



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



In the matter of:)	
)	
)	ISCR Case: 14-05754
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: *Pro se*

August 31, 2015

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has a history of excessive alcohol consumption and criminal misconduct. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of Case

On May 27, 2010, Applicant submitted a security clearance application (e-QIP). On March 7, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines G (Alcohol) and J (Criminal Conduct). (Item 1.) 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 for Determining Eligibility for Access to Classified Information* (AG), effective within the DOD after September 1, 2006.

Applicant responded to the SOR (Answer) on April 3, 2015. (Item 2.) He requested that his case be decided by an administrative judge on the written record. Department Counsel submitted the Government's written case on June 10, 2015. A complete copy of the File of Relevant Material (FORM), containing four Items, was received by Applicant on June 23, 2015. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not submit anything in response to the FORM within the 30-day period that ended July 23, 2015. DOHA assigned the case to me on August 11, 2015.

Ruling on Evidence

Item 4 is a Report of Investigation (ROI) from the background investigation of Applicant. The ten-page document is a summary of an interview of Applicant conducted on April 24, 2014. An ROI may be received and considered as evidence when it is authenticated by a witness.¹ Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is acting in good faith, having highlighted the issue in the FORM,² Item 4 is not authenticated. Applicant's failure to raise this issue in a reply to the FORM is not a knowing waiver of the rule.³ Accordingly, Item 4 is not admissible and is not considered in this Decision.

Findings of Fact

Applicant is 35 years old. He is a high school graduate. He served on active duty in the Army from 2000 to 2007 and has been serving in the Army National Guard since 2007. He has been employed with a Government contractor since 2007. He is married and has two minor children and one minor step-child. (Item 3.)

The SOR alleges Applicant committed two recent alcohol related criminal violations and received citations for traffic related violations. He also received a reprimand from his employer for appearing to be under the influence of alcohol in the workplace. Applicant admitted to all of the allegations contained in the SOR.

Applicant was charged with driving while intoxicated (DWI) and failure to stop/red light violation on May 4, 2013. While that charge was pending, he was arrested and

¹Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing case law that a properly authenticated report of investigation is admissible).

² Department Counsel Brief at 2, n 1.

³Wavier means "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

charged with another DWI, failure to maintain lane control, reckless driving, speeding, and driving while license revoked on August 29, 2013. On January 31, 2014, he appeared before the court on all of the above charges. For the May 4, 2013 charges, he was found guilty of DWI and sentenced to 60 days jail (suspended); 12 months of probation; and fines/fees totaling \$390. For the August 29, 2013 charges, he was found guilty of DWI and sentenced to 12 months jail (with all but 38 days suspended); 18 months of probation; and fines/fees totaling \$640. (Item 2; Item 3.)

Applicant also was verbally reprimanded by his employer for appearing to be under the influence of alcohol. This reprimand occurred in December 2013 or January 2014. (Item 2.)

Applicant has also been cited on four occasions for non-moving traffic violations including: two citations (issued July 30, 2012 and January 16, 2013) for expired registration and no inspection; and two citations (issued July 19, 2013 and October 14, 2013) for driving while license revoked and no inspection. (Item 2; Item 3.)

Applicant expressed remorse for his past alcohol use and criminal conduct. He indicated,

When I first started having these issues, my wife left me. I reconciled with my wife, but everything did not go back to normal. I was still paying child support while we were living together, which added further stress to my situation. She left me again after about a year of us living together, which is when I started the irresponsible drinking. I did not intentionally commit those crimes, but I was under extreme duress . . . I am getting back on track with my life. I completed 40 hours of counseling at the DWI center in [city], which helped me tremendously. It educated me on effects of alcohol and how it can ruin your life. (Item 2.)

Applicant provided a copy of a certificate of completion for 40 hours of Alcohol/Substance Abuse treatment classes dated February 18, 2015. Applicant did not state whether he attended any Alcoholics Anonymous meetings, or other alcohol related treatment beyond the 40 hours of court required counseling. He did not indicate whether he continues to consume alcohol. (Item 2.)

The record lacks evidence concerning the quality of Applicant's professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. No character witnesses provided statements describing his judgment, trustworthiness, integrity, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 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. 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, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

Analysis

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 disqualifying conditions raised by the evidence are:

(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;

(b) alcohol-related incidents at work, such as reporting for work duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(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.

Applicant was convicted of two DWI incidents in May and August 2013, after he consumed alcohol to the point of impaired judgment. He also was reprimanded at work for appearing to be under the influence of alcohol. These incidents raise security concerns under AG ¶¶ 22(a), 22(b), and 22(c).

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; and

(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.

Applicant's alcohol-related incidents are recent. Other than completing the court ordered alcohol-related class, he produced little evidence of rehabilitation that would show future misconduct is unlikely to occur. The current level of his alcohol consumption is unknown. No prognosis was offered into evidence. Applicant failed to meet his burden to mitigate the alcohol-related concerns.

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. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(d) individual is currently on parole or probation.

Applicant has a recent history of multiple criminal arrests and convictions that occurred in 2012 and 2013, including two DWI convictions and four non-moving traffic violations. These offenses give rise to concerns about Applicant's judgment and reliability, both because of the nature of the offenses and the quantity of criminal offenses. Further, he produced no documentation to show he was released from probation. The aforementioned disqualifying conditions have been established.

Four Criminal Conduct mitigating conditions under AG ¶ 32 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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) 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.

Applicant's criminal past continues to cast doubt on his trustworthiness and judgment. His offenses are recent and he failed to present evidence to show that similar criminal conduct is unlikely to recur. AG ¶ 32(a) does not provide full mitigation.

Applicant failed to present evidence to show that he was pressured into criminal acts. He admitted each of the allegations. Neither AG ¶¶ 32(b) nor 32(c) provide mitigation.

Applicant failed to introduce evidence of rehabilitation. While he expressed remorse for his past and completed a class that taught him about the effects of alcohol, he presented nothing to show the levels of his current alcohol consumption, job training or higher education, good employment record, or constructive community involvement. AG ¶ 32(d) does not provide full mitigation.

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. I have incorporated my comments under Guidelines G and J in my whole-person analysis. Applicant's alcohol consumption and criminal conduct occurred during a tumultuous period in his life. He has completed the court-ordered alcohol classes. However, he failed to present enough evidence of rehabilitation to overcome his heavy burden to mitigate his alcohol abuse and criminal conduct. Overall, the record evidence raises doubts about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a through 2.e:	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.

Jennifer I. Goldstein
Administrative Judge