



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



In the matter of:)
)
) ISCR Case No. 06-03112
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Robert Bohn, Esquire

February 24, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

On August 12, 2004, Applicant submitted his Security Clearance Application (SF 86). On September 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). 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 answered the SOR in writing on October 20, 2008, and requested a hearing before an administrative judge. On November 28, 2008, DOHA assigned the case to me and issued a Notice of Hearing on December 16, 2008. The case was heard on January 14, 2009, as scheduled. The parties stipulated to the introduction of the Government's exhibits (GE) 1 through 6, and Applicant's exhibits (AE) A through Q into evidence. Applicant testified in his case-in-chief. DOHA received the hearing transcript (Tr.) on January 26, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in paragraphs 1.a, 1.c and 1.e. He admitted the allegations contained in paragraph 1.b, but denied that he was ordered to attend 10 hours of alcohol counseling. He admitted the allegations contained in paragraph 1.d, but denied that he was found guilty of DUI. He denied the allegations contained in paragraph 2, except those contained in paragraph 2.b which he admitted. His admissions are incorporated into the following findings:

Applicant is 52 years old and divorced. He was married for 14 years and has a 19-year old daughter. He and his wife share custody of their daughter. After graduating from college with a bachelor's degree in accounting, he was an account manager and comptroller for a medium size subcontracting company with revenues between \$25 and \$50 million for several years. (Tr. 16) He then owned his own business and later worked as a consultant for other companies. For the last 15 years, he has worked in the computer technology field. Last summer, he obtained a Master of Science degree in Information Technology.

Applicant began his current position with a defense contractor in October 2002. As an IT project manager, he is responsible for budgeting and scheduling various jobs and about 30 people. He was granted an Interim Secret security clearance in 2004 that was revoked pending this proceeding. Since working in this position, he has received performance evaluations that rate him as meeting or exceeding expectations for the years 2003 to 2007, resulting in increases in his compensation. (AE J)

Applicant began consuming alcohol in his late teens while in high school. (Tr. 35). He continued to consume alcohol during and after leaving college, but was never convicted of any alcohol-related incidents until middle age.

Applicant has five alcohol-related criminal incidents in his background. In July 1998, he was driving home after having a couple beers at a local bar when the police stopped him for going the wrong way down a one-way street. He refused a breathalyzer test and failed a field sobriety test. He was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI); (2) Expired registration; and (3) Driving the Wrong-Way

on a One-way Street. In June 1999, he pleaded guilty to Alcohol Related Improper Control by Driver and Driving the Wrong-Way on a One-way Street. (Tr. 40-47) This first incident occurred in State 1. He was 42 years old at the time. He denied that he was intoxicated at the time of this arrest. (Tr. 78; GE 3)

In May 2001, Applicant had dinner with a couple co-workers. After leaving the restaurant, the police stopped him for speeding and requested that he take a breathalyzer test. Applicant refused the test and was arrested. He was charged with (1) DUI; and (2) Speeding. In October 2001, he pleaded guilty to a charge of Alcohol Related Reckless, and the Speeding charge was dismissed. He was sentenced to 60 days in jail (suspended), and fined \$1,800 (\$900 suspended). (GE 3) He was placed on 12 months supervised probation and ordered to obtain an alcohol assessment, which he did. (Tr. 52) The next time he appeared in court, the judge did not have the evidence of the assessment results, and consequently he did not order Applicant to attend alcohol counseling. (T. 53) This incident also occurred in State 1. During the hearing, he admitted that he had been drinking several hours before being stopped by the police, but denied that he was intoxicated at the time. (Tr. 81)

In September 2004, Applicant attended a family reunion in State 2. On his way back to his hotel, he made an illegal U-turn and ran a red light. After being stopped by the police, he took a breathalyzer test that he failed. He was arrested and charged with (1) Operating While Under the Influence (OWUI); and (2) Improper Turn on Red. He pleaded guilty to the OWUI and the other charge was dismissed. He was fined \$1,250 and his State 3 driver's license was suspended for six months. (GE 4; Tr. 58) The court ordered him to complete an alcohol assessment/driver's safety course. He admitted that he was under the influence of alcohol at the time he was arrested. (Tr. 54) About four years later, in August 2008, he started attending the court-ordered classes, consisting of eight hours of instruction. He completed the course in October 2008. (AE O; P) He did not take the classes sooner because he could not locate an appropriate course in his then-resident state (State 3) before that. (Tr. 57) He found the classes to be educational and informative. (Tr. 70)

In October 2006, Applicant consumed a couple alcoholic beverages after work with friends. He then went to study at a local coffee shop. While he was driving home around 10:30 p.m., he swerved his car to avoid hitting a cat and ran into a tree. (Tr. 111) The police took him to the hospital where he was treated for a concussion. He walked out of the hospital a couple hours later without being discharged. The following morning, he telephoned the police and learned that he was ticketed for a DUI and his car was impounded. He does not remember walking home from the hospital in the early morning or any other details from the accident. (GE 5; Tr. 111) Because he never received any legal documents after the incident, he did not think charges were filed. However, charges were filed and he missed a hearing on the DUI, resulting in an automatic suspension of his State 3 driver's license.¹ (Tr. 92) During the hearing, he admitted that

¹ Applicant has had driver's licenses issued from State 1 and State 3. Both licenses have been suspended at some point. The record is not clear as to the exact time frame of those suspensions or when the licenses were obtained.

he had consumed alcohol prior to the accident, but denied that he was intoxicated. (Tr. 62-63; 86) He reported this incident to his employer in January 2007. (AE Q) The criminal DUI charges were later dismissed. (AE A)

In January 2007, Applicant was stopped by the police after he failed to make a complete stop at a stop sign in State 3. He was arrested by the police and charged with Drive While License Suspended for Driving Under the Influence. After the arrest, he hired a lawyer and learned of the specific DUI charges of October 2006 and that his license was suspended. (Tr. 64) He also found out from the police report that he had been hospitalized after the accident. (Tr. 114) He subsequently biked or took the train to work until the suspension expired in December 2007. (Tr. 97; 115)²

In the fall of 2008, Applicant made an appointment with a certified substance abuse counselor for an alcohol evaluation in preparation for this hearing. (Tr. 106) After an hour and a half interview, the counselor determined that Applicant “does not meet the criteria for Alcohol Dependency.” (AE K; Tr. 104) The counselor noted in his brief November 2008 report that Applicant was attending a counseling center for DUI classes for his 2004 conviction. (*Id.*)

Over the course of his life, Applicant has abstained from consuming alcohol during stressful periods. (Tr. 78) The last time Applicant consumed alcohol was on July 15, 2008, at his daughter’s birthday party. (Tr. 38) Prior to that day, he had a glass of wine on Memorial Day. (39) He has not had an alcoholic drink during the past six months because consuming alcohol has “caused a lot of problems. It turned out to be very expensive. And it doesn’t seem to be worth the trouble.” (Tr. 39) He does not believe he is an alcoholic nor that he has a problem with alcohol. (*Id.*; Tr. 108; 124) He does not intend to use alcohol in the foreseeable future. (Tr. 74) Up to March 2008, he admitted that he was still consuming alcohol.

Four of Applicant’s accomplished colleagues submitted letters in support of Applicant, attesting to his reliability, integrity and trustworthiness, especially as it relates to handling classified information. They have known him since he began working for their current employer in 2004. All of them are aware of the alcohol security concerns underlying this proceeding. (AE C, D, E, and F) Two of Applicant’s former college roommates submitted strong letters of recommendation. They are aware of Applicant’s alcohol-related charges, but do not believe that he has an alcohol problem. (AE H; I) Applicant’s former wife also submitted a letter on his behalf. She has observed him over the years and does not think he abuses alcohol. (AE G)

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

²It is not clear from the record as to the disposition of this January 2007 charge.

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(a), 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.

Directive ¶ E3.1.14 requires the Government to 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 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 that decisions adverse to an applicant shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the Government's 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 two conditions that could raise a security concern and may be disqualifying in this case:

- (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 was arrested and/or charged with alcohol-related offenses in 1998, 2001, 2004 and 2006. There is sufficient evidence to raise significant security concerns under the above-cited disqualifying conditions.

After the Government produced substantial evidence of those disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation. AG ¶ 32 provides five conditions that could mitigate security concerns raised under this guideline, two of which may be 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 the recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's last criminal arrest was in October 2006, about two years ago. This incident involved alcohol consumption, as did four preceding arrests. Hence, the October incident did not occur under such unusual circumstances that would make it unlikely to recur, as required for the application of AG ¶ 32 (a).

Applicant provided some evidence of rehabilitation. He has not been involved in any alcohol-related charge for two years, has a good employment record with his employer over the past four years, and appears remorseful about the criminal charges. He also presented evidence of completing an alcohol counseling course in October 2008, which was court-ordered in September 2004. Based on his four-year delay in

complying with the court's mandate, AG ¶ 32 (d) has less mitigating weight than would otherwise be the case.

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22, one of which is potentially applicable in this case:

(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.

Applicant has four alcohol-related criminal charges in his history: a DUI in 1998, a DUI in 2001, a DUI in 2004, and a DUI in 2006. The Government established security concerns under AG ¶ 22(a).

Conditions that could mitigate security concerns raised under this guideline are provided under AG ¶ 23:

(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.

AG ¶ 23(a) does not provide mitigation for the reasons set forth under AG ¶ 32 (a) above.

Applicant denied that he has an alcohol problem, but acknowledged that it has caused him expensive difficulties over the past ten years. As a consequence, he asserted that he has not consumed alcohol for the past six months. Applicant provided an alcohol evaluation that he obtained in preparation for this hearing and as evidence of actions he has taken to address his concerns. The evaluation was performed by a certified alcohol counselor who was not a duly qualified medical professional, such as a physician, clinical psychologist, psychiatrist, or a licensed clinical social worker who is a staff member of a recognized treatment program, as required under the guidelines. The evaluation consisted of a brief interview of Applicant, resulting in a final opinion that does not address elements routinely contained in standard psychological or psychiatric evaluations of this nature. Hence, the evaluation is given little weight and does not corroborate Applicant's assertions that he has taken steps to address any of his alcohol-related concerns. AG ¶ 23(b) has no application to the concerns raised.

The record evidence does not support the application of AG ¶ 23(c). Applicant did not participate in a formalized substance abuse treatment program, as contemplated under this guideline; hence, AG ¶ 23(d) is not applicable either.

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). They include the following:

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include 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, including Applicant's candid

testimony. Applicant is an intelligent and very successful 52-year-old man, who has worked for his employer for the last four years and received the support of many accomplished colleagues. The outpouring of support is impressive.

Applicant began having problems with alcohol in 1998 and they continued up to October 2006. He has four separate arrests for DUI and three convictions. His driver's licenses have been suspended for significant periods of time as a result. He acknowledged that he had consumed alcohol before each incident, but denied that he was intoxicated, except on one occasion. He believes that he should never consume alcohol and drive again, but does not think he has an alcohol problem, despite the DUIs. He decided to stop drinking in July 2008, about six months ago, and one month later managed to comply with a court order entered four years earlier. This alcohol assessment/driver's safety course was also two years after the serious October 2006 incident. While he now appears to appreciate the significance of his criminal history and the adverse effect it may have on his employment, he has been dilatory, and possibly stubborn, in not addressing his acknowledged concerns sooner, especially in light of his pursuit of a security clearance since August 2004. It is particularly troublesome that two months after submitting an SF 86, he was convicted of a DUI, but waited four years to take the eight hours of alcohol-related counseling, as ordered. That delay exemplifies an underlying lack of good judgment or willingness to comply with rules. Without substantive independent evidence to corroborate his assertions that he does not have an alcohol problem, the record does not contain sufficient evidence of rehabilitation or mitigation.

Overall, the record evidence leaves me with substantial 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 criminal conduct and alcohol consumption guidelines.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

Subparagraph 2.c:

Against Applicant

Conclusion

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

SHARI DAM
Administrative Judge