



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



In the matter of:)	
)	
)	ISCR Case No. 10-07752
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

August 11, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, 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 the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on June 1, 2009. On February 10, 2010, 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 April 5, 2011, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on July 5, 2011. I convened a hearing on July 25, 2011, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called

no witnesses and introduced five exhibits, which were marked Ex. 1 through 5 and admitted to the record without objection. Applicant testified on his own behalf and called no witnesses. He introduced three exhibits and offered one document for administrative notice. Applicant's exhibits were marked as Exhibits (Ex.) A, B, and C and entered in the record without objection. His administrative notice document was marked as Document (Doc.) A and included, without objection, in the record for notice. DOHA received the transcript (Tr.) of the hearing on August 2, 2011.

Procedural Matters

SOR ¶ 1.h. reads: "You were denied access to classified information in about May 2009 by another government agency, in part, for continuing to consume alcohol after having undergone an alcohol assessment on September 12, 2007, and diagnosed as meeting DSM-IV criteria for Alcohol Dependence." In his April 5, 2011, Answer to the SOR, Applicant admitted SOR allegation 1.h. At hearing, Applicant requested leave to amend, in part, his answer to SOR ¶ 1.h. Applicant stated that he admitted that his access to classified information had been denied in May 2009 by another government agency. However, Applicant denied that he had undergone an alcohol assessment on September 12, 2007, and had been diagnosed as alcohol dependent. (SOR; Tr. 8-11.)

Prior to the hearing, Department Counsel had received notice of Applicant's intent to amend his answer to SOR ¶ 1.h., and he did not object to Applicant's request. I granted Applicant leave to amend his answer to SOR ¶ 1.h. from an admission to a partial denial. (Tr. 8-11.)

Findings of Fact

The SOR contains eight allegations of disqualifying conduct under Guideline G, Alcohol Consumption (SOR ¶¶ 1.a. through 1.h.). In his Answer to the SOR, Applicant admitted the eight Guideline G allegations. At hearing, Applicant amended his answer to SOR ¶ 1.h. from an admission to a partial denial. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant, who is 33 years old, is divorced and has no children. He is pursuing a degree in business management. Since 2004, Applicant has been employed by a government contractor as a construction security technician and program manager. (Ex. 1; Tr. 29-30, 44-45.)

Applicant enlisted in the U.S. military in January 1997. He was first awarded a security clearance in 2001, when he carried out sensitive matters and responsibilities overseas. He received an honorable discharge in October 2004, after serving in the military for seven years and ten months. During employment with his current employer, Applicant has held a security clearance and, for certain contracts, has also been read into higher levels of access. During his military service and in his civilian service as a government contractor, Applicant received briefings and training in handling classified material. (Tr. 27, 32-33, 46-48, 50.)

Applicant began consuming alcohol when he was 16 years old. In August 1995, when Applicant was 17 years old, he was arrested and charged with Underage Drinking. He was fined and required to write an essay for the Juvenile Court on Underage Drinking. In October 1995, as the driver of a vehicle, Applicant was arrested and charged with Open Container in a Vehicle and Underage Drinking. He was fined and sentenced to attend a one-day class for teenaged alcohol offenders. This alcohol-related conduct was alleged at SOR ¶¶ 1.b. and 1.c. (SOR; Tr. 59-62.)

In November 1998, while deployed overseas, Applicant received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice for the following offenses: Incapacitated for Duty, Unauthorized Absence from Duty, and Violate a Lawful Order by Consuming Beer or Liquor Within 8 Hours of Duties. He received a reduction in rate to the next inferior pay grade (suspended for six months); forfeiture of one-half of a month's pay for two months (suspended one month of forfeiture for six months), and 45 days restriction and extra duties. Additionally, Applicant was directed to attend one meeting of Alcoholics Anonymous (AA) and to meet with his unit's alcohol counselor.¹ This alcohol-related conduct was alleged at SOR ¶¶ 1.d. and 1.e. During the rest of his military service, Applicant continued to consume alcohol. (SOR; Ex. 5; Tr. 34-35, 63-67.)

At the time he separated from military service in October 2004, Applicant held a security clearance and had also been granted access to Sensitive Compartmented Information (SCI). When Applicant went to work for his government contractor employer in December 2004, the employer expected for him to carry over his security access and to use it in carrying out his new duties. In December 2004, while on a ski trip with friends, Applicant used marijuana one time while under the influence of alcohol and while holding a security clearance.² This behavior is alleged at SOR ¶ 1.f. (SOR; Tr.67-69.)

In October 2006, Applicant was arrested and charged with (1) Operating Under the Influence of Alcohol and (2) Reckless Driving. Applicant's blood alcohol level was .21. He pled guilty to Count (1). His driving privileges were suspended for eight months, and he was ordered to attend a 12-hour intoxicated driver resource class. Additionally, Applicant was fined \$980 and assessed \$1,000 a year for three years. Count (2) was dismissed. This alcohol-related behavior was alleged at SOR ¶ 1.g. (SOR; Ex. 1 at 41-44; Ex. 3 at 3-4; Tr. 70-72.)

¹ Applicant described his meeting with the alcohol counselor as follows: ". . . I did have to go meet with him. We sat down. He questioned, you know, behavior things, my social life and things outside of work, things at work and everything of that nature. And that was about it. I mean nothing came of it." (Tr. 66.)

² Applicant acknowledged that he had previously used marijuana in his teen years. He also acknowledged that he knew that the use of illegal drugs was proscribed for those holding security clearances. He did not tell his Facility Security Officer (FSO) that he had used marijuana while holding a security clearance. (Tr. 69-70.)

Applicant told his immediate supervisor of his October 2006 arrest. He completed the 12-week intoxicated driver course. As a participant in the course, he was not diagnosed as an alcohol abuser or as alcohol dependent. He did not receive a diagnosis or a prognosis. He completed the course as required. (Tr. 72-73.)

The SOR alleged at ¶ 1.a. that Applicant consumed alcohol, “at times to excess and to the point of intoxication, to include blackouts, from approximately 1995 to at least 2010.” In his answer to the SOR, Applicant admitted the allegation at SOR ¶ 1.a. However, at his hearing, he stated that he had not experienced blackouts after consuming alcohol since 2006. He acknowledged that he continued to consume alcohol and, since 2006, he had consumed alcohol to intoxication. He stated that he did not operate a motor vehicle after drinking alcohol but, instead, took public transportation. (Tr. 40, 51-59, 81.)

As discussed above under Procedural Matters, SOR ¶ 1.h. alleges that Applicant was denied access to classified information in May 2009 by another government agency. The other government agency stated that it was denying Applicant access, in part, because he had continued to consume alcohol after having undergone an alcohol assessment on September 12, 2007, in which he had been diagnosed as alcohol dependent. (SOR)

The Government’s evidence in support of SOR allegation 1.h. is a Clearance Decision Statement from the other government agency, addressed to Applicant and dated June 11, 2009. The document informs Applicant that the other government agency disapproved him for additional access and revoked his existing access on May 7, 2009. Applicant provided the document to DOHA in response to interrogatories in November 2010. He did not object to its admission at his hearing. However, Applicant questioned the validity and credibility of the diagnosis as reported in the Clearance Decision Statement because the diagnosis itself was not included in the record.³ The Clearance Decision Statement reads, in pertinent part: “As part of your security processing, you underwent an alcohol assessment on 12 September 2007, by a credentialed mental health professional. At the conclusion of the evaluation, you were diagnosed as meeting the DSM-IV criteria for alcohol dependence.”⁴ Although the Clearance Decision Statement notified him that he could request a review of the agency’s security determination, Applicant failed to do so. (Ex. 2, 1-4; Tr. 76-77.)

³ DOHA’s Appeal Board has ruled that Clearance Decision Statements may be admitted under ¶ E3.1.20 of the Directive without authentication. See ISCR Case No. 02-12199 at 4, 7 (App. Bd. Aug. 8, 2005) Applicant failed to rebut the presumption of good faith and regularity regarding the determination of the other government agency in his case. There was nothing on the face of the Clearance Decision Statement or in its contents to suggest that it was not an official record of the other agency or that it was prepared or maintained in other than the regular course of agency business.

⁴ I take administrative notice that DSM-IV refers to the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.), Washington, D.C. The DSM-IV is the work product of the American Psychiatric Association. (Administrative Notice Document A.)

At his hearing, Applicant stated that he disagreed with the agency's conclusion that he was alcohol dependent. He acknowledged that he went to two facilities of the other government agency on September 12, 2007. He reported that at one facility his blood was drawn and he provided a sample for urinalysis. He reported that he had a one and a half hour interview about his alcohol use at the other facility. He denied that the interview was an alcohol assessment by a credentialed mental health professional. He provided no documentation or evidence to rebut or refute the other government agency's finding that he was alcohol dependent. (Tr. 41-43, 73-74.)

Applicant provided a certificate of excellence from his employer, dated October 2008. The certificate recognized Applicant's outstanding performance and contribution. Applicant also provided an undated certificate of achievement from his employer recognizing Applicant's five years of service with the company. Additionally, Applicant provided a certificate of appreciation from his employer dated August 2010. (Ex. A; Ex. B; Ex. C.)

He continues to consume alcohol. He claims he has matured since 2006, when was arrested for operating a motor vehicle under the influence of alcohol. Although he admits to intoxication since 2006, he says he drinks moderately and responsibly. He stated that he last consumed alcohol two weeks before his hearing. (Tr. 77-80.)

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.”

SOR ¶ 1.d. alleges the same conduct as is alleged in SOR ¶ 1.e. and is therefore duplicative. Accordingly, I conclude SOR ¶ 1.d. for Applicant.

I have considered all of the Alcohol Consumption Disqualifying Conditions. I conclude that Guideline G disqualifying conditions at ¶¶ 22(a), 22(b), 22(c), and 22(d) 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(b) reads: “alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, 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.” AG ¶ 22(d) reads: “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence.”

I also considered AG ¶ 22(f), which reads: “relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.” I recognize that the other government agency’s evaluation of Applicant as alcohol dependent has been established by the Government. While Applicant has denied being diagnosed as alcohol dependent, he has neither rebutted nor refuted the allegation. His participation in a 12-week intoxicated driver’s course occurred before his assessment as alcohol dependent. The record does not reflect that Applicant received a diagnosis of alcohol dependence when he took the 12-week alcohol education course. Accordingly, even though Applicant continues to consume alcohol after his diagnosis of alcohol dependence by a duly qualified professional during an investigation of his security worthiness by another government agency, that conduct cannot be established as relapse under the facts of this case. I conclude, therefore, that AG ¶ 22(f) does not apply.⁵

Applicant began consuming alcohol as an adolescent when he was not yet old enough to drink legally. During his military service, his alcohol consumption led, at times, to binge drinking, intoxication, and blackouts. In 1998, Applicant’s use of alcohol made him unfit to carry out his military duties. In December 2004, when he was under the influence of alcohol, Applicant used marijuana, while holding a security clearance. He was arrested for driving under the influence of alcohol in 2006. His blood alcohol level was .21. In September 2007, Applicant was diagnosed as alcohol dependent by a credentialed medical professional. He continues to consume alcohol. These facts raise security concerns under AG ¶¶ 22(a), 22(b), 22(c), and 22(d).

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

⁵ AG ¶¶ 22(e) and 22(g) are not raised by the facts of this case.

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 33 years old. He admitted consuming alcohol in excess and to the point of intoxication, including blackouts, from 1995 to 2006. In December 2004, while holding a security clearance, he used marijuana after consuming alcohol. His arrest for driving under the influence of alcohol occurred in October 2006. He participated in alcohol awareness education twice in 1995. In 1998, after his nonjudicial punishment, he was directed to attend an AA meeting and to meet with his unit’s alcohol counselor. He was directed to attend a 12-week intoxicated driver resource class after his arrest for driving under the influence in 2006. In 2007, he was investigated for a higher level of access. During that investigation by another government agency, he was diagnosed as alcohol dependent. He continues to consume alcohol, sometimes to intoxication. He no longer drives after consuming 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 young adult who is skilled and competent in his area of expertise. His employer considers him to be effective and reliable. During his military service, Applicant was entrusted, at a relatively

young age, with responsibility for safeguarding classified information. He also received training in his responsibilities to safeguard classified information. He knew that the use of illegal drugs while holding a security clearance raised very serious concerns about an individual's security worthiness. Even so, he used marijuana after consuming alcohol. He has continued to consume alcohol after being diagnosed as alcohol dependent. Applicant's actions raise concerns about his judgment, reliability, and trustworthiness.

At his hearing, Applicant disagreed with the Clearance Decision Statement and denied that he had been diagnosed as alcohol dependent during an investigation of his security worthiness by another government agency. He did not provide a recent assessment by a duly qualified medical professional of his current alcohol use and status. Moreover, he provided no other information or documentation to rebut or refute the other government agency's determination that he is alcohol dependent. His unsupported disagreement is insufficient to meet his burden of persuasion.

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.c.:	Against Applicant
Subparagraph 1.d.:	For Applicant
Subparagraphs 1.e. -1.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 security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge