



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



In the matter of:)
)
) ISCR Case No. 11-04558
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

10/05/2012

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 26, 2008. He was granted access to classified information. On September 13, 2010, Applicant submitted another e-QIP to retain access to classified information required for his position with a defense contractor. After reviewing the results of an ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued Applicant an interrogatory to clarify or augment potentially disqualifying information. After reviewing the results of the background investigation and Applicant's responses to the Interrogatory, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On February 23, 2012, DOHA issued Applicant a Statement of Reasons (SOR) detailing security concerns for personal conduct under Guideline E, criminal conduct under Guideline J,

and alcohol consumption under Guideline G. 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 in the Department of Defense on September 1, 2006. Applicant received the SOR on March 19, 2012.

Applicant answered the SOR in an undated response. He denied all allegations under Guideline J. At the hearing, he admitted the conduct took place, but he had an explanation for each allegation of criminal conduct. He denied the allegation under Guideline E. He admitted two allegations (SOR 3.a, and 3.e) and denied three (SOR 3.b, 3.c, and 3.d) under Guideline G. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 23, 2012. The case was delayed for a few months because Applicant was deployed overseas. The case was assigned to me on June 27, 2012. DOHA issued a Notice of Hearing on June 28, 2012, for a hearing on July 25, 2012. I convened the hearing as scheduled. The Government offered four exhibits, which I marked and admitted into the record without objections as Government Exhibits (Gov. Ex.) 1 through 4. Applicant testified. I left the record open for Applicant to submit documents. Applicant timely submitted medical documents that I marked and admitted into the record without objection as Applicant Exhibit (App. Ex.) A. DOHA received the transcript of the hearing (Tr.) on August 10, 2012.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant denied the allegations under criminal conduct with explanation, denied three and admitted two allegations under alcohol consumption, and denied the allegation under Guideline E. His admissions are included in my findings of fact.

Applicant is a 40-year-old aviation technician for a defense contractor. He served in the Army National Guard from July 1987 until 1995. He served on active duty in the Navy as an aviation technician from December 1999 until May 2006. He was discharged as a petty officer first class (E-6) with a general discharge under honorable conditions for alcohol rehabilitation failure in May 2006. He was married from 1998 until 2004, and from 2006 until 2010. At present, he is single. While working for a defense contractor, he was deployed to Iraq from August 2007 until September 2009. (Tr. 9-14; Gov. Ex. 1, e-QIP, dated September 13, 2010; Gov. Ex. 2, Security Investigator's Transcript of October 14, 2010, dated January 23, 2012)

The SOR alleges criminal conduct for driving on a suspended operator's license and resisting arrest in January 1991 (SOR 1.a); trespassing in August 1995 (SOR 1.b); misdemeanor reckless handling of a firearm within an occupied dwelling in December 1996 (SOR 1.c); domestic assault on March 4, 2003 (SOR 1.d); violating conditions of bail on March 21, 2003 (SOR 1.e); domestic assault in February 2006 (SOR 1.f); and showing obscene material to a minor in May 2010 (SOR 1.g).

In January 1991, Applicant was asked to drive one of his friends to a girl's house. He had completed high school and was 19 years old. He was stopped by police but he had left his driver's license at home. He had been drinking alcohol earlier in the evening. He was placed in a police car and taken to the police station. Outside of the station, he went to scratch his leg and the police officers grabbed him thinking he was reaching for a weapon. He pushed back at the officers. He remembers going to court but the charges were dismissed because he had a driver's license and the potential resisting arrest was a misunderstanding. (Tr. 33-38)

Applicant's mother passed away in early 1995. In August 1995, he went to the house he shared with her when he lived at home to retrieve some items he believed belonged to him. He was the trustee for his mother's estate, but his stepfather of 16 years occupied the house. They had a dispute as to the ownership of the property in the house, and the stepfather called police and accused him of trespassing. He told the judge the circumstances and received a small fine. (Tr. 38-41)

In December 1996, Applicant had been hunting and was sitting in a chair at his sister's house with his shotgun in his lap. He did not know the gun was loaded. The gun slipped from his grip and discharged. He was charged with reckless handling of a firearm in a dwelling. He admitted his handling of the weapon was reckless. (Tr. 41-43; Gov. Ex. 4, Federal Bureau of Investigation (FBI) Criminal Records)

By 2003, Applicant had joined the Navy. His wife accompanied him to his duty station. He returned from a six-month deployment in March 2003 and suspected she had been unfaithful. They argued, she assaulted him, and he assaulted her. He had been drinking alcohol before the incident. She called the police, and he was charged with domestic assault and released pending trial. A condition of his release was not drinking alcohol. The charge was later dismissed. (Tr. 43-46; Gov. Ex. 4, FBI Criminal Records)

Later in March 2003, after Applicant had moved from his house and while still under the orders pending trial, he went to a pub with a friend. He saw the police officer who had arrested him earlier in the month for domestic assault. He was drinking a beer and went to talk to the police officer. The police officer knew he was pending trial and could not drink or possess alcohol. He was arrested for violating the conditions of his release, and sentenced to four days in jail and probation for one year. (Tr. 46-47)

In February 2006, Applicant had a dispute with his live-in girlfriend. He had a medical procedure on his eye and was resting at home and drinking alcohol. She returned from work complaining about receiving a speeding ticket. They argued and he held her down on the floor. She went to the police who charged him with assault. Since he had been drinking beer that afternoon, it was considered by police and his command as an alcohol-related incident. He was sentenced to a fine and court cost. This action precipitated his discharge from the Navy in May 2006 for alcohol rehabilitation failure. (Tr. 51-53; Gov. Ex. 4, FBI Criminal Records)

Applicant started communicating with a female over Facebook in the spring of 2010. After a few months, they started texting and talking. Applicant initially believed the person he was communicating with was at least 18 years old since she discussed going out at night and partying. There were no discussions of age, but he did believe she may be a young girl. In fact, the person was a 16-year-old high school student. She knew he was 38 years old. After a few months, they exchanged pornographic pictures of each other. The girl's mother discovered the pictures on her daughter's computer, and alerted the local police. Applicant was contacted by the local police. He agreed to go to the state where the girl was located to be arrested. He appeared at the police station accompanied by his lawyer and a bail bonds man. He was fingerprinted and formally charged but released. In May 2010, there was a felony charge of transmitting obscene material to a minor against him. Applicant initially pled not guilty with both he and his attorney in court in July 2010. His next court date was set as September 12, 2011. He pled guilty at the September 2011 hearing with his attorney present. He was sentenced on November 4, 2011, to pay a fine and was placed on supervised probation for a year. His probation was transferred to his home state and will run until November 3, 2012. The conditions of his probation are no alcohol or drug use, and good behavior. He is required to keep his address and job current and to report any incidents with police. He has met his probation officer, but his contact with him is mainly by phone. (Tr. 53-64, 73-74)

At the time he completed his e-QIP in September 2010; Applicant had been arrested, appeared at the police station and in court with his attorney, pled not guilty in July 2010, and received a court date of September 2011. He responded no to the question on his September 3, 2010 e-QIP asking if he had been issued a summons, citation, or ticket to appear in court on a criminal proceeding and if he was on trial or awaiting trial on criminal charges, or currently awaiting sentencing for a criminal offense. At the time, Applicant had been arrested, notified of the offense against him, appeared in the police station with his lawyer and bails bondman, pled not guilty, and advised of his trial date in September 2011. He had been to court and knew there were charges pending against him. When asked at the hearing why he did not list the arrest on his e-QIP, Applicant replied he did not know what he was thinking. He completed the application both at work and at home and had time to consider his responses. He did not consult anyone at work and completed the application on his own. He understood that the criminal offense was serious and that he could be incarcerated. He was both embarrassed and nervous about the offense. He did not provide any information on this arrest or pending trial in his security clearance application. When he was interviewed by a security investigator in October 2010, the investigator had examined Appellant's arrest record and knew about the arrest. They discussed the arrest and court proceedings during the interview. (Tr. 64-73)

Applicant started drinking alcohol at approximately age 18. After entering the Navy, his consumption of alcohol was approximately 12 to 24 beers a weekend. After his discharge, he only consumed about two or three drinks about twice a month. He admits to becoming intoxicated on occasion. He is usually social and pleasant when intoxicated. In July 2001, while on active duty and after a domestic violence incident

with his wife, he self-referred to an alcohol prevention program in the Navy. He was sent to a Navy hospital for an intense inpatient program. He was diagnosed as alcohol dependent after successfully completing the 28-day program. The inpatient program was followed by an outpatient aftercare program. He successfully completed both programs. (SOR 3.a) After completion of the inpatient program, Applicant did not consume alcohol for over two years. He was involved in another domestic violence incident involving alcohol in March 2003. He successfully completed another outpatient alcohol treatment program. (SOR 3.b) He was involved in a third alcohol-related domestic violence incident in April 2006. (SOR 3.c) At that time, the medical personnel at the base hospital determined he was still alcohol dependent and an alcohol rehabilitation failure. (SOR 3.d) He was administratively separated from the Navy with a general discharge under honorable conditions due to alcohol rehabilitation failure. (SOR 3.e; October 14, 2010 Interview with Security Investigator, Gov. Ex. 3, Response to Interrogatory, dated January 23, 2012)

Applicant did not consume alcohol while deployed to Iraq from 2007 until September 2009. Upon his return, he had problems concentrating, was nervous, and was having panic attacks. He knew something was not right and he was starting to use alcohol to calm his nerves. He went to the local Veterans Affairs Hospital and the medical personnel determined his problem was anxiety. They prescribed a daily medicine regimen to overcome anxiety and panic attacks. His medical records show he is continuing on his medication, keeping his scheduled medical appointments, and exhibiting good impulse control and judgment. He has abstained from alcohol consumption since 2009. Applicant notes his alcohol problems are behind him. (Tr. 28-31; App. Ex. A, Medical Records, dated May 22, 2012)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 for 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Criminal Conduct, Guideline J

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulation. (AG ¶ 30)

Applicant admits that he was arrested and convicted for minor criminal offenses from 1991, when he was a teenager, until 2006. Alcohol consumption was a factor in most of these offenses. Criminal records confirm most of these offenses. In May 2010, he was arrested and charged with showing obscene material to a minor under the age of 18. He pled guilty, and was sentenced on November 4, 2011, to a fine and probation for one year. He is on probation until November 3, 2012. The criminal conduct, arrests, and convictions raise Criminal Conduct Disqualifying Condition AG ¶ 31(a) (a single serious crime or multiple lesser offenses); AG 31(c) (allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and AG 31(d) (individual is currently on parole or probation).

I considered Criminal Conduct Mitigating Condition AG ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment); and AG ¶ 32(d) (there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement). These mitigating

conditions apply to the criminal conduct allegations in SOR 1.a to 1.f. These criminal activities happened from 6 to 21 years ago. The criminal incidents are all minor, many involving alcohol consumption, which Applicant has now overcome. The incidents were either usual teenage actions or involved domestic disputes. The circumstances leading to the offenses were unusual and not likely to recur. The criminal conduct security concerns expressed in SOR 1.a to SOR 1.f are mitigated.

The criminal conduct security concern in SOR allegation 1.g is not mitigated. The incident happened only two years ago. It is serious criminal conduct involving a 38 year old man (Applicant) communicating obscene photographs with an underage girl. Applicant knowingly and willingly sent the images to the girl knowing she was probably underage. He was convicted of the offense and is still on probation. His conduct may recur, and it still casts doubt on his reliability, trustworthiness, and good judgment. He has not presented sufficient information to mitigate the security concerns expressed in SOR 1.g.

Personal Conduct, Guideline E

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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. (AG ¶ 15) Personal conduct is always a security concern because it addresses whether the person's past conduct justifies confidence the person can be entrusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government.

Applicant did not include his May 2010 arrest for showing obscene material to a minor under the age of 18 in response to a question on the security clearance application he signed on September 3, 2010, asking whether he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding, or is on trial or awaiting trial on criminal charges or awaiting sentencing. His failure raises Personal Conduct Disqualifying Condition AG ¶ 16(a) (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).

Applicant was advised of the criminal offense by police and went to the local police station with his attorney and bail bondsman in May 2010. He was arrested and processed. He appeared in court with his attorney in July 2010, pled not guilty to the offense, and was given a court date in September 2011. When he completed the

security clearance application in September 2010, he knew of the criminal offense. He admitted he was concerned and nervous because he could be incarcerated. In response to questions at the hearing, Applicant could not provide a rationale for why he did not include the offense on his security clearance application. The only logical answer and conclusion to be drawn is that he did not want others to know of the offense for fear he would not be granted a security clearance and lose his job. I find that he intentionally omitted vital security information on the security clearance application.

I considered Personal Conduct Mitigating Conditions AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; AG ¶ (17(c) (the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment); and AG ¶17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur). These mitigating conditions do not apply. He could not explain his failure to include the arrest so his explanation for his oversight lacks credibility. Applicant intentionally omitted his arrest from the security clearance application. He noted that when questioned by a security investigator in November 2010, the investigator knew of the incident. This does not mitigate Applicant's personal conduct since the investigator researched Applicant's criminal conduct to prepare for his interview with Applicant. Applicant admitted his failure to include the arrest on the security clearance application only after being confronted with his failure by the security investigator. Applicant has not mitigated security concerns based on his personal conduct.

Alcohol Consumption, Guideline G

Excessive alcohol consumption is a security concern because it 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 ¶ 21) Applicant was involved in numerous incidents stemming from alcohol consumption from 2001 until 2006 while in the Navy. He attended a Navy extensive in-patient treatment program, as well as extensive aftercare, and was diagnosed as alcohol dependent. After failing a second alcohol rehabilitation program, he was administratively discharged from the Navy for alcohol rehabilitation failure. Applicant's excessive consumption of alcohol, diagnosis as alcohol dependent, and discharge from the Navy for alcohol rehabilitation failure raise Alcohol Consumption Disqualifying Conditions AG ¶ 22(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); and AG ¶ 22(d) (diagnosis by a duly qualified medical professional (e.g. physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence).

I considered Alcohol Consumption Mitigating Conditions AG ¶ 23(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); AG ¶ 23(b) (the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of action taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and AG 23(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 recommendation, 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).

These mitigating condition apply. While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of misconduct, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation. Applicant did not consume alcohol while serving as a civilian in Iraq for two years from 2007 until 2009. When he returned in September 2009, he noticed that he was anxious and stressed and was turning to alcohol for a solution. He went to the local Veterans Affairs Hospital, was seen by a staff psychiatrist, and diagnosed with anxiety and stress. He was prescribed medication and has been taking his medicine as prescribed for over two years. He periodically sees his doctors for continued evaluation as ordered and required. He has not consumed alcohol in over three years. The last alcohol-related incident was over six years ago. He understands the stressors in his life that led to excessive alcohol consumption and learned to deal with the stressors without turning to alcohol. Applicant established that his life circumstances have changed since September 2009. He knows and understands the risk of alcohol consumption. The evidence shows a change of circumstances indicating Applicant has been reformed or rehabilitated. It is unlikely his previous alcohol consumption problems will recur. His present circumstances and lifestyle show that his past conduct does not now reflect adversely on his current reliability, trustworthiness, and good judgment. He established a clear pattern that he does not consume alcohol. In total, Applicant presented sufficient information to meet his burden to establish that his past alcohol use is under control and it does not reflect on his current reliability, trustworthiness, and good judgment. Applicant has mitigated security concerns for alcohol consumption.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all

the circumstances. An 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 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. I considered Applicant's over seven years of active service in the Navy and his two years of civilian service in Iraq in support of soldiers. Applicant mitigated security concerns for his alcohol consumption based on the passage of time and rehabilitation. He mitigated most of his criminal conduct security concerns based on the passage of time and the minor nature of the offenses. However, he did not mitigate the security concerns raised by his criminal conduct of showing obscene photographs to an underage girl and his conviction for the offense for which he is still on probation. In addition he did not mitigate the security concern for his deliberate failure to include his arrest for this offense on his security clearance application. I conclude Applicant has not mitigated the criminal conduct and personal conduct security concerns. His failure to mitigate these concerns raises questions concerning his judgment, reliability, and trustworthiness. The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Paragraph 3, Guideline G: FOR APPLICANT

Subparagraph 3.a – 3.e: 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.

THOMAS M. CREAN
Administrative Judge