



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



In the matter of:)	
)	
)	ISCR Case No. 10-07625
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

July 21, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings and exhibits in this case, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline G, Alcohol Consumption. Applicant’s eligibility for a security clearance is denied.

Statement of Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on January 5, 2010. On February 18, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline G, Alcohol Consumption. 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.

On March 14, 2011, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. On April 20, 2011, the Government compiled its File of Relevant Material (FORM). The FORM contained

documents identified as Items 1 through 7. By letter dated April 25, 2011, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the FORM on May 3, 2011. His response was due on June 3, 2011. On July 11, 2011, the case was assigned to me for a decision.

Applicant filed a one-page undated letter in response to the FORM within the required time period. Department Counsel did not object to the admission of Applicant's additional information. Accordingly, I marked Applicant's letter as Item A and admitted it to the record.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline G, Alcohol Consumption (SOR ¶¶ 1.a. through 1.d.). In his Answer to the SOR, Applicant admitted the four Guideline G allegations. Applicant's admissions are incorporated as findings of fact. (Item 1; Item 4.)

Applicant is 51 years old, married, and has no children. In 1984, he earned a bachelor's degree. From 1991 to August 2002, Applicant worked as a software engineer for a small engineering firm. He has been employed by a government contractor as a staff software engineer since September 2002. In 2003 and 2007, he was granted access to classified information. He seeks renewal of his security clearance. (Item 5.)

Applicant began drinking alcohol in approximately 1978, when he was 19 years old and a college student. In a February 2010 interview with an authorized investigator from the U.S. Office of Personnel Management (OPM), Applicant stated that he drinks one or two glasses of wine, in the company of his wife, at dinner. Twice a month, Applicant and his wife go to a restaurant and each drinks two martinis. Applicant estimated that he becomes intoxicated once a year. He estimated that consuming three alcoholic drinks would make him intoxicated. He enjoys the taste of alcoholic beverages, and he believes that drinking alcohol relaxes him. The SOR alleged at ¶ 1.a. that from 1978 to at least February 2010, Applicant consumed alcohol at times to excess and to the point of intoxication. Applicant admitted the allegation. (Item 1; Item 3; Item 4 at 3; Item 7 at 6.)

The SOR alleged at ¶ 1.b. that in April 1998, Applicant was arrested and charged with (1) Driving Under the Influence Alcohol/Drugs (DUI) and (2) Driving Under the Influence Alcohol/0.08%. Applicant admitted the allegation and acknowledged that he pled guilty to the two charges. He was sentenced to attend 100 meetings of Alcoholics Anonymous (AA), ordered to attend nine months of alcohol awareness classes, and fined approximately \$1,500. (Item 4 at 2.)

In April 2005, Applicant provided a signed affidavit in which he discussed his 1998 DUI. In the affidavit, Applicant asserted that following the 1998 incident, he no longer drove a vehicle after drinking alcohol. (Item 4 at 2.)

At ¶ 1.c., the SOR alleged, and Applicant admitted, that in August 2006, he was arrested and charged with DUI. After pleading guilty to the offense, Applicant was sentenced to 45 days confinement, with 15 days suspended; three years of probation; loss of his driver's license for 18 months; and 120 hours of community service. The court also fined Applicant and ordered him to attend a driver education course. In reporting this arrest on his e-QIP, Applicant stated: "I deserved this arrest. My wife and I were coming home from a party where we performed on guitars together. We drank too much." (Item 5, 32-33; Item 6, 17-23.)

In November 2009, Applicant was arrested and charged with (1) DUI and (2) DUI with a Blood Alcohol Content of .08% or Higher. This arrest, which Applicant admitted, was alleged at SOR ¶ 1.d. On July 6, 2010, Applicant pled guilty to Count (2) and was sentenced to 30 days in jail and five years of informal probation. His driver's license was suspended until January 2011. Additionally, the court ordered Applicant to attend an 18-month multiple offender alcohol program and to attend and complete a Mothers Against Drunk Driving (MADD) victims' impact panel. Count (1) was dismissed. Applicant's five-year informal probation ends in July 2015. (Item 6, 5-16.)

Applicant told the OPM investigator in February 2010 that he had reduced his use of alcohol by 10 to 20% since his arrest in November 2009. He reported that he had begun to attend AA meetings. However, he stated that he would continue to drink alcohol. He stated that he would never drive after drinking alcohol. (Item 7 at 6-7.)

Applicant told the OPM investigator that he had not received any alcohol-related treatment or counseling. He also stated that he has not been diagnosed as an alcohol abuser or as alcohol dependent. (Item 7 at 7.)

In response to the FORM, Applicant provided a one-page statement, which read, in pertinent part, as follows:

Based on the facts, I can understand (and cannot argue) the intent to revoke my current . . . security clearance. Unfortunately, the court has not had the same opportunity as my company, and my fellow associates, to know me as an individual. . . Know my work ethic. . . Know my devotion to the company, and my associates, with whom I have worked for the past 9 years. My company has stood behind me through my "lapses in judgment" (i.e. DUI) because they know that the "lapses" were simply poorly made decisions. My company has stood behind me all of these years because they know that I am a good, reliable, software engineer furthering the company's (and indirectly the Nation's) best interest. I would very much like to maintain my . . . security clearance.

(Item A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the revised 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, the administrative judge applies these 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 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 as to obtaining 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 or 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 G, Alcohol Consumption

Guideline G, Alcohol Consumption, applies in this case to a determination of eligibility for access to classified information. Under Guideline G, “[e]xcessive 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.”

I have considered all of the Alcohol Consumption Disqualifying Conditions. I conclude that Guideline G disqualifying conditions at ¶¶ 22(a) and 22(c) apply in Applicant’s case. AG ¶ 22(a) reads: “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) reads: “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.”

In 1998, 2006, and 2009, Applicant was arrested for alcohol-related driving offenses. Applicant is a habitual consumer of alcohol, and he admits consuming alcohol at times to excess between 1978 and February 2010. Despite three arrests for driving under the influence of alcohol, he continues to drink alcohol. He has participated in alcohol awareness education, and he is presumably aware of the serious consequences to himself and to others if he drives while under the influence of alcohol. In 2005, he stated that he no longer drove after consuming alcohol. However, he was arrested for DUI in 2006 and 2009. These facts raise security concerns under AG ¶¶ 22(a) and 22(c).

The Guideline G disqualifying conduct could be mitigated under AG ¶ 23(a) if “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.” The disqualifying conduct could also be mitigated under AG ¶ 23(b) if “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).” If “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,” then AG ¶ 23(c) might apply. Finally, mitigation might be possible under AG ¶ 23 (d) if “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 is now 51 years old. He admitted consuming alcohol at times to excess and to the point of intoxication from 1978 to February 2010, a period of 32 years. His most recent arrest for driving under the influence of alcohol occurred in November 2009, and he remains under a sentence of probation from that conviction until July 2015. He has participated in alcohol awareness education. He has not been diagnosed as alcohol dependent or as an abuser of alcohol, and he has not received counseling or treatment for his alcohol use that resulted in three DUIs. He continues to drink alcohol. I conclude that none of the Guideline G mitigating conditions fully applies to the facts of Applicant’s case.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an 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. Applicant is a mature adult who is well-educated and skilled. He has worked for his present employer for nine years. In 2005, he asserted that he no longer drove after drinking alcohol.

Yet, since 2006, Applicant has been arrested twice for driving a vehicle while under the influence of alcohol. After his arrest in 2009, he was ordered to take an 18-month multiple offender alcohol program. Even after being made aware of the dangers of drinking and driving, he continues to drink alcohol. In 2010, he again asserted he would not drink and drive in the future. In light of a similar assertion he made in 2005, before his 2006 and 2009 arrests for DUI, Applicant's 2010 assertion that he will not drink and drive in the future lacks credibility. His conduct raises questions about his current judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his 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

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 security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge