



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



In the matter of:)
)
) ISCR Case No. 15-04753
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

08/02/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct, Guideline G, alcohol consumption, and Guideline J, criminal conduct. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On October 15, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines E, personal conduct, G, alcohol consumption, and J, criminal conduct. The action was taken 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) effective within the DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

¹ I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on October 28, 2016, and requested a hearing before an administrative judge. The case was assigned to me on March 22, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 4, 2017. I convened the hearing as scheduled on June 7, 2017. The Government offered exhibits (GE) 1 through 7. Applicant objected to GE 5 and 6. The objection was sustained. GE 1, 2, 3, 4, and 7 were admitted into evidence. Applicant testified and offered exhibits (AE) A through C, which were admitted into evidence without objection. DOHA received the hearing transcript on June 15, 2017.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a through 1.g. He denied the allegations in SOR ¶¶ 2.a, 2.b, 3.a, 3.b, and 3.c. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 42 years old. He served in the military from 1996 to 2003, and was honorably discharged in the paygrade O-3. He earned a bachelor's degree in 1999 and master's degree in 2011. Applicant married in 2005 and divorced in 2006. He remarried in 2016. He and his wife have a two-year-old child. He has worked for his present employer, a federal contractor, since 2012 and for other federal contractors since 2004.²

In 2002, while on active duty in the military, Applicant was arrested and charged with driving under the influence of alcohol (DUI). He was speeding. The police report shows his breathalyzer recorded .143%. Applicant admitted he was drinking alcohol before he was arrested. The charge was reduced to speeding/reckless driving and the DUI was nolle prosequi. He admitted he learned little from this experience because he was young.³

In November 2009, Applicant was arrested and charged with DUI. He testified he failed a field sobriety test. He went to court and was placed on probation for a year. After he completed probation, the charge was dismissed. Applicant was required to attend a 12-week alcohol awareness program. He testified that he learned a lot. When he completed the program, he was told not to drink and drive, and to make better decisions. He continued to consume alcohol.⁴

In May 2010, Applicant was charged with assault on a family member. He stated that an angry ex-girlfriend falsely accused him of the offense. He said the charge was dismissed. There is no evidence of a conviction.⁵

² Tr. 16-19.

³ Tr. 32, 38-40, 75.

⁴ Tr. 40-46, 75-77.

⁵ Tr. 55-57.

In December 2010, Applicant was arrested and charged with driving while intoxicated (DWI). In May 2011, he was found guilty. He was sentenced to 30 days in jail, which was suspended, and a fine. His driver's license was restricted and he was ordered to attend an alcohol awareness class. He completed a 12-week alcohol awareness class. He was told not to drink and drive. He testified that he again learned a lot from the class and was told to make better decisions. He stated that this was still an issue he needed to work on. He continued to consume alcohol after this arrest.⁶

In February 2013, Applicant was arrested and charged with DWI. In March 2013, he was found guilty of the charge. He was required to attend a 12-week alcohol awareness class. The class was the same one he had taken before. He saw a medical professional and was diagnosed with alcohol abuse.⁷

In March 2014, Applicant was charged with attempting to drive a vehicle while under the influence of alcohol and while impaired. He was sitting in a vehicle at the time of his arrest. He testified that he had been drinking alcohol earlier in the day. After his arrest, he refused to take a field sobriety test. The charges were later dropped and expunged from his record.⁸

In November 2007, Applicant completed a security clearance application (SCA). Question 23 asked: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs." Applicant responded "no," failing to disclose that in 2002 he was arrested and charged with DUI. Applicant explained he did not disclose this information because he followed advice from his security manager. He stated that the security manager told him not to disclose anything he was charged with, but only disclose convictions. This is contrary to the plain language of the question. He did not disclose on his 2007 SCA that he was convicted of reckless driving after consuming alcohol.⁹

In February 2013, Applicant completed another SCA. Question 22 asked: "Other than those offenses already listed, have you **EVER** had the following happen to you? . . . Have you **EVER** been charged with an offense involving alcohol or drugs?" Applicant responded "no." He failed to disclose his December 2002 arrest and charge of DUI or subsequent reduction to reckless driving, and his November 2009 arrest and charge of DWI. Applicant's explanation for failing to disclose the 2002 charge was that he thought the offense was outside of a seven-year-window; he did not pay attention to the details of the question; and he read the question wrong. He explained that he did not disclose the 2009 charge because he thought he had already disclosed it in the SCA when it asked about criminal offenses. He did not. In addition, he stated it was an oversight.

⁶ Tr. 30, 46, 77-78.

⁷ Tr. 78-80.

⁸ Tr. 52-54; Answer to SOR.

⁹ Tr. 20-25, 34-38, 46-50; GE 2.

Applicant's explanations for his failure to disclose his 2002 DUI charge on his 2007 SCA or his failure to disclose this charge and the 2009 DUI charge on his 2013 SCA are not credible. I find he deliberately failed to disclose this information.¹⁰

In April 2015, Applicant completed government interrogatories and swore to the information's' accuracy. He disclosed his March 2014 charges as listed above that were later expunged and occurred after he completed his 2013 SCA. He further disclosed that he was last intoxicated on March 29, 2014, the date of his arrest. He disclosed that he participated in six-month alcohol awareness programs, in April 2013 and again March 2014. He stated in the interrogatories: "Quit for Good!" He further stated: "My life has changed, I now have a son that I live for. I have No desire to consume alcohol, I am proud of my sobriety."¹¹

During one of Applicant's alcohol awareness class he was seen by an alcohol counselor. In the discharge summary from June 21, 2011, his counselor wrote:

[Applicant] was a moderately active member of this [s]ixteen [w]eek DWI Counseling Program. While in the Program, [Applicant] followed all the rules and said the right things but it would seem that he was simply going through the motions. He continues to resist any participation in AA although participation in that program would provide the transitional support we feel [Applicant] needs. [Applicant] never quite grasped the reality that treating alcohol abuse and his depression and Diabetes must go hand in hand. [Applicant] now knows what it takes to maintain sobriety, the strategies for self-diagnosis and the community resources available should he find himself at risk of relapse. He needs only to utilize those tools.¹²

Applicant was discharged from the program on November 7, 2011, and his prognosis was "guarded."¹³

Notes from a new counselor during a subsequent alcohol awareness class from April 2013, stated: [Applicant] has given up drinking and had not drank in the last 30 plus days." Additional comments stated: "[Applicant] appears to be motivated to change his/her substance use patterns." Further comments noted: "[Applicant] has stopped using alcohol and continues to show a high desire to stop due to his expecting new children."¹⁴ He was discharged from his program on October 16, 2013, with a diagnosis of alcohol abuse and no discharge recommendations.¹⁵

¹⁰ Tr. 25-32, 36-38, 46-50.

¹¹ Tr. 84; GE 3.

¹² GE 4.

¹³ GE 4.

¹⁴ GE 4.

In March 2014, after his arrest, Applicant voluntarily attended another alcohol program because he believed it would help his court case. Applicant's new alcohol counselor noted the following: [Applicant] appears to be motivated to change his/her substance use patterns." The counselor stated: "This interviewer rates [Applicant's] overall readiness to change as being in the Contemplation stage."¹⁶ Applicant disclosed that his frequency of use was 1-2 times per week and that he has never tried to reduce or control his use of alcohol. He indicated that no one told him to stop using alcohol. His discharge summary indicates he was stable and prognosis was good.¹⁷

Applicant admitted that he has a history of alcohol consumption, at times to excess and to the point of intoxication, beginning in about June 1995. He continued to consume alcohol sporadically after his last arrest in March 2014 until February 2015. He has had setbacks. He does not believe he consumed any alcohol in 2015 because his wife was pregnant. He stated he last consumed alcohol about eight months ago, likely during a sporting event. He estimated he consumed alcohol three times in 2016. He continues to consume alcohol.¹⁸

Applicant testified that he attended court-ordered Alcoholics Anonymous (AA) meetings, but did not like them. He does not currently attend AA. He attended some counseling sessions offered to him by a friend. Her certifications are unknown. He stated that his proven method of dealing with alcohol is to remove himself from the environment and spend time with his family. He does not believe he was a "full-blown alcoholic,"¹⁹ but believes he was headed in that direction and at times he has had a problem. His recent marriage keeps him from drinking. He has been doing his best to stay away from alcohol. He has been seeing his pastor for about 12-months. He speaks with him about twice a month to address his urges to consume alcohol and depression issues. His pastor provided a letter confirming their meetings, and that Applicant is making progress and drinking appears to be less of an issue as other concerns have been explored. No information was provided regarding the pastor's educational background, certifications, or experience in the area of alcohol counseling.²⁰

Applicant provided a character letter from a friend who describes him as an honest and trustworthy person. He stated that Applicant has integrity and lives his life by principles and values.²¹ Applicant also provided copies of awards and certificates.²²

¹⁵ Tr. 69; GE 4.

¹⁶ GE 4.

¹⁷ Tr. 70-73, 80-81; Answer to SOR.

¹⁸ Tr. 62-63, 82, 84.

¹⁹ Tr. 64.

²⁰ Tr. 59-67, 87-89; AE C.

²¹ AE C.

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. Likewise, I have not drawn 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. Directive ¶ E3.1.15 states that an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or 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 the 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.

Section 7 of EO 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).

²² AE C.

Analysis

Guideline G: Alcohol Consumption

AG ¶ 21 expresses the security concern for 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. I find the following to be potentially applicable:

(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant admitted he was arrested and charged five times with alcohol-related offenses, four of which were DUI or DWI. He was convicted three times of DUI or DWI. He was diagnosed with alcohol abuse disorder. He has a history of consuming alcohol sometimes to the point of excess or intoxication from 1995 to at least March 2014. He continues to consume alcohol. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from alcohol consumption. I have considered the following mitigating conditions under 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 judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant continues to consume alcohol despite statements made to alcohol counselors and in his interrogatories that he no longer drinks. He has participated in at least three alcohol awareness classes, each lasting 12 weeks. His pastor is presently counseling him. He has three DUI/DWI convictions. Applicant's long history of alcohol use, from 1995 to the present, and the negative effect it has had on him, has not deterred him to earnestly change his consumption of alcohol. Based on that long history of repeated conduct, there is insufficient evidence to conclude the behavior was infrequent, or that it happened under unique circumstances, and it is unlikely to recur. His conduct continues to cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 23(a) does not apply.

Applicant admitted his alcohol-related conduct and his continued use, but believes it is under control. Other than speaking with his pastor during the past year, he has not provided substantive evidence of actions he has taken to address his problems, such as participating in a legitimate alcohol treatment program with a bona fide alcohol counselor or abstaining from alcohol use for a significant period. He has an established pattern of being involved in alcohol-related criminal conduct, attending alcohol awareness programs, modifying his consumption for a period, and then engaging in another alcohol-related incident. This pattern has repeated itself since his first arrest in 2002. There is limited information from Applicant's pastor regarding the specifics of his counseling and his credentials. AG ¶ 23(c) has some application. Although Applicant reluctantly acknowledges some issues with his alcohol use, there is insufficient evidence to prove that he has established a sustained pattern of modified consumption. Instead, his pattern is to stop drinking after he has an alcohol incident, and then resume after a period-of-time. He has completed three alcohol awareness programs, but there is no evidence that he has completed a treatment program. Based on Applicant's repeated history AG ¶¶ 23(b) and 23(d) do not apply.

Guideline J: Criminal Conduct

The security concern 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 guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following three are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant has a history of criminal conduct. He was arrested and charged four times with DUI/DWI. He was convicted three times, although the 2009 conviction was expunged after he completed a period of probation. In addition, the 2002 offense was reduced to reckless driving. His breathalyzer recorded .143%, well over the legal limit. Applicant admitted he had been drinking alcohol before this arrest. He was also arrested in 2014 with attempting to drive a vehicle while under the influence of alcohol. That charge was ultimately dismissed. Applicant admitted he had been consuming alcohol earlier in the day. Applicant was also arrested and charged in 2010 with assault on a family member. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

- (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;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Regarding the 2010 assault charge, there is insufficient evidence to conclude Applicant committed this offense. AG ¶ 32 applies to SOR ¶ 2.b. The same analysis that was explained under the alcohol consumption guideline applies to Applicant's criminal conduct. Despite his repeated arrests and three convictions, he has not provided sufficient evidence to conclude that his conduct is unlikely to recur. The character

evidence provided was considered, but it is insufficient to mitigate Applicant's significant and recurring criminal conduct. AG ¶¶ 32(a) and 32(d) do not apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for 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 could raise a security concern and may be disqualifying. I find the following potentially applicable:

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual group. Such conduct includes: (1) engaging in activities which if known, could affect the person's personal, professional, or community standing.

Applicant deliberately failed to disclose on his 2007 SCA that in 2002 he was arrested and charged with DUI. On his 2013 SCA, he deliberately failed to disclose his 2002 and 2009 arrests and charges for DUI. I did not find his explanations for failing to disclose these offenses credible.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(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.

There is no evidence that Applicant made prompt, good-faith efforts to correct his omissions before being confronted with the facts. AG ¶ 17(a) does not apply. Applicant claimed his security manager told him he did not have to disclose that he was arrested and charged with DUI in 2002. Question 22 asked if he had been charged or convicted of any offense(s) related to alcohol and drugs. Although the 2002 DUI was reduced to reckless driving, Applicant did not disclose he was convicted of the lesser offense, which involved alcohol. There is insufficient corroborating evidence that Applicant was merely following his security manager's advice when told he only needed to disclose convictions. His failure to disclose the reduced charge and subsequent conviction of reckless driving that involved alcohol contradicts his explanation. He admitted that he consumed alcohol and the breathalyzer recording was .143%. The plain language of the question needs little interpretation. AG ¶ 17(b) does not apply.

Applicant repeated that conduct when he deliberately failed to disclose his 2002 alcohol-related arrest and his 2009 DUI charge. I did not find his explanations credible. Applicant is an educated person with two college degrees and served as a military officer. To claim he thought he had previously listed the two DUI offenses on a different page of the SCA without confirming whether he disclosed the requested information is disingenuous. His conduct is not minor or infrequent, and it casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply.

Applicant's alcohol consumption and criminal conduct were cross-alleged under the personal conduct guideline. His personal conduct regarding his alcohol consumption and criminal conduct is not mitigated under AG ¶ 17(c) based on the same analysis provided under those respective guidelines.

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(d):

(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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G, J and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 42-year-old educated man, who served as an officer in the military for approximately seven years. He has a history of consuming alcohol to the point of excess from 1995 to the present and was repeatedly arrested, charged, and three times convicted of DUI/DWI. Despite attending alcohol awareness programs and promises that to abstain from consuming alcohol, he continues to drink alcohol and make poor decisions. He deliberately attempted to minimize his alcohol issues and criminal conduct by failing to disclose information about his conduct on his 2007 and 2013 SCAs. Applicant's conduct raises questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with serious 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 concern arising under the alcohol consumption, criminal conduct, and personal conduct guidelines.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge