



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



In the matter of:)
)
) ISCR Case No. 15-00233
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

11/04/2016

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline G, alcohol consumption, and Guideline J, criminal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On September 18, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G, alcohol consumption, and Guideline J, criminal conduct. The DOD acted under Executive Order (EO) 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 (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on October 8, 2015, and requested a hearing. The case was assigned me on March 16, 2016. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on May 11, 2016, and the hearing was scheduled for June 13, 2016. The hearing was held as scheduled. The Government offered exhibits (GE) 1 through 6, which were admitted into evidence without objection. The Government's discovery letter was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A-D, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 27, 2016.

Findings of Fact

In Applicant's answer, he admitted all the Guideline G allegations in the SOR, but failed to either admit or deny the Guideline J allegations. Since the underlying allegations are the same under both Guidelines, he is deemed to have admitted them all. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 32 years old. He is single and has no children. He has worked for a defense contractor since 2008. He has a high school education and is taking some college courses.¹

Applicant's conduct raised in the SOR included: (1) at various times from about 2002 to 2012, consuming alcohol in excess resulting in multiple arrests (SOR ¶ 1.a); (2) being arrested for driving while under the influence of alcohol (DUI) in July 2002 and being found guilty of a lesser offense (SOR ¶ 1.b); (3) being arrested for a DUI charge in April 2005 (SOR ¶ 1.c); (4) being arrested for driving on a conditional license violation in September 2006 (SOR ¶ 1.d); and (5) being arrested and charged with DUI in October 2012 (SOR ¶ 1.e). This conduct was also alleged as criminal conduct under Guideline J in the SOR. (SOR ¶ 2.a)

Applicant began drinking alcohol when he was about 16 years old. From 1999 to 2007, he consumed four to six beers per week. From 2007 to 2013, he consumed about four to five beers once a month. In his February 2013 statement to an investigator, he reported that he became intoxicated five times per year. In that same statement he relayed that he did not have a problem with alcohol. During his hearing testimony, he described himself as an alcoholic. He also admitted that he still consumes alcohol on occasion. He realizes this drinking is inconsistent with being a recovering alcoholic.²

Applicant's first DUI arrest in 2002 occurred when he was 17 years old. He was arrested while driving home from a party with a friend. A breathalyzer test showed his blood alcohol content was .03%, which was over the legal limit, since minors are not allowed any alcohol in their systems while driving. The DUI charge was reduced to a

¹ Tr. 5, 23-25; GE 1.

² Tr. 36; GE 2, 20.

lesser offense, he was fined, ordered to take drug and alcohol classes, and placed on probation.³

Applicant's 2005 DUI arrest occurred when he was leaving a bar late in the evening, and he was stopped by law enforcement while driving. He admitted to consuming approximately 8 to 12 beers before driving home that evening. He pleaded guilty to the charge and was sentenced to probation, drug and alcohol classes, and a fine.⁴

In September 2006, while Applicant was operating his vehicle with a conditional driver's license because of his 2005 DUI, he was stopped for having a light out on his vehicle. While stopped, he admitted to drinking a beer to the arresting officer and performed a breathalyzer test which showed his blood alcohol content was .01%. Since he was driving on a conditional license, any amount was prohibited. He was fined and was again ordered to attend alcohol classes.⁵

In October 2012, Applicant was out drinking with friends. He drank three mixed drinks and two beers. Later, he drove a friend home. On the way, he was stopped by law enforcement for speeding. He failed field sobriety tests and took a breathalyzer test. The results of that test were over the legal limit and he was arrested for DUI, speeding, and driving on an alcohol restricted license. He pleaded guilty to the DUI charge and the other two charges were dismissed. He was sentenced to 240 hours of community service, one year of probation, fined, ordered to attend alcohol classes (his third time so ordered), suspension of his driver's license for two years, and had an ignition interlock placed on his car for two years. The interlock was recently removed from his car. He complied with all his sentencing requirements. He immediately reported this incident to his security officer at work.⁶

In addition to the above alcohol-related incidents, Applicant also was arrested in 2003 for possession of marijuana. He paid a fine and was ordered to take drug awareness classes. He also admitted to using methamphetamine for six months in 2006. In December 2006, he was arrested for felony possession of methamphetamine when an amount was found in his wallet when he was searched during a traffic stop. He pleaded to a lesser charge and was sentenced to probation, a fine, drug education classes, and random drug testing. He lost his job as a result of this incident. He claims he no longer uses methamphetamine.⁷

³ Tr. 26, 28; GE 2.

⁴ Tr. 28-30; GE 2, 3.

⁵ Tr. 30; GE 2, 3.

⁶ Tr. 32-34; GE 2, 5, 6.

⁷ Tr. 31; GE 2-4. The drug charges were not alleged in the SOR. I will only consider this information as it might relate to Applicant's credibility, the application of mitigating conditions, and the application of the whole-person factors.

Applicant explained that the most recent court-ordered alcohol counseling consisted of six months of both group and individual counseling. A statement of program completion was included in the record, but no details about the course curriculum were provided. He also stated he has attended Alcoholics Anonymous (AA) meetings in the past. The last AA meeting he attended was three months ago. His last drink was about one and a half months ago. The last time he was intoxicated was when he was arrested in 2012.⁸

Applicant presented reference letters from his company's president, his supervisor, and two friends. They describe Applicant as a "stellar" employee and a hard worker. His friends describe him as dependable, loyal, and trustworthy. They all feel Applicant has learned from his mistakes and won't find himself in that position in the future. They recommend continuation of his security clearance.⁹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

⁸ Tr. 41-42; GE 6.

⁹ AE A-D.

mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security 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 that an applicant may deliberately or inadvertently fail to 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 Executive Order 10865 provides that 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 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 following are potentially applicable in this case:

(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's four DUI arrests or charges and his pattern of excessive alcohol drinking over the years support the application of the above disqualifying conditions.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(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); 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's last adverse alcohol incident occurred in October 2012. His alcohol-related incidents have not been infrequent having been arrested or charged four times since 2002. He continues to consume alcohol, and therefore I cannot conclude that an alcohol-related incident will not recur in the future, partly because his past actions included violating court-imposed license restrictions on multiple occasions. His actions cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 23(a) does not apply.

Applicant admits that he is an alcoholic, yet he continues to consume alcohol despite knowing such consumption is inconsistent with recovering from his alcoholic condition. AG ¶ 23(b) does not apply.

Applicant completed outpatient alcohol counseling in 2012, although there are no details of what this program entailed. He participated in similar court-ordered programs for every other DUI arrest with no effect on changing his behavior. Although he claims to have participated in AA for some period, his last meeting was three months ago. He did not present evidence of a favorable diagnosis. AG ¶ 23(d) partially applies.

Guideline J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out 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 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's four DUIs constitute criminal action. I find that both disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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 last criminal incident occurred in October 2012. His criminal acts have not been infrequent having been arrested or charged four times since 2002. He continues to consume alcohol and therefore I cannot conclude that additional crimes will not recur in the future. He was given at least three opportunities to change his behavior after attending court-ordered alcohol education courses, yet he failed to do so. Additionally, his repeated action in disregarding court-ordered license restrictions casts doubt on his current reliability, trustworthiness, and good judgment, and they also show a lack of successful rehabilitation. 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 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.

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 the facts and circumstances surrounding this case. I considered Applicant's personal circumstances and his support from his employer and friends. However, I also considered that he has not come to grips with his alcohol issues. He continues to consume alcohol even though it has resulted in four different criminal actions against him. Applicant failed to provide sufficient evidence to mitigate the alcohol consumption and criminal conduct security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines G and J.

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: Subparagraphs 1.a - 1.e:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	AGAINST APPLICANT 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.

Robert E. Coacher
Administrative Judge