



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



In the matter of:)
)
) ISCR Case No. 12-03058
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esq., Department Counsel
For Applicant: Catie E. Young, Esq.

February 25, 2014

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Personal Conduct, Alcohol Consumption, and Criminal Conduct security concerns. Applicant has been arrested seven times, between 1990 and 2009, for multiple alcohol-related offenses. He also falsified his e-QIP in 2011. While he has abstained from alcohol use since September 2010, not enough time has passed to hold that recurrence is unlikely or that doubts concerning his judgment and reliability are resolved. Eligibility for access to classified information is denied.

Statement of the Case

On October 5, 2011, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). On August 7, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct; Guideline G, Alcohol Consumption; and Guideline J, Criminal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR on August 7, 2013. He requested a hearing before an administrative judge through his attorney on November 27, 2013. The case was assigned to me on January 13, 2014. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 15, 2014, and the hearing was convened as scheduled on February 10, 2014. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. The Applicant offered Exhibits (AE) A through T, which were admitted without objection. Applicant testified on his own behalf. Applicant requested that the record be left open for additional documentation. On February 14, 2014, Applicant presented AE U through AE Y. Department Counsel had no objections to AE U through AE Y, and they were admitted. The record then closed. DOHA received the hearing transcript (Tr.) on February 19, 2014.

Findings of Fact

Applicant is a 46-year-old government contractor. He has worked for his employer for 20 years. He was married to his first wife from 1994 to 1996. He married his second wife in 2003 and they divorced in 2006. He currently lives with his girlfriend. He has no children. (GE 4; Tr. 30-33, 83.)

The Government alleged that Applicant is ineligible for a clearance due to his personal conduct, alcohol consumption, and criminal conduct. Applicant admitted the SOR allegations contained in subparagraphs 1.a through 1.d; 2.a through 2.g; and 3.a through 3.b. He denied SOR allegation 1.e. The concerns are set out chronologically, below.

Applicant was arrested twice in 1990 for two separate Driving Under the Influence (DUI) incidents, as stated in SOR subparagraphs 2.e and 2.f. Applicant testified he did not recall the specifics of the first arrest. He testified as a result of his first arrest for DUI, his driver's license was suspended, he was required to attend 12 weeks of alcohol counseling, and he was required to attend AA meetings. His second DUI arrest occurred on October 7, 1990. Applicant was driving on a suspended license at that time. He was pulled over for failing to stop at a stop sign, as set forth in the arrest report. His Blood Alcohol Content (BAC) was reported to be .221%. Applicant was convicted of felony DUI. His sentence included incarceration for six months and parole for an unstated period of time. While Applicant was incarcerated, he attended a voluntary alcohol counseling program. He testified that he learned in that program that alcohol caused his problems. Applicant blamed these DUIs on "being young and dumb." He abstained from drinking for approximately ten years after his incarceration. (GE 1; GE 3; GE 6; AE Y; Tr. 33-35, 40, 73-77, 83-85.)

Applicant resumed alcohol use in 2000. When he started drinking again his use was moderate. He met his second wife in 2003, and they married three months after they met. Applicant testified his wife had a substance abuse problem and that they drank together on a daily basis. In 2005 Applicant was arrested and charged with simple

assault after arguing with his second wife, as stated in SOR subparagraph 1.d. Applicant had been consuming alcohol at the time of the argument. Applicant pled guilty to the lesser charge of disturbing the peace. He was sentenced to pay a fine, which he satisfied. When their relationship terminated in 2006, Applicant's alcohol consumption continued. (Tr. 46-47, 81.)

In the summer of 2006, Applicant was arrested twice for DUI. The first arrest occurred in June after he left a sports bar at which he had been consuming alcohol alone. Applicant indicated he was sentenced to fines and required to attend alcohol awareness classes and attend AA as a result of this charge. The second arrest, alleged in SOR subparagraph 1.c, occurred after Applicant left a restaurant near his house. The second arrest also included a charge of evading police, because he did not stop for the police officer immediately. As a result of these arrests, Applicant was ordered to attend one 48-hour in-patient drug-and-alcohol counseling and 16 weeks of outpatient counseling, as set out in SOR subparagraphs 2.c and 2.d. He testified he completed this court ordered alcohol outpatient counseling in November 2007 to February 2008, as stated in SOR subparagraph 2.b.¹ Applicant continued to consume alcohol during this period. (GE 4; GE 6; Tr. 36, 39-46, 70-73, 77-79, 88.)

In September 2007 Applicant was again arrested and charged with DUI, as stated in SOR subparagraph 1.b. The charge was amended to a lesser, unspecified misdemeanor. Applicant pled guilty and was sentenced to a fine of \$1,525, required to complete a "risk reduction program" for 120 days, required to perform 40 hours community service, and placed on probation for 12 months. Applicant admitted to consuming alcohol before this arrest, but asserted that he was not intoxicated. (GE 5; GE 6; Tr. 48, 85-86.)

In March 2009 Applicant was arrested and charged with assault with great bodily harm, as stated in SOR subparagraph 1.a. On the night of this incident, Applicant had a party at his residence. His girlfriend was intoxicated and was about to try to drive home. Applicant tried to stop her and take her keys away from her. The police were called, but Applicant departed before they arrived. Applicant was arrested the day after the incident. The case was dismissed approximately two months after the incident. Applicant admitted to drinking alcohol on this occasion, but claimed he was not intoxicated. (GE 6; Tr. 48-50, 82.)

Applicant testified that he last consumed alcohol in September 2010. He blamed his 2006 and 2007 DUIs on the difficulties he had dealing with his second divorce emotionally. He testified that he received no prognosis during the court-ordered counseling sessions. He still has alcohol in his home for his girlfriend's use. (GE 6; Tr. 38, 79, 87.)

¹ Applicant's testimony and reported dates for the outpatient counseling in his e-QIP are inconsistent. His e-QIP identified he attended alcohol counseling from December 2006 to April 2007. However, he asserts that he only was required to attend this court-ordered program once. He testified that he was not required to attend the April 2010 to May 2010 outpatient counseling, as stated in SOR subparagraph 2.a after he provided proof he completed the counseling in 2008.

On October 5, 2011, Applicant completed the e-QIP. Section 22 of the e-QIP inquired into Applicant's police record through a series of questions, including a question that asked, "In the past seven (7) years have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?" Applicant answered this section "Yes" and disclosed he was "[a]rrested for driving while impaired twice in the summer of 2006." After he disclosed the 2006 arrests, the form asked, "Do you have any other offenses where any of the following has happened to you?" and again asked, "In the past seven (7) years have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?" Applicant marked "No." He failed to disclose his March 2009, September 2007, and September 2005 arrests. Additionally, while it was not alleged in the SOR, it should be noted that Applicant also failed to disclose his 1990 felony DUI conviction when he was asked "Have you **EVER** been charged with any felony offense?" on the same e-QIP (emphasis in original). Applicant testified that his omissions were unintentional and due to oversight or confusion on his part. (GE 4; Tr.54-59, 63-70.)

Applicant is well respected by those who know him, as verified by the letters of recommendation that attest to the high quality of his character. The letters from supervisors, colleagues, and professional contacts reflect that Applicant performs well on the job and is a highly valued employee. His employee performance reviews reflect he is "exemplary" and "highly effective." He regularly exceeds the expectations of his rating supervisors. He has received recognition for his exceptional on-the-job efforts in articles and through numerous certificates awarded for his work performance. (AE A through AE X.)

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 are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Guideline E, Personal Conduct

The security concern for the Personal Conduct guideline is set out in 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(e) personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant was dishonest about the full extent of his criminal conduct. I find he deliberately omitted his March 2009, September 2007, and September 2005 arrests on his October 2011 e-QIP. The questions concerning his police record are clear and unambiguous. He was unable to offer a credible explanation for his omissions. Further, his history of criminal incidents and alcohol abuse from 2005 to 2009 reflect poorly on his judgment and leave him potentially vulnerable to exploitation, manipulation, or duress. His omissions and poor personal conduct demonstrate that he lacks the good judgment to comply with rules and regulations that are counter to his personal desires. The above disqualifying conditions apply.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant failed to present information that he made a prompt, good-faith effort to correct his omission of his March 2009, September 2007, and September 2005 arrests before he was confronted with the facts. AG ¶ 17(a) does not apply.

Applicant exhibited a pattern of exercising poor judgment on multiple occasions. While he testified that he no longer consumes alcohol, which contributed significantly to his lapses in judgment, he relapsed in 2000 after a ten-year period of sobriety. He failed to produce sufficient evidence that similar lapses in judgment are unlikely to recur, without the passage of more time or other evidence that demonstrates trustworthiness and good judgment. Further, he had been sober for almost a year when he intentionally falsified his e-QIP. AG ¶¶ 17(c) and 17(d) are not applicable.

Applicant has earned an excellent reputation at work. However, not enough time has passed to know whether Applicant could again be tempted to violate laws or other rules for his own personal benefit, as he did when he knowingly falsified his e-QIP and committed the alcohol-related violations. AG ¶ 17(e) does not apply.

Guideline G, 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 conditions that could raise a security concern and may be disqualifying. The disqualifying conditions raised by the evidence are:

(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.

Applicant was charged with five DUI incidents spanning from 1990 to 2007. He also was alleged to have been intoxicated during the 2005 and 2009 physical assault incidents. He has received alcohol treatment at least twice, once when he was incarcerated in 1991 and again in 2007. However, he chose to continue to consume alcohol to the point of impaired judgment after his treatment. Applicant has a history of making poor decisions after becoming intoxicated. These incidents raise security concerns under AG ¶¶ 22(a) and 22(c).

AG ¶ 23 provides 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.

Applicant has a very lengthy history of frequent alcohol abuse, leading to a series of criminal charges and other incidents of bad judgment. He previously tried to abstain from alcohol for a ten-year period, but resumed abusive consumption. Not enough time has passed to determine that Applicant will be successful in his efforts to abstain from alcohol use. I cannot hold that recurrence is unlikely or that doubts concerning his judgment and reliability are resolved. Mitigation was not established under AG ¶ 20(a).

Applicant claims sobriety since September 2010, but not enough time has passed to establish a pattern of abstinence. He has experienced longer periods of abstinence, but resumed drinking alcohol. He is not is participating in a counseling or treatment program. He has been to alcohol treatment in the past, but it was unsuccessful and he relapsed. He offered no evidence of a favorable prognosis by a duly qualified medical professional. Accordingly, Applicant failed to establish mitigation under the terms of AG ¶¶ 23 (b), 23(c), or 23(d).

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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.

AG ¶ 31 describes conditions that could generate a security concern and may be disqualifying. The condition potentially raised by the evidence is AG ¶ 31:

(a) a single serious crime or multiple lesser offenses.

Applicant has been arrested seven times, between 1990 and 2009, for multiple criminal offenses including a felony DUI. AG ¶¶ 31(a) is raised by the record.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. They are as follows:

(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) 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.

Applicant's DUIs and assault charges occurred because he has a problem with alcohol. As noted above, while Applicant has been sober since September 2010, he has not yet demonstrated that future instances of criminal behavior are unlikely to recur. He has not yet demonstrated sufficient rehabilitation, nor has sufficient time without recurrence passed, given that Applicant's violations span a 20-year time frame. AG ¶¶ 32(a) and 32(d) do not apply.

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 pertinent facts and circumstances surrounding this case. Applicant provided exceptional service to the United States during his employment as a government contractor. He is well-respected by those that know him. However, Applicant is a mature individual who is accountable for his choices and actions. He built a 20-year-long pattern of alcohol-related criminal infractions. The potential for exploitation or duress is undiminished, and insufficient time has passed since his last arrest in 2009 and last drink in September 2010 to conclude that recurrence is unlikely. Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security

clearance. He did not meet his burden to mitigate the security concerns arising from his personal conduct, alcohol consumption, and criminal conduct.

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 E:	AGAINST APPLICANT
Subparagraph 1.a-1.e:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a-2.g:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a-3.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.

Jennifer I. Goldstein
Administrative Judge