



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



In the matter of:)	
)	
)	ISCR Case No. 10-09234
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

07/23/2012

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings and exhibits in this case, I conclude that there was insufficient record evidence to establish the security concern alleged under Guideline E. However, I also conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct. 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 May 12, 2010. On March 9, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline G, Alcohol Involvement, Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. DOHA acted 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 26, 2012, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. On May 7, 2012, the Government compiled its File of Relevant Material (FORM). The FORM contained documents identified as Items 1 through 9. By letter dated May 23, 2012, 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 June 1, 2012. His response was due on July 1, 2012. Applicant did not file a response within the required time period. On July 18, 2012, the case was assigned to me for a decision.

Findings of Fact

The SOR contains four allegations of disqualifying conduct under Guideline G, Alcohol Consumption (SOR ¶¶ 1.a. through 1.d.); one allegation of disqualifying conduct under Guideline J, Criminal Conduct (SOR ¶ 2.a.); and one allegation of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶ 3.a.). In his Answer to the SOR, Applicant admitted all six SOR allegations. Applicant's admissions are entered as findings of fact. (Item 4.)

The facts in this case are established by the record provided in the FORM by the Government. The record evidence includes Applicant's answers to the SOR; his May 2010 e-QIP; official investigation and agency records; and Applicant's responses to DOHA interrogatories.¹ (See Items 4 through 9.)

Applicant, who is 55 years old, is married and the father of an adult son. He graduated from high school in 1974, and he began working at sea soon thereafter. He is employed as a merchant officer on a vessel operated by a U.S. company. He has worked for his current employer since 2000. He seeks a security clearance for his current work as a Chief Mate. (Item 5.)

Applicant has a history of problems related to alcohol consumption. During an interview with an authorized investigator from the U.S. Office of Personnel Management (OPM), Applicant stated that he began to drink beer when he was about 18 years old. He reported that he usually drank three or four beers at a time. He also told the investigator that he became intoxicated after drinking six to eight beers, and when he was intoxicated, he became argumentative. (Item 6.)

Applicant told the authorized investigator that he was arrested, charged, and found guilty of Driving Under the Influence (DUI) in 1983 or 1984. He was sentenced to loss of his driver's license for two months, and the court ordered him to attend alcohol

¹ Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM) on June 16, 2010. In response to DOHA interrogatories, Applicant reviewed the investigator's report and made no additions or deletions. On August 16, 2011, Applicant signed a notarized statement that he agreed with and adopted the investigator's report as accurately reflecting his June 16, 2010, interview. (Item 6.)

and drug awareness classes. Applicant attended alcohol and drug awareness classes in 1983 or 1984. These facts are alleged at SOR ¶¶ 1.c. and 1.d. (Item 1; Item 6.)

In October 2009, Applicant was arrested and charged with assault and battery (domestic violence) against his wife. He struck his wife three times with his fists after consuming six to eight beers. Applicant pled guilty, and he was sentenced to one year of unsupervised probation. These facts are alleged at SOR ¶ 1.a. Applicant's DUI and assault and battery (domestic violence) convictions are also cross-alleged as criminal conduct at SOR ¶ 2.a. (Item 6; Item 7; Item 8.)

On October 19, 2009, Applicant voluntarily entered an outpatient alcohol treatment program, where he was diagnosed as alcohol dependent. Over a period of approximately two months, Applicant received counseling and therapy intended to provide him with skills to cope with his alcohol dependence and to prevent relapse. When he completed treatment, he was abstinent. At some time after completing treatment, however, Applicant began again to consume alcohol. These facts are alleged at SOR ¶ 1.b. (Item 9.)

When he was interviewed by the OPM investigator in June 2010, Applicant asserted that he had "never been advised by a physician that [he] had an alcohol dependency problem." Applicant failed to disclose that he had been diagnosed as alcohol dependent by a duly qualified medical professional or licensed social worker while attending an outpatient alcohol treatment program in October and November of 2009. DOHA alleged in SOR ¶ 3.a. that Applicant's failure to disclose his diagnosis of alcohol dependence to the OPM authorized investigator was a deliberate falsification of a material fact. Applicant admitted the allegation. He provided no exculpatory or mitigating information. (Item 1; Item 4; Item 6; Item 9.)

The treatment records contain a diagnosis but do not recount treatment or diagnosis by a physician. Moreover, the treatment records do not include a physician's name or signature. The treatment records show a therapist's signature and the signature of the clinical director's designee. The credentials of these professionals are not identified in the record, and their names and signatures are not legible. (Item 9.)

At his interview with the OPM investigator, Applicant stated that his alcohol-related DUI and domestic violence incidents were isolated and did not manifest a pattern of behavior. He also reported that he currently drinks beer "socially and responsibly." He further stated that he does not intend to drink alcohol and drive in the future. (Item 6.)

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 when seeking 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 or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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), 22(c), and 22(f) 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.” AG ¶ 22(f) reads: “relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.”

Applicant acknowledged drinking alcohol to excess. His binge drinking led to his arrest in 1983 or 1984 for DUI and to his 2009 arrest for domestic violence. In 1983 or 1984, he attended a court-ordered, two-week alcohol and drug awareness class. This fact is alleged at SOR ¶ 1.d. Because it does not raise a disqualifying condition, I conclude SOR allegation 1.d. for Applicant.

In 2009, after his conviction for domestic violence, Applicant voluntarily sought treatment for his excessive alcohol consumption, and while in a recognized alcohol treatment facility as an outpatient, he received a diagnosis of alcohol dependence. It is not clear from the record whether the diagnosis was made by a licensed medical professional or whether Applicant was evaluated as alcohol dependent by a licensed clinical social worker who was a staff member at the alcohol treatment center. At the time he completed the alcohol treatment program, Applicant was abstinent. However, sometime after leaving the program, he began to consume alcohol again, and he told the investigator at the time of his interview that he drank beer socially. Applicant’s DUI and domestic violence arrests after consuming alcohol and the facts recited above in this paragraph raise security concerns under AG ¶¶ 22(a), 22(c), and 22(f).

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."

While 26 years separate Applicant's two alcohol-related incidents, they both occurred after Applicant drank alcohol to excess. He was 27 years old when his DUI occurred; he was 53 years old when his excessive alcohol consumption resulted in spousal abuse. Even though time has passed, it does not appear that Applicant's behavior happened under such unusual circumstances that it is unlikely to recur. Applicant's more recent alcohol-related incident, when viewed in light of his earlier incident, raises concerns about his maturity, reliability, and good judgment. I conclude that AG ¶ 23(a) does not apply to the facts of Applicant's case.

Applicant entered an alcohol treatment program in 2009 and was diagnosed as alcohol dependent. He successfully completed the alcohol treatment program, and after completing the program, he was abstinent. However, he did not maintain his abstinence, and he returned to consuming alcohol. In his interview with the OPM investigator, he identified himself as a responsible social drinker, suggesting that he had not acknowledged his alcohol dependence. I conclude that AG ¶¶ 23(b), 23(c), and 23(d) do not apply in mitigation to the facts of Applicant's case.

Guideline J, Criminal Conduct

Under the Guideline J, "[c]riminal 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 ¶30.

In 1983 or 1984 Applicant was arrested, charged, and convicted of DUI. In 2009, he was arrested, charged, and convicted of assault and battery (spousal abuse). These facts are sufficient to raise a security concern under AG ¶¶ 31(a) and 31(c). AG ¶ 31(a) reads: "a single serious crime or multiple lesser offenses." AG ¶ 31(c) reads: "allegation or admission or criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

Two criminal conduct mitigating conditions might apply to Applicant's case. If "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," AG ¶ 32(a) might apply. If "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 involvement," then AG ¶ 32(d) might apply.

Applicant's two instances of criminal conduct occurred in 1983 or 1984 and in 2009. Twenty-six years separate the two episodes. However, both crimes occurred when Applicant, who has been diagnosed as alcohol dependent, had been consuming alcohol to excess. Despite completing an alcohol treatment program, Applicant has relapsed and has resumed drinking alcohol, raising concerns about his trustworthiness and judgment. Additionally, the circumstances that gave rise to Applicant's criminal conduct in the past currently exist, raising concerns about recurrence and Applicant's lack of rehabilitation. I conclude that AG ¶¶ 32(a) and 32(d) do not apply in mitigation to Applicant's case.

Guideline E, 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.

When Applicant was interviewed by an OPM investigator, he stated that he had never been advised by a physician that he had an alcohol dependency problem. Because Applicant was diagnosed as alcohol dependent, his denial on its face could suggest a deliberate falsification, and it raises a security concern under AG 16(b)². However, the record does not establish that Applicant was interviewed, treated, or diagnosed by a physician when he attended the alcohol treatment program. No physician's name or signature appears in the treatment notes included in the record. The credentials of other professionals on the staff of the treatment center are also not identified. Therefore, Applicant could have truthfully made the statement which the Government alleges demonstrates falsification.

² AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative."

I conclude that the record is insufficient to establish that Applicant deliberately falsified material facts in his interview with the OPM investigator. Accordingly, the SOR allegation at ¶ 3.a. is concluded for Applicant.

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 has a history of binge drinking. He also knows that when he becomes intoxicated, he becomes argumentative. He has been convicted of two crimes that occurred as a result of his excessive use of alcohol. Despite a diagnosis of alcohol dependence, Applicant continues to consume alcohol. This behavior raises concerns under the whole-person concept about Applicant's judgment, reliability, trustworthiness, and ability to protect classified information.

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 and criminal conduct.

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
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
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 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