



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 11-06138
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

10/23/2013

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the security concerns arising from his past history of alcohol abuse and intentional falsification of his security clearance applications. Three years ago, Applicant consumed alcohol and committed a serious criminal offense while under the effects of an alcohol-induced blackout. Although he has taken some positive steps to overcome his alcohol issues, he did not establish that a similar situation is unlikely to recur. Applicant also deliberately falsified two separate security clearance applications regarding the extent of his past drug use. He did so in order to secure a job. He took responsibility for his conduct at the hearing, but his past dishonesty and decision to place his own interests over his security obligations continues to raise doubts about his current eligibility for a security clearance. Clearance is denied.

Statement of the Case

On March 1, 2013, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Applicant answered the SOR and requested a hearing to establish his eligibility for a security clearance (Answer).

On May 23, 2013, I was assigned Applicant's case and, after coordinating with the parties, scheduled the hearing for July 1, 2013.¹ At hearing, Government Exhibits (Gx.) 1 through 12 and Applicant's Exhibits (Ax.) A through S were admitted into evidence without objection. Applicant testified and called several character references as witnesses. He requested additional time to submit matters post-hearing. I granted his request and he submitted Ax. T, which was admitted without objection. The hearing transcript (Tr.) was received on July 9, 2013, and the record closed on July 19, 2013.

Findings of Fact

Applicant, 27, is married and recently became a father. He has an undergraduate and a master's degree in electrical engineering. He has been working full time as a federal contractor since 2008. Applicant's position is contingent upon receiving and maintaining a security clearance, which was first granted to him in 2008. (Tr. at 67-70, 90, 97; Gx. 1 – 3; Ax. N – P) A number of individuals submitted letters attesting to his positive work history and good character. (Ax. B – H, Q, T). His performance evaluations reveal that he is a good employee. (Ax. I – M)

Applicant began drinking alcohol and using marijuana in high school. His alcohol use increased when he started college in 2004. During his freshman year of college, Applicant was cited for drinking alcohol underage and required to complete 40 hours of community service. He was then arrested in 2005 for possessing a fake I.D. and purchasing alcohol for other underage students. Applicant completed an intensive outpatient substance abuse treatment program. He told his substance abuse counselor that he had experienced alcohol-induced blackouts. He was diagnosed with alcohol abuse without physiological dependence and cannabis abuse. He received a favorable prognosis and the alcohol-related charges were eventually dropped. He was advised by his attorney that he did not need to list the arrest and criminal charges on future job applications. After the criminal matter was resolved, Applicant resumed drinking alcohol and using marijuana. He stopped using marijuana in February 2007. He graduated from college in 2008, and then began working full time for his current employer. (Tr. at 59-61, 66, 74-76, 98-99; Gx. 3 – 4, 8; Answer)

In late 2010, Applicant was on a business trip when he decided to go out for drinks with a co-worker. Applicant consumed a substantial amount of alcohol and blacked out. When he awoke, Applicant was being treated by medical personnel and being placed under arrest for vandalism and battery. Applicant, while in his alcohol-induced state, stopped someone driving a vehicle, pulled the person out of their car, and then physically assaulted them. Applicant entered a no contest plea and was placed on probation. He complied with all the terms of his probation, to include receiving alcohol counseling, and the criminal charges were eventually dismissed. (Tr. at 25-27, 39-42, 46-47, 61-64, 86-87, 94-95; Gx. 3, 5 – 6)

¹ Prior to the hearing, Department Counsel moved to amend the SOR. Applicant did not oppose and the motion was granted. Hearing Exhibits (Hx.) II and III are the Government's motion to amend and Applicant's response thereto, respectively. Pen-and-ink changes were made to the original SOR, without objection, to reflect the deleted allegations and insert the ISCR case number. (Tr. at 9, 52-57, 101)

Applicant's employer issued him a warning letter and placed him on probation for six months, during which time he was required to receive alcohol treatment and was subject to random testing for alcohol and illegal drugs. Applicant complied with the terms of his employer's probationary period. He received a favorable prognosis from the treatment facility, and his alcohol and drug screens were all negative. He was retained by his employer, subject to the final disposition of his security clearance review. (Tr. at 92, Gx. 5, 7, 9 – 11)

Applicant's former supervisor, who issued the warning letter, and the co-worker, who was on the 2010 business trip, both testified at the hearing. They both state that Applicant's criminal conduct was uncharacteristic behavior and that his duty performance, before and after the 2010 incident, was exceptional. (Tr. at 19-39) Applicant's current manager concurs with the witnesses' assessment that the 2010 incident was an isolated incident. He goes on to state:

Personally, I have also thoroughly review (sic) his entire personnel file, and spoken previously to each of [Applicant's] supervisors. His performance since this incident has been flawless. He has clearly learned from this and dedicated himself to making changes in his personal life to prevent any further problems.

(Ax. R)

Applicant testified that he has not consumed alcohol since the 2010 incident and continues to actively participate in Alcoholics Anonymous (AA). His AA sponsor testified and confirmed Applicant's commitment to sobriety. (Tr. at 64-65, 90-92, 43-50; Gx. 12) At hearing, Applicant submitted a letter of intent never to abuse alcohol again, subject to automatic revocation of his clearance. (Ax. A). A month before the hearing, Applicant voluntarily submitted his hair for drug testing and it was negative for any illegal drugs. (Ax. B) Applicant explained his decision to remain sober as follows:

The reason, I guess, why -- there's books that we read in the AA program called, "Living Sober," and one of the chapters that I'd kind of go back to all the time is called, "Remembering Your Last Drink." And, the last drink put me in [jail], which is not a place anyone wants to be. So, any time, you know, a thought comes into my mind, I can go right there and remember that I don't want to be back in an orange jumpsuit . . .

(Tr. at 99)

In 2011, Applicant submitted a security clearance application (SCA). In response to a question regarding whether he had used any illegal drugs, to include marijuana, in the past seven years, Applicant disclosed he had used marijuana. However, he claimed to have only used marijuana on five occasions between 2004 and 2005. (Gx. 1 at 49-50) He provided the same response to a similar question on his initial SCA in 2007. (Gx. 2 at 49-50) On both SCAs, Applicant certified that the answers he provided in response

to the questions on the SCAs were “true, complete, and correct to the best of my knowledge and belief” subject to criminal penalty under 18 U.S.C. § 1001 (Gx. 1; Gx. 2)

Applicant used marijuana far more extensively and for a longer period of time than he claimed on his 2007 and 2011 SCAs. In 2005, he admitted to his substance abuse counselor that he generally used marijuana on a weekly to monthly basis, and at times on a daily basis. He used marijuana from 2002 to February 2007. He stopped using marijuana four months before submitting his initial SCA in 2007. (Tr. at 74-76; Gx. 2; Gx. 8, *Chemical Use History*)

In his Answer to the SOR, Applicant states that his listing of February 2005 on his SCAs as the date he last used marijuana was a mistake. (Answer) In responding to the amended SOR, Applicant claimed that the omission was a result of not being able to recall “specific dates or the number of times that [he] had experimented with marijuana, *due to the significant passage of time.*” (Hx. III) (emphasis added). Applicant did not explain his inconsistent explanations for omitting the full extent of his drug use on his SCAs. He also did not explain why he could not recall, when he submitted his initial SCA just four months after he stopped using marijuana, that he had used marijuana far more extensively than five times over a one year period.

At hearing, Applicant admitted he falsified his SCAs when he failed to disclose the full extent of his past drug use. He admitted that he minimized the number of times he used marijuana on his initial SCA because he was concerned that if he provided a truthful response he would not get the job with his current employer. (Tr. at 75, 79) Applicant then admitted he falsified his response to the amended SOR allegations, because he “didn’t feel that the use of marijuana was a reflection on [his] capability to keeping the national interest or secrets safe.” (Tr. at 93) He went on to state that he falsified his response to the amended SOR because “I wanted this, and I wanted to show that I was trustworthy, and I felt that that would make me seem more trustworthy.” (Tr. at 93-94)

Applicant also did not disclose his 2005 alcohol-related charges for possessing a fake I.D. and providing alcohol to minors on his initial SCA. He omitted this information based on the advice he received from his former attorney. Applicant did, however, disclose the substance abuse treatment he received following the 2005 charges. He also voluntarily discussed the arrest and charges with a security investigator who conducted his initial background interview in 2008. He listed the 2005 alcohol-related arrest and charges on his current SCA. (Tr. at 59-61, 66, 76-79; Gx. 1 at 49; Gx. 2 at 35, 37; Gx. 3 Hx. III)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national

interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.²

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. 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 an 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.³

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

² See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991)).

³ See generally *Kaplan v. Conyers, et al.*, 2013 U.S. App. LEXIS 17278 at ** 23-24, 40-51 (Fed. Cir. Aug. 20, 2013) (federal courts will generally defer to the predictive judgments made by executive branch officials responsible for determining the eligibility of an applicant for a security clearance).

Analysis

Guideline E, Personal Conduct

The personal conduct concern is set forth at AG ¶ 15:

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's admission at hearing that he falsified his SCAs by minimizing the extent of his past drug use in order to obtain a position with his current employer directly implicates the above concern. It also establishes 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."⁴

AG ¶ 17 sets forth a number of conditions that could mitigate the personal conduct security concern. After considering all the mitigating conditions, I find that none apply. Applicant decided to deliberately falsify his SCAs for his own personal benefit. He falsified his 2011 SCA after having worked as a defense contractor and held a security clearance for several years. By that point, he was no longer a recent college graduate and should have been fully cognizant of the significance of falsifying a SCA. Applicant then compounded these falsifications by submitting false and misleading responses to the initial and amended SOR. Although his decision to admit his wrongdoing at hearing speaks positively as to his potential to regain his eligibility in the future, it is too soon and his falsifications are far too serious and extensive to resolve the doubts raised by his past conduct in his favor. Consequently, Applicant's dishonesty and decision to place his own interests ahead of his security obligations continue to raise doubts about his current reliability and trustworthiness.⁵

⁴ The SOR also alleges Applicant falsified his initial SCA by omitting his 2005 alcohol-related arrest. Applicant omitted this information based on the advice of counsel. He then volunteered and fully discussed the matter during his initial security clearance interview in 2008. AG ¶¶ 17(a), 17(b). Accordingly, I find in Applicant's favor as to SOR ¶ 2.e.

⁵ The Government cross-alleged Applicant's history of alcohol abuse under the personal conduct guideline. As more fully explained below, Applicant's past alcohol problems continue to raise a concern about his overall judgment, either considered on its own or in combination with his dishonesty. See *generally* ISCR Case No. 06-21537 at 5 (App. Bd. Feb. 21, 2008) (Government may allege security significant conduct under more than one guideline).

Guideline G, Alcohol Consumption

The concern regarding excessive alcohol consumption is articulated at AG ¶ 21:

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.

Applicant's long history of alcohol abuse, which culminated in 2010 with Applicant committing a serious criminal offense while on a business trip that left him unable to complete his assigned work duties, raises this concern. It also triggers application of the following disqualifying conditions under 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;

(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;

(d) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized treatment program; and

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

AG ¶ 23 sets forth a number of conditions that could mitigate the excessive alcohol consumption concern:

(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.

Applicant last consumed alcohol nearly three years ago. He recently completed an alcohol treatment program. Even after the conditions imposed on him by his employer and a civilian court were lifted, Applicant continues to participate in AA. All these matters tend to suggest that Applicant has finally overcome his long running problems with alcohol and support a finding in favor of the mitigating conditions noted above. However, it has been less than three years since Applicant committed a serious criminal offense while under the effects of an alcoholic blackout. This incident occurred about five years after Applicant told a substance abuse counselor that he had suffered alcohol-induced blackouts in the past and was diagnosed with alcohol abuse. Applicant's testimony as to his commitment to a life of sobriety was poignant and appeared heartfelt. Yet, his relapse after completing the substance rehabilitation program in 2005 and past dishonesty leave me to question whether his testimony and the other evidence of sobriety were sincere. After carefully weighing all the disqualifying and mitigating conditions, I find that Applicant did not meet his burden of persuasion. His past alcohol issues continue to raise a concern about his overall judgment and the likelihood that he may relapse.

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 the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁶ I specifically considered Applicant's work performance, character references, and the steps he has taken to overcome his past behavior. However, the seriousness and extent of Applicant's past conduct cannot be ascribed to a mere isolated incident by a young individual, who on a business trip overindulged. Applicant chose to lie on his initial application to secure a security clearance, which he needed as a condition of his employment. He chose to lie again on his most recent application, in order to keep his job. He then submitted two separate notarized statements in response to the present allegations, where he again lied in order to keep his clearance. Applicant's falsifications are serious criminal offenses and, in conjunction

⁶ The non-exhaustive list of adjudicative 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.

with his commission of a battery while under the effects of a self-induced alcoholic blackout, constitute a pattern of serious criminal conduct.

Furthermore, Applicant's deceitful conduct over the past six years demonstrates that he is willing to place his own interests above his security obligations, not the least of which is to provide full and frank responses on a security clearance application and during the ensuing security clearance process. At the same time, I recognize that Applicant's decision to admit at hearing that he falsified his applications and responses to the SOR constitutes a significant mitigating factor and speaks favorably to his future potential eligibility. However, at this point, Applicant's past conduct leaves me with doubts about his continued eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	Against Applicant
Paragraph 2, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 2.a – 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge