



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



In the matter of:)	
)	
)	ISCR Case No. 16-03633
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

02/09/2018

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct, and Guideline G, alcohol consumption. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On January 6, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct and Guideline G, alcohol consumption. The DOD acted under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.¹

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

Applicant answered the SOR on February 10, 2017, and he provided a supplemental answer on February 27, 2017. He also requested a hearing. The case was assigned to me on May 16, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 18, 2017, and the hearing was held as scheduled on August 17, 2017. The Government offered exhibits (GE) 1 through 10, 12 through 14, and 16 through 19. I overruled Applicant's objections to AE 5, 8, 9, 12, 13, 16, and 19. All offered exhibits were admitted into evidence.² Applicant testified and offered exhibits (AE) A through E, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on August 25, 2017.

Findings of Fact

In Applicant's answers, he admitted all the allegations in the SOR with explanations. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 48 years old. He is single, never married and has no children. He has worked for his current defense contractor-employer since January 2012. He previously worked for other defense contractors since 1999. He has a bachelor's degree, which was awarded in 1998.³

The SOR alleges Applicant was charged with driving under the influence of alcohol (DUI) on five occasions: July 1987; August 1991; June 1993; June 1998, and March 2014; he was charged with criminal mischief in September 1995 and failure to appear in February 1996. (SOR ¶¶ 1.a-1.g) His DUI arrests were also alleged as alcohol consumption under Guideline G in the SOR. (SOR ¶ 2.a) Additionally, the SOR alleged, Applicant testified at an earlier DOHA security clearance hearing that he would completely abstain from alcohol use. (SOR ¶ 2.b)

Applicant began drinking alcohol when he was about 15 years old (1984). He consumed as much as 8 to 12 beers twice weekly from 1984 to 1998. From 1998 to 2002 he claimed to consume two to three beers monthly. He also claimed abstinence from alcohol use from about 2002 to 2014. He admitted and court records establish his five DUI convictions in 1987, 1991, 1993, 1998, and 2014. In July 2003, Applicant was issued an earlier SOR, alleging the DUIs of 1987, 1991, 1993, and 1998. That case went to a hearing before another DOHA administrative judge who found that Applicant mitigated the security concerns and granted his security clearance.⁴

² Tr. 23, 26-30, 32-34, 37. GEs 11 and 15 were withdrawn and not admitted. Concerning GE 6, 8, 9, and 13, although admitted into evidence, I gave them minimum weight in my overall evaluation of this case.

³ Tr. 7; GE 1.

⁴ Tr. 44, 48; GE 3, 5, 7, 10, 14.

During his investigation for the earlier DOHA case, Applicant made a sworn statement to a defense investigator in April 2002. He made the following specific statement:

I categorically state that I will not drink and drive a vehicle again. I realize by making this statement, if I have another alcohol related driving offense, I could lose my security clearance and therefore my job. My last arrest almost ruined me. I was afraid with having to participate in the work release program I would lose my job. I had a close call and it will never happen again. I have felt guilty about my use of alcoholic beverages and driving. I placed other in jeopardy.

He also told the administrative judge during his November 2003 hearing that he would abstain from alcohol consumption in the future.⁵

In March 2014, Applicant was arrested for his fifth DUI offense. He claimed that during his preceding 15 months of unemployment, he began drinking alcohol again. He was drinking about twice a month. On the evening in question, he was drinking at a friend's house celebrating his recent hiring. He consumed between 10 and 12 beers then drove home. He stopped at a convenience store where he was later approached by a police officer asking to see his identification. When he could not produce proof of insurance, he was offered a field sobriety test, which he refused. He was given a breathalyzer test, which registered at .203 BAC (blood alcohol content). He was arrested for DUI. He pleaded guilty to the DUI charge and was sentenced to 60 days in jail (with work release); two years supervised probation; fines and fees; 24 hours of level II alcohol education; and 86 hours of alcohol therapy. He was sentenced to level II education classes for his previous DUI convictions. He completed all of his sentencing requirements and was released early from supervised probation. He completed his probation in September 2016.⁶

Applicant testified that he does not currently attend any substance abuse counseling, such as Alcoholics Anonymous (AA), or any similar group. His way of staying sober is by "surrounding myself with people that do not drink." This includes his girlfriend who does not drink. At the hearing, he was specifically asked if he intended to drink in the future. He responded by saying, "if I do, and which I shouldn't, I will take appropriate steps, such as go to counseling, install an interlock device on my vehicle of my own accord because I can't guarantee that I might have a relapse."⁷

In September 1995, Applicant was arrested for criminal trespass. In February 1996, the case was tried before a judge who found Applicant not guilty of the charge.

⁵ Tr. 48; GE 3.

⁶ Tr. 44, 47, 49-50; GE 2; AE A, C, E.

⁷ Tr. 54-56, 58.

There is insufficient evidence to establish a failure to appear offense against Applicant in February 1996.⁸

Applicant presented reference letters from current and former colleagues and supervisors. He also provided information from his probation officer. His colleagues describe Applicant as an excellent employee and someone who is trustworthy. They recommend continuation of his security clearance.⁹

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. Instead, 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 AG ¶ 2(a), the entire process is a careful weighing 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.

Under 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 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 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 that an applicant may deliberately or inadvertently fail to safeguard

⁸ GE 12.

⁹ AE B.

classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

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 in this case. The following are potentially applicable:

- (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, formally prosecuted or convicted.

Applicant’s long criminal record, notably his five DUIs, constitute a pattern of criminal conduct. I find that both disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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;
- (c) no reliable evidence to support that the individual committed the offense; 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.

Applicant's last criminal incident occurred in March 2014. His criminal acts have not been infrequent having been arrested on DUI charges five times since 1987. He resumed drinking after more than ten years of abstinence when he committed his last DUI offense in 2014. He retained his security clearance at a previous DOHA hearing after he committed to investigators and the administrative judge that he would not drink and drive again. He failed to live up to that commitment. Although he claims abstinence now, he cannot commit to an abstinent future. I cannot conclude that additional crimes will not recur in the future. He was given an opportunity to change his behavior after his last DOHA hearing, yet he failed to do so. His repeated criminal behavior casts doubt on his current reliability, trustworthiness, and good judgment, and it also shows a lack of successful rehabilitation, despite his successful completion of his probation. AG ¶¶ 32(a) and 32(d) do not apply. AG ¶ 32(c) applies to SOR ¶¶ 1.d and 1.e.

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 following are potentially applicable 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 whether the individual is 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.

Applicant's five DUIs support the application of the above disqualifying conditions. The allegation stated in SOR ¶ 2.b does not establish a disqualifying condition.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(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 established a 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's last adverse alcohol incident occurred in March 2014. His alcohol-related incidents have not been infrequent, having been convicted five times since 1987. He resumed drinking and committed his fifth DUI offense after over 10 years of abstinence. He faced losing his security clearance in 2003 because of alcohol consumption concerns and he committed then to not drink and drive in the future. He failed in that commitment. Based upon his long pattern of alcohol abuse, I cannot conclude that an alcohol-related incident will not recur in the future. His actions cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 23(a) does not apply.

Applicant claims he is currently abstinent, but he cannot fully commit to abstinence in the future. AG ¶ 23(b) does not apply.

Applicant participated in court-ordered alcohol treatment programs after each DUI incident. However, he has not engaged in counseling on his own and does not participate in AA or other similar groups. AG ¶ 23(d) does not apply.

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 the 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.

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 the facts and circumstances surrounding this case. I considered Applicant's contractor service, his letters of recommendation, input from his probation officer, and his personal circumstances. However, I also considered that he has not reformed his alcohol misuse leading to criminal DUI charges. Applicant essentially promised a previous administrative judge that he would not drink and drive in the future, but he did drink and drive again, and was convicted of his fifth DUI offense. Applicant failed to provide sufficient evidence to mitigate the alcohol consumption and criminal conduct security concerns.¹⁰

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines J and 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 J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Subparagraphs 1.d – 1.e:	For Applicant
Subparagraphs 1.f – 1.g:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

¹⁰ I considered the exceptions under Security Executive Agent Directive (SEAD) 4, Appendix C, dated June 8, 2017, and determined they are not applicable in this case.

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.

Robert E. Coacher
Administrative Judge