



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



In the matter of:)
)
) ISCR Case No. 16-03194
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

01/09/2018

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied. Applicant failed to mitigate security concerns for alcohol consumption.

Statement of the Case

On August 26, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to retain a security clearance required for his position with a defense contractor. Applicant was interviewed by a security investigator from the Office of Personnel Management (OPM) on February 16 and 18, 2016. After reviewing the results of the OPM background investigation, Department of Defenses (DOD) adjudicators could not make the affirmative findings required to issue a security clearance. On April 28, 2017, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for alcohol consumption under Guideline G. These actions were 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 in DOD on September 1,

2006. On June 8, 2017, new AGs were implemented and are effective for decisions issued after that date.¹

Applicant answered the SOR on May 19, 2017. He admitted two allegations (SOR 1.a and 1.b) and denied one (SOR 1.c) allegation concerning alcohol consumption. Applicant requested a decision on the record. (Item 2) Department Counsel submitted the Government's written case consisting of six items on July 19, 2017 (Item 7). Applicant received a complete file of relevant material (FORM) on July 21, 2017. He was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant timely replied to the FORM (Item 8). He did not object to any information in the FORM or the information in the PSI. He provided additional information to refute, extenuate or mitigate the disqualifying conditions. Department Counsel had no objection to consideration of Applicant response. (Item 9). The case was assigned to me on October 23, 2017.

Procedural Issues

Applicant was advised in the FORM that the summary of the PSI with an OPM investigator (Item 4) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that he waived any objection to the admissibility of the PSI summary. Applicant did not raise any objection to the PSI when he responded to the FORM. Since he did not raise any objection to consideration of the PSI, I will consider information in the PSI in my decision.

Findings of Fact

After a thorough review of the pleadings and exhibits, I make the following findings of fact. Applicant's admissions are included in my findings of fact.

Applicant is 38 years old. Available information in the case file indicated that Applicant has some college education. There is no information in the case file that he received a college degree. He has been employed in various computer-related positions by DOD contractors in both the United States and overseas since December 2004. He worked for DOD contractors in Kuwait from July 2006 to November 2008, and in Iraq from November 2008 until April 2010. Since January 2015, he has been employed as a network controller by a DOD contractor. He is not married. He has been eligible for access to classified information since 2009. (Item 3, e-QIP, dated August 26, 2015; Item 4, PSI, dated February 16 and 18, 2016)

¹ I considered the previous AGs, effective September 1, 2006, as well as the new AGs, effective June 8, 2017. My decision would be the same if the case were considered under the previous AGs.

The SOR alleges that Applicant was arrested and convicted of driving while intoxicated (DWI) in January 2004, and placed on 18 months probation. (SOR 1.a). The SOR alleges that Applicant was charged with and convicted of DWI in September 2012, and placed on nine months probation. (SOR 1.b) The SOR further alleges that Applicant was charged with operating a vehicle under the influence of intoxicants in April 2015. (SOR 1.c) Applicant admitted the first two allegations, but denied the third allegation because he was found not guilty and the charge was dropped. The Government presented Federal Bureau of Investigation (FBI) records (GX 5) and court documents (GX 6) to confirm the arrests and convictions.

In January 2004, Applicant was arrested for driving while intoxicated. Applicant and a friend went to a restaurant to eat and consumed alcohol. He went back to his friend's house but does not remember consuming alcohol there. He thought he was able to drive. While driving home, Applicant was weaving on the road when stopped by police. He failed a field sobriety and breathalyzer test. He pled guilty and was convicted of DWI, fined \$600, his driver's license was suspended for six months, and he was ordered to complete an alcohol awareness class and community service. He satisfied all obligations of his sentence.

In September 2012, Applicant left a party after consuming alcohol and stopped at a bar to eat food and consume more alcohol. After leaving the bar, he was stopped by police for failing to keep a lane. He failed a field sobriety test. He pled guilty to DWI, was fined \$1,700, received nine months probation, and completed an alcohol awareness program. He was permitted to drive to and from work. Applicant completed all requirements of the sentence. (Item 4, PSI, at 12; Item 5, FBI Criminal History)

Less than three years after his DWI conviction in 2012, Applicant was arrested for DWI in April 2015. Applicant stopped at a restaurant to get some food and drink alcohol after exercising. He admits to consuming alcohol before starting to drive home. As he drove home at approximately 1 a.m., he was stopped by police for crossing the lane markers. He claims he was not driving erratically but merely responding to the circumstances of a police car following him. He received a field sobriety test and a breathalyzer test, but the case file does not note the results. He was taken to the local jail, and was administered another breathalyzer test which he failed with a reading of .08.² His license was not suspended, he was released on bail, and was given a court date. His case was scheduled for a hearing six times over the next eight months but was postponed each time at the request of either the prosecutor or Applicant's attorney. In February 2016, the case was heard and the charges dismissed based on a Fourth Amendment issue. (Item 4, PSI, at 5-6; Item 6, Court Records; Item 8, Response to FORM)

Applicant did not use alcohol while working in Kuwait and Iraq from 2006 until 2010. Applicant claims that the use of alcohol has not had a negative impact on his personal, professional, or social life. He claims that he has not consumed any alcohol

² A reading of .08 or above is considered DWI.

and operated a motor vehicle since April 2015. When he consumes alcohol now, he uses taxis or public transportation. He realizes his prior alcohol and driving behavior is unsafe and costly. (Item 6, PSI, at 17-18)

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 and mitigating conditions, which must be considered 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, the 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 AG ¶ 2(c), 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. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility 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 Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant 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 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Alcohol Consumption

Excessive alcohol consumption is a security concern because it 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 ¶ 21)

Applicant had two DWIs about eight years apart, in 2004 and 2012. Less than three years after his 2012 arrest and conviction, Applicant was arrested for DWI in April 2015. His actions in 2015 of stopping for food, drinking alcohol, and then driving fits the behavior pattern of the first two incidents. The charges of DWI were dismissed not based on the merits of the case but on a legal technicality. Available evidence shows Applicant continues to consume alcohol, but that he may not drive after consuming alcohol. Applicant's DWI arrests and convictions in 2004 and 2012 and arrest for DWI in 2015 are sufficient to establish the following Alcohol Consumption Disqualifying Condition under 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.

I considered the following Alcohol Consumption 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 good judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of action taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

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

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of an alcohol issue, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant experienced three driving while intoxicated events within 11 years. Applicant's pleas of guilty and court records establish the first two events in 2004 and 2012. In the third event in 2015, Applicant admits to consuming alcohol and being arrested for DWI by police. He claims that his driving was not impaired because of alcohol consumption but by the actions (under the circumstances) of the police officer. The admission of consuming alcohol and being arrested for DWI under the circumstances is sufficient to raise a security concern. The DWI charge was dismissed after numerous court dates on a legal technicality and not on the merits of the case.

Applicant completed the sentences imposed in the first two DWIs including alcohol awareness and driving programs, Applicant claims did that he has not consumed alcohol and then drove a vehicle since April 2015. He is not receiving counseling concerning alcohol consumption, and he is not participating in any rehabilitation programs.

Applicant has not presented evidence to establish a pattern of abstinence and has not shown sufficient evidence of action taken to overcome his alcohol consumption problems. He did not present any evidence of participation in a program such as Alcoholics Anonymous. He admits that he has and continues to consume alcohol since the incident in 2015. Accordingly, Applicant has not presented sufficient evidence to show a change of circumstance. He has not established that he can now control his alcohol consumption impulses. He has not presented information leading to a favorable opinion of his reliability and trustworthiness. The evidence does not show that Applicant has been reformed or rehabilitated. I find that Applicant has not mitigated security concerns for alcohol consumption, and that he does present a security concern based on his previous alcohol consumption.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and the relevant circumstances. An 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

