



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



In the matter of:

Applicant for Security Clearance

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) ISCR Case No: 15-06018
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Appearances

For Government: Charles C. Hale, Esquire, Department Counsel

For Applicant: *Pro se*

05/17/2017

Decision

DAM, Shari, Administrative Judge:

Applicant failed to mitigate alcohol and criminal conduct allegations related to two charges of driving under the influence of alcohol. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of Case

On October 29, 2013, Applicant submitted a security clearance application (SF-86). On March 19, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct. (Item 1.) The action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information* (AG), effective within the DOD after September 1, 2006.

Applicant answered the SOR on April 2, 2016, and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On May 16, 2016, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing five Items, was mailed to Applicant on that day. He received it on May 19, 2016. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. He did not file any objection to the Government's FORM or submit additional information. DOHA assigned the case to me on March 27, 2017. Items 1 through 5 are admitted into evidence.

Findings of Fact

Applicant admitted all allegations in the SOR. (Item 1.) His admissions are incorporated into these findings of fact.

Applicant is 46 years old and unmarried. He has a 20-year-old daughter. He began working with his employer in April 2013. (Item 2.)

On July 2, 2009, Applicant was charged with operating a motor vehicle under the influence (OUI) and resisting arrest. His blood alcohol content (BAC) was over the legal limit. He plead guilty to the OUI. In addition to being fined, the judge ordered him to attend driving under the influence (DUI) classes for 20 hours. His driver's license was suspended for 30 days. (Items 4, 5.)

On September 8, 2013, Applicant was charged with another OUI. His BAC was over the legal limit. His license was suspended for five years. He was ordered to complete an alcohol education program. During a background investigation interview in December 2013, Applicant said that his case was pending and that he was contesting the charge. (Items 4, 5.) The record does not contain evidence regarding the final disposition of this case or any sentencing terms imposed if he was convicted.

In his April 2016 Answer, Applicant stated that he did not intend to make excuses for the OUI charges. He said he is not an excessive drinker and no longer drives after consuming alcohol. He has been the "lead person for 2 ½ years by a majority vote of my coworkers and supervisors." (Item 1.)

Applicant offered no evidence that he completed court-ordered terms. He did not provide documentation that he participated in any treatment programs or courses, or established a pattern of abstinence or responsible drinking. There is no evidence to corroborate his statements that he is not an excessive drinker and does not drink and drive.

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 (AG) list potentially disqualifying conditions and mitigating conditions, 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(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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or 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 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 two conditions that could raise a security concern and be disqualifying in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant admitted that he was charged with an OUI in 2009 and 2013. He plead guilty to the 2009 crime. Both offenses involved the consumption of alcohol to the point of legal intoxication. The evidence raised both disqualifying conditions.

After the Government raised potentially disqualifying conditions, the burden shifted to Applicant to rebut and prove mitigation of the resulting security concerns. AG ¶ 23 provides four conditions that could mitigate security concerns raised under this guideline:

(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.

There is insufficient evidence to establish mitigation under any the above mitigating conditions. AG ¶ 23(a) does not apply. Given the recency of Applicant's last OUI in 2013 and a previous conviction in 2009, insufficient time has passed to determine his trustworthiness and good judgment. Applicant failed to acknowledge that he has a problem with alcohol, or that he has established a pattern of abstinence or responsible drinking, which proof is necessary to apply AG ¶ 23(b). AG ¶ 23(c) does not apply because he did not provide evidence that he successfully participated in a counseling or treatment program, or, is currently participating in a treatment program. There is no evidence relevant for the application of AG ¶ 23(d).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concerns 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 two conditions that could raise a security concern and may be disqualifying:

- (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 admitted that he was charged twice for alcohol-related offenses, and convicted for one of them. The evidence raised both disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate security concerns raised in this case:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) does not apply for the reasons set out under AG ¶ 23(a). The evidence establishes minimal mitigation under AG ¶ 32(d). The only evidence of relevant rehabilitation is Applicant's acceptance of accountability for the incidents and his assertion that he performs well in his position. He provided no evidence indicating that he completed all court-imposed terms for the 2009 conviction, or that the 2013 charge was dismissed.

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.

According to 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 a 47-year-old mature adult, who is responsible for his choices and conduct that underlie the security concerns alleged in the SOR. He stated the he has successfully worked for a defense contractor since 2013. He accepts responsibility for the two OUIs alleged in the SOR. Those are factors in favor of granting him eligibility for a security clearance. However, that evidence is not sufficient. There is no corroborative evidence confirming that he does not have an alcohol problem or that it is under control. He did not submit evidence that he completed sentencing terms imposed on him for the 2009 criminal charges or the disposition of his most recent OUI offense from 2013. Overall, the record leaves me with questions as to Applicant's suitability for a security clearance. The likelihood that similar problems will continue remains a security issue, which raises questions about his

reliability, trustworthiness and good judgment. He did not meet his burden to mitigate the security concerns arising under the guidelines for alcohol consumption and criminal 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 and 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.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.

SHARI DAM
Administrative Judge