



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



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 11-04839
)
)
 Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

08/08/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns raised by allegations of adverse personal conduct. He did not mitigate the concerns raised by his criminal conduct and alcohol consumption. His request for a security clearance is denied.

Statement of the Case

On January 5, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to renew his security clearance. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to find¹ that it is clearly consistent with the national interest to continue Applicant's access to classified information. On January 20, 2012, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

raise security concerns addressed in the adjudicative guidelines (AG)² for criminal conduct (Guideline J), alcohol (Guideline G), and personal conduct (Guideline E).

Applicant answered the SOR (Answer) on February 3, 2012, and requested a hearing. The case was assigned to me on June 7, 2012. Pursuant to a Notice of Hearing issued on June 11, 2012, I convened a hearing in this matter on June 28, 2012. DOHA received a transcript (Tr.) of the hearing on July 9, 2012. The parties appeared as scheduled, and the Government presented eight exhibits, six of which were admitted as Government's Exhibits (Gx.) 1 - 6.³ Applicant testified, but presented no documents.

Findings of Fact

In the SOR, the Government alleged, under Guideline J, that in January 2010, Applicant was arrested and charged with assault and battery on a family member, that in November 2010, he pleaded guilty to misdemeanor trespassing and was given a 12-month suspended jail sentence, placed on three years probation, and ordered to complete an anger management class; and that he had consumed alcohol before his arrest. (SOR 1.a).

The Government also alleged under this guideline that in December 2007, Applicant left his job by mutual agreement after his employer learned Applicant and others had stolen scrap metal from work and converted it to cash by selling it at a recycling center (SOR 1.b); that in August 2000, Applicant was arrested and charged with driving under the influence of alcohol (DUI) and was found guilty of that charge (SOR 1.c); that in March 2000, he was arrested and charged with making threats to burn, a felony, but later pleaded guilty to a misdemeanor charge of making threats over the phone and was given a six-month suspended jail sentence (SOR 1.d); that in April 1998, he was arrested and charged with assault and battery, of which he was found guilty in June 1998 (SOR 1.e); that in the early 1980s, Applicant was charged with and convicted of DUI (SOR 1.f). Applicant admitted all of the Guideline J allegations except SOR 1.b. (Answer; Tr. 20 - 28)

Under Guideline G, the Government alleged that Applicant has consumed alcohol, at times to excess and to the point of intoxication, since he was a teenager (SOR 2.a). The Government also cross-alleged, as alcohol-related conduct, the events listed at SOR 1.a, 1.c, and 1.f (SOR 2.b). Applicant admitted these allegations. (*Id.*)

Under Guideline E, it was alleged that, in 2006 and 2007, Applicant sold scrap metal taken, without authorization, from his employer, and that he left that job by mutual agreement as a result (SOR 3.a); and that from September 1999 through December 2005, Applicant was warned four times for failing to report to work, that he also missed work without calling in on July 12, 2006, and that, as of October 2007, his attendance

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ Department Counsel provided an index of its documents. It is contained in "Government's Proposed Exhibits" and included in the record as Hx. I. I excluded Gx. 7 and Gx. 8 for reasons discussed at Tr. 54 - 64.

was below average. (SOR 3.b) Applicant denied SOR 3.a and admitted SOR 3.b. As to SOR 3.b, Applicant also claimed his work attendance suffered for medical reasons. (*Id.*)

Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 50 years old and employed by a defense contractor in a position that requires a security clearance. He has held a security clearance since about 1985. He has worked for his current employer since March 2008. Applicant is a shipfitter by trade. Since 1982, he has worked for private companies supporting maintenance and repair of U.S. Navy warships. (Gx. 1; Tr. 87)

Before being hired by his current employer, Applicant worked for another company from 1992 until he resigned under adverse circumstances in December 2007. Applicant had a history of attendance problems at that company and was counseled several times about failing to show up for work without calling in. For example, over one three-year period with his previous employer, Applicant had an average of 18.25 days of unauthorized absence. Records from that employer also reflect that Applicant was argumentative and obstinate when approached about his attendance problems. (Gx. 4) In November 2007, Applicant was diagnosed with severe diabetes. He suffered from the undiagnosed effects of his disease for about two years before he left his previous employer. Applicant attributes some of his absenteeism to medical problems he now knows were caused by diabetes. (Tr. 68 - 70, 89 - 90) Applicant also acknowledged at the hearing that some of his attendance was affected by his use of alcohol, discussed more fully below. (Tr. 116) Applicant has not had any attendance problems with his current employer. (Tr. 91)

In 2007, Applicant was accused of stealing from his former employer. Applicant and his crew were assigned a job aboard a Navy ship in which they were fitting aluminum ducting throughout the ship. As they worked, they accumulated large amounts of small pieces of scrap aluminum in 55-gallon barrels. Traditionally, disposal of the aluminum involved melting it down; however, aluminum can also be recycled for cash. Applicant suggested to his immediate supervisor that, rather than melt down the scraps, they should recycle them for money they could use for supplies or for work-related social events. The immediate supervisor approved and Applicant turned over cash and receipts to him each time they recycled their scraps.

In late November or early December 2007, managers above Applicant's supervisor learned that one of Applicant's co-workers had converted some scraps for cash at the recycling center. They indicated that this was against company policy and asked who else was engaged in this activity. The employee implicated Applicant and others from his crew. Applicant then was told he would be fired if he did not resign. Applicant resigned on December 10, 2007. He has consistently denied that he acted without authorization. All of the available information shows that Applicant was forced to resign because he violated company policy. However, available information also shows that he reasonably thought he was acting with company approval and did not unlawfully convert company property for his own monetary gain. The police were not called

regarding this alleged theft of company property and Applicant was never charged with any crime. (Gx. 1; Gx. 2; Gx. 3; Gx. 4; Answer; Tr. 91 - 101)

In 1999 and 2000, Applicant was dating a woman who lived across the street, and for whom he often did work on her house and yard. Applicant built a fence for her and paid for half of the \$3,000 of materials the job required. Soon thereafter, they broke up and Applicant asked his ex-girlfriend to reimburse him \$1,500 for the fence and labor. She refused and they began arguing about the matter. One day in March 2000, they argued on the phone about the fence. The argument became heated and Applicant threatened to either burn the fence down or to blow it up. The next day, they argued in person and Applicant shoved his ex-girlfriend, who then called police. As alleged in SOR 1.d, Applicant was charged with making threats to burn, a felony, but later pleaded guilty to a misdemeanor trespassing charge and was given a six-month suspended jail sentence. (Gx. 2; Gx. 6; Tr. 78 - 79)

Applicant admitted that he was charged and convicted of assault and battery in 1998, as alleged in SOR 1.e. However, the record contains no other details available about that arrest. (Answer; Gx. 6)

Applicant has twice been charged and convicted of DUI. His first charge occurred in the late 1980s when he was stopped by police after drinking all night. The second arrest occurred on August 13, 2000. Both convictions resulted in court-ordered alcohol awareness classes and suspended jail sentences. (Answer; Gx. 2; Gx. 3; Gx. 6)

Applicant was also arrested in January 2010 and charged with assault and battery of a family member. He had been at his girlfriend's house watching football and drinking beer. He estimates he drank between six and eight beers that day. He was napping on the couch late in the afternoon when his girlfriend tripped and fell in the kitchen. Her 19-year-old son, with whom Applicant did not get along, entered the room when his mother screamed and assumed Applicant had assaulted her. The boy then assaulted Applicant and beat him severely. Applicant was arrested and charged with assault and battery of a family member. He did not press charges against his assailant in deference to his girlfriend's wishes. In October 2010, Applicant entered into a plea agreement whereby he was given a deferred finding of guilt as to the assault charge, he was sentenced to 12 months in jail (suspended), and placed on probation for two years.

Applicant's plea agreement to an assault charge meant that he was barred from access to the Navy facility where he was working. A lesser charge would still allow him to access the facility. In November 2010, Applicant asked that the charges be amended. In response to his request, Applicant was found guilty of trespassing and his 12-month jail sentence remained, but his probation was extended to three years. He was also ordered to complete an anger management class. Applicant's probation is scheduled to end in November 2013. (Answer; Gx. 1; Gx. 2; Gx. 3; 5; Gx. 6; Tr. 80 - 84, 110 - 112)

Applicant began consuming alcohol around 1978, when he was 17 or 18 years old. From then until 2008, he drank two or three times weekly and on weekends. He drank to intoxication at least twice monthly. His drinking decreased in 2008 after he was diagnosed with diabetes. He claims to have ceased drinking altogether after he was

arrested in January 2010, and that he did not drink again until 2011. At his hearing, Applicant acknowledged that he has “a drinking problem.” (Tr. 67) He intends to quit drinking altogether (Tr. 104), and claimed he does not drink now (Tr. 102). He also provided different accounts of his alcohol consumption since his diagnosis of diabetes, which he acknowledged can be complicated by the fact that the body metabolizes alcohol into sugar. By contrast, until late 2011, he drank as many as 12 beers in one sitting, but he did not say how often. (Tr. 103) Since his 2010 arrest, he drinks as much as a six pack on weekends when he gets together with a friend, whom he is helping build a house. (Tr. 103 - 104) He also stated that when he was arrested in January 2010, he had consumed eight or nine beers (as opposed to the six to eight beers he reported in a January 2011 subject interview). (Gx. 2; Tr. 107 - 108) Since his arrest in 2010, he reported that the most he has had to drink was either four or five beers in one sitting (Tr. 108) or eight beers as recently as April 2012. (Tr. 110)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent⁴ with the national interest for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government’s case.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁷

Analysis

Criminal Conduct

The Government’s information is sufficient to raise security concerns about criminal conduct. The information in support of the allegation at SOR 1.b does not establish that Applicant engaged in criminal conduct when he recycled scrap aluminum from work for cash. However, he is still on probation from his January 2010 arrest and plea agreement. He was also arrested and convicted of four other criminal offenses between the late 1980s and March 2000. Information about Applicant’s conduct raises a security concern addressed at AG ¶ 30 as follows:

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 regulations.

Available information further requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*); and AG ¶ 31(d) (*individual is currently on parole or probation*).

The security concerns about Applicant’s criminal conduct can be mitigated by establishing one or more of the following conditions listed at 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 or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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.

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

The mitigating condition at AG ¶ 32(a) does not apply because Applicant's conduct is recent and he is still on probation. AG ¶ 32(d) does not apply because, as discussed under Guideline G below, all but one of his arrests were for alcohol-related conduct or occurred after he had been drinking. Questions remain about his current use of alcohol. Unless and until Applicant can demonstrate that alcohol will no longer influence his conduct, and until he successfully completes probation in November 2013, there is no basis to conclude that he has been rehabilitated. On balance, Applicant has not mitigated the security concerns about his criminal conduct.

Alcohol Consumption

The Government's information also raised a security concern about Applicant's use of alcohol. That security concern is addressed at AG ¶ 21 as follows:

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.

In addition to his DUI arrests, his 2010 assault and battery arrest occurred after he had consumed between six and nine beers that day. Applicant also acknowledged that he has consumed alcohol to excess since his last arrest, and his conflicting testimony and statements to investigators about his current and future use of alcohol have raised more questions than they have answered. Available information requires application of the following disqualifying conditions at 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
- (c) 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.

In response to the Government's information, Applicant acknowledged he has a drinking problem, but proffered his intention to quit drinking altogether, if for no other reason than to improve his health and avoid complications from diabetes. However, Applicant's claims in this regard are clouded by inconsistent and misleading statements about his current use of alcohol. Aside from admitting he has a problem and intends to stop drinking, Applicant presented no information that supports any of the mitigating conditions under AG ¶ 23. He has not mitigated the security concerns about his drinking.

Personal Conduct

Applicant denied the SOR 3.a allegation that he resigned in lieu of termination because he allegedly stole from his previous employer. The Government's information

was sufficient to show that he, in fact, left that job under adverse circumstances. However, all of the available information probative of SOR 3.a tends to show that Applicant reasonably thought he had permission to recycle the scrap aluminum for cash to be used in the workplace. SOR 3.a is resolved for the Applicant.

However, the Government's information regarding Applicant's work performance at that same employer, supports the allegation of poor attendance in SOR 3.b. This information raises a security concern about Applicant's personal conduct, which is addressed at AG ¶ 15, as follows:

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.

More specifically, information about Applicant's adverse personal conduct supports application of the disqualifying condition at AG ¶ 16 (d):

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:...(2) disruptive, violent, or *other inappropriate behavior in the workplace ...* (emphasis added)

Applicant was absent from work numerous times over several years, at one point averaging at least 18 days of unauthorized absence per year over a three-year period. When confronted about his attendance and his failure to communicate with his supervisors about that issue, Applicant became belligerent. However, in more than four years with his current employer, there is no indication that his attendance has been a problem. Also, it is likely that his attendance was affected by the effects of his undiagnosed diabetes, which has been treated since around the time he left that company.

Available information supports application of the following mitigating condition at 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.

As alleged, Applicant's conduct at his previous employer is no longer a security concern. The personal conduct security concerns are resolved for Applicant.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E, G and J. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 50-year-old shipfitter who has been steadily employed for about 30 years in work that supports maintenance and repair of Navy warships. Aside from his employment history, he presented no new information that would support application of any of the whole-person factors. Applicant is presumed to be a mature, responsible adult; however, he has engaged in poor conduct at various times throughout his adult life. Much of his adverse behavior resulted from or occurred after drinking too many beers, which he still does with varying frequency. Further, he knows he has a medical condition that is complicated by too much alcohol use, yet he has not consistently lessened or eradicated his alcohol intake. All of this information sustains the doubts about his suitability for clearance that have been raised by the Government's information. Because protection of the national interest is of paramount importance in these adjudications, those doubts must be resolved against the individual.

Formal Findings

Formal findings 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c - 1.f:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a - 3.b:	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge