



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 12-09900
)	
Applicant for Security Clearance)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: Philip D. Cave, Esq.

08/26/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant's evidence was insufficient to mitigate security concerns raised by three alcohol-related arrests over an eight-year period. Clearance is denied.

History of the Case

On August 21, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the alcohol consumption and personal conduct guidelines.¹ On September 22, 2015, Applicant answered the SOR and requested a hearing to establish his eligibility for continued access to classified information. (Answer)

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by DOD on September 1, 2006.

On March 16, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for April 21, 2016.² The hearing was convened as scheduled. Department Counsel offered Government exhibits (Gx.) 1 – 6. Applicant testified, called his former program manager as a witness, and offered Applicant's exhibits (Ax.) 1 – 3. All the exhibits were admitted into the record without objection. The hearing transcript (Tr.) was received by DOHA on May 2, 2016.

Findings of Fact

Applicant, 41, has been with his current employer since 2011. He has held a security clearance since 2002. In his Answer, Applicant notes he is an Eagle Scout and several of his family members have served in the U.S. military and government. His former program manager testified about his favorable opinion regarding Applicant's honesty, reliability, and work performance. (Tr. 10-22) Numerous individuals submitted letters providing their favorable opinions of Applicant's character and work as a Government contractor. (Ax. 1) His performance evaluations reflect that Applicant generally exceeds the expectations of his position. (Ax. 2.E)

Between 1999 and 2011, Applicant had several alcohol-related incidents. He received substance abuse counseling or treatment in 2003, 2008, and 2010. He was diagnosed with alcohol dependency, relapsed on several occasions, and resided in a sober living house for several years before recently purchasing a home. He has not been involved in an alcohol-related incident since August 2011. Specifically, the record reflects the following alcohol-related incidents:

1. In June 1999, Applicant attended a concert, got drunk, and was arrested for public intoxication. He was issued a citation and paid the fine.
2. In June 2003, Applicant was arrested and charged with driving or attempting to drive a vehicle while intoxicated. At hearing, Applicant acknowledged that he had been drinking heavily before driving his car. He was stopped by police and his blood alcohol content (BAC) measured above the legal limit to drive. He pled guilty to the DWI charge, but received probation before judgment. He was placed on probation for two years and ordered to attend a six-month alcohol treatment program, which he completed.
3. In August 2008, Applicant was stopped for speeding and subsequently arrested for DWI. His BAC was measured at a .20. He pled guilty to the DWI charge. He received a sentence of four months in jail (most of which was suspended) and was placed on supervised probation for two years. He was ordered to install an interlock device on his car while on probation. Applicant complied with the terms of his sentence.
4. In 2010, Applicant was fired by his former employer because of attendance issues related to his excessive alcohol consumption. He was going through

² Prehearing scheduling correspondence, the notice of hearing, and case management order are attached to the record as Hearing Exhibits (Hx.) I – III, respectively.

outpatient alcohol counseling and treatment before being fired. After being fired, Applicant received intensive substance abuse treatment. He last received substance abuse counseling or treatment in the fall of 2010, receiving a diagnosis of alcohol dependence, with a fair prognosis upon being discharged.

5. In August 2011, after being involved in a minor traffic accident, Applicant was arrested and charged with driving under the influence (DUI). Applicant had been drinking with a childhood friend the night before and after sleeping for several hours, they decided to go bowling. On the way to the bowling alley, Applicant rear-ended another car. When police arrived, Applicant was administered a field sobriety test and was then asked to take a breathalyzer. He refused the breathalyzer, and was arrested and charged with DUI.

Applicant voluntarily installed an alcohol interlock device on his car following the arrest. The prosecutor elected not to pursue the case and the DUI charge was dismissed. As of the date of the hearing, Applicant maintained an interlock device on his car. He stopped associating with the friend who he drank with before the arrest.

After the August 2011 DUI arrest, Applicant did not drink alcohol for about six months. He consumed alcohol, including after being diagnosed alcohol dependent and advised not to drink alcohol. While a resident at the sober living house from September 2010 to January 2015, Applicant consumed alcohol. He drank outside the home and did not tell his landlord. (His former landlord was one of the individuals who provided a character reference letter.) Applicant testified that he stopped drinking alcohol about five months before his security clearance hearing. (Tr. 46-51, 58-65; Ax. 1.A; Ax. 2.B)

Applicant did not report the 2011 arrest to his employer or facility security officer (FSO). His former program manager testified that employees are required to report this type of adverse information up the chain-of-command and, in due course, he would have been notified of the adverse information. Applicant did not report the 2011 DUI arrest to his former program manager. The program manager was unaware of the 2011 DUI arrest until he was on the stand testifying.³ (Tr. 20-22)

Applicant acknowledges that he did not report the 2011 DUI arrest to his FSO. He claims that he was unaware of his employer's reporting requirements. He knew that his periodic background reinvestigation would take place in 2012, and the adverse information would have to be reported at that time.⁴ (Tr. 36)

³ Applicant's witness had just been asked: "And I know you've been asked about this, but do you think, in your opinion, is [Applicant] a truthful person, honest, in that sense?" And, responded: "He absolutely is. I mean, he absolutely is. I don't hesitate, I can't think of a reason or an instance when he did not tell me the truth, or we had any kind of incident where he would need to not tell me the truth, I guess, if that helps." (Tr. 17)

⁴ Applicant's failure to report the adverse information about his 2011 DUI arrest to his FSO and the 2010 alcohol-related job termination were not alleged in the SOR. These matters were not considered as disqualifying, but were considered in assessing Applicant's mitigation case, claim of rehabilitation, credibility, and whole-person factors.

In March 2012, Applicant filled out and submitted a security clearance application (SCA) as part of the reinvestigation process. He listed the 2008 DWI conviction, 2010 job termination, 2011 DUI arrest, and substance abuse counseling and treatment he received. He discussed these matters and his history of alcohol abuse with a background investigator. He responded to a detailed alcohol interrogatory sent to him by the DOD CAF. He provided counseling and treatment records with his response.

As of July 30, 2015, when Applicant signed the interrogatory response, he was consuming alcohol, usually in social settings with family and close friends. Applicant estimated that in these social settings he would usually consume “around 4-6 beers.” He went on to state that he did not “currently” drink to the “point of intoxication,” and that “over six months” had passed since he had last become intoxicated. He noted that he intended to continue to drink alcohol, since he had been responsibly managing his alcohol consumption over the past few years. (Gx. 3 at 2-3)

At the hearing, Applicant acknowledged his alcohol problem and stated that he is alcohol dependent. He reported last consuming alcohol nearly five months earlier on New Year’s Eve, and claimed that since that date he had abstained from drinking alcohol. (Tr. 23-24) He stopped drinking alcohol because of health and economic concerns. He used to attend Alcoholics Anonymous (AA) when he was a resident at the sober living house, but then stopped. He restarted attending AA in February 2016. He tries to attend two to three AA meetings a week. He testified that he has received AA coins in the past for remaining sober and the longest period of time he had remained sober was about six months. (Tr. 63)

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 eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

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 commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that due process proceedings are conducted “in a fair, timely and orderly manner.” Directive ¶ E3.1.10. Judges make certain that an applicant receives fair notice of the issues raised, has a reasonable

opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In resolving an applicant's eligibility for access to classified information, 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, recognizing the paramount importance of protecting national security in all suitability determinations, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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.

Analysis

Guideline G, Alcohol Consumption

The security concern regarding an applicant with a history of 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 three alcohol-related arrests between 2003 and 2008, repeated relapses after receiving court-mandated alcohol counseling or therapy, and diagnosis of alcohol dependence raise the overall Guideline G concern and the following disqualifying conditions:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence . . . regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

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;

AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and

AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

An applicant may mitigate the excessive alcohol consumption concern by establishing one or more of the following mitigating conditions under AG ¶ 23:

AG ¶ 23(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;

AG ¶ 23(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);

AG ¶ 23(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

AG ¶ 23(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's last alcohol-related incident was five years ago. In the intervening years, he has resided in a sober living house, accumulated a good employment record, and purchased a home. Notwithstanding, full application of AG ¶¶ 23(a) – 23(d) are not warranted. Applicant's three alcohol-related arrests were separated by five years between his first and second DUI arrest and three years between his second and third alcohol-related arrest. Applicant's history of committing alcohol-related criminal offenses after long stretches of time undercuts the mitigating value of the passage of time since his last alcohol-related arrest.

Furthermore, the mitigating value of Applicant's residence in the sober living house is minimal, at best. Applicant continued to drink alcohol during his time at the sober living residence in apparent violation of house rules and the purpose behind his residence at the house. He apparently was able to hide his problem drinking, except for the 2011 DUI arrest, from the individual who was in charge of the house. This evidence raises concerns about Applicant's ability to follow rules and regulations when it comes in conflict with his desire to consume alcohol.

Moreover, the good employment record Applicant has been able to garner in the past five years came after he failed to report the 2011 DUI arrest. This arrest came early on in his tenure with his current employer and after he had been fired by his former employer for alcohol-related absence issues. Applicant's claim that he was not aware of his employer's adverse information reporting requirement was not credible. His subsequent disclosures during the course of the current background investigation do not fully mitigate concerns raised by his initial failure to report the adverse information to his employer. Applicant was required to answer the pointed alcohol-related questions on the SCA and follow-up questions posed by the background investigator and the DOD CAF. However, clearance holders are held to a higher standard and are expected to report adverse information at the time it occurs not just when they are specifically asked about the topic. Otherwise, concerns arise that if a security violation or other security-significant issue arises Applicant may not self-report the matter.

Applicant's installation and maintenance of an interlock device, and recent period of sobriety and AA attendance receive minimal mitigation value. The timing of when Applicant took these actions strongly suggests that they were primarily motivated by a desire to avoid criminal prosecution and improve his prospects of being awarded a security clearance. Applicant's acknowledgment at hearing that he has an alcohol problem appeared sincere, but he has never gone more than six months sober before resuming his alcohol consumption. He has resumed consuming alcohol after multiple arrests, job loss, and being advised on multiple occasions by professional substance abuse counselors or therapists to abstain from alcohol use due to his condition.

Applicant's receipt of a favorable prognosis after his latest substance abuse treatment was undermined by his conduct just a year later when he decided to drink and drive. He has not received any further counseling or therapy since 2010, nor provided an updated evaluation. Consequently, although AG ¶¶ 23(a), 23(b), and 23(d) are all partially applicable, they are insufficient to mitigate the Guideline G security concerns.

Guideline E, Personal Conduct

The personal conduct security 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 alcohol-related arrests and continued drinking after being diagnosed as alcohol dependent and advised to refrain from drinking alcohol were cross-alleged in the SOR under Guideline E. As more fully explained above, Applicant's alcohol-related arrests and refusal for years to acknowledge the professional medical advice of his counselors and therapist raise serious questions about his judgment, ability to follow rules and regulations, and other essential traits required of clearance holders. I

specifically found the personal conduct disqualifying conditions listed at AG ¶¶ 16(c) through 16(e) fully apply and the mitigating conditions listed at AG ¶¶ 17(c) through 17(e) partially apply for similar reasons noted above under the Guideline G analysis. Also for similar reasons, I find that Applicant's evidence is insufficient to mitigate the personal conduct security concern.

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).⁵ I incorporate my (excessive) alcohol consumption and personal conduct analysis and highlight some additional whole-person factors.

I gave due consideration to Applicant's good employment record, community involvement through the Boy Scouts, favorable character references, and the honesty he showed in disclosing the adverse information from the point in time he filled out and submitted his SCA through the submission of his DOD CAF interrogatory responses. However, security clearance determinations require a judge to make predictive judgments regarding a person's security clearance suitability based on that person's past history and present circumstances. Furthermore, as the protection of national security is the paramount concern, any doubt regarding a person's suitability raised by the evidence must result in an adverse determination.

After considering all the evidence, both favorable and unfavorable, Applicant's alcohol-related issues continue to raise doubt about his suitability and eligibility for access to classified information. Hopefully, he will continue on his current path of recovery and be able to reestablish his eligibility in the near future. However, at this time, the record evidence does not support a favorable finding. Overall, the record evidence leaves me with doubts about Applicant's eligibility for continued access to classified information.

⁵ The non-exhaustive list of 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.

Formal Findings

I make the following formal findings regarding the allegations in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive:

Paragraph 1, Guideline G (Alcohol Consumption)	AGAINST APPLICANT
Subparagraphs 1.a – 1.d, and 1.i: Subparagraphs 1.e – 1.h:	Against Applicant For Applicant ⁶
Paragraph 2, Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of the circumstances presented by the record in this case, 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

⁶ These allegations reference Applicant's substance abuse treatment, which do not raise a security concern. Instead, it is Applicant's repeated relapses after receiving treatment and being advised not to drink alcohol due to his diagnosed condition (alcohol dependent), which is listed as a concern in SOR 1.i, that raise a concern. Accordingly, as SOR 1.e – 1.h reference the same or similar security concern in SOR 1.i, these other allegations are decided in Applicant's favor.