



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



In the matter of:

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) ISCR Case No. 15-06868
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Applicant for Security Clearance

Appearances

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

November 18, 2016

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant engaged in a series of alcohol-related criminal violations from 1995 to 2012. The evidence is insufficient to mitigate the alcohol and criminal conduct security concerns. He mitigated the personal conduct security concerns related to omissions on his August 2012 security clearance application. 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 28, 2012. On April 19, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines E (Personal Conduct), J (Criminal Conduct), and 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 10, 2016, and requested a hearing before an administrative judge. The case was assigned to me on June 13, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 16, 2016, scheduling the hearing for July 26, 2016. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified on his own behalf, called one witness, and offered two exhibits marked Applicant Exhibit (AE) A and B. AE A and AE B were admitted without objection from Department Counsel. The record was left open until August 9, 2016, for receipt of additional documentation. Applicant did not present any further documentation by that date, and the record closed. DOHA received the transcript of the hearing (Tr.) on August 3, 2016.

Findings of Fact

Applicant is a 42-year-old employee of a defense contractor. He has worked for his employer since July 2010. He served in the Army on active duty from 1993 to 1996. He has been a member of the Army National Guard since 1996. He possesses the rank of Sergeant First Class, E-7. He is divorced since November 2015 and has no children. (GE 1; GE 3; Tr. 38-39, 71.)

In his response to the SOR, Applicant admitted the factual allegations in SOR subparagraphs 1.a, 1.b, 1.d, 1.e, 1.g, and 1.i; but denied subparagraphs 1.c, 1.f, 1.h, 1.j, 2.a, 3.a, 3.b, and 3.c. Applicant's admissions are incorporated in the following findings.

Applicant was arrested on September 23, 1995, and charged with driving while intoxicated (DWI), unlicensed operator, and unsafe speed, as alleged in SOR subparagraph 1.a. Applicant recalled that he crashed his vehicle into a tree stump on this occasion. Records show his blood alcohol content was .19%. He pled guilty to all charges and was sentenced to a \$500 fine, for the DWI; a fine of \$50 for the unlicensed operation conviction; and a \$75 fine for speeding. (GE 3; GE 4; Tr. 40-41.)

Applicant was arrested in August 1997 and charged with driving under the influence of alcohol (DUI), as alleged in SOR subparagraph 1.b. SOR subparagraph 1.c is a duplicate listing concerning this charge. At hearing, he did not recall the details that led up to his arrest. According to his May 16, 2006 personal subject interview, Applicant consumed "about eight beers" before driving home from a party. (GE 3.) He "drove off the freeway," but was not injured. The police responded and detected alcohol on Applicant's breath. He was cited for DUI and released. He was convicted of misdemeanor DUI, sentenced to pay a fine of \$1,864, and was required to attend alcohol classes once per week for nine months. He was placed on probation for 36 months. Proof of completion of the alcohol program was filed with the court. (GE 3; GE 6; Tr. 41-42.)

Applicant was arrested on November 30, 2001, and charged with DUI and driving with a suspended license, as alleged in SOR subparagraph 1.d. Applicant was activated for National Guard duty approximately 30 days after this arrest and failed to appear in

court. He testified that on the day of the arrest he only had one or two beers, but in a May 16, 2006 personal subject interview, he disclosed that he “had consumed 4 or 5 beers” prior to driving. After his 2006 interview, he turned himself in on these charges. Ultimately, the charges were dismissed pursuant to a plea bargain. (GE 2; GE 3; GE 5; GE 7; Tr. 43-47.)

Applicant was arrested in December 2011 and charged with driving under the influence of alcohol (DUI), as alleged in SOR subparagraph 1.e. SOR subparagraphs 1.f and 1.h are duplicate listings concerning this charge. On this occasion Applicant consumed approximately six beers before attempting to drive home. He felt sleepy and pulled off the freeway to rest. The police noticed his hazzard lights and stopped to investigate. Applicant was given a field sobriety test, which he failed. He was convicted of DUI and sentenced to 36 months probation; a fine of \$1,827, and required to attend an alcohol program for six months. Applicant’s probation was revoked in January 2013. Proof of completion of the alcohol program was filed on March 29, 2013. Applicant’s probationary status was reinstated in April 2013. It was again revoked in July 2015 because Applicant failed to pay his fine. As of July 11, 2016, the case was referred to a collection agency. Applicant has yet to fully pay the fine. Applicant is still on probation for this offense. (GE 3; GE 5; GE 8; Tr. 48-54.)

Applicant was arrested in August 2012 and charged with driving under the influence of alcohol (DUI), as alleged in SOR subparagraph 1.g. SOR subparagraph 1.i is a duplicate listing concerning this charge. On this occasion, Applicant consumed five to six beers while playing golf with a friend. He elected to drive home and hit a parked car. Applicant fled the scene. He was later arrested at his house. He was sentenced to 30-days house arrest and a 52-week alcohol course. He was also fined. Applicant is on probation for this offense. (GE 3; GE 5; Tr. 55-58.)

Applicant was court ordered to attend counseling as a result of his alcohol use. He attended counseling from July 2013 to February 2015. He completed 52 group sessions, 6 educational sessions, 26 face to face interviews, and 4 reentry groups. He denied receiving any type of alcohol-related diagnosis. (AE A; Tr. 59-62.)

Applicant currently drinks four to five beers twice per week. He testified that he “barely consumes alcohol now”. (Tr. 73.) When pressed further to explain this claim he testified that he drinks significantly less now than he did when he was going through his divorce. (Tr. 73-74.)

The SOR alleged that Applicant intentionally falsified his answers in his August 28, 2012 security clearance application when he failed to disclose some of his alcohol arrests, charges, and convictions. Specifically, he was asked “have you EVER been charged with an offense involving alcohol or drugs?” and “In the past seven (7) years have you been charged, convicted or sentenced of a crime in any court?” On Applicant’s August 28, 2012 security clearance application, in section 22, Applicant was asked several questions about his police record. Applicant disclosed his December 2011 arrest (stated in SOR subparagraph 1.e); a May 2012 DUI; his August 2012 DUI

(as stated in SOR subparagraph 1.i); and a 1997 DUI conviction. He testified that he did not have his records with him when he attempted to complete the security clearance application and made errors unintentionally. He omitted his 2001 DUI because it was dismissed and he did not understand that he was still required to list it. (Tr. 37, 75.)

The SOR also alleged that Applicant intentionally falsified his August 28, 2012 security clearance application in Section 25 when he failed to disclose that his security clearance had been suspended as a result of an administrative withdrawal in 1996. Applicant testified that he was not aware of the suspension. He testified that he left active duty in March 1996 and had a clearance at that time. In 2009 while deployed as a National Guard member, he learned that he did not have an active clearance, but was never notified of a suspension or revocation. Three days after he learned his clearance was not active, it was reactivated. (Tr. 69-71.)

Applicant's supervisor testified and submitted a statement on Applicant's behalf. He indicated that Applicant went through a difficult divorce and is now on a path to success. Applicant is an asset to his employer, and the witness considers him to be his "wing man." Applicant has not had any security violations. (AE B; Tr. 5-14.)

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 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 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 DC raised by the evidence is:

(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.

Applicant admitted the five alcohol-related incidents, set forth in SOR ¶¶ 1.a through 1.i, which occurred from 1995 to 2012. These incidents raise security concerns under AG ¶ 22(a).

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

(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 has a very lengthy history of alcohol abuse, leading to a series of criminal charges. Because he continues to consume four to five beers twice per week, it cannot be determined that recurrence is unlikely or that doubts concerning his judgment and reliability are resolved. Mitigation was not established under AG ¶ 20(a).

Applicant offered the testimony of his supervisor as evidence of rehabilitation. While good work performance shows some mitigation, here it is not controlling. Applicant has a long history of alcohol-related incidents. Only four years have passed since his last conviction and he is still on probation for two of his DUI arrests. Not enough time has passed to show that Applicant has the judgment necessary to hold a security clearance. He continues to consume alcohol in excess. He is not currently participating in any treatment program and offered no favorable prognosis. Accordingly, Applicant failed to establish mitigation under the terms of AG ¶¶ 23 (b), (c), or (d).

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(d) individual is currently on parole or probation.

Applicant has a history of multiple criminal arrests and convictions that occurred between 1995 and 2012, including four DWI/DUI convictions and one DUI arrest that was dismissed pursuant to a plea agreement. These offenses give rise to concerns about Applicant's judgment and reliability, both because of the nature and the quantity of criminal offenses. Further, he is currently on probation for his 2011 and 2012 convictions. The aforementioned disqualifying conditions have been established.

Four Criminal Conduct 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;

(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.

Applicant's criminal past continues to cast doubt on his trustworthiness and judgment. Some of his offenses are recent and he failed to present evidence to show that similar criminal conduct is unlikely to recur. AG ¶ 32(a) does not provide full mitigation.

Applicant failed to present evidence to show that he did not commit the offenses or that he was pressured into criminal acts. Neither AG ¶¶ 32(b) nor 32(c) provide mitigation.

Applicant failed to introduce sufficient evidence of rehabilitation. While he expressed remorse for his past, completed a class that taught him about the effects of alcohol, and has a good employment record, his current alcohol consumption remains a concern given his history of recidivism. AG ¶ 32(d) does not provide full mitigation.

Guideline E, Personal Conduct

The security concern for the personal conduct guideline is set out in AG ¶ 15:

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. The following disqualifying condition is 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.

Applicant failed to disclose his 2001 DUI arrest on his e-QIP. While he knew he had been arrested for this DUI, he was genuinely confused as to why he was required to report it when the charge had been dismissed. He now understands that the Government is asking about all arrests, and not just convictions. Applicant did identify his four other DWI/DUI arrests on his e-QIP, despite incorrect dates. He did not intentionally conceal his DUI convictions from the government. Further, he was not aware his security clearance had been administratively withdrawn after his separation from active duty. He did not intentionally falsify sections 22 or 25 on his August 28, 2012 security clearance application. The Government failed to establish this disqualifying condition applies.

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 provided exceptional service to the United States during several deployments. His supervisor indicated he is a trustworthy employee. However, Applicant is a mature individual who is accountable for his choices and actions. He built a 17-year-long pattern of alcohol-related criminal infractions and he continues to consume alcohol. The potential for exploitation or duress is undiminished, and insufficient time has passed since his last alcohol-related arrest in 2012 to conclude that recurrence is unlikely. Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. While he did not engage in falsification, 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 G:	AGAINST APPLICANT
Subparagraphs 1.a through 1.j:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a through 3.c:	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