



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



In the matter of:)
)
) ISCR Case No. 17-00812
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

03/13/2018

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns but he did not mitigate the alcohol consumption security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 14, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse) and Guideline G (alcohol consumption). The action was taken 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).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 responded to the SOR on May 2, 2017, and elected to have the case decided on the written record in lieu of a hearing. On September 11, 2017, he requested a conversion from an administrative determination to a hearing before an administrative judge. The case was assigned to me on September 25, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 10, 2017, scheduling the hearing for November 9, 2017. I convened the hearing as scheduled.

The Government's and Applicant's exhibit lists were appended to the record as Hearing Exhibits (HE) 1 and 2, respectively. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through D, which were admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on November 17, 2017.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.c, and 2.a to 2.f. He denied SOR ¶¶ 1.b and 2.g. He is 30 years old. He obtained his high-school diploma in 2006 and a bachelor's degree in 2011. He has worked as a software engineer for a defense contractor since September 2014. He has never held a security clearance. As of the hearing, he had never been married and he did not have any children.²

Applicant used marijuana from September 2008 to December 2016. He began using marijuana when he was in college. After college, he continued to use marijuana a few times every six months. He also used hallucinogenic mushrooms twice, once in July 2010 when he was in college and again in July 2014 when he was on vacation. He used marijuana and hallucinogenic mushrooms in social settings when they were offered to him. He purchased hallucinogenic mushrooms once and he never purchased marijuana.³

Applicant's last use of marijuana in December 2016 occurred after he completed his security clearance application in February 2016 and after his April 2016 background interview. He viewed his employer's 2014 pre-employment drug test, which he passed, as a formality. He has not since been drug tested or received training concerning illegal drug use, though he believed his employer has a random drug testing policy. He acknowledged that his December 2016 marijuana use was a bad decision and that illegal drug use was prohibited by his employer and anyone attempting to seek or hold a security clearance.⁴

Applicant stated in his application and during his interview that he intended to use marijuana in the future, as that was his state of mind at the time. It was not until he received the April 2017 SOR that he understood for the first time the necessity to refrain from using illegal drugs so long as he sought or held a clearance. As such, he did not

² Response to the SOR; Tr. at 8, 17-18, 20-26, 69-70; GE 1; AE A, C.

³ Tr. at 26-41; GE 1, 3; AE A.

⁴ Tr. at 26-41, 67, 69-71, 91-92; GE 1, 3; AE A.

intend to use illegal drugs in the future. He signed a statement of intent to not use illegal drugs in the future. Since late 2016, he disassociated himself from individuals who use illegal drugs and venues where illegal drugs might be present. On one occasion, he left when he found himself in a social setting where illegal drugs were being used.⁵

Applicant began consuming alcohol at age 18, when he was a freshman in college in state A. While in college, he was cited by the police four times for alcohol-related incidents. In September 2007, he was cited for underage drinking after he left a fraternity party with a beer in his hand. He was fined \$150 and his driver's license was suspended for three months.⁶

Though he could not recall the specific details, he was cited and fined for public drunkenness and disorderly conduct in July 2009, disorderly conduct in February 2010, and public drunkenness in August 2010. On one occasion, he tried to walk home while he was intoxicated. On another occasion, though he could not recall if this incident was for one of the three citations from 2009 to 2010, he walked home drunk, blacked out, and ended up in the front seat of a delivery car. He recalled that this was the first time he was taken to a hospital. On yet another occasion, he blacked out while he and others waited for a bus ride home after a night out on the town. He could not recall whether this was the same incident in which he was cited for using the wrong bathroom in a bar. He recalled that this was the second time he was taken to a hospital. He had too much to drink on each of these occasions. As a result of these incidents, he was mandated by his college to see a counselor to discuss his alcohol usage. He was unaware whether the counselor made any alcohol-related diagnoses, but he recalled that the counselor made no recommendations for continued alcohol counseling.⁷

After college, he remained in state A and worked as a software developer. He also worked at a bar and continued to socialize with many of his college friends. In January 2013, he was taken to a hospital for the third and last time after he was found blacked out in a car due to intoxication. After this incident, he decided that he needed to grow up, find another job, and move away from state A's college environment. He could no longer justify the situations he found himself in as a result of his excessive alcohol consumption.⁸

Applicant moved to state B in April 2013. He consumed three beers at least once weekly. In June 2014, he got intoxicated during a night out with friends. When he got home, he could not find his keys, so he broke a window to gain entry. A neighbor called the police because of the disturbance. He did not intend to consume alcohol in excess, but things got out of hand.⁹

⁵ Tr. at 26-41, 67, 71-74; GE 1, 3; AE A, B.

⁶ Tr. at 42-46, 61-64, 76-77; GE 1, 3; AE A.

⁷ Tr. at 42-46, 61-64, 76-83; GE 1, 2, 3; AE A.

⁸ Tr. at 46-52, 74-75, 83, 96; GE 1, 3; AE A.

⁹ Tr. at 46-53, 74-75; GE 1, 2, 3; AE A.

Unrelated to the June 2014 alcohol-related incident, Applicant moved to state C in January 2016, where he resided as of the hearing. He decided as he approached his 30s that a lifestyle change was necessary and he reduced his level of alcohol consumption. He also started the process of trying to obtain a security clearance, so that more job opportunities would be available to him. During his interview, he described his alcohol consumption to the point of intoxication as once weekly. Since May 2016, he consumed alcohol once every one and a half months. He intended to continue to limit his alcohol consumption in the future. He did not believe he had a problem with alcohol. He did not consider himself an alcoholic. He had never been arrested or charged with driving under the influence. He had no alcohol-related incidents at work. He has not had any alcohol-related incidents since June 2014.¹⁰

Applicant expressed concern that he had a history and pattern of excessive alcohol consumption that he needed to decrease. He acknowledged that he had been told on occasion that he was a heavy drinker, a description to which he did not disagree. He testified, "I believe that if I stop drinking entirely that doesn't solve the problem. That just puts a lid on it, the concern being, of course, if I started drinking again at some point, I wouldn't be able to stop." As such, he was trying to learn how to drink responsibly. He believed he was doing well and had a decent period of time in which he had not abused alcohol. He acknowledged, though, that despite his reduced alcohol consumption since May 2016, he consumed alcohol and blacked out three times, or once every four to six months. He recalled that his three blackouts occurred while he was out with friends, by himself, and at a family wedding. His last blackout occurred six months prior to the hearing.¹¹

Applicant attributed his excessive alcohol consumption while he was in college to his lack of an identity that stemmed from his parents' separation when he was three years old and the consequent custody battles in which he and his brother were caught in the middle. He has since matured.¹²

Applicant enjoys his job. He provided letters of recommendation from individuals who spoke highly of his work performance. His current engineer manager, who has known him for two years, described him as a hardworking, reliable, ethical, and trustworthy individual. His prior supervisor and colleague described him in the same manner. Since moving to state C, he has found a social network primarily with his colleagues. He teaches software for his company and to his friends. He joined a bowling league.¹³

¹⁰ Tr. at 52-69, 75-76, 83-91, 96-98; GE 3; AE A.

¹¹ Tr. at 44, 52-68, 83-88, 93-97; GE 3.

¹² Tr. at 18-26; AE A.

¹³ Tr. at 62-68, 98-99; AE A, D.

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 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, administrative judges apply the guidelines 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 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 the national security."

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

Section 7 of Exec. Or. 10865 provides that adverse 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying conditions potentially applicable in this case include:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana from 2008 until December 2015. He stated in his application and during his interview that he intended to use marijuana in the future. AG ¶¶ 25(a) and 25(g) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant has not used marijuana since December 2015. Though his last use of marijuana occurred after both his application and his interview, and he stated in both his application and his interview that he intended to use marijuana in the future, he acknowledged that his last use of marijuana was a bad decision. As of the April 2017 SOR, he understood the necessity to refrain from using illegal drugs so long as he sought or held a security clearance. He also understood that illegal drug use was prohibited by his employer. He signed a statement of intent to not use illegal drugs in the future. Since late 2016, he disassociated himself from individuals who use illegal drugs and venues where illegal drugs might be present. Applicant has demonstrated an appropriate period of abstinence from illegal drug use and that the use of illegal drugs is unlikely to recur. AG ¶¶ 26(a) and 26(b) are applicable.

Guideline G, Alcohol Consumption

The security concern for alcohol consumption 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.

The guideline notes conditions that could raise security concerns under AG ¶ 22. The disqualifying conditions potentially applicable in this case include:

(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.

Applicant has a pattern of excessive alcohol consumption and alcohol-related incidents. AG ¶¶ 22(a) and 22(c) are applicable.

AG ¶ 23 provides the following conditions that could mitigate security concerns:

(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; and

(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.

Applicant's excessive alcohol consumption and alcohol-related citations while he was in college occurred under unusual circumstances that are unlikely to recur. However, the same cannot be said for his excessive alcohol consumption and alcohol-related incidents since then. In 2013, he blacked out due to excessive alcohol consumption and was consequently taken to a hospital. In 2014, the police were called after he caused a disturbance because he was intoxicated. In April 2016, he stated that he consumed alcohol to the point of intoxication once weekly. Though he reduced his alcohol consumption since May 2016, he continued to consume alcohol to the point of blacking out on three occasions, or once every four to six months. His last blackout occurred just six months prior to the hearing. On one occasion, he blacked out after he consumed alcohol by himself. These incidents are recent, are not mitigated by the passage of time, and continue to cast doubt on his current reliability, trustworthiness, and judgment. While he acknowledged that he might be a heavy drinker only on occasion, he has not demonstrated a clear pattern of modified consumption and he failed to provide evidence of actions he has taken to overcome his problem. AG ¶¶ 23(a) and 23(b) are not applicable.

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.

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 have incorporated my comments under Guidelines H and G in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the drug involvement and substance misuse security concerns but he did not mitigate the alcohol consumption security concerns.

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 H: | FOR APPLICANT |
| Subparagraphs 1.a – 1.c: | For Applicant |
| Paragraph 2, Guideline G: | AGAINST APPLICANT |
| Subparagraphs 2.a – 2.d: | For Applicant |
| Subparagraphs 2.e – 2.g: | Against 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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge