



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



In the matter of:)	
)	
)	ISCR Case No. 14-06040
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/29/2016

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline G, alcohol consumption and Guideline J, criminal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On July 10, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G, alcohol consumption, and J, criminal conduct. The action was taken under 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 effective within the DOD for SORs issued after September 1, 2006.

On October 1, 2015, Applicant answered the SOR, and he elected to have his case decided on the written record in lieu of a hearing. On November 20, 2015,

Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant, and it was received on December 9, 2015. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence and Items 2 through 13 are admitted into evidence. Applicant provided additional information that is marked as Applicant Exhibits (AE) A through D. The Government had no objection and the exhibits are admitted into evidence. The case was assigned to me on January 21, 2016.

Findings of Fact

Applicant admitted the SOR allegations with explanations. I have incorporated his admissions into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 48 years old. He is a high school graduate. He has not served in the military. He married in 1997. He has no children. He has worked for federal contractors since 2002 and his present employer since 2013.¹

Applicant was arrested in August 1991 and charged with driving under the influence of alcohol (DUI). He received 12 months of probation before judgment. In Applicant's sworn statement from May 2003, he admitted he had consumed seven drinks before driving. He stated that he had learned his lesson from that incident and did not drink and drive for years.²

In May 1998 Applicant was arrested and charged with driving while intoxicated. He entered into a plea bargain and the charge was changed to DUI. His license was suspended for six months. He was required to pay court costs and fines, serve 18 months probation, and he was ordered to attend alcohol counseling. In his sworn statement, Applicant stated he consumed 12 beers over a three-hour period, then went to a bar and consumed 3 more beers over a 45-minute period. He was aware he was intoxicated and should not drive, but decided to because his house was close. He lost control of his vehicle. His breathalyzer result was .20%. He completed the terms of his sentence, including a 26-week outpatient alcohol treatment program. There is no information if he received a diagnosis by a licensed professional. Applicant indicated in his statement that he is not an alcoholic and that he learned a lot from this mistake. He indicated he did not intend to drink and drive in the future. He explained the 1991 alcohol-related incident only taught him a lesson for a few years because he did not suffer many ramifications for his actions. He stated he did not consume alcohol for 18 months after this incident. He also stated his probation officer suggested it was a good idea to abstain from alcohol consumption while on probation.

¹ Item 2.

² Item 9.

In his 2003 statement, Applicant indicated he never used alcohol at work and it had not caused him any problems. He did not believe he had a problem with alcohol, he no longer involved himself in that type of behavior, and he never engaged in embarrassing or disgraceful actions. He explained he had never been diagnosed by a professional. He stated he continued to consume three to five beers twice a week.³

In January 2013, while on a work-related trip, Applicant was arrested and charged with resisting arrest and assault. According to the police report, Applicant was heavily intoxicated while at a club. He refused to pay for services provided. He was told to leave the club and then became belligerent. He told the bouncer that he forgot his coat, and he was permitted to go back inside the club to retrieve it. He could not locate the coat, and he was again told to leave the club and was escorted off the property by the bouncer. Upon getting to the main lobby he again became belligerent and refused to leave. He then struck the bouncer in the left side of his face with a closed fist. Applicant was then wrestled to the floor and held down. The police arrived approximately a minute later. The bouncer's statement was corroborated by the manager's statement.

Applicant reported the incident to his supervisor and disclosed the following. He indicated he had been at an unknown bar or nightclub. He believed there were four other people involved in the incident, who may have been police officers. He began drinking alone around 5:00 p.m. and recalled going to three bars. He admitted he was drinking heavily with a mixture of beer and whiskey. He remembered getting a cab and going to another bar, but the rest of the night is blurry, and he blacked out. He vaguely recalled being handcuffed, getting into a vehicle, and being in a jail cell. He had no idea why he was there. He recalled that sometime later he was escorted to a larger holding area with inmates, where he stayed for several hours. In the morning, he was brought before a judge via video and learned he was involved in a physical altercation with police, and he had punched one of them. He made no statement. His wife posted bail and he was released. He was in pain and later learned he had broken ribs, an injured elbow, and cuts and bruises. He hired an attorney, who represented him at the proceedings. His case was continued for several months. The judge later ruled if he stayed out of trouble for a period of time and made a \$1,000 donation to the local food bank, the charges would be dismissed. The charges were later dismissed after he provided proof of his donation and good conduct.⁴

In Applicant's response to the FORM regarding his 2013 arrest for assault and resisting arrest, he stated that he was going through a stressful time, was away from home, and unfortunately chose to binge on alcohol. He stated:

The incident resulted in an arrest for assault, but I feel this was in major part due to my treatment at the hands of the bouncers at the nightclub I was in. I would not, nor have I ever assaulted another person without being in a situation of self-defense. I felt I was being unfairly targeted and I

³ Item 9.

⁴ Item 12; AE C, D.

was under attack, so I responded with force. Let it be known, as I was charged also for resisting arrest, this was my result of being unable to breathe as I had been face-down on the floor with weight on my back and hands obstructed. I did not strike an officer, as I incorrectly stated at the time of the interview. The police report will show that fact.⁵

This statement contradicts Applicant's report to his supervisor that he blacked out and could not recall what happened at the time of the incident.

Applicant completed a security clearance application in October 2013. In response to question 24 that asked if, in the past seven years, alcohol had a negative impact on his work performance, professional or personal relationships, finances, or resulted in intervention by law enforcement or public safety personnel, Applicant answered "yes" it had from October 2012 to February 2013.⁶ He disclosed:

October 2012-excessive drinking while on business travel. Was late for work and admitted to my boss the situation. Jan[uary] 30, 2013-excessive drinking while on business travel-contributed to my behavior which resulted in my arrest.⁷

He further disclosed that the negative impact alcohol had on him included poor performance at work and his arrest due to drinking alcohol. He admitted he was drinking too much at the time and it also caused a strained relationship with his wife.⁸

Applicant voluntarily participated in counseling from February 2013 to August 2013. He indicated he wanted to show he could stop drinking. He stated he did not consume alcohol from February 2013 to June 2013. He attended group sessions, but he did not participate in individual counseling. He indicated he successfully completed the program, which included attending some Alcoholics Anonymous (AA) meetings. No information was provided as to whether he received a diagnosis or a prognosis by a professional.⁹ In his background interview, Applicant stated that he attended this treatment for depression and not due to any alcohol issue.¹⁰ This contradicted his response to the FORM in which he said he mitigated the issues raised by his alcohol

⁵ AE A.

⁶ Item 2.

⁷ Item 2.

⁸ Item 2.

⁹ Item 6.

¹⁰ Item 6; AE C.

consumption through attendance at a counseling program and some Alcoholics Anonymous meetings.¹¹

During his background interview in January 2014, Applicant indicated that he began drinking alcohol when he was about 19 years old. He would consume about six beers per sitting every weekend. In 2012 he began drinking liquor because it was more fun. He had three to four drinks twice a week. He confirmed that he continued to consume alcohol.¹²

In Applicant's response to the SOR, he argued that the three alcohol-related incidents are not related because significant time had passed between them, such that they are isolated incidents. The first occurred when he was 23 years old and irresponsible. The second occurred when he was 30 and deterred him from future drunk driving. The third incident, which involved an arrest for assault and resisting arrest, occurred when he was 45 years old, and it was a learning experience for him.¹³ He stated:

The three alcohol-related incidents happened at different times in my life, each separated by 7 and 15 years in between. As of this writing, I believe my quality of life has never been better. As I have learned after my 2nd incident to not drink and drive, and it is the final incident that has given me perspective to change my life and to never be in the position of trouble with the law for the remainder of my life.¹⁴

In response to the FORM, Applicant confirmed he continues to consume alcohol, but changed his mentality about drinking and no longer binges on alcohol. He explained he is able to abstain from alcohol consumption for weeks and months. He believes that except for the three alcohol-related incidents he has had a positive career and has been a trusted advisor to the federal government as a contractor.¹⁵

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). 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.

¹¹ AE C.

¹² Item 6.

¹³ AE A.

¹⁴ AE A.

¹⁵ AE A, B.

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 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to 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

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.

I have considered all of the disqualifying conditions under AG ¶ 22 and the following are potentially applicable:

- (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
- (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 has been arrested three times for alcohol-related incidents. He was charged with DUI in 1991. He was charged with driving while intoxicated in 1998, and the charge was reduced to DUI. He was charged with assault and resisting arrest in 2013 while on business travel for his job. The last incident occurred when he was binge drinking and blacked out. I find AG ¶¶ 22(a) and 22(c) apply.

I have considered all of the mitigating conditions under AG ¶ 23 and 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 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"); 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 has been involved in three serious alcohol-related incidents over a 22-year-period. After his first DUI arrest in 1991, he indicated he learned his lesson and did not drink and drive for years. After the second DUI in 1998, he stated he had learned a lot from this mistake and did not intend on drinking and driving in the future. He explained that the 1991 DUI only taught him a lesson for a few years because he did not suffer many legal ramifications for his actions. Regarding the 2013 incident,

Applicant admitted he was binge drinking. He told his supervisor he blacked out and could not remember what happened. In his response to the FORM, he said he was provoked by the bouncer at the club and acted in self-defense. His contradictions raise concerns. Although there is a significant period of time between each incident, there is also a pattern. Applicant participated in group counseling, but he first indicated it was not for his alcohol abuse, but was rather for depression. He provided evidence that he attended AA, which was part of the counseling program. I am not convinced that Applicant's past alcohol-related conduct happened under circumstances that are unlikely to recur, because they have recurred, albeit over a period of years. His comment that he only learned a lesson for a few years raises the question as to how long the 2013 incident will have an impact on him. Applicant's conduct casts doubt on his good judgment, reliability, and trustworthiness. I find AG ¶ 22(a) and 22(d) do not apply.

Applicant acknowledged that alcohol had a negative effect on him, but he believes he has resolved his issues. He indicated he abstained from consumption for a period of time to prove he could abstain. He attended group counseling and some AA meetings. He continues to consume alcohol, and there is no evidence that he has been involved in an incident since 2013. AG ¶ 22(b) provides some mitigation.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions for criminal conduct under AG ¶ 31, and the following potentially apply:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has been arrested three times for alcohol-related criminal conduct in 1991, 1998, and 2013. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions for criminal conduct under AG ¶ 32, and 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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal conduct spans a 22-year-period. The analysis under Guideline G, alcohol consumption, also applies under Guideline J, criminal conduct. Until Applicant's alcohol issues are resolved, I am not confident that his criminal behavior is unlikely to recur. At this juncture, I find his past criminal conduct casts doubt on his good judgment, reliability, and trustworthiness. I find AG ¶ 32(a) does not apply. There is some evidence that Applicant is remorseful for his conduct and he indicated he has a good employment record. I find AG ¶ 32(d) has some application.

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 the 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. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 48 years old. He has been married to his wife since 1997. He has worked for federal contractors since 2002. He has been involved in three alcohol-related incidents since 1991. The last one occurred in 2013 when he blacked out and was arrested for assault and resisting arrest. After each of the three incidents, Applicant acknowledged his mistakes and indicated he had learned his lesson. He participated in two counseling programs. Although a significant period of time had passed between each, there is a recurring pattern of alcohol-related incidents resulting in criminal charges. Some mitigation was provided to show that Applicant participated in group

counseling, but there is conflicting information about the purpose of his participation. Initially Applicant indicated that the counseling was for his depression, and later stated it was related to the alcohol incident. This is relevant because there is insufficient information to determine whether his issues with alcohol were adequately addressed. Although there is some evidence of mitigation, it is insufficient because Applicant has continued to periodically consume alcohol to the point of impairment over the years, which is concerning. Without credible and independent evidence to corroborate his assertions that he has gained insight into the behaviors which underlie the three alcohol-related instances, I remain unconvinced that similar incidents will not recur. Applicant has not met his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline G, alcohol consumption and Guideline J, 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.c:	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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge