



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02640

Appearances

For Government: Andre M. Gregorian, Esquire, Department Counsel

For Applicant: Joseph J. Valvo, Esquire

03/27/2018

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On October 7, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G (Alcohol Consumption).¹ Applicant responded to the SOR on November 18, 2016. He admitted one of four allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On February 9, 2017, the SOR was amended to add one allegation under Guideline M (Use of Information Technology), which Applicant denied.

I was assigned the case on March 1, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 10, 2017, setting the hearing for June 14, 2017. The hearing was convened as scheduled.

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 (AG) effective within the DOD on or after September 1, 2006. Since that time, the AG has been again amended. The present AG, applied here, is in effect for any adjudication on or after June 8, 2017. Applicant was advised before the hearing that this AG would apply in making this decision.

The Government offered seven documents, accepted without objection as exhibits (Exs.) 1-17. Applicant offered testimony and eight documents, accepted without objection as Exs. A-H. The transcript (Tr.) was received on June 28, 2017, and the record was closed. Based on the exhibits, testimony, and record as a whole, I find Applicant failed to mitigate security concerns under Guideline G (Alcohol Consumption), but mitigated security concerns under Guideline M (Use of Information Technology).

Findings of Fact

Applicant is a 58-year-old modernization coordinator who has worked in his current capacity with the United States military since November 2016. He has maintained a security clearance since 1999. Applicant has earned a bachelor's degree. Divorced, he has one adult child. He has a girlfriend currently living in another state. He first began to consume alcohol in high school.

In February 2001, Applicant got inebriated at a birthday celebration in a bar. While driving himself home, he fell asleep and crashed his sport utility vehicle into a retaining wall at a train trestle in a tunnel, totaling the vehicle. (Tr. 47) He was arrested and charged with driving while intoxicated (DWI), and Applicant pled guilty to the charge. Applicant lost his driver's permit for six months, was ordered to attend 12 hours of alcohol education, and pay various fines and charges.

In June 2005, Applicant had a few alcoholic beverages before leaving his home to meet a friend at a bar. After a couple of brandies, Applicant drove home. He was spotted swerving by the police and pulled over. Applicant again pled guilty to DWI. As a result, his driver's license was suspended for two years, he was ordered to attend 48 hours of alcohol education, assessed various fines and fees, required to use an ignition interlock device for one year, attend alcohol counseling and visit Alcoholics Anonymous (AA) for at least four weeks. Applicant completed all requirements. He was never diagnosed with an alcohol-related disorder.

In 2009, during a subject interview related to this process, Applicant stated he would no longer drive after consuming so much as one drink. (Tr. 53) In March 2012, he went to a friend's home at some time around 7:00 p.m. He had alcoholic beverages through then night, ultimately leaving for home around midnight. On his way, he drove into a guardrail Applicant's vehicle was totaled and he incurred severe back damage.

After this accident, Applicant voluntarily attended alcohol counseling. Applicant went to court, where he faced charges of careless driving, DWI, reckless driving, failure to wear seat equipment, and traffic on marked lane/unsafe lane change. There, he learned "that any amount of alcohol is going to put you impaired, by law. I hadn't looked at it in that fashion, but [he] had [his] a-ha moment. . . ." (Tr. 32) Ultimately, Applicant pled guilty to the reckless driving charge, and the other charges were dismissed. There, he learned "that any amount of alcohol is going to put you impaired, by law. I hadn't looked at it in that fashion, but [he] had [his] a-ha moment. . . ." (Tr. 32)

As part of his plea bargain, Applicant's license was suspended from April through July 2013, and it was recommended that Applicant undergo more alcohol counseling, which he did between April and July 2013. There, the connection between Applicant's drinking, personal stress, and socializing finally became apparent. (Tr. 63) He was told not to again drink, or drink and drive, given his problems with alcohol. (Tr. 63-64) Except for his birthday, he was abstinent during this counseling period.

In August 2013, a couple of weeks after his driver's license was reinstated, Applicant came home one evening. He parked in the street as someone was blocking his driveway. Once indoors, he consumed alcohol while doing some work. He later went to the vehicle to retrieve some paperwork. He was in the car searching and turned on the car to illuminate the automobile's interior. When the car started, the radio came on. The next thing he knew, he was awakened by a police officer. Being in control of a running vehicle with a .16 blood alcohol level, he was arrested and charged with driving under the influence (DUI), general impairment, and DUI with a blood alcohol level of .16 or higher. Applicant pled guilty to the lower component DUI available, DUI general impairment. Applicant was sentenced to 72 hours of jail, six months of probation, an eight week DUI class, 12 hours of highway safety coursework, and he was ordered to pay a fine of about \$2,000.

Today, Applicant does not drink and drive. (Tr. 39-40) He has also reduced his alcohol consumption overall. (Tr. 40) Looking back to comments he had made in 2015, Applicant noted that he would normally drink "two, three, four" drinks to become impaired. (Tr. 72) Now, he usually limits himself to two drinks, citing to the damage that has been caused by alcohol in terms of his back injury and diabetes. (Tr. 72-73) He testified he last drank alcohol to the point of intoxication nine months before the hearing. (Tr. 73) At the time, he had consumed three, possibly four, alcoholic beverages. (Tr. 73) Overall, Applicant has never been diagnosed with an alcohol disorder. Only his ex-wife has stated he was alcohol-dependent or an alcohol abuser. (Tr. 75) Applicant maintains he has bad luck, not an alcohol problem. (Tr. 75)

In the autumn of 2013, Applicant was scheduled to be terminated on a specified date in November 2013. Before he left, he copied proprietary company files onto a personal USB device ("stick") during his separation from employment.² Among the items copied were personal files. Applicant did not equate copying with downloading. (Tr. 80) He was unaware that it was against company policy to download such files. (Tr. 81) Applicant was also motivated by copying certain files to pass along to his replacement, so the two could discuss the contents. Applicant "just wanted to bring [the replacement] up to speed because he was only doing half of [Applicant's] work . . . and there were critical that were catching up." (Tr. 21)

Applicant was ultimately found culpable of violating the company's policies regarding date and storage. The stick, which had never left corporate premises, was ultimately returned to him in February 2014. Applicant never had the intention of

² Applicant noted that others used personal "sticks" because the company did not order enough encrypted corporate USB devices. (Tr. 80)

removing the stick from corporate property and, as he emphasizes, his actions were done to benefit a smooth transition.

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 list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to the AG, the entire process is a conscientious scrutiny 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. The AG requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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.

Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline G - Alcohol Consumption

The Alcohol Consumption guideline is set out in AG ¶ 21:

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.

Applicant has a troubled history with alcohol that dates back 17 years. During that time, he was cited for drinking and driving four times. He was thrice convicted of an appropriate charge. A fourth charge was dropped as part of an apparent plea agreement despite his admission that he had been drinking. He continued drinking and driving after being advise to cease such activity after his 2012 DWI, not long before his fourth infraction in 2013. Given these facts, the following Disqualifying Conditions are applicable under AG ¶ 22:

AG ¶ 22(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

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Under these facts, the mitigating conditions potentially applicable are:

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 good judgment;

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has established a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

AG ¶ 23(c): the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

AG ¶ 23(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's string of incidents involving drinking and driving ended in August 2013, less than five years ago. The common theme in each incident is Applicant putting

himself in control of a motor vehicle after consuming alcohol. Applicant continues to imbibe, having been last intoxicated less than a year before the hearing, despite his driving history and his health concerns. While Applicant notes that he generally sticks to one or two drinks, that number is perilously close to the “three, possibly four” alcoholic beverages he consumed before he was last intoxicated. This is particularly true given the variances in drink sizes poured at home and in bars. At this time, Applicant is neither in counseling, in treatment, or attending AA. Given all of these considerations, sufficient concerns remain to obviate applicability of AG ¶ 23(a). However, AG ¶ 23(b) may apply in part. Inasmuch as Applicant has not undergone an alcohol treatment program *per se*, neither AG ¶ 23(c) nor AG ¶ 23(d) apply.

Guideline M – Use of Information Technology

The concern under this guideline is that failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations. 40.

Here, Applicant downloaded proprietary company files onto a personal USB device or stick while being separated from employment, and ultimately found culpable of violating company policy regarding data and storage. Conditions that could potentially raise a security concern and may be disqualifying include:

AG ¶ 40(d): downloading, storing, or transmitting classified, sensitive, proprietary, or other protected information on or to any unauthorized information technology system; and

AG ¶ 40(f): introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system when prohibited by rules, procedures, guidelines, or regulations or when otherwise not authorized.

Conditions that could mitigate security concerns include:

AG ¶ 41(a): so much time has elapsed since the 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;

AG ¶ 22(b): the misuse was minor and done solely in the interest of organizational efficiency and effectiveness;

AG ¶ 22(c): the conduct was unintentional or inadvertent and was followed by a prompt, good faith effort to correct the situation and by notification to appropriate personnel; and

AG ¶ 22(d): the misuse was due to improper or inadequate training or unclear instructions.

Applicant credibly testified that he did not equate copying information from his computer on his own USB device to transfer information to his successor was a violation of policy. He also credibly explained that he had never equated copying files from a computer as downloading them. He emphasized that employees were known to take such action due to the short supply of company encrypted devices available, that he never removed the stick from the company premises, and that he voluntarily worked with his superiors when inquiry was made concerning the download. His intent was to assure a smooth transition between himself and the individual who would be assuming his work function. It was never his intent to violate company policy. In light of the totality of the circumstances, AG ¶ 22(b) applies.

Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(a). The final determination must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and conducted a whole-person analysis based on the record. In addition to Applicant's past illegal drug involvement, alcohol consumption, and personal conduct, I considered his present life, candor at the hearing, and credible explanations. Applicant is a 58-year-old modernization coordinator who has worked in his current capacity since November 2016. He has maintained a security clearance since 1999. Divorced with one adult child, Applicant has earned a bachelor's degree.

Applicant first began consuming alcohol in high school. Between 2001 and 2013, Applicant was charged with drinking and driving four times. Twice he totaled his vehicle, including one incident where his drinking led to his own accident-related back injury. His lack of judgment with regard to drinking and the use of a motor vehicle led him to be discovered passed out in a running car with a blood alcohol level of .16 or higher, a level so high that his state classifies that level of intoxication as a more severe crime.

Throughout this period, Applicant maintained a security clearance. That fact alone should have led him to exercise better judgment going forward after each arrest, but that was not to be. While maintaining a security clearance does not prohibit an individual from enjoying alcohol responsibly, this level of abuse warrants special

scrutiny. Applicant feels that it was poor luck, not an alcohol problem, which led to his four alcohol-related arrests. If so, one must wonder why he repeatedly challenged fate and took control of a vehicle after drinking, despite past arrests, two totaled cars, a severely injured back, and the chance that his driving could hurt others on the road. Another problem here is that after four arrests, he continues to drink to excess despite, at least on one occasion, advice to curtail drinking, if not drinking and driving.

Applicant went from June 2005 to March 2012 without being cited for an alcohol-related incident. That was a span nearly seven years. Although he continues to imbibe alcohol, sometimes to intoxication, Applicant needs to have sufficient time to demonstrate that he is capable of either avoiding motor vehicle when drinking, drinking responsibly, or maintaining sobriety for a significant period of time. While a seven year period poses no special significance for these purposes, a period of at least five years is needed to demonstrate Applicant can avoid similar charges in the future. As for his downloading material from his company's computers on his own USB device despite policies to the contrary, Applicant showed that this error was neither intentional nor completely understood. In sum, I find Applicant mitigated security concerns under Guideline M, but failed to mitigate such concerns under Guideline G.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1d:	Against Applicant
Paragraph 2, Guideline M:	FOR APPLICANT
Subparagraphs 2.a:	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 a security clearance. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge