



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



In the matter of:)
)
) ISCR Case No. 06-15166
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

May 19, 2008

Decision

HEINY, Claude R., Administrative Judge:

Between 1987 and 2005, Applicant was convicted three times for Driving Under the Influence and once for public intoxication. Following his 2003 arrest, Applicant received counseling and stopped drinking. However, he drank again in May 2005, which resulted in the public intoxication conviction. With this arrest it was clear to Applicant that he should never again drink. He has not drunk alcohol since 2005.

After a thorough review of the case file, pleadings, exhibits, and evidence, I conclude Applicant has rebutted or mitigated the government's security concerns under Guideline J, criminal conduct, and Guideline G, alcohol consumption. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order

and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on October 28, 2007, detailing security concerns under criminal conduct and alcohol consumption.

On November 16, 2007, Applicant answered the SOR, and requested a hearing before an administrative judge. On January 16, 2008, I was assigned the case. On March 12, 2008, DOHA issued a notice of hearing scheduling the hearing held on March 26, 2008. The government offered Exhibits (Ex.) 1 through 4, which were admitted into evidence. Applicant testified on his own behalf. The record was kept open to allow Applicant to submit additional matters. On March 26, 2008, two additional documents were received. There being no objection, the documents were admitted into evidence as Exs. A and B. On April 10, 2008, the transcript (Tr.) was received.

Findings of Fact

In his Answer to the SOR, Applicant admits the factual allegations in SOR ¶ 1 and neither admitted nor denied the allegations in SOR ¶ 2, which relate to SOR ¶ 1, allegations which he admitted. In 1987, 1995, and 2003, Applicant was arrested and convicted for Driving Under the Influence of alcohol (DUI).

Applicant is a 41-year-old lead technician who has worked for a defense contractor since June 2003, and is seeking to obtain a security clearance. (Tr. 41-42) Applicant worked for the same company for a couple of years before leaving and then returning. (Tr. 24)

Applicant grew up in the mid-West. Applicant began drinking in 1987 at age 19. Also in 1987, his parents divorced, which occurred when he was away at school. His parents sold their house and moved while he was away at school. (Tr. 83) His mother and sister moved to California and his father stayed in the mid-West. (Tr. 27, 39) Following the divorce, Applicant was a bitter person who getting along with was difficult.

In May 1987, Applicant, then age 20, was arrested for DUI. (Tr. 71) He had been at a bar drinking with friends. (Tr. 68) He spent the weekend in jail. Following his conviction for DUI, Applicant was sentenced to 30 days in jail, a \$310 fine, and he received six months probation.

In February 1994, Applicant obtained his associate's degree in electronics and received training in computer technologies. (Tr. 23, 30) He was working as an electronic technician in California. In 1998, he returned to the mid-West. (Tr. 33) In 1999, he moved to California to start his own business. (Tr. 33) The business was underfinanced and folded. (Tr. 28, 38) Applicant moved back to the mid-West. (Tr. 34) In June 2001 following a few months of unemployment, he moved to California and attended school.

¹ 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 received additional computer and network certifications. (Tr. 31) In June 2003, he moved back to the mid-West and started working for his current employer. (Tr. 34)

New Year's Eve 1995, Applicant was arrested for speeding and DUI. Following conviction for DUI, his driver's license was suspended for 30 days, he paid a \$500 fine, attended an alcohol awareness class and victim impact education, and was in a diversion program from six to twelve months. (Ex. 3, Tr. 65) In October 2000, he got his vehicle stuck following a rain. The police officer smelled alcohol and charged him with DUI. He was found not guilty of the charge.

In 2001, he was arrested and charged with DUI and refusing to submit to a preliminary breathalyzer test (PBT). The DUI charge was dismissed, but his driver's license was suspended for one year having been found guilty of refusing to submit to a PBT. Applicant attended 90 days recovery treatment. (Ex. A) In November 2003, he was charged with DUI and failure to maintain a single lane of traffic. He spent the weekend in jail. The failure to maintain a single lane of traffic charge was dismissed but he was found guilty of the DUI. He paid a \$500 fine, was required to attend Alcoholics Anonymous (AA) meetings for two months, received one year probation, and his driver's license was suspended for a year. (Tr. 54) When his license was reinstated, Applicant was required to put a breath analyzer device in his car for an additional year. (Tr. 60)

Applicant's father is in the chronic stages of alcohol dependency and is in the process of needing emergency acute care. (Ex. A) Applicant is at risk for biological dependence due to his father's chronic stage of alcoholism. (Ex. A) Applicant has watched his father, who is a heavy alcoholic, deteriorate and disintegrate. This has increased Applicant's motivation to quit drinking. (Tr. 108-109)

From late 2003 until the summer of 2004, Applicant attended intensive weekly counseling with a certified alcohol drug abuse counselor. (Ex. A, Tr. 54) It was determined he was not chemically dependant on alcohol. He was diagnosed with "nondependent alcohol abuse unspecified drinking behavior." (Ex. A, page 3, Tr. 56) During treatment, he took a hard look at this background and family issues and why things were happening to him. (Tr. 54) The counseling looked at his childhood, family issues, and his parent's problems. Applicant came to realize he was harboring resentment against his parents for their divorce. (Tr. 82) He realized he had to accept things and move on. He chose to no longer blame himself and realized there were events and things he had no control over and for which he was not responsible. (Tr. 107) Following treatment, he describes himself as more honest, open minded, and having learned to live with facts as they are. (Tr. 108) He is physically in better shape.

In treatment, he was exceptionally motivated, wanted to do well, believed he had a problem and was willing to put forth the effort to change. He did not blame others for his problems. In May 2004, at the conclusion of treatment, Applicant continued to show improvement and a willingness to maintain abstinence. He was remorseful over his conduct. In treatment he came to believe "he can not drink without consequences." (Ex. A) Applicant made a decision to never again drive after having anything to drink. (Tr. 61)

After completing counseling, Applicant stopped drinking. (Tr. 77) The next time he drank was in May 2005, when he was out with friends at a bar. When he left the bar, he tripped over a parking stop and was arrested for public intoxication. Applicant was in total disbelief because he was shocked by his ill fortune in that the one night he drank he was arrested. (Tr. 109) This was the last time Applicant drank alcohol. (Tr. 45) He was found guilty of public intoxication and sentenced to five days in jail (suspended), fined \$75 and he paid \$55 in court costs. (Tr. 48-49) It was a clear sign to him that he should not drink again. (Tr. 77-78)

Applicant has dissociated himself from the friends who consumed alcohol with him. (Tr. 75) He last saw them in 2005. His friends did not take it well when he explained he could no longer associate with them. (Tr. 75) He told them he could not afford to get into any more trouble and it was easier if he was with them when they were drinking. His own abstinence was easier if he did not go out with them. (Tr. 75)

Applicant's family is his support system. They see him as a different person now that he has stopped drinking. (Tr. 82) He now spends time with friends who do not drink. (Tr. 76) He spends his time snow skiing, biking, traveling, going to movies, working on cars, and going to car shows. He decided to stop drinking because whenever he drank trouble followed him. He understands nothing good happens when he drinks and he believes it is better to abstain from drinking. (Ex. A, Tr. 74)

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 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

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. AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” apply. Between 1987 and May 2005, Applicant was arrested a number of times, convicted three times of DUI, and once for public intoxication.

Applicant has a serious drinking problem, which is in remission. Although not chemically dependent on alcohol, he was diagnosed with nondependent alcohol abuse. In 1987, at age 20, Applicant was first arrested and convicted of DUI. He was also arrested and convicted of DUI in 1995 and November 2003. In May 2005 he was convicted of public intoxication.

Following his November 2003 arrest, Applicant attended seven months of intensive counseling. During treatment, he was exceptionally motivated, believed he had an alcohol problem, and was willing to put forth the effort to change. Applicant realizes there are events, people, and things over which he had no control or responsibility. In treatment he came to believe “he can not drink without consequences.”

His father's problem with alcohol was a motivating factor. He recognized that alcohol had devastated his father, and he did not want to suffer the same fate.

After completing counseling, Applicant stopped drinking. The next time he drank, he was again arrested. Applicant was in shock and disbelief for the one night that he chose to drink he was arrested for public intoxication. This was the last time Applicant drank alcohol. He has dissociated himself from his drinking buddies. He last saw them in 2005.

Not all of his arrests resulted in convictions. AG ¶ 32(c) "evidence that the person did not commit the offense," applies to those incidents.

It has been three years since his last arrest. Applicant has a good employment record, has expressed remorse, has changed his friends, and no longer goes to the city where the majority of his arrests occurred. AG ¶ 32(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," applies as does AG ¶ 32(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."

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." Applicant was arrested and convicted four times for alcohol related incidents. AG ¶ 22(a) "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other criminal incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," and AG ¶ 22(c) "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," apply.

Applicant was diagnosed with nondependent alcohol abuse by a certified alcohol drug abuse counselor. The record does not contain the exact nature of Applicant's counseling, nor is it established the counseling was part of an "alcohol rehabilitation program." Therefore, even though a certified alcohol drug abuse counselor made the evaluation and Applicant relapsed following his counseling, 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," and AG ¶ 22(f) "relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program," do not apply. The counselor does not meet the criteria of a licensed clinical social worker under AG ¶ 22(e) and is not a medical professional under AG ¶ 22(d).

AG ¶ 22(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),” applies. His counseling was an action to overcome his problem. Starting in 2003, Applicant sought counseling, was exceptionally motivated, believed he had a problem and was will to put forth the effort to change. Even though abstinence is required only for those alcohol dependent, Applicant has established a pattern of abstinence. In the four and a half years his November 2003 arrest, Applicant has refrained from drinking except for a single night. It has been three years since his last drink. He is committed to maintaining abstinence. He has changed his friends.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was an alcohol abuser. During the seventeen year period between 1987 and May 2005, he was arrested eight times. Following his November 2003 DUI arrest, Applicant stopped drinking. However, it was his one day return to drinking that resulted in his most recent arrest in 2005 and reinforced his belief he should not drink again. He no longer associates with his drinking friends. He spends time with people who do not drink. He no longer frequents the city were the majority of arrests occurred. In the vernacular of AA, he has changed has “playmates” and “playpens.”

Applicant is motivated to refrain from all use of alcohol. He has come to believe nothing good happens when he drinks and believes it is better to abstain from drinking. His May 2005 arrest, following a year and a half of abstinence assisted in his motivation to stop using as did his father’s problems with alcohol. His father is in the chronic stages of alcohol dependency. His father’s deterioration and disintegration has strengthened Applicant’s resolve to remain alcohol free.

His counseling not only addressed his drinking, but also his problems with his family. The counseling gave him insight into how he was leading his life. Applicant has made permanent behavioral changes. It has been three years since his last drink which supports the likelihood Applicant will remain alcohol free and have no additional adverse alcohol incidents.

Even with his numerous alcohol related arrests during the 17 year period ending in May 2003, overall, the record evidence, including his counseling and three year abstinence from alcohol, leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the criminal conduct and alcohol consumption security concerns.

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: FOR APPLICANT

Subparagraph 1.a: For Applicant
Subparagraph 1.b: For Applicant
Subparagraph 1.c: For Applicant
Subparagraph 1.d: For Applicant
Subparagraph 1.e: For Applicant
Subparagraph 1.f: For Applicant
Subparagraph 1.g: For Applicant

Paragraph 2, Guideline G: FOR APPLICANT

Subparagraph 2.a: For Applicant

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge