



**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*

11/13/2017

Remand Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the alcohol and criminal conduct allegations related to two charges of driving under the influence of alcohol. Based upon a review of the pleadings, remand order, and exhibits, national security eligibility for access to classified information is granted.

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.

On May 17, 2017, I issued a Decision denying Applicant's request for a security clearance on the basis that he failed to mitigate the alcohol and criminal conduct allegations related to two criminal charges of driving under the influence of alcohol. Applicant appealed. On August 9, 2017, the Appeal Board remanded the case to me to consider documents Applicant attached to his appeal brief, which he had previously submitted in reply to the FORM, but were not included in the file or noted in my Decision. I received the Remand Order on August 10, 2017, and the file and exhibits on August 17, 2017. I marked the exhibit as Applicant's Exhibit (AE) A. It has nine pages.¹

Remand Findings of Fact

Applicant admitted all allegations in the SOR. (Item 2.) 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 OUI classes for 20 hours. His driver's license was suspended for 30 days. (Items 4, 5.)

On September 8, 2013, Applicant was charged with driving under the influence (DUI). His BAC was over the legal limit. On April 15, 2014, he was convicted of DUI and fined. He was ordered to complete a DUI program with a state agency and his driver's license was suspended. On April 17, 2014, he paid a \$644 fine. On April 30, 2014, he completed the DUI program through a state counseling agency. His license was reinstated on May 5, 2014. (AE A at 1, 5, 7.)

In his April 2016 Answer, Applicant stated that he did not intend to make excuses for the OUI or DUI 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.) He attributed the two offenses to extenuating

¹ The Decision issued on May 17, 2017, applied the AGs in effect as of September 1, 2016. On June 8, 2017, new AG were implemented. This Remand Decision applies the new AG.

circumstances, involving his former partner, which were devastating for him. In July 2009, she was diagnosed with cancer, and he had difficulty handling his emotions. In August 2013, she died, and he suffered another emotional breakdown, contributing to the September 2013 DUI. He acknowledged that those circumstances did not “justify [his] actions.” (AE A at 1.) Since then he has completed treatment and counseling for alcohol and bereavement. He continues to accept responsibility for his actions and mistakes. (AE A at 1.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the 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 national security eligibility 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 national security eligibility 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 the frequency of the individual's alcohol use or whether the individual is diagnosed as an 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 that he was charged with an OUI in 2009 and a DUI in 2013. He was convicted of both crimes, which 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 three 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 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.

Applicant stated that both charges occurred as a consequence of his inability to manage his emotions after learning of his partner's cancer and later death. These were unusual circumstances, such that they cast minimal doubt on his current reliability. There is some evidence to establish mitigation under AG ¶ 23(a). Applicant acknowledged his mistakes and takes responsibility for them. AG ¶ 23(b) does not fully apply because he did not present sufficient evidence addressing his current consumption habits. In 2014 Applicant completed the counseling program he was ordered to participate in after being convicted for the 2013 charge. Applicant said he also participated in bereavement counseling to deal with the loss of his partner, which contributed to his alcohol consumption at the time of the offenses. The evidence establishes some mitigation under 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 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 person was formally charged, prosecuted, or convicted.

Applicant was charged twice for alcohol-related offenses, and convicted for both of them. He admitted the allegations. The evidence established 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

There is evidence to establish partial mitigation under AG ¶ 32(a) as explained under AG ¶ 23(a) above. The evidence also establishes some mitigation under AG ¶ 32(d). Applicant accepted responsibility for the offenses and expressed remorse. He stated that he performs well in his employment position. He provided evidence that he completed a court-ordered counseling program, had his driver's license reinstated, and paid the fines imposed on him for the 2013 conviction.

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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility 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 takes responsibility for his choices and conduct that underlie the security concerns alleged in the SOR. He explained the unusual circumstances surrounding his two alcohol-related crimes and presented evidence of rehabilitation. Overall, the record leaves me without questions as to Applicant's current eligibility for a

security clearance. He met his burden to mitigate the security concerns arising under the guidelines for alcohol consumption and criminal conduct.

Remand 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:	FOR APPLICANT
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Subparagraphs 1.a and 1.b:	For Applicant
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Paragraph 2, Guideline J:	FOR APPLICANT
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Subparagraph 2.a:	For Applicant
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Remand Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is granted.

SHARI DAM
Administrative Judge