



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



In the matter of:)
)
) ISCR Case No. 17-01926
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Kenneth M. Roberts, Esq.

04/16/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the alcohol consumption and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 2, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). Applicant responded to the SOR on August 15, 2017, and requested a hearing before an administrative judge.

The case was assigned to me on November 9, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 18, 2017, scheduling the hearing for January 31, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibits (AE) A through L, which were admitted without objection. DOHA received the hearing transcript (Tr.) on February 7, 2018.

Findings of Fact

Applicant is a 34-year-old employee of a defense contractor. He has worked for his current employer since 2010. He served on active duty in the U.S. military from 2001 until he was honorably discharged in 2009. He attended college for a period without earning a degree. He is single with one child.¹

Applicant has a history of alcohol-related driving offenses. He was arrested in May 2006 and charged with driving under the influence (DUI). He was found guilty and sentenced to 180 days in jail (suspended); a \$1,750 fine; court costs; and attendance at alcohol-related classes. He also completed a substance abuse rehabilitation program through the military.²

Applicant was arrested in March 2009 and charged with DUI, reckless driving, and hit and run – leaving the scene of a crash involving damage. He pleaded *nolo contendere* to DUI. He was sentenced to 50 hours of community service; a fine and court costs; attendance at a DUI school; and his driver's license was suspended for six months. Applicant denies committing the hit and run offense. He stated that he left his insurance information on the parked car he hit, and that charge was dismissed.³

In May 2009, Applicant received nonjudicial punishment in the military for the above March 2009 DUI. He was reduced one pay grade, ordered to serve 45 days extra duty, and he forfeited pay. He completed an outpatient drug and alcohol program through the military. He was discharged from the military before the end of his enlistment because of his alcohol issues, but with an honorable discharge.⁴

Applicant was interviewed for his background investigation in January 2016. He discussed his two DUI arrests. He stated that he had never been dependent on alcohol. He changed his alcohol use after his second arrest. He stated that his alcohol consumption was once or twice a month, no more than two to three drinks, and he did not drink and drive. He stated that he would not risk his job by getting another alcohol-related arrest.⁵

Applicant was arrested in May 2016 after he hit a truck that had stopped for a yellow light. In February 2017, he pleaded *nolo contendere* to DUI, above the legal limit. In March 2017, he was sentenced to 2 days in jail with credit for time served; 30 days in jail (suspended); 40 hours of community service; attendance at a victim impact panel

¹ Tr. at 47, 59, 74; GE 1.

² Tr. at 47-49, 62, 67; Applicant's response to SOR; GE 2, 3, 5.

³ Tr. at 48-49, 63-65; Applicant's response to SOR; GE 2, 5.

⁴ Tr. at 47, 50-52, 65-66; Applicant's response to SOR; GE 2, 5.

⁵ GE 2.

and the coroner's DUI program; and \$685 in fines and fees. He completed all the requirements of his sentence.⁶

Applicant admitted in his testimony that he abused alcohol on a number of occasions, but he does not believe he is an alcoholic. He has gone many months without alcohol. He stated that he occasionally consumes alcohol but only responsibly, and he does not drink and drive.⁷

Applicant called witnesses and submitted numerous documents and letters attesting to his excellent job performance. He is praised for his professionalism, security conscientiousness, work ethic, dependability, responsibility, trustworthiness, reliability, dedication, and integrity.⁸

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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."

⁶ Tr. at 55-57; Applicant's response to SOR; GE 2, 4, 5.

⁷ Tr. at 53-54, 57-58, 72.

⁸ Tr. at 14-45; AE C-L.

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 EO 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

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 several conditions that could raise security concerns under AG ¶ 22. 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 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 was arrested for DUI in 2006, 2009, and 2016. The above disqualifying conditions are applicable.

SOR ¶ 1.b alleges that Applicant received nonjudicial punishment in the military for the March 2009 DUI arrest that is alleged in SOR ¶ 1.c. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 1.b is concluded for Applicant.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

(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 admitted in his testimony that he abused alcohol on a number of occasions, but he does not believe he is an alcoholic. He has gone many months without alcohol. He stated that he occasionally consumes alcohol but only responsibly. I believe he is sincere, but I also believe he was sincere in January 2016 when he told the background investigator essentially the same thing. Four months later he hit a truck and was arrested for his third DUI. I am unable to conclude at this time that irresponsible alcohol use is in his past. None of the mitigating conditions are sufficient to overcome concerns about his alcohol use.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's three DUIs were cross-alleged under criminal conduct. The above disqualifying condition is applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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.

Applicant has a strong work record and favorable character evidence. However, he also has three DUIs, two of which involved accidents. I have unmitigated concerns under the same rationale discussed in the alcohol consumption analysis.

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 G and J in my whole-person analysis. I also considered Applicant's honorable military service and his favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the alcohol consumption and criminal conduct 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 G:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.d:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

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.

Edward W. Loughran
Administrative Judge