



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



In the matter of:)	
)	
)	ISCR Case No. 14-04815
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2016

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny him eligibility for access to classified information. Between 1996 and 2014, he was arrested and/or ticketed 30 times for various crimes, four of which were felonies. Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the facts proven by the written record concerning his history of excessive alcohol consumption and criminal conduct. Accordingly, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 16, 2015, the DoD issued a Statement of Reasons (SOR) detailing security concerns. On July 18, 2015, Applicant answered the SOR and elected to have the matter decided without a

¹ 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 within the DoD on September 1, 2006.

hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated January 5, 2016. The FORM contained six attachments (Items). On January 14, 2016, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. He did not reply within the 30-day period from receipt of the FORM. The case was assigned to me on March 29, 2016.

Findings of Fact

In his Answer to the SOR, Applicant admitted the arrests and/or ticketing listed in the SOR, but neither admitted nor denied the excessive alcohol consumption listed in SOR 2.a. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is a 35-year-old ship laborer who has worked for a defense contractor since March 2011 and seeks to obtain a security clearance. (Item 3) He is not married and has a 12-year-old son. (Item 3)

In his December 2013 Electronic Questionnaire for Investigations Processing (e-QIP), Applicant put the Government on notice that he had a number of arrests. (Item 3) He listed two driving while intoxicated (DWI) arrests and two disorderly conduct arrests. He also indicated that he had used cocaine for about a year before he stopped using in 2010.² He stopped when he realized it was jeopardizing his health and possibly his freedom. (Item 3) He has also stopped driving and now walks to wherever he needs to go. (Item 3)

Applicant has admitted the thirty arrests and/or ticketing for various crimes. His criminal history is set forth in the state department of public safety computerized criminal history and in his FBI identification record. (Items 5, 6)

In Applicant's January 2014 personal subject interview (PSI), he acknowledged the March 2011 arrest and/or ticketing for disorderly conduct. (Item 4) He admitted the April 2010 driving with a suspended license following his March 2010 DWI. In the March 2010 DWI he had consumed 15 beers at a bar and crashed into a pole on his way home. (Item 4) He stated he would become intoxicated after drinking 14 or 15 beers. At the time of his PSI, he stated he was getting intoxicated on weekends four times a month. (Item 4)

During his PSI, Applicant acknowledged his July 2000 felony arrest for burglary of a building. (Item 4) He had taken tools out of a garage. After pleading guilty, he was sentenced to two years confinement, which he served. (Items 4, 6) He also

² In Applicant's January 2014 interview, he said he had used cocaine on weekends once a week from December 2002 through September 2008. (Item 4) He asserted his last use was in September 2008. Applicant's use of illegal drugs is not alleged in the SOR. This information is included simply to show Applicant was open, honest, and forthright in answering his security questionnaire.

acknowledged his July 2000 DWI when he was arrested after leaving a supermarket where he had gone to buy more beer. (Item 5) He no longer operates a motor vehicle or drives. (Item 3, 5)

Applicant acknowledged he had been found guilty and sentenced to probation for five years for felony credit card abuse. (Item 5) During the PSI, he had no knowledge or memory of a number of his arrests. He has been arrested for possession of marijuana in October 1996 and January 1997; arrested in December 1996 for theft of property; and arrested twice for DWI, once in July 2000 and again in July 2010. Each of these crimes were misdemeanors. His felony arrests include: a January 1997 arrest of burglary of a habitation, a second degree felony; a January 1997 arrest for aggravated robbers, a first degree felony; a March 1999 arrest for credit card abuse, simply listed as a felony; and July 2000 arrest for burglary of a habitation, a first degree felony. (Items 4, 5, 6)

Applicant has not provided documentation as to duty performance, character reference, mitigation or extenuation concerning the crimes listed in the SOR. He did not provide documentation in his reply to the SOR or the FORM.

Law and 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 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, 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(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 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.

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

Analysis

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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(a) states it may be disqualifying where there “a single serious crime or multiple lesser offenses.” Similarly, AG ¶ 31(c) provides “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted” may be disqualifying. Between 1996 and January 2014, Applicant was arrested and/or ticketed 30 times. Four of the arrests involved felonies. He spent two years in jail and five years on probation for different crimes. AG ¶ 31(a) and 31(c) apply.

The nature and relevant circumstances surrounding the conduct must be considered. Applicant has provided no information about his crimes, other than acknowledging they took place. To his credit, he no longer uses cocaine. However, he is still getting intoxicated on weekends four times a month. Security concerns raised by criminal conduct may be mitigated under certain circumstances. There is no evidence Applicant was pressured or coerced into committing the crimes (AG ¶ 32(b)) or evidence he did not commit the offenses (AG ¶ 32(c)). These mitigating factors do not apply.

The criminal security concern could mitigate security concerns under AG ¶ 32(a) 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. The last arrest was in January 2014, which is recent, and there is nothing to show any of the arrests occurred under unusual circumstances. AG ¶ 32(a) does not apply.

Under AG ¶ 32(d), criminal conduct may be mitigated 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 community involvement.” No clear evidence of successful rehabilitation has been present. AG ¶ 32(d) does not apply

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.”

Between June 1998 and January 2012, Applicant has been arrested 13 times for alcohol-related offenses away from work including: ten arrests for public intoxication in June 1998, January 1999, February 2000, April 2000, twice in May 2000, June 2002, January 2009, May 2010, and January 2012. Three of the arrests also included theft in addition to public intoxication and one other public intoxication arrest included a charge of disorderly conduct. He was arrested twice for DWI, in July 2000 and July 2010. He admits becoming intoxicated on weekends four times a month. In December 2009, he was arrested and/or ticketed for having an open container of alcohol. Although he continues to drink, he no longer drives or operates a motor vehicle.

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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” and AG ¶ 22(c) “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,” apply.

AG ¶ 23 provides conditions that could mitigate alcohol consumption 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 good judgment;

(b) 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);

(c) 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; and,

(d) 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.

None of the mitigating conditions apply. AG ¶ 23(a) does not apply because the behavior was not infrequent and it did not occur under unusual circumstances. He is still drinking to the point of intoxication four times a month. It is too soon to find his prior behavior, which led to his numerous arrests for public intoxication, is unlikely to recur. AG ¶ 23(b) does not apply because there is no acknowledgement of alcoholism or issues of alcohol abuse. Additionally, there is no evidence of actions to overcome the problem and there is no abstinence. AG ¶ 23(c) does not apply because there is no showing he has been or is in a counseling or treatment program or that he is making satisfactory progress in such a program. AG ¶ 23(d) does not apply because Applicant never successfully completed aftercare or demonstrated a clear and established pattern of modified consumption or abstinence.

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(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. In requesting a decision without a hearing, Applicant chose to rely on the written record. However, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances and facts that would mitigate the criminal conduct and alcohol consumption security concerns. Applicant has not presented sufficient information to rebut, explain, extenuate, or mitigate the facts proven by the written

record. By failing to provide such information, and simply acknowledging the SOR allegations, he failed to mitigate the security concerns.

It is noted that Applicant was open, honest, and forthright in listing derogatory information when completing his e-QIP. His actions when completing the e-QIP speaks favorably of him. However, Applicant's problematic criminal and alcohol history creates doubt about his current reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. However, a clearance at this time is not warranted.

Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

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, Criminal Conduct:	AGAINST APPLICANT
Subparagraphs 1.a – 1.dd :	Against Applicant
Paragraph 2, Excessive Alcohol Consumption:	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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge