



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



In the matter of:)	
)	
)	ISCR Case No. 15-00669
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

12/07/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant was involved in four alcohol-related incidents, including three arrests for driving while impaired in 2005, 2007, and 2011. He falsified his 2013 security clearance application (SCA) to cover two alcohol-related offenses, a handgun violation, and that he was fired from his job for being absent while serving a prison sentence. The personal conduct security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted an SCA on July 25, 2013. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guidelines G (alcohol consumption) and E (personal conduct) on November 10, 2015. Applicant answered the SOR on January 27, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on August 12, 2016. DOHA issued a notice of hearing on December 22, 2016, setting the hearing for January 24, 2017. At the hearing, the Government offered ten exhibits (GE 1 through 10). Applicant testified, presented the testimony of one witness, and submitted 22 exhibits (AE 1 - comprised of

Tabs A through V). I received AE V post-hearing. All exhibits were admitted without objections. DOHA received the hearing transcript (Tr.) on February 2, 2017.

Findings of Fact

Applicant admitted all of the SOR allegations with comments. His SOR and hearing admissions are incorporated as findings of fact. After a thorough review of the record evidence, and having considered Applicant's testimony and his demeanor while testifying, I make the following additional findings of fact:

Applicant is a 38-year-old employee of a federal contractor. He graduated from high school in 1997, and completed an associate's degree in 2001. He married his first wife in 2005 and divorced in 2012. He has a seven-year-old child from that relationship. He recently married again.

Applicant's work history indicates that he worked for a federal contractor between October 2001 and August 2007. He worked for a second federal contractor from May 2008 to March 2012. His second employer terminated him for his failure to comply with the company's code of conduct and policies. His current employer and clearance sponsor, a federal contractor, hired him in May 2012, and he has worked there since. He has possessed a secret clearance intermittently since August 2001.

Applicant's background investigation revealed that he has been involved in four alcohol-related offenses. He was cited with alcohol in an open container in 2002. He was charged with driving while impaired by alcohol (DWIA), handgun in vehicle violation, and driving while under the influence (DWUI), and DWUI per se in July 2005. He pled guilty to the first two offenses. He received probation before judgment (three-year probation) and paid a fine and court costs. The remaining two offenses were not prosecuted.

In November 2007, Applicant was charged with DWUI per se and attempting to drive while impaired by alcohol. He pled guilty to the DWIA, and the DWUI per se was not prosecuted. In May 2011, Applicant was charged with DWUI and DWIA. Applicant pled guilty to DWIA and was sentenced to one-year jail (suspended) with 20 days in jail to be served immediately. Applicant claimed that he requested a leave of absence from his employer, but it was denied. Applicant was terminated from his employment because of his failure to comply with his employer's code of conduct and policies. (AE 1, Tab G) He was unemployed from March to May 2012. The courts in the three DWIA cases required him to attend substance abuse counseling.

Section 13A (Employment Activities) of Applicant's July 2013 SCA asked him to disclose whether in the last seven years he had been fired from a job. Applicant answered "No" and failed to disclose that he was fired from his employment in March 2012. Applicant claimed that he was confused with the SCA question. In his mind, he was out of work because his extended leave of absence was disapproved. Applicant's explanations are not credible, particularly when considered in light of his March 2012

termination of employment letter indicating he was terminated for his failure to comply with his employer's code of conduct and policies. (AE 1, Tab G)

Section 22 (Police Record (Ever)) asked Applicant whether he had ever been charged with an offense involving firearms or explosives. Applicant answered "No" and failed to disclose that he was charged with, and pled guilty to, a handgun violation in 2005. Applicant claimed he did not disclose the handgun violation because his lawyer told him that if he forfeited the gun, he would not be charged. Section 22 required Applicant to disclose whether he had been arrested and charged within the preceding seven years, regardless of whether his record had been expunged or the charge dismissed. Moreover, the evidence show he pled guilty to the handgun violation and was given probation before judgment (three year-probation).

Section 22 also asked Applicant whether he had ever been charged with an offense involving alcohol. Applicant answered "No" and failed to disclose his 2005 alcohol-related charges (DWIA, DWUI, and DWUI per se). Applicant also failed to disclose that in November 2007, he was charged with DWIA and DWUI per se.

Applicant explained that he failed to disclose his 2005 and 2007 alcohol-related arrest and charges in his 2013 SCA because he was rushing through the application and did not read the questions. He claimed he never intended to falsify or to mislead the government because he knew the government would always have access to his criminal record, and he had informed his supervisor about the incidents.

Applicant's performance evaluations, supervisor's testimony, and character statements indicate he is considered to be a model employee with exemplary performance, a role model for younger coworkers, and to possess superior technical abilities. His performance has been recognized through pay increases and spot bonuses. He is well-liked by his employer for his important contributions. Applicant would like to continue his contributions to the federal government, but needs his clearance to continue working in his position.

Applicant testified he has matured since the birth of his daughter in 2010. He wants to be a role model for his daughter. He purchased a home in February 2016 and married his wife in August 2016. He now consumes alcohol in moderation, usually once a month. His supervisor has not seen him consume alcohol since 2011. Applicant testified the last time he consumed alcohol was during the 2017 New Year's celebration. There is no evidence of any additional alcohol-related incidents after the 2011 DUI.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining*

Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017, which replaced the 2006 AG. I decided this case under the current AGs implemented by SEAD 4.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Alcohol Consumption

AG ¶ 21 articulates the security concern relating 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

Between 2002 and 2011, Applicant was involved in four alcohol-related incidents that resulted in law enforcement intervention. AG ¶ 22 provides two disqualifying conditions that could raise a security concern and may 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 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.

The record established the above disqualifying condition, requiring additional inquiry about the possible applicability of three 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; 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

All the above mitigating conditions apply. The four alcohol-related incidents happened between 2002 and 2011. There is no additional evidence of any alcohol-related incidents or issues of concern after 2011. It has been over six years since Applicant's last alcohol-related incident. He is consuming alcohol responsibly and in moderation.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine national security clearance eligibility or trustworthiness. . . .¹;

¹ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a *prima facie* case under Guideline E and the

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; 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 or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

Applicant falsified his July 2013 SCA when he failed to disclose he was fired from a job in March 2012. His employer, a federal contractor, terminated his employment because he failed to comply with the company's code of conduct and policies. Applicant was convicted of DWIA in March 2012, and served 20 days in jail. He claimed he requested a leave of absence from his employer, but it was denied. Applicant also provided false or misleading information when he stated in his 2013 SCA that he was employed between May 2008 and May 2012. In fact, he was fired in March 2012, and was unemployed from March to May 2012.

Section 22 (Police Record (Ever)) of the 2013 SCA asked Applicant to disclose whether he had ever been charged with an offense involving firearms. He answered "No" and deliberately failed to disclose that he was charged with a handgun violation in 2005. Applicant claimed he had a lapse of memory and made an innocent mistake. He had the mistaken belief that he was never charged with the handgun violation because he surrendered the weapon to the state. He claimed his attorney told him that if he surrendered the weapon he would not be charged with the handgun violation. The state court records indicate Applicant pled guilty to the handgun violation and he was given probation before judgment. Considering the documents, his explanations are not credible.

Section 22 also asked Applicant to disclose whether he had ever been charged with an offense involving alcohol or drugs. Applicant answered "No" and failed to disclose his alcohol-related charges from July 2005 (DWIA, DWUI) and November 2007 (DWIA, DWUI). Applicant claimed innocent mistake - that he was rushing while

burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

completing the SCA. He stated he would never lie about his police record because he knew the government would have access to his records. Considering the evidence as a whole, Applicant's explanations are not credible.

Although not alleged in the SOR, I note that Section 24 (Use of Alcohol) asked Applicant: (1) whether in the last seven years his use of alcohol resulted in intervention by law enforcement; (2) whether he had ever been ordered to seek counseling or treatment as a result of his use of alcohol; and (3) whether he had ever voluntarily sought counseling as a result of his use of alcohol. Applicant answered "No" to questions (1) and (2), and failed to disclose his 2005 and 2007 alcohol-related offenses and counseling. However, he claimed he voluntarily sought counseling after his 2011 DWIA charge and conviction. I find that Applicant falsified his 2013 SCA as alleged.

AG ¶ 16 describes conditions that could mitigate the personal conduct security concerns:

- (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;
- (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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

None of the above mitigating conditions are applicable and the personal conduct security concerns are not mitigated. Applicant's explanations for his failure to disclose that he was fired from his job in 2012, that he was charged with a handgun violation in 2005, and his 2005 and 2007 alcohol-related offenses are not credible when considered in light of the evidence as a whole.

AG ¶ 17(a) does not apply because there is no evidence of Applicant's efforts to correct his omissions. AG ¶ 17(b) does not apply because there is no credible evidence that legal counsel or a qualified individual counseled Applicant not to disclose the information.

AG ¶ 17(c) does not apply because making a false statement is a serious offense (felony), it did not occur under unusual circumstances, and it continues to cast doubt on Applicant's reliability, trustworthiness, and good judgment.

AG ¶¶ 17(d) and (e) have partial applicability, but are insufficient to fully mitigate the security concerns. Applicant told his supervisor about the SOR allegations. This disclosure could be considered as a step to reduce his vulnerability to exploitation, but it fails to mitigate Applicant's deliberate omissions from his 2013 SCA.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guidelines G and E in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant is a 38-year-old employee of a federal contractor. He has worked for his employer since 2012, and has held a clearance intermittently since 2001. Applicant's evidence is sufficient to mitigate the alcohol consumption security concerns. However, Applicant's evidence is insufficient to mitigate his deliberate falsification of his 2013 SCA. The personal conduct security concerns are not mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.d:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance denied.

JUAN J. RIVERA
Administrative Judge