



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



In the matter of:)
)
) ISCR Case No. 10-10587
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: Shane Mattingly, Esquire

09/25/2012

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline G, Alcohol Consumption, and Guideline E, Personal 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 March 4, 2010. On May 3, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G, Alcohol Consumption, 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.

Applicant’s notarized answer to the SOR was undated. He elected to have a hearing before an administrative judge. The case was assigned to me on June 29,

2012. I convened a hearing on August 20, 2012, 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 entered in the record without objection. Applicant testified and called one witness. He introduced two exhibits, which were identified and marked as Applicant's Ex. A and Ex. B and entered in the record without objection. DOHA received the hearing transcript (Tr.) on August 28, 2012.

Findings of Fact

The SOR contains nine allegations of disqualifying conduct under Guideline G, Alcohol Consumption (SOR ¶¶ 1.a. through 1.i.), and two allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 2.a. and 2.b.). In his Answer to the SOR, Applicant admitted eight of the Guideline G allegations (SOR ¶¶ 1.a. through 1.h.) He denied the SOR allegation at ¶ 1.i.¹ He denied the Guideline E allegation at SOR ¶ 2.a., and he admitted the allegation at SOR ¶ 2.b. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant is 43 years old, divorced, and the father of a 20-year-old son. He is employed as a logistics analyst by a government contractor. His annual salary is \$75,000. (Ex.1; Tr. 18, 38.)

Applicant enlisted in the U.S. military in 1987, when he was 18 years old. He was first awarded a security clearance in 1989. In 2004, after 16 years of active duty, he was administratively separated from military service for alcohol rehabilitation failure. He received an honorable discharge. This conduct is alleged at SOR ¶ 1.h. (Ex. 1; Ex. 4; Tr. 30-31.)

When he was 15 years old, Applicant began experimenting with alcohol and drank to intoxication. By age 19, he had established a pattern of regular alcohol consumption. In 1991, when he was approximately 22 years old, Applicant self-referred for an evaluation after experiencing marital problems. He was diagnosed as alcohol dependent and attended level III alcohol treatment. This conduct is alleged at SOR ¶ 1.a. (Ex. 3; Ex. 4; Tr. 20-21.)

In March 1999, while operating an automobile on a military base, Applicant was detained and charged with driving under the influence of alcohol (DUI). When questioned by the arresting officer, Applicant denied consuming alcohol. He subsequently failed three sobriety tests. His blood alcohol content was .186%. This conduct is alleged at SOR ¶ 1.b. (Ex. 5; Tr. 22-23.)

¹ Applicant's answer does not identify SOR ¶ 1.h., although he provides an answer to that allegation. He identified allegation 1.i. as allegation 1.h. Allegation 1.i. states: "You continue to consume alcohol on a weekly basis and have failed to participate in Alcoholics Anonymous (AA) meetings as recommended." Applicant denied drinking alcohol on a weekly basis. (Answer to SOR.)

As a consequence of his March 1999 DUI, Applicant received non-judicial punishment for drunken or reckless operation of a vehicle, aircraft or vessel, a violation of Article 111 of the Uniform Code of Military Justice (UCMJ). He was directed to attend a relapse prevention program, which he did in March 2000. This conduct is alleged at SOR ¶¶ 1.c. and 1.d (Ex. 4; Tr. 23-25.)

Applicant served as a career counselor for his military command. In February 2002, it was alleged by a superior that Applicant reported for work with alcohol on his breath. Applicant was referred for a fitness for duty evaluation. Applicant's blood alcohol level was measured and found to be 0.033. He was considered fit for duty. His command removed his duties as a career counselor and ordered him to attend alcohol rehabilitation, which he did, as an inpatient, from August to September 2002. During this treatment, Applicant was diagnosed as alcohol dependent by a medical doctor. After his treatment, he attended meetings of Alcoholics Anonymous (AA) for three months in 2002, but he did not consider the meetings relevant because he did not believe he had an alcohol problem.² This conduct is alleged at SOR ¶ 1.e. (Ex. 2; Ex. 4; Tr. 25-27, 44-45.)

In December 2003, Applicant and a colleague left their military base to purchase food items for an event for which they were responsible. The colleague drove and Applicant rode in the vehicle while consuming an alcoholic drink he had prepared for himself. At their destination, Applicant's intoxicated behavior caused him to be detained by local police. The police notified his command. This conduct is alleged at SOR ¶ 1.f. (Ex. 2; Tr. 29-31, 46-47.)

In January 2004, Applicant underwent substance abuse screening by a military drug and alcohol counselor and a licensed independent practitioner. The report and treatment recommendations resulting from the screening are signed by a doctor of psychology who is head of mental health services for a military medical clinic. The report reads, in part, as follows:

[Applicant] was previously diagnosed as alcohol dependent. His disclosures support that diagnosis. He meets the American Society of Addiction Medicine (ASAM) patient placement criteria for outpatient services. Based on his return to drinking and subsequent incident [,] [Applicant] is a rehabilitation failure. Per reference [omitted], [Applicant] shall be processed for administrative separation unless a written waiver is obtained from the [military commander]. If [Applicant] is retained in [military service], it is recommended [he] be placed in the SARP. . . program and held strictly accountable for all actions. It is further recommended he attend 4 [AA] meetings weekly. (Ex. 4 at 10.)

² Professional clinical notes from his treatment report that Applicant "exercises very poor self-control when using alcohol." (Ex. 4.)

In February 2004, Applicant received non-judicial punishment for his intoxicated behavior the previous December. He was charged with a violation of UCMJ 134: drunkenness. This conduct is alleged at SOR ¶ 1.g. His commanding officer recommended that Applicant receive an administrative separation and an honorable discharge, effective April 2004. (Ex. 4; Tr. 30-31.)

At his hearing, Applicant denied he had an alcohol problem. He stated that when he completed alcohol rehabilitation treatment in 1991, he understood that he could not drink alcohol anymore. When he was interviewed by an authorized investigator in August 2010, Applicant reported that he drank three or four beers weekly. At his hearing, Applicant acknowledged that he continues to consume alcohol, although he denied he drank alcohol on a weekly basis. He stated that his most recent alcohol consumption occurred two weeks before his hearing, when he drank four beers. (Ex. 2; Tr. 42, 45, 49, 57.)

Applicant stated that he thought the alcohol dependence diagnoses he had received lacked credibility because they were by military substance abuse counselors and not by a medical doctor or other health professional. He also acknowledged that he had not sought an independent assessment and diagnosis from a medical doctor or other licensed medical health professional. (Tr. 47-56.)

Section 22e on the e-QIP that Applicant completed in March 2010 asks the following: Have you EVER been charged with any offense(s) related to alcohol or drugs?" Applicant answered "No" to Section 22e. He did not disclose his DUI charge in March of 1999 or his detention for drunkenness in December 2003. SOR ¶ 2.a. alleges that Applicant deliberately falsified his answer to Question 22e when he failed to list on his e-QIP that he was charged with DUI in 2003. In his answer to the SOR, Applicant answered "No" to ¶ 2.a. He explained his answer as follows: "All charges were dropped [;] therefore I answered NO." At his hearing, Applicant affirmed that his 1999 DUI was his only DUI charge. The SOR allegation at ¶ 2.a. incorrectly alleges that Applicant deliberately falsified his e-QIP by failing to report a DUI charge in 2003. Because SOR ¶ 2.a. alleges a fact not established by the record, I conclude the allegation at ¶ 2.a. for Applicant. (Ex. 1; Answer to SOR; Tr. 35-36.)

Section 24b on the e-QIP that Applicant completed in March 2010 asks: "In the last 7 years, have you been ordered, advised, or asked to seek counseling or treatment as a result of your use of alcohol?" Applicant answered "No" to Section 24b. The SOR alleged at ¶ 2.b. that Applicant deliberately falsified his answer to Section 24b when he failed to list the alcohol-related treatment alleged at SOR ¶ 1.f. In his answer to the SOR, Applicant acknowledged that he should have answered "Yes" to Section 24b. At his hearing, he stated he did not mean to falsify his answer and he made a mistake when he answered "No" to Section 24b. He stated further that he completed his security clearance application in haste and did not read parts of the e-QIP carefully when he was completing it. (Answer to SOR; Tr. 62-64.)

Applicant's witness stated that he has known Applicant since 1992. He explained that he and Applicant were coworkers in the past, but now their relationship was personal. Applicant's family and the witness's family frequently get together for dinner. The witness stated that he considered Applicant to be a trustworthy and reliable friend. The witness observed that he had seen Applicant consume alcohol in the past. He also stated that he had not seen Applicant intoxicated for five years. (Tr. 67-72.)

Applicant provided two letters of character reference, one from his friend who testified as a witness and the other from a former program manager. The program manager, who knew Applicant well, stated that he was a sober, responsible, and dedicated professional. Applicant's friend stated that he was well-respected by colleagues and coworkers. The friend noted that since leaving military service, Applicant, a single father, had acquired a college degree. (Ex. A; Ex. B.)

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.”

Applicant began to experiment with alcohol when he was 15 years old, and by the time he was 19, he had established a pattern of habitual alcohol consumption. In 1991, at age 22, he attended alcohol treatment and was diagnosed as alcohol dependent. After his diagnosis of alcohol dependence, he understood that he should abstain from all alcohol consumption.

However, Applicant was charged with DUI in 1999, and he attended a relapse prevention workshop in March 2000. He continued to consume alcohol. After reporting to work with alcohol on his breath in 2002, he was directed by his command to attend a one-month inpatient substance abuse rehabilitation program, where he was again diagnosed as alcohol dependent. After an episode of public drunkenness in December 2003, Applicant was evaluated as a rehabilitation failure by a doctor of psychology who

was the head of mental health services for a military medical clinic. He received non-judicial punishment and was administratively separated from military service for alcohol rehabilitation failure. At his hearing he denied he had a problem with alcohol, and he acknowledged that he continues to consume alcohol, although not on a weekly basis.

I have considered all of the Alcohol Consumption Disqualifying Conditions. I conclude that Guideline G disqualifying conditions at ¶¶ 22(a), 22(b), 22(c), 22(d), 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(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." AG ¶ 22(f) reads: "relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program."

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."

After completing alcohol treatment and after receiving an evaluation of alcohol dependence, Applicant failed to establish a pattern of abstinence. While he denied he consumed alcohol on a weekly basis, he failed to provide documentation to support sobriety, and his denial lacked credibility. He continues to consume alcohol and has not continued with aftercare. His continued alcohol consumption under these circumstances raises concerns about his trustworthiness, reliability, judgment, and ability to protect

classified information. I have reviewed the facts of Applicant's case carefully, and I conclude that none of the Guideline G mitigating conditions apply.

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.

Applicant received treatment and counseling for his alcohol consumption in 1991 and 2002, and he was ordered to attend an evaluation in January 2004 by a substance abuse rehabilitation program following an episode of public drunkenness in December 2003. A subsequent treatment plan was recommended for Applicant. When he completed his e-QIP in March 2010 and was asked if he had been ordered, advised or asked to seek alcohol treatment or counseling in the last seven years, he failed to list his 2004 alcohol counseling and treatment. Applicant's personal conduct raises security concerns under AG ¶ 16(a).

AG ¶ 16(a) reads: "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

DOHA's Appeal Board has cogently explained the process for analyzing falsification cases:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

At his hearing, Applicant stated that his failure to list his 2004 alcohol counseling and treatment was not deliberate. He further stated that he completed his security clearance application in haste and did not read all sections carefully before he completed them. I observed Applicant at his hearing. I listened carefully to his testimony, and I reviewed the case record in detail. I noted that Applicant had first been granted a security clearance 23 years ago in 1989. During his military service and as a federal contractor, Applicant was aware of the importance of telling the truth to the Government when completing a security clearance questionnaire. As one who had completed security clearance applications in the past, he also knew that certain kinds of information can raise security concerns about a person's judgment, reliability, and willingness to follow rules. Applicant had reason to hide his 2004 alcohol assessment and counseling from the Government because it resulted in his administrative separation from military service and ended his military career.

I also noted that Applicant was not a credible witness when he denied having any problems with alcohol consumption, even though he had been diagnosed as alcohol dependent and stated that he knew that an alcohol dependent person should abstain from the consumption of alcohol. After considering the record evidence as a whole to determine whether there was direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the omission occurred, I conclude that Applicant had reason to conceal his 2004 alcohol assessment and counseling. I also conclude that his "No" answer to Section 24b was deliberate.

One Guideline E mitigating condition might apply to Applicant personal conduct. If "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," then AG ¶ 17(a) might apply.

Applicant made no effort to correct his falsification before he was confronted with the facts. He sought to conceal his alcohol consumption, alcohol dependence, and failed alcohol treatment, behavior which reflected poor judgment and unreliability. The fact that this behavior occurred when Applicant was a mature adult continues to cast doubt on his reliability, trustworthiness, and good judgment. I conclude that AG ¶ 17(a) does not apply in mitigation.

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 whose military and civilian contractor experience has provided him with knowledge of the security clearance process and its policies. He knows, or should know, of the importance of telling the truth on a security clearance application. Applicant deliberately falsified material facts in response to a question on his e-QIP about his alcohol use and counseling. He has a history of using alcohol to excess, and he has been evaluated as alcohol dependent. He continues to consume alcohol, and he denies that his consumption of alcohol raises problems. Applicant's denial raises serious doubts under the whole-person concept about his judgment and ability to protect classified information.

Overall, the record evidence leaves me with questions and doubts about 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 personal 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.i.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	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