



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 15-04045

Appearances

For Government:

Andrew Henderson, Esquire, Department Counsel

For Applicant:

Ryan Nerney, Esquire
The Edmunds Law Firm

November 4, 2016

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP), on November 12, 2014. (Government Exhibit 1.) On December 16, 2015, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J (Criminal Conduct) and G (Alcohol Consumption) concerning Applicant. 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on February 26, 2016 (Answer), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 4, 2016. This case was assigned to me on April 11, 2016. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 15, 2016. I convened the hearing as scheduled on May 10, 2016. The Government offered Government Exhibits 1 through 5, which were admitted without objection. Applicant testified on his own behalf, called two additional witnesses, and he submitted Applicant Exhibits A through T, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on May 18, 2016. The record was left open until June 3, 2016, for the receipt of any additional information or argument. Applicant elected not to submit any additional information or argument. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Ruling on Amendment

Pursuant to Directive ¶ E3.1.17, Department Counsel made a motion to amend the SOR to render it in conformity with the evidence presented. (Tr. 105-113.) Department Counsel's amendment proposed to add a Paragraph 3 to the SOR under Guideline E (Personal Conduct), with two subparagraphs; and a Paragraph 4 (Drug Involvement) with one subparagraph. The proposed amendment was served on Applicant's counsel on May 10, 2016. On June 3, 2016, Applicant admitted Paragraphs 3 and 4, and all subparagraphs. (Judge Exhibit I.)¹ The particular facts of this allegation will be discussed under Findings of Fact, below.

Findings of Fact

Applicant is 29, single, and a high school graduate. He has been employed by a defense contractor for ten years, and seeks to retain a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline J, Criminal Conduct) Paragraph 2 (Guideline G, Alcohol Consumption)

The Government alleges in Paragraph 1 that Applicant is ineligible for clearance because he engaged in criminal activity that casts doubt on his judgment, reliability and trustworthiness. Applicant denied the two allegations in this paragraph, which both concerned arrests for Driving Under the Influence of Alcohol (DUI).

The Government further alleges in Paragraph 2 that Applicant's conduct as set forth under Paragraph 1 supports a finding that he is ineligible for a clearance because he used intoxicants to excess. Applicant did not separately admit or deny Paragraph 2, which incorporated the allegations in Paragraph 1 by reference in his Answer. I view his silence as a denial.

¹At his request, Applicant was given until June 3, 2016, to submit additional evidence concerning these new allegations but, other than his admissions, he chose not to do so. (Tr. 105-113, 125-127.)

Applicant began drinking alcohol when he was 19 and just beginning to work in the defense industry right after finishing high school. He testified that he would drink to intoxication about three times a week from about 2006 to 2013. Applicant admitted that he often drove after drinking to excess. (Tr. 67-68, 95-96.)

1.a. Applicant was first arrested for DUI on May 24, 2013. He drank excessively at a house party and was arrested while driving home. He made the decision to drive on his own. Applicant plead *nolo contendere* to the charge and was sentenced to three years informal probation, to attend alcohol classes, and fined. (Tr. 65-71, 95.)

1.b. Applicant was again arrested for DUI on January 10, 2014. Applicant admitted that he had not learned his lesson from the first arrest and, after several months, he was again drinking to excess. He drank to excess at a party, and decided to drive friends because he had the least to drink. When stopped by the police, Applicant jumped into the back seat of the car in a failed attempt to conceal the fact he was driving. Applicant again pleaded *nolo contendere*. His sentence included extending his probation period so that it ends three years from this conviction. Applicant also had to wear an alcohol-monitoring device for several months, was ordered to attend additional alcohol education classes, and was fined. Finally, Applicant participated in the Sheriff's Alternative Work Program as an alternative to being jailed for 60 days. (Tr. 72-78, 96-97; Applicant Exhibits Q, R, and S.)

Applicant testified that he has changed his lifestyle since his second arrest. He moved in with his parents for about two years. Applicant also states he has a healthier lifestyle: changing friends, going back to school, exercising, and watching his diet. Applicant states he currently drinks in moderation and never drives after drinking alcohol. He also submitted a signed statement saying that should he have alcohol abuse problems in the future he consented to automatic revocation of any security clearance. (Tr. 78-88, 97-100; Applicant Exhibits P, and T.)

Applicant was seen by a psychologist, who prepared a written report. Based on his analysis, Applicant received a diagnosis of Alcohol Use Disorder, Moderate, In Sustained Remission. (Applicant Exhibit C.)

Paragraph 3 (Guideline E, Personal Conduct)

As stated, the SOR was amended on motion of Department Counsel. The Government alleges in Paragraph 3 that Applicant is ineligible for clearance because he engaged in conduct that shows questionable judgment, dishonesty, lack of candor, or unwillingness to comply with rules and regulations. Specifically, the Government alleges that Applicant made false statements to the Department of Defense during the clearance screening process. Applicant admitted both subparagraphs under this paragraph.

3.a. Applicant filled out a Questionnaire for National Security Positions on June 23, 2006. Section 24 of that Questionnaire asked whether Applicant had used drugs including marijuana within the past seven years. It also asked whether Applicant had

used marijuana while holding a security clearance. To each question he answered, "No." These were false answers to relevant questions about his drug history. (Tr. 91-93, 101-103; Government Exhibit 5.)

3.b. Applicant filled out another Questionnaire for National Security Positions on November 12, 2014. Section 23 of that Questionnaire asked whether Applicant had used drugs including marijuana within the past seven years. It also asked whether Applicant had used marijuana while holding a security clearance. To each question he answered, "No." These were also false answers to relevant questions about his drug history. (Tr. 91-93, 101-103; Government Exhibit 1.)

Applicant began working for his employer soon after graduating from high school in 2006. He has held a security clearance during almost his entire employment. Applicant admitted to his psychologist that he had used marijuana approximately twice per week from about 2005, when he was in high school, to 2010. However, at the hearing, Applicant denied such use by testifying that his statements on the questionnaires were true. This was in fact a false statement itself. (Tr. 92, 101-104; Applicant Exhibit C at 3.)

Paragraph 4 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used illegal drugs.

Applicant admitted the sole allegation under this paragraph, which is that he used marijuana no more than twice per week from the time he was in high school (approximately 2005) until he was 23 years old (approximately 2010). That admission is a finding of fact. As stated above, after initially denying such use at his hearing, Applicant admitted using marijuana during the time he was employed by a defense contractor. (Tr. 92, 101-104; Applicant Exhibit C at 3.)

Mitigation

Two of Applicant's supervisors testified on his behalf. (Tr. 16-60.) The witnesses testified that Applicant is a reliable, dependable, and trustworthy employee. Both of them would recommend Applicant for a position of trust. The impact of their testimony, however, is lessened by the fact that neither of them know that Applicant used marijuana during the time he was employed by their company. (Tr. 104-105.)

Applicant submitted considerable documentary evidence showing that he is a respected, liked, and successful employee. (Applicant Exhibits N, and O.) Eight people, in addition to the witnesses, supplied letters of recommendation for Applicant. Several of these people are co-workers of Applicant. All were extremely laudatory. (Applicant Exhibits A, B, E, F, G, H, I, J, K, and L.)

Policies

Security clearance decisions are not made in a vacuum. 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 and mitigating conditions, which are to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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. 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, "The 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."

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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Paragraph 1 (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.

The following disqualifying conditions under AG ¶ 31 applies to this case:

- (a) a single serious crime or multiple lesser offenses;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The following mitigating conditions under AG ¶ 32 have also been considered:

- (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; 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 has had two arrests and convictions for DUI within less than a year. In 2013 and 2014. He made an independent decision to drive after drinking on both occasions. He remains on probation for the latest conviction. His second arrest violated his probation from the first conviction. AG ¶¶ 31(a), (d), (e) apply. He states that he has changed his lifestyle and no longer engages in the conduct, further described below, which resulted in these arrests. However, based on all of the evidence, including the credibility issues uncovered during the hearing, I cannot find that mitigating conditions AG ¶¶ 32(a), (b), or (d) were established. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline G - Alcohol Consumption)

The security concern relating to the guideline for Alcohol Consumption is set out in 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 has a long history of alcohol abuse, which resulted in his being arrested twice for DUI within several months in 2013 and 2014. He remains on probation for the most recent arrest. Applicant states that he has changed his pattern of drinking, seriously reducing it and no longer driving after drinking. He was diagnosed by a psychologist as having Alcohol Use Disorder, Moderate, In Sustained Remission.

There are two disqualifying conditions that apply to this case under AG ¶ 22:

(a) alcohol-related incidents away from work, such as driving under the influence, . . . or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment or abstinence.²

Under the particular facts of this case, the following two mitigating conditions potentially apply to Applicant's situation pursuant to 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; and

(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).

Applicant, by his own admission, was a problem drinker for many years. He was arrested for DUI in 2013 and 2014. There is some evidence that Applicant has changed his lifestyle to avoid future problems. However, once again, there are serious credibility issues with Applicant's testimony. Under the particular circumstances of this case, given his age, the recency of the events, and his substance abuse history, not enough time has passed to be sure that his current pattern of reduced drinking will continue. Paragraph 2 is found against Applicant.

²Applicable to Applicant's second DUI arrest.

Paragraph 3 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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 falsified two Government questionnaires, in 2006 and 2014, about his drug use history. This included failing to admit that he used drugs while holding a security clearance.

I have examined the disqualifying conditions under AG ¶ 16 with regards to the conduct set forth under Paragraph 3 and especially considered the following:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, . . .

I have examined the potentially applicable mitigating conditions under AG ¶ 17 and have determined none of them apply. AG ¶ 17(a) does not apply because Applicant did not make a prompt effort to correct the omissions. In fact, as stated above, he gave false testimony at his hearing concerning his drug use and truthfulness on the questionnaires at issue. AG ¶ 17(c) does not apply as his falsifications are repeated, not minor, occurred as recently as May 2016, and do cast doubt on his reliability, trustworthiness and good judgment. Paragraph 3 is found against Applicant.

Paragraph 4 (Guideline H - Drug Involvement)

The security concern related to Drug Involvement is set forth in AG ¶ 24 as follows:

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.

Applicant admitted using marijuana from approximately 2005 to 2010. He had a security clearance during the majority of that time.

The following disqualifying conditions are applicable to the facts of this case under AG ¶ 25:

- (a) any drug use; and
- (g) any illegal drug use after being granted a security clearance.

I have examined the mitigating conditions under AG ¶ 26, particularly the following:

- (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; and
- (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.

According to Applicant, his marijuana use ended six years ago. He stated that he has changed his friends and his lifestyle. While that evidence was submitted in relation to his alcohol use, it is also relevant to this discussion. On the negative side is the fact that the Applicant has repeatedly lied about the facts of his drug use. Given the state of the record, I cannot find that the mitigating conditions apply in this case at this time. Paragraph 4 is found against Applicant.

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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. The discussion under Guidelines J, G, E, and H above, applies here as well. Applicant has a history of criminal conduct, alcohol abuse, drug abuse, and repeated incidents of falsification to the Government. He failed to provide sufficient mitigating information to overcome the adverse inference arising from his actions.

Under AG ¶ 2(a)(3), his conduct is recent and continuing. I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also cannot find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); or that there is no likelihood of continuation or recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct, alcohol consumption, drug abuse, and personal conduct. Accordingly, the evidence supports denying his request for a security clearance.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Paragraph 4, Guideline H:	AGAINST APPLICANT
Subparagraph 4.a:	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.

WILFORD H. ROSS
Administrative Judge