicant failed to inform his wife and friends about his current use of alcohol, thus deceiving them to the extent that they were willing to "swear" at the hearing that he stopped drinking completely in 2007. AG ¶ 17(e) does not apply.

Guideline M, Use of Information Technology Systems

AG ¶ 39 expresses the security concern pertaining to use of information technology systems:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) unauthorized use of a government or other information technology system.

Applicant used his company computer to view pornographic images over an extended period, which led to his termination for violating company policy. AG ¶ 40(e) applies.

I have considered all of the mitigating conditions under AG ¶ 41 and the following is potentially applicable:

(a) so much time has elapsed since the 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.

Applicant's conduct was discovered in 2005. He viewed thousands of pornographic images on his company computer before then. After the company conducted a thorough investigation, he lost his job as a result of his actions. He attributes his poor judgment on those occasions to his use of alcohol. However, he continued to drink to excess through March 2011, despite what it already had cost him. The events are recent enough, given the number and the circumstances, and Applicant presented insufficient evidence to convince me that the behavior will not recur. AG ¶ 41(a) does not apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to 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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

- (a) alcohol-related incidents away from, such as driving while under the influence . . . regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependant;
- (b) alcohol-related incidents at work . . . regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependant;
- (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;
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant's DUI arrests in 1994 and 1997 were both alcohol-related incidents away from work. His suspension from work and his firing were also both alcohol-related incidents occurring at work. His continued drinking to excess as recently as March 2011, and his deception to his wife about his current alcohol consumption, show a pattern of habitual or binge consumption. Applicant was diagnosed by a psychologist in 1997 as alcohol dependant. She reaffirmed that diagnosis in March of this year. He received alcohol treatment from 1994 through 1996 and again in 2007, but relapsed after each occasion. All the disqualifying conditions listed above apply.

I have also considered all of the mitigating conditions for Alcohol Consumption under AG ¶ 23. The following are potentially applicable in this case:

- (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 last alcohol-related incident was in 2005, however, his drinking continued through March 2011. Applicant's history of drinking while driving, his job related alcohol incidents, his failed alcohol counselling, and his questionable credibility concerning when he stopped drinking, and his deception to his wife about his current drinking, cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 23(a) does not apply. Applicant acknowledged that he has a problem with alcohol, but he has not established a pattern of abstinence. AG ¶ 23(b) does not apply. There is evidence that Applicant is currently undergoing counselling or treatment, but no clear pattern of abstinence or modified consumption was demonstrated. He did receive a "favorable" prognosis from his psychologist, however, that was conditioned upon monitoring his abstinence for one year. AG ¶ 23(d) does 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. I considered Applicant's service to his country and his company before the events that led to his termination. I also considered the seriousness of his actions resulting in the termination. Additionally, I considered the strong recommendations he received from friends and coworkers

concerning his honesty, reliability, and trustworthiness. However, Applicant's actions were violations of the clear company policy against viewing pornography on his company computer. His record of alcohol-related incidents, both off the job and on the job, demonstrates poor judgment and unreliable behavior. Applicant did not meet his burden to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a position of public trust. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising under Guideline E, Personal Conduct, Guideline M, Use of information Technology, and Guideline G, 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 E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g. – 1.h:	Against Applicant
Paragraph2, Guideline M:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph2, Guideline G:	AGAINST APPLICANT
Subparagraphs 3.a – 3.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 national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Robert E. Coacher
Administrative Judge