



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



In the matter of:)
)
) ISCR Case No. 10-02518
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esquire, Department Counsel
For Applicant: William F. Savarino, Esquire

July 29, 2011

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Applicant has a history of alcohol related arrests and has been diagnosed as alcohol dependent. He voluntarily sought treatment, which he completed successfully. He last consumed alcohol and his last arrest occurred almost 2.5 years ago. He is currently being treated by a clinical psychologist, who gives a favorable prognosis for continued sobriety. He did not falsify his February 2009 security clearance application. Clearance is granted.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on December 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a statement of

¹ This case is adjudicated under Executive Order (EO)10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this

reasons (SOR) explaining that it was not clearly consistent with the national interest to grant Applicant access to classified information. The SOR detailed the factual bases for the action under the adjudicative guidelines for Alcohol Consumption (Guideline G) and Criminal Conduct (Guideline J).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 5, 2011. The hearing proceeded as scheduled on May 17, 2011. Government's Exhibits (GE) 1 through 10 were admitted without objection. Applicant's counsel presented the testimony of three witnesses, including Applicant. Counsel also offered Applicant's Exhibits (AE) A through E, which were admitted without objection.

Based on testimony provided at hearing, I requested that each party submit additional information by June 1, 2011. Each party submitted one additional document. I admitted the documents, identified as GE 11 and AE F, respectively. I received the Transcript (Tr.) on June 26, 2011.

Procedural Rulings

On February 17, 2011, Department Counsel submitted a written motion to amend the SOR, adding a Guideline E allegation based on Applicant's alleged failure to disclose his January and February 2009 arrests on his February 2009 security clearance application in response to Question 22 (Police Record). Applicant denied the allegation. At hearing, I amended the SOR, without objection from Applicant's counsel as follows:²

3. Guideline E: 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.

a. You falsified material facts on Electronic Questionnaire for Investigations Processing (e-QIP), Standard Form 86, that you signed on February 29, 2009, in which you were required to answer the following questions: "**22. Police Record. a. [For the timeframe of the last 7 years.] Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you; are you on trial or awaiting a trial on criminal charges; or are you currently awaiting sentencing for a criminal offense?;** and **d. have you EVER been charged with any offense(s) related to alcohol or drugs?;**" to which you responded, "**Yes**", but you deliberately failed to disclose your arrests and charges for DWI on January 9, 2009, and on February 19, 2009.

case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replaces the guidelines in Enclosure 2 to the Directive.

² Tr. 10-12.

At hearing, Department Counsel withdrew SOR allegation ¶ 2.c.³

Findings of Fact

Applicant is a 30-year-old employee of a government contractor. He is single and has no children. He completed college in 2008, at age 27, with a degree in computer science. He was initially granted a security clearance in 2004 while working for a different government contractor. In February 2009, Applicant's facility security officer (FSO) entered an adverse information report into the Joint Personnel Adjudication System (JPAS) concerning Applicant's arrest and subsequent confinement for driving while intoxicated (DWI). The adverse information report triggered a new background investigation focusing on Applicant's history of alcohol-related issues.⁴

The Applicant admits, as alleged in the SOR, that he was arrested seven times between 1999 and 2009. His first arrest in 1999 was for possession of marijuana. He was acquitted of the charge. Between 2001 and 2009, Applicant was arrested six times for alcohol-related offenses, resulting in five convictions.⁵

In 2001, Applicant was arrested for and pleaded guilty to possession of alcohol under 21. He received probation before judgment. For the next five years, Applicant did not have any alcohol-related incidents. In May 2006, he was arrested for and pleaded guilty to driving while impaired by alcohol (DWIA). The court sentenced him to 30 days in jail, with 28 days suspended, and probation before judgment. Less than a year later, in March 2007, Applicant was arrested for multiple counts of alcohol-related driving offenses after a traffic stop for speeding. Applicant submitted to a breathalyzer test, which registered a .08 blood alcohol level. He pleaded guilty to DWIA and was sentenced to 60 days incarceration, with 50 days suspended, and two years supervised probation. Three months after pleading guilty to the March 2007 DWIA, he had another alcohol-related arrest. He was charged with driving while intoxicated, rogue and vagabond, and theft less than \$100. These charges were nolle prossed.⁶

In January 2009, one month before the end of his probation on the March 2007 arrest, Applicant was again arrested and charged with multiple alcohol-related driving offenses. In exchange for serving 30 days in jail, with work release, the case was placed on the stet docket. The prosecutor dismissed the charges after Applicant completed his jail term. His final arrest occurred February 19, 2009. During a routine traffic stop for speeding, the officer smelled alcohol on Applicant's breath. Applicant refused to take field sobriety tests, but agreed to take a breathalyzer, which registered a .08 blood

³ Tr. 14.

⁴ Tr. 108-110; Incident Report, dated February 26, 2009.

⁵ SOR, Answer.

⁶ GE 1; GE 5-7; GE 10.

alcohol level. Ultimately, he pleaded guilty to a reduced charge of reckless driving and received probation before judgment.⁷

At hearing, Applicant testified that he hit his “rock bottom” during the ride home with his mother after his February 2009 arrest. Usually, his friends picked up him up from jail as he avoided his parents during the time he was drinking heavily. During the car ride, Applicant watched his mother cry and blame herself for his problems with alcohol. Although not a drinker herself, alcoholism runs in her family. Applicant testified that seeing his mother so distraught touched him in a way nothing else had before. Even as his mother recalled that day during her testimony, Applicant became teary-eyed. He testified that night he realized that something needed to change. In April 2009, after being put on a wait-list, he voluntarily entered a 28-day inpatient alcohol treatment program.⁸

Applicant reported that he began drinking at age 15, usually in social settings, but not to intoxication. He began drinking more when he went off to college, where he consumed alcohol to the point of intoxication almost every weekend. Upon entering the workforce after college, Applicant reined in his drinking. He continued to drink on weekends, often to intoxication. In 2006, however, his drinking habits escalated substantially. He would drink alcohol three to four times a week, consuming eight or more beers at a time. During treatment Applicant was diagnosed as being alcohol-dependent by a licensed clinical alcohol and drug counselor.⁹

He successfully completed the 28-day program. His discharge summary included five “special recommendations” as part of his continuing care plan. Those special recommendations were that Applicant: (1) abstain from drugs and alcohol; (2) complete outpatient addictions counseling; (3) see a psychiatrist to help him manage his anxiety issues; (4) attend Alcoholics Anonymous (AA) three times per week and obtain a sponsor; and (5) submit to random urinalysis and breath analysis. Applicant testified that he took the list as a set of suggestions, not a rigid plan for him to follow. He left treatment with the understanding that the underlying purpose of the recommendations was to help him maintain sobriety by developing a sobriety support network.¹⁰

Applicant attended AA for one month after he left treatment. While he appreciated the lessons he learned in the program, he did not feel AA was a good fit for him. After consulting his primary care physician, Applicant decided not to see a psychiatrist because he did not want to be medicated for his anxiety issues. Instead, he opted to create a sobriety support network more suitable to him. His network consists of his family, his girlfriend and a few other friends, his co-workers, his church, and a clinical psychologist, Dr. M. Applicant talks to his mother on the telephone regularly, at

⁷ GE 1; GE 5-6; GE 8.

⁸ Tr. 114-118.

⁹ GE 6; GE 9; AE 11.

¹⁰ Tr. 118-120, 148-149; AE F.

least every three to four days. He sees his father at work. The two have lunch together each week. They also check-in with each other during the work week, visiting each other's work area. Applicant knows that his parents compare notes on his behavior and progress. He also attends family gatherings at his parent's house, something he did not do while he was drinking. He has cultivated new friendships, as well as a romantic relationship that support his sobriety. His co-workers also support him in maintaining his sobriety. He also attends church regularly.¹¹

Applicant has been seeing Dr. M since March 2011. Dr. M has 27 years of experience as a clinical psychologist. In private practice since 1991, her practice focuses on holistic healing. Although alcohol dependency issues constitute a small percentage of her current practice, she does have significant experience with the condition. As a doctoral candidate, she completed an internship at an alcohol rehabilitation center for the Navy. Her dissertation focused on the use of group therapy in the treatment of alcohol dependency. Post-doctorate, she worked with two police departments counseling officers and their families, at times dealing with alcohol dependency. In her current practice she continues to treat patients, like Applicant who have been diagnosed as being alcohol dependent. She also does some peer supervision in this area.¹²

Applicant sought Dr.M's help after having an anxiety attack. He was also experiencing relationship and anger issues. Applicant reported his issues with alcohol and his recent treatment for alcohol dependency. In their initial session, Dr. M completed a personality assessment of Applicant. The assessment revealed that Applicant is extremely introverted and does not openly share his feelings. In the months Applicant has worked with Dr. M, the two have explored his reasons for drinking. As a teenager, he drank alcohol to ease feelings of social awkwardness and to fit in with his peers. As an adult, Applicant used alcohol to cope with stress. Dr. M has taught Applicant techniques to manage his trigger emotions: stress, anger, and anxiety.¹³

Dr. M is aware of the continuing care recommendations that Applicant received when he was discharged from his treatment program. She does not view the recommendations as a set of hard rules that Applicant must follow to ensure his sobriety. Because Applicant is introverted, Dr. M was not surprised when Applicant reported that he stopped participating in AA. Because AA requires participants to talk openly about their personal experiences in a group setting, it does not mesh well with Applicant's introverted personality type. Participation in AA, Dr. M testified, is not a requirement for an alcoholic to maintain sobriety because the program does not work for everyone. The key to maintaining sobriety, she explained, is to develop a strong support system. She believes that Applicant has done so and has adhered to the spirit of the suggestions provided to him by the treatment program. She believes the adjudication of

¹¹ Tr. 92-93, 99, 111-112 123-126, 135-141.

¹² AE A; Tr. 33-34.

¹³ Tr. 35-42, 130-135.

Applicant's security clearance has been a very revealing event. Instead of turning to alcohol to deal with the stress associated with the process and its potential results, Applicant has leaned on his support network. Dr. M is very pleased with Applicant's progress and gives him a favorable prognosis. The two plan to continue their work together for the foreseeable future.¹⁴

Today, Applicant admits that he is an alcoholic and has expressed a commitment to sobriety. He has been sober for almost 2.5 years. He credits his sobriety support network, which he sees as having eight sponsors that he can reach out to at anytime. Applicant enjoys sobriety. He feels as if he has gotten his life back.¹⁵

Personal Conduct

Applicant denied the allegation that he deliberately omitted his January and February 2009 arrests from his February 2009 security clearance application in response to questions 22(a) and (d).

When he returned to work after his February 2009 arrest, having missed a day while he was in jail, he received a call from his (FSO) who had seen news of Applicant's arrest in the local newspaper and discovered that the local police had reported Applicant's latest arrest to base security. She asked Applicant if he had been in trouble. Applicant confirmed his arrest. Later, his supervisor told him that he had three days to complete a new security clearance application. Applicant testified that in the days after his February 2009 arrest he felt as if he was in a haze. He was distracted and overwhelmed. When he answered question 22, he reported all of his arrests with the exception of the January and February arrests. He completed the security clearance application and submitted it on February 25, 2009. The next day, the FSO entered the adverse information report in JPAS.¹⁶

He did not learn of the omission until his interview with an Office of Personnel Management investigator in June 2009. During the interview, he disclosed the details of his arrests. He testified that he was able to do so at the interview because he was sober and his thought process was much clearer. At the time of the interview he had completed treatment and been sober for four months. He was not in the same state of emotional turmoil he had been in February 2009 when he completed the security clearance application. Applicant testified that he did not have any intent to purposely conceal his arrests from the government. Prior to the February 2009, Applicant completed two security clearance applications in July and December 2002. He fully disclosed his arrest history on each of those applications. He completed another security clearance application in August 2010, also fully disclosing his criminal history.¹⁷

¹⁴ Tr. 37, 46- 51, 65-73,

¹⁵ 126,128-131,145-146.

¹⁶ Tr. 174-177; GE 2.

¹⁷ Tr. 166-177; GE 1-2, 4, 6.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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 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 responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 protect 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

The security concern about 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 disqualifying conditions that are relevant to Applicant's case:

AG ¶ 22(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;

AG ¶ 22(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the person is diagnosed as an alcohol abuser or alcohol dependent; and

AG ¶ 22(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant has a history of alcohol-related arrests and convictions. He has habitually driven a car after consuming alcohol in excess of the legal intoxication limit. That he engaged repeatedly in this behavior not only shows impaired judgment, but a reckless disregard for the law and the safety of others. After his last arrest in February 2009, Applicant entered a rehabilitation program where he was diagnosed as being alcohol dependent by a licensed clinical alcohol and drug counselor.¹⁸

Three of the mitigating conditions available under AG ¶ 23, are applicable:

AG ¶ 23(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 and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 23(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this

¹⁸ AG ¶ 22(e) is not limited to the specific credentials that are enumerated. Instead, they "contemplate a broad range of providers who, by education and by position, are qualified to diagnose and treat alcohol dependence and other substance abuse disorders." ISCR Case No. 07-00558 at 5 (App. Bd. Apr. 7, 2008).

problem and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

AG ¶ 23(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 has not consumed alcohol since February 2009, almost 2.5 years ago. Because he is no longer consuming alcohol, he no longer engages in the behaviors that gave rise to the present security clearance adjudication. He voluntarily entered an inpatient treatment program, which he successfully completed. He accepts and readily admits that he is an alcoholic and has demonstrated a commitment to sobriety by developing a strong sobriety support network. Since March 2011, he has been in therapy with Dr. M, a licensed clinical psychologist, who lauds Applicant for the work he has done to maintain sobriety. She gives him a favorable prognosis for sobriety in the future.

Applicant's journey to sobriety has been unorthodox, but successful. While he has not followed the special recommendations given to him in his discharge from his inpatient treatment, he has, as Dr. M testified, taken the underlying goal of the suggestions to heart. Applicant is not required to follow a specific methodology with respect to alcohol treatment.¹⁹ He has crafted a system that works for him. He is actively and responsibly managing his alcohol dependence. He has mitigated the Guideline G concerns.

Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Adjudicative Guidelines:

Criminal activity 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.

Between 1999 and 2009 Applicant was arrested seven times. His arrests and resulting five convictions for DWIA is disqualifying under AG ¶ 31(a), "a single serious crime or multiple lesser offenses."

The following three mitigating conditions enumerated in AG ¶ 32 are applicable:

¹⁹ See ISCR Case No. 02-09608 (App. Bd. Dec 17, 2003).

(a) so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) evidence that the person did not commit the offense; 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 last arrest occurred almost 2.5 years ago. Now that he has decided to abstain from alcohol, it is unlikely that he will engage in criminal conduct in the future. Given that Applicant has been sober, without relapse for 2.5 years; his past criminal behavior is not an indication of his current security-worthiness. His 1999 possession marijuana arrest is mitigated because Applicant was acquitted. Applicant has shown successful rehabilitation as contemplated under AG ¶ 32(d) for the reasons enumerated in the discussion mitigating the Alcohol Consumption concerns.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

The government alleges that Applicant deliberately falsified his February 2009 security clearance application by failing to disclose his January and February 2009 DUI arrests in response to questions 22 (a) and (d). Applicant claims that his failure to list the most recent arrests was not intentional as he listed his entire arrest history save the most recent arrests. A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

I conclude that Applicant did not falsify his security clearance application. He credibly testified that he inadvertently failed to disclose his January and February 2009 arrest. He attributes the unintentional omission to his distracted state of mind when he completed the security clearance application. In addition to feeling pressured for time, he was still sorting through the emotions of his mother's revelations and his decision to get help. Applicant's lack of intent to falsify his security clearance application is

supported by the fact that he fully disclosed his arrest history on the two security clearance applications he completed prior to February 2009 and on the security clearance application he completed in August 2010.

I have no reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. Applicant's history of alcohol dependency and his associated criminal record is extensive. He does not minimize the seriousness or extent of his problem. He voluntarily sought in-patient treatment and enlisted the help of a clinical psychologist. With this most recent decision he has affirmed his commitment to sobriety and shown maturity in recognizing when he needs help. Given the nature of alcohol dependency, it is impossible to predict whether or not an individual will relapse, but in this case Applicant has surrounded himself with an effective support network, which decreases the likelihood. Applicant has mitigated the Alcohol Consumption, Criminal Conduct, and Personal Conduct 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:

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|------------------------------------|---------------|
| Paragraph 1, Guideline G: | FOR APPLICANT |
| Subparagraphs 1.a - 1.h: | For Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT |
| Subparagraphs 2.a -2.b., and 2.d.: | For Applicant |
| Subparagraph 2.c.: | Withdrawn |
| Paragraph 3, Guideline E: | FOR APPLICANT |
| Subparagraph 3.a. | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is granted.

Nichole L. Noel
Administrative Judge