



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



In the matter of:

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) ISCR Case No. 15-06687
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Applicant for Security Clearance

Appearances

For Government: Aubrey De Angelis, Esquire, Department Counsel
For Applicant: *Pro se*

January 13, 2017

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant had two alcohol-related driving offenses in 2007, and two subsequent convictions for driving on a suspended license in 2008 and 2012. He is presently on probation for an unalleged 2015 alcohol-related offense. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on August 14, 2014. On April 28, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline J (Criminal Conduct), and Guideline G (Alcohol Consumption). 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on May 12, 2016, and requested a hearing before an administrative judge. The case was assigned to me on July 19, 2016. DOHA issued a Notice of Hearing on August 16, 2016, and I convened the hearing as scheduled on September 12, 2016. The Government offered exhibits (GE) 1 through 7, which were admitted without objection.¹ Applicant offered one documentary exhibit, marked Applicant Exhibit (AE) A. Department Counsel had no objection to AE A, and it was admitted. Applicant testified on his own behalf. I granted Applicant's request to leave the record open until September 23, 2016, to permit submission of written evidence. DOHA received the transcript of the hearing (Tr.) on September 21, 2016. On September 23, 2016, Department Counsel forwarded an email from Applicant dated September 21, 2016. It was marked as AE B. Department Counsel had no objection to AE B. The exhibit was admitted and the record closed.

Findings of Fact

Applicant is a 33-year-old employee of a defense contractor, where he has worked since 2011. He served in the Navy from 2002 to 2006 and achieved the rate of E3. He earned a bachelor's degree in business in June 2015. He is married to his second wife, but is in the process of obtaining a divorce from her. He has two minor children with his second wife. (GE 1; Tr. 24, 29-30, 54-55.)

In the SOR, the Government alleged that Applicant was convicted twice for driving under the influence of alcohol (DUI) and convicted twice of driving on a suspended or revoked license. It also alleged that Applicant failed to complete a court-ordered alcohol program. Applicant admits each of the allegations with respect to his criminal record as listed on the SOR. (Answer.) However, he failed to admit or deny the allegations identified under the Alcohol Consumption security concerns identified in SOR subparagraphs 2.a and 2.b. As a result, Applicant is deemed to have denied SOR subparagraphs 2.a and 2.b. (Tr. 7.)

Applicant was arrested in August 2007 and charged with Driving Under the Influence of Alcohol (DUI) , as alleged in SOR subparagraph 1.a. Applicant testified that he had been out with friends drinking and made a u-turn, which was observed by a police officer. He was stopped and given a breathalyser, which he failed. One month later in September 2007, Applicant was arrested again and charged with DUI, as alleged in SOR subparagraph 1.b. On that occasion, he had been consuming alcohol with his roommate's brother and went out to get food. Applicant swerved while driving because his car's alignment was off and a police officer observed his swerve. Applicant's attorney suggested that the sentence for both DUI arrests run concurrently and the court agreed. He was sentenced to three days in county jail, fined approximately \$3,500, and his driver's license was suspended. Applicant was required by the court to complete an 18-month second offender alcohol program. He was also placed on probation for approximately four years. The terms of his probation required

¹Exhibit 7 was admitted without objection after one paragraph was stricken from the document. (Tr. 22.)

him to drive only on a valid license and forbade him from drinking alcohol before driving. (GE 2; GE 5; GE 6; GE 7; Tr. 25-27, 31-34.)

Applicant was arrested in November 2008 and charged with Driving on a Suspended/Revoked License, as alleged in SOR subparagraph 1.c. Applicant had previously failed to satisfy the fines or attend the court-ordered 18-month alcohol course, and his license remained suspended as a result. However, he elected to drive a borrowed vehicle to bring his pregnant second wife to the doctor and he was stopped by the police. He was arrested, spent one night in jail, and was released with a court date. When he was arraigned in November 2012, he was released, but told he had to satisfy the fines or serve 120 days in jail. (GE 4; Tr. 26-27.)

Applicant was again arrested in November 2012 and charged with Driving on a Suspended/Revoked License. Applicant failed to complete the court-ordered alcohol class from his 2007 DUIs and pay the resulting fines. He pled guilty and was sentenced to serve 120 days in jail. He was released after approximately ten days of incarceration. He testified that he finally completed the court-ordered 18-month alcohol course in October 2014. He also had to pay a fine and install an ignition interlock device that was on his vehicle until 2015. He has completed all of those requirements and now has a valid drivers license. However, he violated his probation for this offense in November 2015, as discussed below. (GE 2; GE 3; AE A; Tr. 27-28, 41-42.)

Applicant disclosed at hearing that he was convicted of “wet reckless” in April 2016 as a result of a November 2015 DUI arrest. He and his spouse had an argument. He left his home, parked his vehicle, and consumed alcohol in his parked vehicle. He fell asleep in his vehicle. The police did a welfare check after Applicant was observed in the vehicle. He was arrested for DUI, but pled to the lesser charge of wet reckless because he was not driving his vehicle at that time. Applicant was required to complete an 18-month alcohol awareness course. He started the course in June 2016 and is attending the course as required. He is currently on probation for this offense.² (Tr. 36-40.)

Applicant continues to consume alcohol. He testified that he drinks a few beers every couple of weeks at home. (Tr. 44-46.) Applicant is currently seeing a counselor at work and through Veterans Affairs (VA). (AE B; Tr. 50.) He attends Alcoholics Anonymous (AA) regularly as a requirement to complete his court-ordered 18-month alcohol course. (Tr. 51.)

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

²Applicant testified that the probation is either for three or five years, but he could not recall the exact term. (Tr. 56.)

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 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. They include:

- (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.

As alleged on the SOR, Applicant was convicted twice for driving under the influence of alcohol (DUI) in 2007 and convicted twice of driving on a suspended or revoked license.³ These multiple offenses, which span from 2007 to 2012, create doubt about Applicant's judgment, reliability, and trustworthiness.

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.

AG ¶ 32 (a) is not supported by the evidence. Applicant has not established that future criminal behavior is unlikely. In 2015 he was arrested for wet reckless after he

³ The SOR did not allege Applicant's 2015 wet reckless conviction and it is not appropriate to consider it under the disqualifying conditions, but it will be considered under the mitigating conditions.

was discovered intoxicated in a parked vehicle. He is on probation for that offense for at least two more years. His behavior continues to cast doubt on his judgment.

AG ¶¶ 32 (b) and 32 (c) are also inapplicable. He failed to produce evidence that he was pressured into the criminal acts or that he did not commit the offenses. He admitted culpability in his testimony.

AG ¶ 32 (d) is not fully supported by the evidence. Applicant is credited with obtaining his bachelor's degree, and a stable job with a government contractor. He expressed sincere remorse regarding his past criminal acts. However, while Applicant has recently sought treatment through work and through the VA, he did not provide treatment records or other statements from the treating professionals showing any diagnoses or prognosis. While seeking treatment is a step toward establishing rehabilitation, it is too soon to tell whether Applicant's criminal activities will recur, given his recent conviction in 2015.

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 asserted by Department Counsel⁴ 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; 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 was arrested for, and convicted of, two DUI offenses in 2007. He also was delinquent in completing his court-ordered alcohol classes. These incidents establish security concerns under AG ¶¶ 22(a) and 22 (c).

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns:

⁴Tr. 59.

(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 was recently arrested for DUI and convicted of wet reckless. He continues to drink alcohol, despite being enrolled in an 18-month court-ordered alcohol class and attending AA meetings. Mitigation was not established under AG ¶ 23(a).

Applicant is enrolled in his second 18-month court-ordered alcohol class. He is attending counseling through his work and through the VA. However, there is no evidence of a favorable prognosis or satisfactory progress in evidence. He continues to consume alcohol. He failed to establish a pattern of abstinence or responsible use. Given his November 2015 wet reckless conviction and his probationary status, it is too early to conclude that Applicant established mitigation under the terms of AG ¶¶ 23 (b), (c), or (d).

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 has had three alcohol-related arrests and two arrests relating to the suspension of his driving privilege. While he has obtained counseling, graduated from college, and is taking steps to complete his court-ordered alcohol classes, he has yet to demonstrate the ability to use alcohol responsibly or comply with driving regulations in the absence of probationary supervision. In the past nine years, he has three DUI and two driving while licence suspended offenses, establishing a pattern of irresponsible choices and bad judgment.

Applicant is a mature individual who is accountable for his choices and actions. He failed to demonstrate reduced susceptibility to pressure or duress in the face of potentially unpleasant consequences, or that recurrence of alcohol-related misconduct is unlikely. He provided no evidence of good work performance or good character to overcome the resulting security concerns. Overall, the record evidence creates 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 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For 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.

JENNIFER I. GOLDSTEIN
Administrative Judge