



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-26682
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: Greg D. McCormack, Esquire

February 26, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 28, 2005. On October 10, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, J, and E for Applicant. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 31, 2007. He answered the SOR in writing on November 2, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on November 16, 2007. The case was assigned to another judge and a hearing was scheduled on December 12, 2007. The hearing was cancelled due to appearance of counsel. I received the case assignment on December 7, 2007. I granted Applicant's request for a delay until

January 29, 2008, in order for his counsel to be available. DOHA issued a notice of hearing on January 2, 2008, and I convened the hearing as scheduled on January 29, 2008. The government offered Exhibits (Ex.) 1 through 10, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through D, without objection. DOHA received the transcript of the hearing (Tr.) on February 11, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated June 25, 2007, Applicant admitted the factual allegations in ¶¶ 1.a- 1.g; ¶¶ 2.a-2.c; and ¶¶ 3.a, 3.b, 3.c, 3.e, and 3.f of the SOR, with explanations. He denied the factual allegations in ¶ 3.d of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 41 years old. He is divorced with two adult children. After his high school graduation in 1987, he began employment with a government contractor. He has maintained that employment for 20 years, receiving various promotions. He holds a confidential clearance.¹

Applicant started drinking alcohol in high school with his friends. He drank beer on the weekends. In 1986, he was charged with improper equipment and Driving Under the Influence (DUI). He attended driver improvement class. The charge was later amended to Reckless Driving. His license was suspended. In 1987, Applicant was charged with Drunk in Public. He and his girlfriend were in his car and she had an open bottle of alcohol. He was arrested and fined \$15 and ordered to pay \$20 in court costs. He was on probation for one year. In 1988, Applicant was fined for being disorderly in a public place.²

In May 1989, Applicant was found guilty of a DUI. He completed an alcohol driver awareness program ordered by the state. His license was suspended for six months. He received counseling in a chemical dependency program after that incident from June 26, 1989 until January 1990.³

Applicant's 1989 marriage ended in divorce in 1998. Applicant was awarded custody of his two sons after contested custody. He raised his two sons as a single parent. In March 1999, Applicant was with his son at a basketball game. He and his ex-wife had a disagreement over how to handle a minor injury that his son received. Applicant was arguing with his ex-wife and stepped in front of her and she fell back. He was charged with a misdemeanor assault and battery of a family member. As a result of

¹GE 1 (Applicant's security clearance application, dated November 28, 2005).

²GE 3 (Applicant's response to Interrogatories, dated March 16, 2006).

³*Id.*

this charge, Applicant was required to attend anger management classes. He completed the course successfully. The court also placed Applicant under a restraining (protective) order for 12 months. Applicant complied with the court orders and on July 5, 2000, the charges were dismissed.⁴

In February 2000, Applicant received his second DUI charge. He was found guilty and sentenced to 60 days jail (suspended), placed on probation, fined, had his license suspended and was referred to alcohol rehabilitation. He completed counseling and received treatment for a substantial period of time until November 2002. Applicant attended Alcoholics Anonymous and abstained from drinking for a short time.⁵

On October 27, 2000, Applicant purchased a shot gun for his son as a Christmas present. He completed the requisite paperwork. He was charged with making a false statement to purchase a firearm/false statement on firearm consent form, which is a felony under state law because he did not disclose that he was under a protective order at the time of the application for the firearm. He believed the year for the protective order was over and thus he did not disclose anything on the form. On March 8, 2001, the charges were Nolle Prosequi (dismissed) and Applicant paid a \$50 fine.⁶

Applicant has continued to consume alcohol. He drinks beer after work. His normal work day is approximately 12 hours. His recent alcohol consumption was approximately 12 beers a week. He does not drink at work.⁷

On Applicant's November 28, 2005, security clearance application he disclosed his incidents and arrests involving alcohol, domestic violence and purchase of a shotgun for his son. He answered "yes" to questions concerning his police record. He listed the charge for making a materially false statement and the subsequent dismissal of the charge in 2001. He did not disclose any use of marijuana or any other illegal drug.⁸

Applicant's work performance is rated "exceeds normal requirements" or higher.⁹ He has recommendations from his colleagues and his supervisor. Applicant is very professional in his conduct and work ethic. He is an asset to his current team. He gets along well with others and has a strong commitment to his job. Applicant is a conscientious and meticulous worker. He requires minimal supervision.¹⁰

⁴Tr. 38; 39 and 40.

⁵Tr. 35; GE 4 (Interrogatories, dated March 2006).

⁶Tr. 42; 43 and 44.

⁷GE 2 (Applicant's response to interrogatories, dated March 2006).

⁸GE 1 (Security Clearance Application, dated March 2005).

⁹AE C (Performance Appraisals 2005-2007).

¹⁰AE B (Enclosures 1-7).

Applicant responded to written interrogatories in March 2006. He disclosed that he had used marijuana (1996) in response to Question 1 concerning the use of any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any Cannabis (to include marijuana and hashish).¹¹

In November 2006, Applicant was working 12 hour days for long periods at a time. He forgot to register his vehicle. He was charged with failure to obtain registration/title, an infraction under the state code. He was fined and ordered to pay costs.

On July 2, 2007, Applicant was evaluated for substance abuse as part of his security investigation. He admitted to a history of significant alcohol use. He also acknowledged using marijuana and trying cocaine in the past but does not do so any longer. After receiving treatment for alcohol and substance abuse from 1999 until 2002, he continued to drink. His last reported alcohol use was June 30, 2007. However, a urine screen collected at the time of the evaluation revealed a positive for ethylglucuronide. The urine screen reports any consumption of alcohol for approximately 80 hours prior to the test. Due to the test result, the evaluator opined “the test results appear to be in direct contradiction with his self reported last use. This allows for some concern that his consumption may be more significant than he revealed.” The evaluator in 2007 recommended an outpatient substance abuse treatment program for at least 16 weeks. Applicant did not heed the recommendation for the treatment or abstinence. She also recommended a 12-step support group and urine screening and breath alcohol testing. Applicant did not comply with the recommendations.¹²

During the 2007 evaluation for drug use, Applicant was asked many questions. He admitted trying cocaine in the past when he was a teenager. He forgot to list cocaine as a drug that he had used in the past on his March 2006 interrogatories.¹³

On January 23, 2008, shortly before his hearing, Applicant signed an Affidavit that he no longer drinks alcohol. He is willing to submit to another evaluation and participate in treatment.¹⁴ He realizes that it was not the wisest decision not to begin another treatment program at that time.

Policies

When evaluating an Applicant’s suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list

¹¹Tr. 44.

¹²GE 5 (Report of Evaluation, dated July 17, 2007).

¹³*Id.*

¹⁴AE A (Affidavit, dated January 23, 2008).

potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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

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, “(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.”

In this case, Applicant has a documented history of problems with alcohol when he was young man (1986-1989). He has several alcohol related driving incidents and arrests. His last DUI was in 2000. He admitted he has a history of significant alcohol use which has led to impaired judgment while driving. Thus, AG ¶ 22 (a) and (c) apply.

In July 2007, Applicant was evaluated for substance abuse by a licensed substance abuse therapist/practitioner. The legal and substance abuse treatment history was deemed significant. Thus, AG ¶ 22(e), “evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program,” applies.

AG ¶ 23 provides conditions that could mitigate 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.

Applicant had a lengthy history of alcohol abuse, and his last DUI was in 2000. Since that time, he has not had any other alcohol-related incidents. He has received counseling and treatment on several occasions. Applicant did not see a need to abstain from alcohol after his treatments. In 2006, he acknowledged drinking beer and he intended to do so in the future. However, he did not heed a 2007 recommendation to abstain from drinking or enter an outpatient treatment program. He acknowledges that was not a wise decision. The therapist doubted that Applicant truthfully reported his last use of alcohol. Just a few days before the hearing, Applicant vowed to abstain from alcohol and began counseling sessions. He received alcohol treatment and counseling in the past and did abstain from drinking for short periods of time. Thus, his drinking is likely to recur. Applicant's recent consumption of alcohol and untruth to the therapist as shown by the urine test showing recent alcohol use does not allow mitigation under 23(a) and (b).

Guideline J, 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 describes conditions that could raise a security concern and may be disqualifying, "(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's alcohol-related arrests and DUI's combined with his arrest for domestic assault, his charge of making a false statement to purchase a firearm constitute criminal activity as envisioned under ¶¶ 31(a) and 31(c).

AG ¶ 32 provides conditions that could mitigate security concerns:

(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;

(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 has had no serious infractions with the law since 2000. He has been employed with the same company for 20 years. He raised his son as a single parent. He completed anger management classes after the domestic incident with his ex-wife. He has modified his alcohol consumption as described above. He is described as an exemplary employee. Thus, 32(a) and (d) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant disclosed the information concerning the 2001 charge concerning the gun he purchased on his 2005 security clearance. He did not disclose any illegal drug use in the past. However, when he completed his 2006 interrogatories he listed marijuana use in 1996. I find him credible that he did not think of that since it was in the distant past. The government did not establish that this was an intentional omission on the part of the Applicant. Similarly, in 2007 when Applicant was interviewed and evaluated for substance abuse, he acknowledged use of marijuana and trying cocaine. He did not list cocaine in the 2006 interrogatories. He used cocaine one time when he was a teenager. He did not think about it when he was answering the questions about illegal drug use in 2006. If he were trying to hide something, he would not have been so open with the evaluator in 2007. Thus, ¶16(a) has not been established.

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) 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.

Applicant had problems with alcohol when he was young. His last incident with alcohol occurred in 2000. Since that time he completed court ordered treatment programs and modified his drinking. Applicant did not exhibit any problems with alcohol after his 2002 treatment. However, he was diagnosed recently in 2007 by a licensed therapist and did not heed the recommendations for treatment. He also was not truthful about the last use of alcohol according to the test result noted in that report. Applicant also was involved in a domestic assault incident with his ex-wife in 1999. He completed his probation and successfully completed anger management classes. In 2000, he decided to purchase a gun for his son. However, he did not realize that he was still under a protective order. Thus, he did not disclose anything unfavorable on his application for the gun purchase. The charge for the misrepresentation was dismissed.

Applicant raised his sons as a single parent. He has been employed with the same company for 20 years. He has received various promotions during the years. His appraisals rate him as exceeding standards. He has never had any difficulty at work with any situation, including alcohol. He disclosed information on his 2005 security clearance application in detail concerning his alcohol-related incidents, arrests, and domestic assault charge. He also listed the charge concerning the purchase of the gun and the charge for misrepresentation. However, he did not list any use of an illegal drug on that application.

In 2006, when Applicant completed an interrogatory for drug use, he listed marijuana in 1996 but did not list the cocaine. During the 2007 evaluation he was asked many questions. He acknowledged that he used marijuana and had tried cocaine once. Applicant was candid at the hearing that he did not think to mention the 1996 usage of marijuana or his experiment with cocaine. He had already disclosed his various infractions and problems with the law and his police record in the 2005 application. This was not an intentional deception on Applicant's part.

Applicant is a loyal and hardworking employee. He is a dedicated father. He has many favorable references and character notes. He extricated himself from his marital situation. However, he has not mitigated the security concerns under the alcohol consumption guideline. Just several days before the hearing, Applicant vowed his alcohol consumption was behind him. Granted, he has not been involved in any legal issues or problems at work as a result of drinking. However, given the long history of alcohol use, diagnosis by a therapist, minimizing of alcohol consumption, and his decision in 2007 not to followup on treatment and abstain from drinking, it is premature to conclude that it will not recur. He has just recently decided not to drink and began alcohol treatment. He realizes that he is now subject to scrutiny for testing and would jeopardize his job and his security clearance. However, a longer track record of abstinence is necessary to mitigate alcohol consumption concerns. He was candid at the hearing and was credible in his testimony that he is not vulnerable to any threats or intimidation that might jeopardize national security.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Overall, 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 mitigated the security concerns arising from criminal conduct and personal conduct. He has not mitigated the concern under alcohol consumption.

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:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant
Subparagraph 3.d:	For Applicant
Subparagraph 3.e:	For Applicant
Subparagraph 3.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

NOREEN A. LYNCH
Administrative Judge