



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



In the matter of:)	
)	
)	ISCR Case No. 11-02866
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2012

Decision

HEINY, Claude R., Administrative Judge:

Between 1999 and 2008, Applicant was arrested and convicted twice of Driving While Intoxicated (DWI) and received a deferred adjudication for a third alcohol-related offense. He has failed to rebut or mitigate the alcohol consumption security concerns. Clearance is denied.

History of the Case

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on September 20, 2011, detailing security concerns under Guideline G (Alcohol Consumption).

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On October 6, 2011, Applicant answered the SOR and did not request a hearing. On November 28, 2011, I was assigned the case. On November 23, 2011, DOHA issued a Notice of Hearing for the hearing held on December 7, 2011.

The Government offered exhibits (Ex.) 1 through 5, which were admitted into evidence without objection. Applicant testified and submitted no documents. The record was held open to allow Applicant to submit additional information. In a timely manner, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Exs. A and B. On December 15, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he denies being incarcerated for eight months as set forth in SOR ¶ 1.b, but admits the remaining factual allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 34-year-old systems administrator who has worked for a defense contractor since October 2006. Applicant called no witnesses other than himself, and produced no work or character references.

Applicant acknowledges he has made some bad choices related to alcohol. (Tr. 52) In his SOR answer, he stated:

If I lose my security clearance, I have no one to blame but myself . . . The choices I have made have brought me to where I am today, and I wish I had made a few less bad choices, but I didn't and I have to deal with the consequences for my actions.

Applicant also stated, "I understand why I'm here. It's -- the Government has their concerns and they have valid reasons for their concerns." (Tr. 62)

In August 1999, Applicant -- then age 22 -- was charged with DWI. Applicant had gotten off work at 11:00 p.m. and went to a local tavern. (Ex. 3) While there he drank beer. On the way home, he was stopped for speeding. He was arrested after a verbal argument with the officer, an individual whom he knew because the officer had gone to high school with Applicant's sister. (Ex. 2, Tr. 20) He was released after a night in jail. He pleaded no contest to the DWI. (Ex. 2) He was found guilty, sentenced to eight months incarceration, fined \$300, incurred \$219 court costs, and sentenced to 12 months of probation. (Ex. 5, Tr. 36)

Applicant was ordered to, and did attend, a 12-hour alcohol awareness class, where he learned it was never a good idea to drink and drive. (Tr. 20) He was also required to do community service, which he did working with the elderly. (Tr. 21) His automobile insurance also increased from \$80 to \$120 monthly. (Tr. 37) At that time, he

was working as a server at a restaurant and the fine, court costs, and increase insurance fees had a “huge impact” on his lifestyle. (Tr. 38) While on probation, he was to abstain from drinking and to report to a probation officer monthly initially and then every other month. (Tr. 38)

On Applicant’s November 2010 Electronic Questionnaires for Investigations Processing (e-QIP), he acknowledged he had been charged with or convicted of alcohol-related offenses and listed this arrest. (Ex. 1) He also listed it on his June 2007 e-QIP. (Ex. 2)

In May 2005, Applicant – then age 27 – was charged with Public Intoxication. He paid a \$120 fine and received deferred adjudication. The charges were later dropped. He had been drinking in a bar and decided it was unsafe to drive home so he decided to sleep in the car. (Tr. 23) He was sleeping in his vehicle when a police officer asked him if he was able to drive home. (Ex. 4) He was arrested when he told the officer he should not be driving. He did not list it on his e-QIP because he had forgotten about it. (Ex. 4) The charge occurred the week before his university graduation. (Tr. 39)

In November 2008, Applicant – then age 31 – was charged with DWI, Second. He was arrested, spent the night in jail, and was released the next day. Applicant indicated he was in town attending computer training. (Tr. 41) He met his niece for dinner. He had two beers with dinner, went to a pool hall, played pool for 2 ½ to 3 hours, and drank beer while playing pool. (Ex. 3) He drove his niece home and then was driving across town to stay at his brother’s place. (Tr. 42) He fell asleep while driving, woke just prior to hitting a police car parked at the side of the road, and was arrested when the officer saw him swerve to avoid the collision. (Ex. 3) He failed a sobriety test and refused to take a breathalyzer test.

At a trial in May 2009, Applicant was found guilty, fined \$700, ordered to attend alcohol awareness classes, and placed on probation for two years. (Exs. 3, 5) He was required to refrain from alcohol consumption while on probation. (Tr. 38) His attorney cost \$5,000. (Tr. 43) His automobile insurance increased \$60 monthly. (Tr. 43) Three years later, his insurance premiums have come down some, but he still pays an increase in insurance due to this incident. (Tr. 44) He attended court-ordered classes two or three times a week from May 2009 through May 2011. (Tr. 27) The class was entitled DWI Intervention Program. (Ex. 3) He found the classes to be very eye opening to see how alcohol can affect people’s lives. (Tr. 27) On June 2011, his community supervision had expired and was discharged from the community service program. (Ex. B) He listed this arrest on his e-QIP.

In May 2008, Applicant started attending Alcoholics Anonymous (AA) meetings. (Ex. 1, Tr. 28) As of November 2010, he was attending twice a week. (Ex. 1) He provided documentation that he attended 142 12-step meetings between September 2009 and July 2010. (Ex. A) He last attended a meeting in June 2011. (Tr. 28) By attending AA, he decided he does not have a problem with alcohol. (Tr. 30) He never obtained an AA sponsor and was working on the second of the twelve steps. (Tr. 31)

In December 2010, in a personal subject interview, Applicant stated he would consume six or seven beers in a social setting at home over the weekend. (Ex. 3) He stated he got intoxicated one a month on average. Intoxication meaning the point where someone's judgment was impaired and poor decisions result from their intoxication. (Ex. 3) At that time, he was not attending AA, used a designated driver when he drank, or did his drinking at home. He asserted he had reduced the amount and frequency of his alcohol consumption. At this time, he was on probation, which ran from May 2009 through May 2011. As a condition of probation he was to refrain from alcohol consumption. At some point, he returned to attending AA meetings. He stated he last attended AA in June 2011, which was shortly after his probation ended.

Applicant currently drinks beer once or twice a week. (Tr. 32) He will purchase a 12-pack for the weekend. (Tr. 32) He understands another alcohol-related driving arrest would be a felony and have serious consequences for him. (Tr. 63) In 2007, he purchased a home. (Tr. 40)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 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 interests of 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 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 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

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 a condition that could raise a security concern and may be disqualifying:

(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.

AG ¶ 22 (a) applies due to Applicant’s three alcohol-related arrests including: a 1999 DWI conviction, a deferred adjudication for 2005 public intoxication, and a second DWI conviction in 2008.

AG ¶ 23 provides four 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.

None of the mitigating conditions apply. Applicant had three arrests and, as of December 2010, he stated he was drinking six or seven beers in a social setting weekly and admitted to drinking to intoxication monthly. He was on probation during this period, which required him to refrain from all alcohol consumption. His behavior was not infrequent, nor did it happen under unusual circumstances. He got off work, went to a bar, drank, and got arrested for speeding. Five years later, he was again at a bar drinking and decided he should not drive home resulting in his public intoxication arrest. Three and a half years later, he goes to dinner, has a few beers, shoots pool, has a few more, falls asleep driving home, and almost hits a police car. The drinking did not occur under unusual circumstances and there is nothing to prove it is unlikely to recur.

The first arrest resulted had a "huge impact" on Applicant's life style. He was 22 years old and a server in a restaurant. The fine and increased monthly auto insurance greatly affected his finances. His most recent arrest cost him \$5,000 in attorney fees, a fine, court costs, and additional monthly auto insurance. Even with the financial impact on his life, as of December 2010, he was getting intoxicated monthly and currently drinks a 12-pack over the course of a weekend. The mitigating factor in ¶ 24(a) does not apply.

Applicant has not acknowledged his issue of alcohol abuse. He thought he had an alcohol problem due to his three arrests, but after attending AA realizes he does not have a problem. The mitigating factor in ¶ 24(b) does not apply. The mitigating factor in ¶ 24(c) does not apply because he is not participating in counseling or treatment. He did take classes, but is drinking a 12-pack on weekends.

Applicant attended AA meetings from May 2009 through May 2011. His attendance ended about the time his probation did. It is clear he has gotten something from his attendance. However, even while he was attending AA meetings regularly, he was continuing to drink six to seven beers during a setting and was getting intoxicated monthly as of December 2010. The knowledge he gained from his attendance was insufficient to end his monthly intoxication. Whatever value he was receiving from his attendance would have diminished when he stopped attending, which occurred in June 2011. He has not attended inpatient or outpatient counseling or rehabilitation along with

any required aftercare, nor has he demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations. Additionally, there is no favorable prognosis. The mitigating factor in ¶ 24(d) does not apply.

It has been a little over three years since Applicant's arrest for DWI and about two and a half years since he was convicted to the DWI charge. Considering the three arrests, his drinking to intoxication while on probation, the period since his late conviction, it is too soon to be able to safely predict that the security concern pertaining to alcohol consumption is no longer applicable.

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 the facts and circumstances surrounding this case. To his credit, Applicant acknowledges he has made some bad choices and there are valid reasons for the Government's concern. This is an important beginning. Additionally, he received important insight during his attendance at AA. He is now 34 years old and purchased a home in 2007, each event known to have a maturing impact on individuals. This is countered by him believing he once might have had a problem with alcohol, but after attending AA no longer believes alcohol is a problem for him.

It was Applicant's drinking while on probation and his getting intoxicated monthly as of at least December 2010, which indicates it is too soon to find his alcohol consumption is no longer a security concern. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant not mitigated the security concerns.

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, Alcohol Consumption: AGAINST APPLICANT

Subparagraphs 1.a – 1.d: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge