



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



In the matter of:

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) ISCR Case No. 15-02311
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Applicant for Security Clearance

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: *Pro se*

03/15/2017

Decision

WHITE, David M., Administrative Judge:

Applicant drove under the influence of alcohol in 2009. His sentence included an alcohol treatment program, during and after which he continued consuming alcohol despite his diagnosis of Alcohol Dependence and Cannabis Abuse. He was discharged Under Other Than Honorable Conditions from the Navy in 1998 for marijuana use, after less than three months of service. He falsified his 2012 security clearance application and failed to file required Federal and state income tax returns for 2011. Resulting security concerns were not mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on November 14, 2012.¹ On November 14, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR)

¹Item 3.

to Applicant, detailing security concerns under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct).² The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines that came into effect in the Department of Defense on September 1, 2006.

Applicant submitted his written responses to the SOR on December 18, 2015, and February 9, 2016, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on March 16, 2016. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on March 22, 2016. He submitted no additional evidence, made no objection to consideration of any contents of the FORM, and did not request additional time to respond. I received the case assignment on December 13, 2016.

On page 2 of the FORM, Department Counsel purported to unilaterally amend the SOR, pursuant to Directive ¶ E3.1.13, by adding an entirely new Guideline E allegation concerning Applicant's false denial of illegal drug use during the preceding seven years on his 2012 e-QIP. The cited paragraph of the Directive contains no authority for Department Counsel to modify the SOR, but instead sets forth the requirement for mutual document discovery in advance of a hearing when an applicant requests one. The Directive permits an administrative judge to amend the SOR during a hearing, to conform to the evidence,⁵ but contains no provision permitting a department counsel to add new allegations to an SOR in connection with submitting a FORM after

² Item 1.

³ Item 2.

⁴ Department Counsel submitted four Items in support of the SOR allegations. Item 4 is inadmissible. It will not be considered or cited as evidence against Applicant's interests in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on January 16, 2013. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation summary is inadmissible against Applicant's interests in the absence of an authenticating witness. See Executive Order 10865 § 5. In light of Applicant's admissions, Item 4 is also cumulative. Applicant is not legally trained and might not have understood Department Counsel's FORM footnote, which described the potential admissibility of Item 4. I therefor reviewed it for any potentially mitigating information that Applicant might have thought would be considered. No mitigating information was found in Item 4 that was not available from other sources in the record, and which was accordingly considered.

⁵ Directive ¶ E3.1.17.

an applicant requests a decision without a hearing. Department Counsel's attempt to add this new Guideline E allegation is void, and Applicant's false answer concerning his previous drug use on his 2012 e-QIP will not be considered as substantial evidence to establish any disqualifying condition in this case. The extensive FORM discussion of this additional falsification, which was not alleged in the SOR, was also improper and was not considered for any purpose adverse to Applicant's interests.

Findings of Fact

Applicant is 35 years old. He has worked for a defense contractor since March 2012, and seeks a security clearance in connection with that employment. He is married and has two children, ages 10 and 7. He earned a high school GED in May 1998. He served on active duty in the U.S. Navy from August to October 1998, when he was administratively discharged Under Other Than Honorable Conditions (OTH) after testing positive for marijuana use.⁶

In his response to the SOR, Applicant failed to formally admit or deny any of the SOR allegations. However, he provided explanatory responses to each paragraph of the SOR that acknowledged the truth of the allegations under each guideline, except that he denied having any intent to falsify facts on his e-QIP. Applicant's admissions are incorporated into the following findings of fact.

Applicant was arrested for Driving Under the Influence (DUI) of alcohol in August 2009. He was convicted of misdemeanor DUI, fined, and required to undergo an alcohol treatment program. (Item 3.) In January 2010, he entered a 26-week outpatient substance abuse treatment program with initial diagnoses of: Alcohol Dependence; Cannabis Abuse; and Depressive Disorder, Not Otherwise Specified. His original treatment plan was extended twice due to positive drug screens, which he attributed to THC metabolites remaining in his system from his pre-program use, and his positive test for alcohol in May 2010. He claimed that this was caused either by drinking an unknown beverage offered to him by a friend during a cook out or from taking cold medication. He was discharged upon completion of this program in October 2010, with a fair prognosis. Despite his diagnosis of Alcohol Dependence, he continues to consume alcohol. (Item 2; Item 3.)

Applicant admitted that he used marijuana between 1996 and the time of his OTH discharge from the Navy after testing positive for drug abuse in October 1998. He also tested positive for marijuana use on the first two drug screens of his outpatient treatment program in January and February 2010. (Item 2; Item 3.)

Applicant failed to file his Federal and state income tax returns for tax year 2011, as required. As of the close of the record, these returns remain unfiled. (Item 2; Item 3.)

⁶ Item 2; AE A.

In his response to Section 24 on his 2012 e-QIP, Applicant answered, “No,” and failed to disclose that he had been ordered, advised, or asked to seek counseling or treatment as a result of his use of alcohol. This answer was false, since he had undergone the 2010 court-ordered alcohol treatment program described above after his 2009 DUI conviction. He did, however, include “ASAP” (Alcohol Safety Action Program) as part of his sentence when he disclosed this conviction in Section 22 of the e-QIP concerning his Police Record. He denied intending to falsify facts, and said that he was in a large group when completing his e-QIP, the office was getting ready to close, and he was rushed when completing the form. (Item 2; Item 3.)

The record lacks mitigating evidence addressing the quality of Applicant’s professional performance or his track record with respect to handling sensitive information and observation of security procedures. No character witnesses provided statements describing his judgment, trustworthiness, integrity, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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 (DCs) and mitigating conditions (MCs), 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, these guidelines are applied 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7

of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

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 DCs established by the evidence in this case 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;

(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 was arrested for, and convicted of, DUI in 2009. He was diagnosed as Alcohol Dependent in January 2010 by the staff of his court-ordered alcohol treatment program. He tested positive for alcohol use in May 2010 while still undergoing treatment, and admitted that he continued to consume alcohol after completion of the program. This evidence establishes security concerns under AG ¶¶ 22(a), 22(e), and 22(f).

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 committed DUI in 2009, and was subsequently diagnosed as Alcohol Dependent. He continued to drink alcohol after completing his court-ordered outpatient treatment program. These choices support a conclusion that alcohol-related incidents are likely to recur, and cast doubt on his current judgment. Mitigation was not established under AG ¶ 23(a).

Applicant eventually completed outpatient treatment after his DUI offense, but received only a "fair" prognosis. He has resumed and continued alcohol consumption since completing the program. Accordingly, he also failed to establish mitigation under the terms of AG ¶¶ 23 (b), (c), or (d).

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. The DCs raised by the evidence in this case are:

(a) any drug abuse (see above definition); and

(b) testing positive for illegal drug use.

Applicant admittedly abused marijuana between 1996 and 2010, when he most recently tested positive for illegal marijuana use while undergoing substance abuse treatment after his 2009 DUI conviction. These facts raise security concerns under AG ¶¶ 25(a) and (b), and shift the burden to Applicant to establish mitigation of those concerns.

AG ¶ 26 provides conditions that could mitigate drug-related security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's last admitted use of marijuana was in 2010, and the Government presented no evidence that he has abused drugs since then. Mitigation, under AG ¶¶ 26(a) and (b), was established due to that apparent period of abstinence from drug abuse.

Guideline J, 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 raise a security concern and may be disqualifying. The DCs established by the evidence in this case are:

- (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 was convicted of DUI in 2009, and admitted illegal drug abuse from 1996 through early 2010. These criminal offenses establish security concerns under AG ¶¶ 31(a) and 31(c).

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

The most recent SOR-alleged criminal offense occurred in early 2010, more than seven years ago. This passage of time provides mitigation of criminal conduct security concerns under AG ¶¶ 32(a) and 32 (d).

Guideline F, Financial Considerations

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

The record evidence established security concerns under one DC, as set forth in AG ¶ 19:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant admitted that he failed to file required Federal and state income tax returns for tax year 2011. He attributed this failure to various causes, none of which justify his continued failure to file the returns to date. His ongoing unwillingness to meet these income tax obligations raises security concerns under AG ¶ 19(g), and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial difficulties:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's admitted failure to file required Federal and state income tax returns spans the past six years, and is ongoing. He did not dispute his obligation to file the returns in question. Accordingly, the record does not establish mitigation for his financial irresponsibility under any of the foregoing provisions.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 raise security concerns and may be disqualifying with relation to the allegations in this case:

(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;

(c) credible adverse information in several adjudicative issue 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 the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant answered, “No,” when asked if he had ever been ordered, advised, or asked to seek counseling or treatment as a result of his use of alcohol on his 2012 e-QIP, despite having completed almost 10 months of court-ordered alcohol treatment just two years before certifying the truth of that answer. He provided insufficient explanation for this falsification to support a conclusion that it was an innocent mistake. I find that this was a deliberate falsification.

Applicant also engaged in alcohol-related misconduct and drug abuse between 1996 and 2010. These incidents are not individually sufficient for a current adverse determination under Guidelines G or H, but support a whole-person assessment of questionable judgment, untrustworthiness, and unwillingness to comply with rules and regulations. They also involved conduct which, if known, would affect his personal, professional, and community standing, making him vulnerable to exploitation, manipulation, and duress.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. Four MCs have potential applicability under the facts in this case:

- (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 did not disclose his participation in court-ordered alcohol treatment before being confronted about it. When combined with other events of concern, which include his failure to file required income tax returns, his DUI conviction, and his drug abuse, his unwillingness to comply with rules and regulations has not been minor or infrequent. This pattern of misconduct reflects adversely on his current reliability, trustworthiness, and judgment. He did not demonstrate effective counseling, rehabilitation, or other steps to reduce vulnerability to manipulation or duress. Applicant failed to meet his burden to establish significant mitigation under these conditions.

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 is an accountable adult, who is responsible for his voluntary choices and conduct that underlie the security concerns expressed in the SOR. His past drug abuse, his DUI conviction, his attempt to conceal his alcohol treatment history from the DoD, and his ongoing failure to file required Federal and state income tax returns, combine to demonstrate a pattern of voluntary misconduct reflecting untrustworthiness, unreliability, and bad judgment.

Applicant offered insufficient evidence of counseling, rehabilitation, better judgment, or responsible conduct in other areas of his life to offset resulting security concerns. The potential for pressure, coercion, and duress remains largely undiminished. Applicant has not demonstrated a basis from which to reasonably conclude that he would not violate laws, rules, or regulations in the future.

Overall, the record evidence leaves me with 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 alcohol consumption, financial considerations, and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a through 2.d:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant
Paragraph 5, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	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.

DAVID M. WHITE
Administrative Judge