



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



In the matter of:)	
)	
)	ISCR Case No. 12-00397
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

12/12/2013

Decision

CURRY, Marc E., Administrative Judge:

Applicant has been arrested three times in the past nine years. Two of the arrests were alcohol-related. The most recent arrest occurred after he completed his security clearance application. Under these circumstances, it is too soon to conclude Applicant has mitigated the alcohol consumption and criminal conduct security concerns. Clearance is denied.

Statement of the Case

On June 4, 2013, the Department of Defense Consolidated Adjudications Facility (DODCAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines G, alcohol consumption, and J, criminal conduct. 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 revised adjudicative guidelines (AG).

Applicant answered the SOR on June 20, 2013, admitting the allegations, and requesting a decision without a hearing. On August 22, 2013, Department Counsel prepared a File of Relevant Material (FORM). Applicant was provided a copy of the FORM on September 5, 2013. On September 15, 2013, Applicant filed a Response to the FORM. The case was assigned to me on October 28, 2013.

Findings of Fact

Applicant is a 56-year-old married man with three adult children. He earned a bachelor's degree in 1983. Since graduating from college, Applicant has been working as an engineer for a defense contractor. (Item 5 at 14)

In May 2004, Applicant was arrested and charged with vandalism and disturbing the peace after a road rage incident in which he got out of his car and yelled obscenities at another driver for allegedly cutting him off, then punched the driver's vehicle when the driver drove away. (Item 6 at 31) The driver's wife and two small children were in the car with him during the incident. Subsequently, Applicant pleaded guilty to the second charge,¹ was sentenced to three years of probation, and was ordered to perform community service, pay restitution, and attend anger management classes. (Item 6 at 13) Applicant complied with the terms of the court order.

One day in September 2009, Applicant was drinking tequila and driving his truck when he nearly collided with an unmarked police car. (Item 6 at 67) The police officer driving the unmarked cruiser stopped him. Subsequently, Applicant was arrested and charged with driving under the influence of alcohol (DUI), and DUI with a blood alcohol content of .08% or more. He pleaded no contest to the first charge and he was acquitted of the second charge. (Item 6 at 45; Item 4 at 1) Subsequently, Applicant was fined and ordered to serve one year of unsupervised probation.

One evening in June 2011, while sitting at home and drinking tequila, Applicant decided to drive to a regional casino. After arriving, he gambled for a while, then returned to his car to drink more tequila in the parking lot. After leaving the casino, his car was pulled over by a police officer. Subsequently, Applicant was arrested and charged with DUI, and DUI with a blood alcohol content of .08% or more. (Item 6 at 14) On October 5, 2011, Applicant pleaded no contest to the first charge and the second charge was dismissed. The court then sentenced him to three years of unsupervised probation, ordered him to pay fines and fees, and required him to attend a three-month alcohol education program. (Item 6 at 70-71)

Applicant has never been diagnosed as alcohol abusive or alcohol dependent. He has been drinking alcohol since he was a teenager. (Item 6 at 15) Currently, he drinks alcohol two to three times per week. (Item 6 at 63) He drinks to the point that he characterized as "stumbling drunk" two to three times per year. (Response to FORM at

¹The prosecutor dismissed the vandalism charge. (Item 6 at 19)

1) On September 12, 2013, Applicant joined Alcoholics Anonymous (AA). (Response to FORM at 1)

Policies

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.”

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 security clearance.

Analysis

Guideline G, Alcohol Consumption

Under this guideline, “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 ¶ 21) Applicant’s drinking habits and his history of alcohol-related arrests trigger the application of AG ¶¶ 22(a), “alcohol 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(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.”

The following mitigating conditions under AG ¶ 23 are potentially applicable:

(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; and

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment or relapse, and is making satisfactory progress.

Applicant's two DUI arrests both occurred within the past five years. The most recent arrest occurred after he completed his security clearance application. Conversely, Applicant recognizes that his alcohol consumption poses a security concern and has enrolled in counseling through AA.

Applicant joined AA three days before he filed his Response to the FORM. Given the recency of his AA participation, it is too soon to gauge his progress. AG ¶ 23(c) is inapplicable. Applicant's most recent DUI occurred after the initiation of the security clearance investigation. Moreover, it was not isolated, as he had been arrested for DUI approximately two years previously. AG ¶ 23(a) is inapplicable.

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness." (AG ¶ 30) Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." (*Id.*)

Applicant's DUI arrests and his road rage arrest trigger the application of AG ¶ 31(a), "a single serious crime, or multiple lesser offenses." Applicant was sentenced to three years of probation related to his 2011 offense. He presented no evidence that the court has reduced the length of the probation. I conclude that he remains on probation. AG ¶ 31(d), "the individual is currently on parole or probation," applies.

The following two mitigating conditions under AG ¶ 32 are potentially applicable:

(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

(d) 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.

Applicant's most recent criminal offense happened less than two years ago. He was drinking tequila in his truck before the police stopped him during both the 2009 and 2011 arrests. Consequently, these circumstances cannot be characterized as unusual. AG ¶ 32 (a) does not apply.

Applicant deserves credit for acknowledging his drinking problem by joining AA. However, he did so just three days before he filed the Response to the FORM. Moreover, he presented no evidence of job performance, community involvement, or any of the other variables in AG ¶ 32(d) for it to be applicable. Applicant has failed to mitigate the criminal conduct security concern.

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 the 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.

I considered the whole-person concept factors in my analysis of the security guidelines, and they do not warrant a favorable conclusion. Consequently, I conclude that Applicant has failed to mitigate 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, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

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

MARC E. CURRY
Administrative Judge

