



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



In the matter of:)	
)	
)	ISCR Case No. 10-01612
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Allison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

November 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under adjudicative guideline (AG) G, Alcohol Consumption, and AG J, Criminal Conduct. Applicant’s eligibility for a security clearance is denied.

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on September 27, 2009. On August 25, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under AG G, Alcohol Consumption, and AG J, Criminal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the Department of Defense on September 1, 2006.

On September 8, 2010, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. On September 28, 2010, the Government compiled its File of Relevant Material (FORM). The FORM contained

documents identified as Items 1 through 10. By letter dated September 29, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the FORM on October 4, 2010. His response was due on November 3, 2010. On November 1, 2010, the case was assigned to me for a decision. Applicant filed a two-page letter in response to the FORM within the required time period. Department Counsel did not object to the admission of Applicant's additional information. Accordingly, I marked Applicant's letter as Applicant's Exhibit (AE) A and admitted it to the record.

Findings of Fact

The SOR contains seven allegations of disqualifying conduct under AG G, Alcohol Consumption (SOR ¶¶ 1.a. through 1.g.), and one allegation of disqualifying conduct under AG J, Criminal Conduct (SOR ¶ 2.a.). SOR ¶ 2.a. alleges that Applicant's alcohol-related arrests, as alleged in SOR ¶¶ 1.b., 1.c., and 1.d. under AG G, also constitute criminal conduct under AG J. In his Answer to the SOR, Applicant admitted the seven AG G allegations and the one AG J allegation. Applicant's admissions are admitted as findings of fact. (Item 1; Item 4.)

Applicant is 51 years old, married, and the father of two adult children. He has been employed by a government contractor since July 2008 as an engineering manager. From 1984 to 2008, he worked for one employer as a production manager. In 2004, he received a master's degree. He has not previously held a security clearance. (Item 5.)

Applicant began drinking alcohol in 1977, when he was 18 years old. From 1977 to at least December 2009, Applicant consumed alcohol at times to excess and to the point of intoxication. Since 2003, Applicant and his wife each drink as many as three beers together each day. On weekends, they individually drink as many as six beers a day. Applicant defines intoxication as drinking 8 to 10 beers and being unable to walk straight. He admits to drinking to intoxication only one time, in 2000. (Item 6 at 5.)

In 2002, Applicant was arrested and charged with Driving Under the Influence (DUI). He was detained overnight in jail and released the next morning on bail. The case was later dismissed and Applicant's bail was returned to him. (Item 6 at 3-4.)

In July 2003, Applicant was arrested and charged with public intoxication, a misdemeanor. The charge was later dismissed. (Item 6; Item 10.)

In December 2007, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol or Drugs and (2) Blood Alcohol Level .08% or Higher. He was found guilty of Count (2), sentenced to three years probation, ordered to attend level 2 of the first offender drinking driver's program within nine months, and ordered to pay certain fees and a fine of \$1,651. Count (1) was dismissed. Applicant's three-year probation ends on February 20, 2011. (Item 7.)

For approximately one year, from March 2008 until March 2009, Applicant received outpatient alcohol treatment at a medical facility in his home community. A licensed psychologist in the facility's chemical dependency services diagnosed Applicant as alcohol dependent. One of his treatment goals was continued and ongoing abstinence. From June 2008 until September 2008, Applicant attended weekly meetings of Alcoholics Anonymous (AA). (Item 6 at 5; Item 8 at 4-5.)

In January 2008, Applicant enrolled in a DUI education program. He completed the program in October 2008. The progress report summarizing Applicant's completion of the DUI education program states: "[Applicant's] records only contain Attendance and Completion. Because our program is Educational in nature we make no prognoses on recovery or rehabilitation." (Item 9.)

Despite his treatment for alcohol dependence, Applicant continued to drink alcohol. The clinical records of his treatment for alcohol dependence reflect that he had resumed alcohol consumption in January 2009. In his response to the FORM, Applicant stated that he was no longer consuming alcohol excessively but was drinking in moderation. (Item 8 at 22; AE A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AGs. 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, the administrative judge applies these 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(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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

Section 7 of Executive Order 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 G, Alcohol Consumption

Guideline G, Alcohol Consumption, applies in this case to a determination of eligibility for access to classified information. Under Guideline G, “[e]xcessive 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.”

I have considered all of the Alcohol Consumption Disqualifying Conditions. I conclude that Guideline G disqualifying conditions at ¶¶ 22(a), 22(c), 22(d), and 22(f) apply in Applicant’s case. AG ¶ 22(a) reads: “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 as an alcohol abuser or alcohol dependent.” AG ¶ 22(c) reads: “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.” AG ¶ 22(d) reads:

“diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence.” AG ¶ 22(f) reads: “relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.”

In 2002 and 2007, Applicant was arrested for alcohol-related driving offenses. In 2003, he was arrested for public intoxication. Applicant is a habitual consumer of alcohol, and he admits consuming alcohol at times to excess between 1977 and December 2009. However, despite two arrests for driving under the influence of alcohol, a diagnosis of alcohol dependence, and treatment for alcohol dependence, he continues to drink alcohol. He has participated in alcohol awareness education, and he is presumably aware of the serious consequences to himself and to others of driving under the influence of alcohol. These facts raise security concerns under AG ¶¶ 22(a), 22(c), 22(d), and 22(f).

The Guideline G disqualifying conduct could be mitigated under AG ¶ 23(a) if “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.” The disqualifying conduct could also be mitigated under AG ¶ 23(b) if “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).” If “the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress,” then AG ¶ 23(c) might apply. Finally, mitigation might be possible under AG ¶ 23 (d) if “the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.”

Applicant is now 51 years old. He admitted alcohol-related conduct from 1977 to December 2009, a period of 32 years. His most recent arrest for driving under the influence of alcohol occurred in December 2007, and he remains under a sentence of probation from that conviction until February 2011. He has participated in alcohol awareness education. He has been diagnosed as alcohol dependent; he has undergone treatment for alcohol dependence, and he continues to drink alcohol. Accordingly, I conclude that none of the Guideline G mitigating conditions fully applies to the facts of Applicant’s case.

Guideline J, Criminal Conduct

Under the Criminal Conduct guideline “[c]riminal 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 ¶ 30.

Applicant was arrested for public intoxication in 2003. He was arrested for DUI in 2002 and 2007. After his 2007 arrest, he was convicted of having a blood alcohol level of .08 % or higher, and he was sentenced to three years of probation for that offense. His probation will not expire until February 2011. This behavior raises concerns under AG ¶¶ 31(a), 31(c), and 31(d). AG ¶ 31(a) identifies a potential security concern when an individual has committed “a single serious crime or multiple lesser offenses.” AG ¶ 31(c) provides: “allegation or admission or criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” AG ¶ 31(d) provides: “individual is currently on parole or probation.”

Two mitigating conditions might apply to Applicant’s case. If “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,” AG ¶ 32(a) might apply. If “there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive involvement,” then AG ¶ 32(d) might apply.

The record demonstrates that Applicant’s criminal behavior, which began in 2002, has continued to the present, and is, therefore, recent. As a person diagnosed as alcohol dependent, Applicant has not yet established a record of sobriety to assure that his long-standing criminal behavior and rule violations related to alcohol use are unlikely to recur. His lack of successful rehabilitation raises security concerns about his reliability, trustworthiness, and good judgment. I conclude that neither AG ¶ 32(a) nor AG ¶ 32 (d) applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all relevant circumstances. The 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 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. Applicant is a mature adult who is well-educated and skilled. His employer has entrusted him with managerial responsibilities.

At the same time, in the last eight years, Applicant has been arrested twice for driving a vehicle while under the influence of alcohol. After his arrest in 2007, he was ordered to take a course in alcohol education. He was also diagnosed and treated for alcohol dependency. Even after being made aware of the dangers of drinking and driving, he continues to drink alcohol. Applicant's conduct raises questions about his current trustworthiness and reliability.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his alcohol consumption and criminal conduct.

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. - 1.g.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge