



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



In the matter of:)
)
) ISCR Case No. 12-04838
)
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

01/12/2016

Decision

MASON, Paul J., Administrative Judge:

Applicant has a fairly long history of alcohol-related and criminal conduct that has not been mitigated. He intentionally omitted relevant information about his criminal record, alcohol history, personal history, and substance abuse treatment history. Applicant's laundry list of rationales and explanations for the omissions does not mitigate the Government's case under the personal conduct guideline. Eligibility for access to classified information is denied.

Statement of the Case

On May 15, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under alcohol consumption (Guideline G), criminal conduct (Guideline J), and personal conduct (Guideline E). The action was taken

pursuant to 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) implemented by the Department of Defense on September 1, 2006.

Applicant's answer to the SOR was signed and notarized on June 11, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 8, 2015, for a hearing on January 19, 2016. The hearing was held as scheduled. Four Government exhibits (GE 1-4) were admitted in evidence without objection. Applicant's four exhibits (AE A-D) were admitted into evidence without objection. The transcript was received on January 28, 2016, and the record closed the same day.

Evidentiary Rulings

The SOR is amended as follows:

1. SOR ¶¶ 3.a, 3.b, 3.c, 3.d, and 3.e cite an Electronic Questionnaire for Investigations Processing (e-QIP) dated August 27, 2011. The date is incorrect. Applicant actually signed and certified the e-QIP on November 9, 2011. See, GE 3.

2. SOR ¶¶ 3.c, 3.d, and 3.f are allegations that apply to Applicant's November 9, 2011 e-QIP. (GE 3) Each allegation makes a reference to an incident (SOR ¶ 1.b) that transpired on January 12, 2013, after the foregoing e-QIP was signed. SOR ¶ 1.b is hereby removed from the three foregoing allegations. The foregoing two amendments are authorized by E3.1.17 of DoD Directive 5220.6, to conform the SOR to the evidence presented.

Findings of Fact

The SOR contains six allegations under the alcohol consumption guideline, two allegations under the criminal conduct guideline, and seven allegations under the personal conduct guideline. Applicant admitted most of the allegations except for SOR ¶¶ 3.c, 3.d, and 3.g. Because no evidence was presented to establish SOR ¶ 3.g, the allegation is found in Applicant's favor.

Applicant is 60 years old. He has been married since October 1980. The marriage produced a 24-year-old son and 32-year-old daughter. Applicant received a bachelor's degree in June 1978 and a master's degree in June 2001. He served in the United States Marine Corps from November 1979 to December 2005, and received an honorable discharge in January 2006. He has held a security clearance since the early 1980s. (GE 2, December 2011 summary interview at 2)

In his February 10, 2012 summary interview, Applicant indicated that he began drinking alcohol at the age of 16. The interview does not reveal the frequency and scope of Applicant's drinking over the years. For example, the interview states that Applicant normally consumes two drinks at home, but does not provide a frequency. The interview does indicate that Applicant reached intoxication after drinking four drinks about two times a year. Applicant opined that when a person becomes intoxicated, he uses poor judgment and poor motor skills. He recalled that his intellect suffered when he drinks. He informed the investigator from the Office of Personnel Management (OPM) that he stopped drinking on September 29, 2011, the day after he was arrested for driving while under the influence of alcohol. See SOR ¶ 1.d. He noted that he began a court-ordered state alcohol safety action program on February 7, 2012, where a counselor diagnosed him an alcohol abuser. See SOR ¶ 1.c. He completed the program in May 2012. He completed a second program in December 2012. He was attending Alcoholics Anonymous (AA) five days a week during the period. (GE 2, February 10, 2012 summary interview at 1-3; GE 4 at Tab B, Tab C)

Alcohol-related Offenses and Other Criminal Conduct

In April 1988, Applicant was stationed at a military base on a Friday evening when two of his roommates telephoned him that they had driven to another location and had too much to drink. Applicant drove to their location, picked them up, and was returning when he was stopped for speeding. Although he maintains that he had not been drinking and passed a field sobriety test, he was arrested for DWI. (SOR ¶ 1.f) The charge was reduced to reckless driving. (Tr. 24-25)

In February 1992, Applicant was the commander of three rifle companies at a military installation. His wife requested that he drive to the store to purchase diapers. He recalled driving through a stop sign without stopping, a traffic violation apparently noticed by military police officers. When he pulled into his driveway, the officers pulled in right behind him. Applicant had been drinking and the officer detected an alcohol odor emanating from his body. After smelling alcohol, Applicant was arrested for (1) speeding, (2) DWI, (3) DWI refusal, and (4) reckless driving. (SOR ¶ 1.e) He pleaded guilty to counts 1, 3, and 4, and was required to attend a military safety action program. Applicant's driver's license was suspended for a year for refusing to take the field sobriety test. (Tr. 24-28, 40)

On September 13, 2005, Applicant was awarded non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), based on an extra-marital affair. (SOR ¶ 2.a) He received a letter of censure and forfeiture of pay that was suspended. He was reduced in rank and retired in January 2006. (Tr. 30-35)

After Applicant's retirement from the Marines in January 2006, his drinking increased and he became concerned about whether he could control his drinking. He voluntarily

enrolled in treatment for about three weeks between November and December 2008. (Tr. 59)

In September 2011, Applicant was drinking with friends at a restaurant from 8 p.m. to about 10:30 p.m. After consuming four mixed drinks, he was driving home and totaled his car in a single car accident. He was taken to the hospital where he refused a blood test and was charged with DWI. (SOR ¶ 1.d) He was fined and ordered to attend a state safety action program. Applicant recalled he was placed on probation until he completed the program. (SOR ¶ 1.c) (GE 2 at 2)

After an undisclosed period of abstinence and AA attendance, Applicant resumed drinking. He was arrested in January 2013 for (1) DWI (second conviction) within less than 5 years, and (2) driving on a restricted license after a DWI conviction. (SOR ¶ 1.b) He continued to drink for more than seven months after the arrest, but stopped drinking on August 1, 2013, when he realized he was going to spend time in jail for the DWI. Applicant pleaded guilty to both offenses and was incarcerated for 20 days of a 150-day suspended sentence. He was ordered to complete a state safety action program. Applicant believes he was on probation only until he completed the program. He has to report to a case manager once every three months. The court records (July 25, 2013) do not clearly show that he was placed on probation for three years. However, they do show that his driver's license was suspended for three years and an interlock device restriction was attached to his car ignition for six months. (GE 4 at Tab D; Tr. 43-45, 46)

In November 2013, Applicant was attending five AA meetings a week and group counseling twice a week. He had a group counselor and a case manager. He had a sponsor and fully embraced the 12-step program and is committed to a life of sobriety and spiritual renewal. Because of the support from his wife, his support group and his AA chapter, he believes his abstinence will realize long-term success. Speaking through the 12 steps of AA, Applicant regrets his alcohol-related conduct. (GE 4 at Tab D; Tab B; Tr. 43-45, 46, 66)

Personal Conduct

On August 26 or 27, 2011, Applicant filled out an e-QIP (AE D) in draft form for his then employer. AE D became the e-QIP that Applicant certified and signed on November 9, 2011. (GE 3) He does not deny he signed the form. He believes he filled out the form in August and was asked to sign the e-QIP in November. A careful examination of both e-QIPs reflects that they contain the same information and are missing the same information that is alleged in the SOR. The only difference is that alphabetical letters appear next to the questions in AE D, whereas the relevant questions in GE 3 are not lettered. (GE 3; AE D; Tr. 37-41)

SOR ¶ 3.a alleges that in Section 15 of his November 9, 2011 e-QIP, Applicant answered “No” to being subject to disciplinary proceedings under the UCMJ in the last seven years. He did not disclose his September 13, 2005 non-judicial punishment because he claimed he had already supplied that information to his command. The punishment was an embarrassing part of his life that he did not want to share. (GE 3 at 16; Tr. 50-52, 74, 78)

SOR ¶ 3.b alleges that Applicant did not disclose his youngest child in Section 18 of the November 9, 2011 e-QIP. He did not list the child because he did not have custody or any legal rights. He did not know where the child was located. He was aware of the court-ordered requirement to provide care and custody of the child. He remembered informing his government supervisor and his company supervisor. (GE 3 at 16; Tr. 50-52, 74, 78)

SOR ¶ 3.c alleges that Applicant responded “No” to section 22 of the November 9, 2011 e-QIP requiring an applicant to disclose any offenses related to alcohol or drugs. In his February 2012 interview, he defended his “No” answer with advice he received from a friend that he did not have to disclose the offense since he had not been convicted of the September 2011 offense. Applicant’s other justifications for not disclosing the information about the other alcohol-related offenses were: (1) that he had at least two previous background investigations culminating in security clearances; (2) that the seven-year window applied to the question; (3) the past offenses were no longer relevant because they had been adjudicated and addressed; and (4) he never intended to conceal information because he had given the investigators permission to look at his records. (GE 2 at 2; Tr. 47-49, 52-53)

SOR ¶¶ 3.d and 3.e allege that under Section 24 of the November 2011 e-QIP (alcohol treatment), Applicant answered “No,” to deliberately failing to list his treatment in 1992 (SOR ¶ 1.e) and November 2008. He forgot about his 1988 treatment, but admitted failing to disclose the 2008 treatment. (Answer to SOR; Tr. 56)

SOR ¶ 3.f alleges that Applicant deliberately concealed facts during his December 15, 2011 OPM interview. Those facts were his alcohol-related arrests, non-judicial punishment, and alcohol treatment, as set forth in SOR ¶¶ 1.e, 1.f, and 2.a. The OPM investigator had a copy of Applicant’s e-QIP and reviewed the document with him. The investigator had a copy of Applicant’s credit report, since he questioned Applicant about two accounts that were in a collection paid status. The interview ends with the statement “All other information discussed with the [Applicant] was consistent with the information the [Applicant] provided on the security questionnaire.” As noted in SOR ¶¶ 3.a through 3.e, a large portion of that information on the e-QIP is incorrect. (GE 2, December 2011 interview at 1-3)

Character Evidence

Applicant's direct supervisor for the past two years provided a character reference. The supervisor considers Applicant a conscientious team player who is relied upon to continually provide valuable guidance to military and civilian personnel. Applicant authored a substantive position statement and primer to ensure that U.S. Marines are trained to defend and defeat improvised explosive devices. (AE A, C)

The second reference in AE A has been Applicant's colleague and friend since 1983. He extolled Applicant's leadership qualities while serving in the U.S. Marine Corps. Applicant's commanding officers have always provided positive comments about his professionalism. Applicant's keen interest in military history adds to his overall expertise. (AE B)

Applicant's Meritorious Service Medal was based on his laudable efforts in innovating training programs for the period of 1991 to 1993. Applicant received the Meritorious Service Medal for his outstanding leadership contributions from March to August 2002. Applicant received an award of merit based on his contributions between July 2004 and December 2005. (AE B)

Applicant's program manager recognized Applicant for his 2014 performance by authorizing a cash award. (AE B)

On January 7, 2015, a lieutenant general in the U.S. Marine Corps, acknowledged the ongoing danger of improvised explosive devices, and the importance of ordinances and procedures that are available, i.e., Applicant's primer, to counter them. (AE C)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The disqualifying and mitigating conditions should also be evaluated in the context of nine general factors known as the whole-person concept to bring together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision for security clearance eligibility. Such decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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 of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Alcohol Consumption

AG ¶ 21 sets forth the security concern for 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.

The pertinent disqualifying conditions under AG ¶ 22 that may be disqualifying are:

(a) alcohol-related incidents away from work 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;

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

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

Applicant began consuming alcohol at age 16. He has had four traffic offenses since 1988. Alcohol was involved in three of the four offenses. All four occurred while he held a security clearance. Applicant's recognition that he was losing control over his drinking in 2006 suggests binge consumption of alcohol during the period. Though there are no medical records showing a diagnosis from a duly qualified medical professional, Applicant recalled the counselor of the state action program diagnosing him as an alcohol abuser in February 2012. After Applicant completed the treatment program in December 2012, he relapsed and was arrested in January 2013 for DWI and driving on a restricted license. AG ¶¶ 22(a), 22(c), and 22(f) apply.

The conditions that potentially mitigate under AG ¶ 23 are:

(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 actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

(d) the individual has successfully completed an inpatient or outpatient treatment counseling or rehabilitation along with any required after care, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of AA or a similar organization and has received a favorable diagnosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized treatment program.

Though Applicant's last alcohol-related offense occurred in January 2013, he did not stop drinking until August 2, 2013, when he realized that he was going to spend time in jail. I have reviewed his enrollment in AA and group counseling, however, I conclude that insufficient time has transpired for me to justify with complete confidence that Applicant's past alcohol abuse will not recur. AG ¶ 23(a) has only limited application. AG ¶ 23(d) does not receive full application because there is no favorable prognosis from a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized treatment program.

Criminal Conduct

The security concern for criminal conduct is set forth in AG ¶ 30:

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 of the criminal conduct guideline lists two disqualifying conditions that may be applicable to this case:

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

(c) allegation or admission of criminal conduct, regardless of whether the person was formally prosecuted or convicted; and

(d) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Between February 1992 and January 2013, Applicant committed three DWI offenses. Almost 20 years separate the first DWI and the third DWI. However, less than two years separates the second and third DWI. Significantly, the third DWI occurred about a month after Applicant completed his treatment (December 2012) for the second DWI, and was still on probation for the second DWI. AG ¶¶ 31(a), 31(c), and 31(d) apply.

The pattern of conduct and rule violations to consume alcohol in excess and then drive an auto also raise questions about Appellant's judgment, reliability, and trustworthiness. AG ¶¶ 31(a) and 31(c), and 31(d) apply to shift the burden to Appellant to submit evidence in rebuttal, mitigation, and extenuation.

AG ¶ 32 lists two pertinent mitigating conditions that may be applicable in this case:

(a) so much time has passed since the criminal behavior happened, or it happened under such 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 development.

The application of AG ¶ 32(a) is only partially applicable for the same reasons discussed under AG ¶ 23(a). Applicant has provided favorable evidence of a good job performance since 1983. He has expressed his contrition for his alcohol-related conduct. However, because less than three years have passed since Applicant's last alcohol-related incident, AG ¶ 32(d) is only partially applicable.

Personal Conduct

The security concern for personal conduct is set forth 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 contains three disqualifying conditions that are potentially pertinent:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personnel security statement, or similar form to conduct investigations, determine employment qualifications, award benefits and status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official . . . or other government representative; and

(c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 he may not properly safeguard classified information.

The omission of relevant information during a security investigation, e.g., e-QIP or interview, raises security concerns about an applicant's judgment, reliability, and trustworthiness. However, omissions which result from haste, oversight, or misreading the question(s) asked, are not deliberate and therefore not within the reach of AG ¶¶ 16(a) or 16(b). None of those explanations are present in this case. Applicant deliberately concealed information about his alcohol-related arrests (SOR ¶ 3(c), his non-judicial punishment (SOR ¶¶ 3.a, 3.b), and his alcohol treatment (SOR ¶ 3.d) from his November 2011 e-QIP. AG ¶ 16(a) applies. Applicant's deliberate omission of the foregoing information from his December 2011 OPM interview falls within the scope of AG ¶ 16(b). Alternatively, Applicant's omissions of relevant information during two significant phases of the security investigation represent rule violations under AG ¶ 16(c).

There are three mitigating conditions under AG ¶ 17 that are potentially pertinent to the circumstances in this case. Those conditions are:

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

(c) the offense was 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

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

In his November 2011 e-QIP, Applicant deliberately did not disclose the information identified in SOR ¶¶ 3.a, 3.b, 3.c, 3.d, and 3.e. He repeated this conduct a month later in his first OPM interview in December 2011. (SOR ¶ 3.f) The repeated claims of not intending to conceal information and giving the investigators permission to view his records does not excuse Applicant's deliberate omission of truthful and candid answers to e-QIP questions, and during the interview. None of the mitigating conditions apply.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of alcohol consumption, criminal conduct, and personal conduct. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

Applicant is 60 years old and has been married for 35 years. He has two grown children. Before entering the military in 1979, Applicant received his bachelor's degree. He served in the military for 26 years and received an honorable discharge in January 2006. During his service, he received a certificate for meritorious service in from July 1991 to April 1993. In June 2001, he received a master's degree. He was recognized for his military

service from June 2001 to June 2003. He was honored again for outstanding service from July 2004 to December 2005. His discharge was tarnished by the discovery of an extra-marital affair leading to a reduction in rank and retirement. Applicant has earned the respect of two close friends for his leadership qualities and strength of character for the past 32 years. His program manager rewarded his 2014 job performance with a cash bonus in December 2014.

The foregoing favorable evidence cannot be viewed in isolation, but together with the unfavorable evidence of Applicant's alcohol-related criminal conduct since 1982. In the 31-year period, Applicant has been fined, sentenced to three alcohol safety action programs, evaluated as alcohol abuser by a counselor from the February 2012 program, and had his driver's license suspended or restricted. In November 2011, Applicant deliberately omitted his history of alcohol-related conduct along with other relevant information, giving the impression that he had no alcohol-related or criminal history. Applicant's deliberate omissions of relevant information to determine his security qualifications reduces the weight that can be assigned to his current abstinence effort. Having evaluated the disqualifying evidence with the mitigating evidence, and in the context of the whole-person concept, Applicant has not met his burden of persuasion under the guidelines for alcohol consumption, criminal conduct, and personal 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 G):	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, 1.d, 1.e :	Against Applicant
Subparagraphs 1.c, 1.f:	For Applicant
Paragraph 2 (Guideline H):	AGAINST APPLICANT
Subparagraphs 2.a, 2.b (except 1.f):	Against Applicant
Paragraph 3 (Guideline E):	AGAINST APPLICANT
Subparagraphs 3.a-3.f:	Against Applicant
Subparagraph 3.g:	For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge