



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

)
)
)
)
)
)
)

ISCR Case No. 15-02804

Appearances

For Government: Douglas Velvel, Esq., Department Counsel
For Applicant: *Pro se*

08/29/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant's acceptance of responsibility for his actions and his responsible use of alcohol are sufficient to mitigate the security concerns raised by his use of alcohol and his related criminal conduct. His request for a security clearance is granted.

Statement of the Case

On July 7, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is

clearly consistent with the national interest for Applicant to continue to receive a security clearance.¹

On December 13, 2015, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guidelines² for criminal conduct (Guideline J) and alcohol consumption (Guideline G). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on March 24, 2016, and I convened the requested hearing on April 25, 2015. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 4.³ Applicant testified and presented Applicant's Exhibits (Ax.) A - N.⁴ A transcript of the hearing (Tr.) was received on May 3, 2016.

Findings of Fact

Under Guideline J, the Government alleged that in December 2007, Applicant was arrested for driving under the influence of alcohol (DUI), a charge of which he was convicted in January 2008 (SOR 1.a); that in February 2008, he was charged with driving with a suspended driver's license (SOR 1.b); that in May 2008, he was charged with occupying a passenger's seat while under the influence of alcohol (SOR 1.c); and that in May 2014, Applicant was arrested for DUI, but pleaded guilty in January 2015 to reckless driving and open container (SOR 1.d). Applicant denied SOR 1.c and admitted SOR 1.a, 1.b, and 1.d.

Under Guideline G, the Government cross-alleged the alcohol-related charges specified at SOR 1.a, 1.b, and 1.d (SOR 2.a). Applicant denied this allegation. All of Applicant's responses were accompanied by extensive explanatory remarks. In addition to the facts established through Applicant's admissions, I make the following findings of fact.

Applicant is 32 years old. He is a single father of an 11-year-old boy, and he has a bachelor of science degree in aerospace engineering he earned in December 2006. Applicant has worked for his current employer, a large aerospace and defense industry corporation, since May 2006, when he was selected for an engineering internship. In March 2007, he was hired as a full-time engineer for work in State A. In May 2014, when that contract ended, he was hired for work on a defense contract in State B,

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ At Department Counsel's request, I have included, as Hearing Exhibit (Hx.) 1, a copy of the Government's Exhibit List. Gx. 2 was admitted over Applicant's objection. (Tr. 28 - 32).

⁴ Ax. A - K were included with Applicant's response to the SOR. See Tr. 16 - 19.

where he moved in June 2014. This is Applicant's first security clearance application. (Answer; Gx. 1; Gx. 2; Tr. 6 - 7)

In December 2007, Applicant went out to socialize with some co-workers. Applicant did not drive and had at least three mixed drinks while he was out. After he was dropped off at home at the end of the evening, Applicant decided to go out by himself to get something to eat. He thought he was not intoxicated or otherwise unable to drive, but before he returned home, he was pulled over and subsequently arrested and charged with misdemeanor DUI. In January 2008, he pleaded guilty and was placed on 12 months probation. He also was ordered to complete 40 hours of community service, and his driver's license was suspended except for getting to and from work and his son's school. (Answer; Gx. 1 - 4; Ax. B; Ax. L)

On February 2, 2008, Applicant and his son were invited to a Super Bowl party about two hours away. A friend drove to Applicant's house and picked them up. But the friend had been working the night before and became too tired to drive. Even though his driver's license was still restricted, Applicant agreed to drive for an hour so his friend could sleep. A short time later, the car was pulled over for an improper license plate. Applicant was arrested and charged with driving on a suspended license. The charge was later dismissed. According to arrest records in one of the Government's Exhibits (Gx. 2), Applicant also was charged with occupying a passenger seat while intoxicated. Another set of arrest records (Gx. 3; Ax. L) does not show this charge. Gx. 2 shows he was found guilty of this charge and placed on 12 months probation; however, the driving on a suspended license charge had been dismissed at the same court hearing because the officer who arrested him did not show up to testify. Applicant has no recollection of the occupying a passenger seat charge. It was not discussed, as were the other arrests at issue in this case, during his subject interview with a Government investigator in December 2014. (Answer; Gx. 1 - 4; Ax. A; Tr. 52 - 54, 59, 62 - 63)

After his company's contract in State A ended, Applicant was able to stay with the company by taking his current position in State B. In May 2014, not long after he was hired for his job, he and some friends went out to celebrate before he left State A. Later that evening, Applicant was pulled over after having consumed alcohol and was charged with DUI and having an open container in his car. Applicant disclosed this arrest, as well as his 2007 and 2008 infractions in his July 7, 2014 EQIP. On July 17, 2014, Applicant pleaded guilty *in absentia*⁵ to a lesser included offense of reckless driving, and to the open container charge (despite his assertion that the container belonged to one of his passengers). He was fined \$2,200, placed on 12 months of probation, and ordered to complete 240 community service hours (which he satisfied by paying an additional \$1,500 fine). Applicant also was ordered to complete a driver safety class. He completed all of the court's requirements without incident. (Answer; Gx. 1 - 4; Ax. B; Tr. 54 - 55, 57 - 58)

⁵ By the time he was due in court, Applicant had already moved to State B to start his new job.

Applicant first consumed alcohol in college when he was 19 years old. Until 2007, he drank an average of six beers every weekend. Since 2007, his use of alcohol has been moderate, consisting of a glass of wine or a beer each weekend. He is a busy single father who rarely goes out to socialize. Both times he was arrested for DUI, however, he had consumed at least three mixed drinks. He has acknowledged the adverse impact his alcohol-related misconduct has had on his professional, financial, and personal circumstances. Other than the 2014 driver safety class, Applicant has never received any alcohol counseling and he has not been evaluated as alcohol dependent or as an abuser of alcohol. Applicant does not intend to again drive under circumstances when he has consumed alcohol. (Gx. 4; Ax. D - G; Tr. 56, 66 - 70)

Applicant has an outstanding reputation in the workplace and in his community. His performance evaluations and statements from co-workers show that he is reliable, honest, and professional. Applicant also is active in his community as a youth sports coach. Personal and workplace references who have interacted with Applicant in social settings where alcohol has been served state that he does not consume alcohol to excess and that he always behaves responsibly. (Ax. A; Ax. C - K; Ax. M)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the “whole-person” concept, those 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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

⁶ See Directive, 6.3.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁹

Analysis

Criminal Conduct

Applicant denied the SOR 1.c allegation of being charged with occupying a seat while intoxicated. Thus, it was still incumbent on the Government to provide sufficient information to support that controverted issue of fact. The Government relied on one document (Gx. 2)¹⁰ that showed the charge and a conviction for it. But the charge occurred at the same time as the arrest for driving on a suspended license alleged in SOR 1.b. Available information shows that the SOR 1.b charge was dismissed because the arresting officer failed to appear in court. Based on the foregoing, I conclude the Government did not meet its burden of production as to SOR 1.c, which is resolved in favor of the Applicant.

Nonetheless, the Government's information and Applicant's admissions support the remaining allegations under this guideline. The facts established reasonably raise a security concern about criminal conduct that is addressed at AG ¶ 30, as follows:

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.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; AG ¶ 2(b).

¹⁰ The arrest records in Gx. 3 did not reflect the SOR 1.c charge.

Applicant was arrested in 2007 for DUI; he was convicted of that charge in 2008. One month later, although the charge was later dismissed, he was charged for driving on a suspended license. Finally, Applicant was charged with DUI in 2014, but pleaded guilty to a lesser charge of reckless driving. This information requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

I have also considered the following pertinent AG ¶ 32 mitigating conditions:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or 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.

AG ¶ 32(a) does not apply because less than two years ago, Applicant engaged in additional criminal conduct six years after his 2007 and 2008 offenses. Nonetheless, AG ¶ 30(d) applies because Applicant has accepted responsibility for his actions. He has changed his drinking and social behavior, which were the underlying factors in his arrests, so as to avoid finding himself in such situations in the future. His employment record and his community involvement also show stability and reliability indicative of good judgment in the future. Multiple workplace and personal references have observed Applicant in social settings and have seen no indication that the factors underlying his offenses will recur. Applicant has mitigated the security concerns under this guideline.

Alcohol Consumption

In SOR 2.a, the Government cross-alleged as alcohol-related conduct the arrests at SOR 1.a, 1.c, and 1.d. For reasons stated above, the concern about SOR 1.c is resolved for Applicant. Nonetheless, available information regarding SOR 1.a and 1.d, as alleged under this guideline, reasonably raises a security concern that is expressed at AG ¶ 21, as follows:

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 was convicted of DUI in 2008. In his 2014 arrest, although his consumption of alcohol was about the same as in 2008, the 2014 charge was resolved through a plea agreement as reckless driving. Regardless, this was an alcohol-related incident. This information requires application of the disqualifying condition at AG ¶

22(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).

By contrast, available information requires application of the mitigating condition at 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*). Applicant never has been evaluated as being an alcohol abuser or dependent on alcohol. Co-workers and personal associates have observed him in social settings as a responsible user of alcohol. He has accepted responsibility for his conduct and he has moderated his use of alcohol so as to greatly reduce the likelihood of future alcohol-related misconduct. Applicant has mitigated the security concerns under this guideline.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a mature, responsible adult who is highly regarded in the workplace and in his community. The adverse information presented by the Government is not reflective, in light of the record as a whole, of Applicant's judgment and reliability. A fair and commonsense assessment of all of the available information shows that the security concerns raised by the Government's information have been mitigated.

Formal Findings

Formal findings 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 J: | FOR APPLICANT |
| Subparagraphs 1.a - 1.d: | For Applicant |
| Paragraph 2, Guideline G: | For APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge