



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



In the matter of:

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) ISCR Case No. 10-07734
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Applicant for Security Clearance

Appearances

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

05/21/2012

Decision

WHITE, David M., Administrative Judge:

Applicant had alcohol-related driving offenses in 1990, 2002, and 2008. He is presently serving five years of probation in connection with his latest offenses. He successfully completed a two-year outpatient treatment program for his alcohol dependence in July 2011. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on May 12, 2010. On August 23, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines G (Alcohol Consumption), and J (Criminal Conduct). 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on September 30, 2011, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 15, 2011. The case was assigned to me on November 22, 2011. DOHA issued a Notice of Hearing on December 19, 2011, and I convened the hearing, as rescheduled due to inclement weather, on January 23, 2012. The Government offered exhibits (GE) 1 through 10, which were admitted without objection. Applicant offered no documentary evidence beyond the items submitted with his answer to the SOR, and testified on his own behalf. Another witness also testified for him. I granted Applicant's request to leave the record open until February 8, 2012, to permit submission of written evidence. DOHA received the transcript of the hearing (Tr.) on February 1, 2012. On March 2, 2012, Department Counsel forwarded Applicant's exhibit (AE) A, without objection to its admission. The exhibit was admitted and the record closed.

Findings of Fact

Applicant is a 55-year-old employee of a defense contractor, for whom he has worked as a sheet metal mechanic since April 2010. Before that, he worked as an elementary school custodian for about ten years. He is divorced, with no children. He earned a General Educational Development (GED) credential while serving in the Marine Corps from January 1974 to December 1977, when he received a General Discharge under Honorable Conditions. He was granted a confidential security clearance from August 1978 to September 1994, while he worked for the Navy as a civilian ordinance equipment mechanic. He was released from that job for failure to follow procedure by a supervisor with whom he had a personal conflict.¹ In his response to the SOR, Applicant admitted the truth of all allegations, with some explanations.² Applicant's admissions, including his statements in response to DOHA interrogatories,³ are incorporated in the following findings.

Applicant first consumed alcohol at age 14, and began regular consumption of up to six beers at a time on weekends at age 18. In approximately 1983, he was arrested and convicted for an offense he recalls to have been reckless driving, after he had consumed five or six beers during the preceding two or three hours. He was not required to undergo an alcohol evaluation, but was required to attend an alcohol information class. On December 23, 1990, he was arrested for driving under the influence (DUI), and driving while his license was suspended (DWLS). The following July, he was convicted of both offenses and sentenced to 365 days in jail (with 350 days suspended), and fined \$1,475 (with \$800 suspended). He was not required to undergo an alcohol evaluation or attend any classes after this conviction.⁴

¹GE 1; Tr. 5-7, 30-31.

²AR; Tr. 12-14.

³GE 2.

⁴AR; GE 3; GE 10; Tr. 31-35. The SOR inaccurately described the fine as being \$625.

Applicant and his girlfriend had a domestic dispute on August 13, 1998. His girlfriend called police from a neighbor's house and complained that he assaulted her. She has since recanted that complaint, and would not cooperate with prosecutors to testify against him. Applicant entered into a deferred prosecution agreement under which he was on probation until February 2002, when the charge was dismissed. While on probation, he was ordered to perform eight hours of community service, to pay \$325, and to obtain an alcohol evaluation. This evaluation did not result in any treatment.⁵

Applicant continued regular alcohol consumption at about the same rate, and was arrested for DUI again on November 30, 2002. His blood alcohol content (BAC) tested in excess of .20, with .08 being the legal limit. On December 2, 2002, he pled guilty to DUI and was sentenced to 365 days in jail (with 335 suspended for two years), five years of supervised probation, and fined \$5,000 (with \$3,900 suspended). He was also ordered to obtain a chemical dependency evaluation, not to possess or consume any alcohol or drugs while on probation, and not to drive a vehicle without an ignition interlock for one year. After the dependency evaluation, he was only required to attend a one-day alcohol information school.⁶

With one exception, Applicant complied with the court order not to drink alcohol during his five-year probationary period. On March 25, 2003, he was stopped by police while driving when his license was still suspended from the previous DUI. This offense was not alcohol related. He pled guilty to DWLS second degree on July 21, 2001, and was sentenced to 365 days in jail (with 350 suspended) and fined \$5,000 (with \$4,250 suspended).⁷

Sometime during 2003, Applicant had a barbecue party at his house and his guests were drinking alcohol. One of them had a flat tire on her car, and asked to use Applicant's car to go to the store and buy something to fix it. When she blew into the ignition interlock, it alarmed and recorded her BAC as .13. When Applicant took the interlock for a regularly scheduled recalibration, the mechanic reported the positive result to Applicant's probation officer. On October 9, 2003, the deputy prosecuting attorney filed a motion to revoke the suspension of Applicant's sentence for failure to remain abstinent from alcohol. During a subsequent hearing on this motion, and during Applicant's security clearance hearing, the guest testified that she was the person who had blown into and triggered the ignition interlock. The court found that Applicant had not violated the court order or caused the positive reading on the ignition interlock.⁸

Applicant resumed drinking alcohol after his probation ended in late 2007. On September 21, 2008, Applicant rolled his car off a narrow rural road and onto its side

⁵AR; AE A; GE 2; GE 4; Tr. 33-34.

⁶AR; GE 2; GE 5; Tr. 34-36.

⁷AR; GE 2; GE 6; Tr. 36-37.

⁸AR; GE 2; GE 7; Tr. 29-30, 37-42.

after having consumed eight to ten beers at a bar and a friend's house. He was lost and disoriented, and was transported to a hospital to ensure that he had not suffered any serious injuries. While at the hospital, he provided a blood sample that tested at .17g/ml (equivalent to .17 BAC). On April 14, 2009, he entered into a deferred sentencing agreement under which final sentencing was deferred for five years of monitored unsupervised probation, and he was required to pay a fine of \$875 and \$600 in restitution. He was also required to undergo and comply with treatment recommendations of an alcohol abuse assessment, abstain from alcohol, and use an ignition interlock.⁹

On December 28, 2008, Applicant was stopped by police and again charged with DWLS second degree. He said that he did not understand the timing of his license suspension after his DUI arrest. His prosecution on this charge was combined with the recent DUI charge, he was found guilty of both, and final sentencing was deferred for the same five-year probation period ending April 15, 2014. He was also required to pay \$900 in fines and costs as part of this agreement.¹⁰

Applicant entered a three-phase intensive outpatient alcohol treatment program on March 24, 2009, pursuant to his deferred prosecution agreement and after being evaluated as alcohol dependent by a licensed Chemical Dependency Professional on the staff of the treatment facility. He successfully completed the treatment program on July 21, 2011. He has not consumed any alcohol since the night of his last DUI in September 2008. Since completing his outpatient treatment, he only occasionally attends Alcoholics Anonymous (AA) meetings, and does not have a sponsor.¹¹

Applicant did not provide any evidence concerning the quality or nature of his recent work performance, or of his reputation for reliability, character, judgment, or trustworthiness among his personal or professional acquaintances.

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 (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According

⁹AR; GE 2; GE 8; Tr. 44-48, 52-57.

¹⁰AR; GE 2; GE 9; Tr. 48-49.

¹¹AR; GE 10; Tr. 43, 47-52.

to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

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 DCs asserted by Department Counsel¹² are:

¹²Tr. 59.

(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

(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 was arrested for and convicted of DUI offenses in 1990, 2002, and 2008. His BAC levels during the two most recent DUI incidents were .20 and .17, both of which were more than twice the legal limit and indicative of binge consumption. He was found to be alcohol dependent by a state-licensed Chemical Dependency Professional on the staff of a recognized alcohol treatment program who performed a court-ordered alcohol evaluation during March 2009. These incidents establish security concerns under AG ¶¶ 22(a), (c), and (e).

There is evidence that Applicant was ordered to undergo an alcohol evaluation by the court in connection with his 1998 domestic violence assault proceedings, but no evidence that a problem was diagnosed at that point or that the precipitating argument was alcohol related. Of his three alleged and admitted arrests and convictions for DWLS, only the first, in 1990, was alcohol related.

Applicant proved that the 2003 positive reading on his ignition interlock was caused by someone else trying to start his car, and was not evidence that he violated the 2002 court order requiring him to abstain from alcohol. He admitted having one drink at some unspecified time and place during that five-year period of probation, but that was neither alleged in the SOR nor asserted by Department Counsel as a security concern under SOR ¶ 22(g).

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns:

(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 committed DUI offenses in 1990, 2002, and 2008. None were caused by unusual circumstances, and his BAC was more than twice the legal limit during the two more recent incidents. That pattern is neither infrequent nor far enough in the past to support a conclusion that it is unlikely to recur or does not cast doubt on his current reliability and judgment. Mitigation was not established under AG ¶ 23(a).

Applicant successfully completed intensive outpatient treatment after his third DUI offense, but he has only occasionally participated in AA meetings since July 2011, and is not an active participant. There is no evidence of a favorable prognosis by a duly qualified medical professional or licensed social worker. He has remained abstinent since September 2008, but this abstinence has been pursuant to a court order and probationary monitoring with substantial suspended punishment pending for any violation. Applicant's 2008 DUI occurred less than a year after he successfully completed his previous five-year period of court-ordered abstinence and probation. Accordingly, although he is beginning to establish a pattern of abstinence, it is too early to conclude that Applicant established mitigation under the terms of AG ¶¶ 23 (b), (c), or (d).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "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."

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Despite the numerous and undisputed incidents of criminal activity alleged under Guideline G in ¶ 1 of the SOR, the only Criminal Conduct DC alleged in the SOR and asserted by Department Counsel is:

(d) individual is currently on parole or probation.

Applicant is on probation, for his 2008 DUI and DWLS offenses, until April 15, 2014. To date, he has complied with the conditions of that probation.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(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.

As discussed above under Guideline G, Applicant successfully completed a five-year probationary period after his 2002 DUI conviction, but committed another DUI within the next year and another DWLS shortly after that. Applicant's repeated alcohol-related offenses and defiance of legal limitations on his driving privileges preclude a finding of mitigation under any of the foregoing MCs. Applicant's trustworthiness, judgment, and willingness to comply with laws, rules, and regulations remain in doubt. He has begun to establish evidence of successful rehabilitation, but to date that has only occurred under probationary supervision and the threat of substantial punishment if he should commit additional offenses.

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 pertinent facts and circumstances surrounding this case. Applicant recently completed an outpatient treatment program for his alcohol dependence, and has not consumed alcohol since September 2008. This is a good start toward establishing rehabilitation, but he has yet to demonstrate his ability to abstain from alcohol or comply with driving regulations in the absence of probationary supervision. In the past twelve years, he has three DUI and three DWLS offenses, establishing a pattern of irresponsible choices and bad judgment.

Applicant is a mature individual who is accountable for his choices and actions. He failed to demonstrate reduced susceptibility to pressure or duress in the face of potentially unpleasant consequences, or that recurrence of alcohol-related misconduct is unlikely. He provided no evidence of good work performance or good character to overcome the resulting security concerns. Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his alcohol consumption and criminal conduct.

Formal Findings

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

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant*
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant*
Subparagraph 1.e:	For Applicant*
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant*
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

*The factual allegations in these subparagraphs are true, but they do not describe incidents during which Applicant's conduct was alcohol related.

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.

DAVID M. WHITE
Administrative Judge