



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



In the matter of:)	
)	
-----)	ISCR Case: 06-18108
SSN: -----)	
)	
Appellant in Personal Appearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant:: Kim Michelle Crump, Esquire

January 28, 2008

Decision

Braeman, Kathryn M., Administrative Judge:

History of the Case

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on June 13, 2007. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.¹ The SOR alleges specific concerns over alcohol (Guideline G), criminal conduct (Guideline J) and personal conduct (Guideline E) based on the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant received the SOR on June 22, 2007. He responded to these SOR allegations in an Answer dated July 5, 2007, where he admitted all the allegations and requested a hearing for which he retained counsel.

¹ This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

After Department Counsel indicated the case was ready to proceed on August 6, 2007, the matter was assigned to me on August 9, 2007. Subsequently, a mutually convenient date for hearing was agreed to. A Notice of Hearing, issued on August 16, 2007, set the matter for September 25, 2007, at a location near where Applicant works and lives.

At the hearing the Government offered five exhibits (Exhibit 1-5) admitted without objection. Applicant's counsel offered one exhibit, Exhibit A, admitted without objection, and called four witnesses including Applicant. The transcript (TR) was received on October 3, 2007.

Findings of Fact

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following findings of fact:

Applicant, 28 years old, has been employed as a computer operator and telecommunications mechanic by a defense contractor #1 in State #1 from December 2001 to August 2007. He now lives in State #2 and has worked for defense contractor #2 from August 2007 to present. He completed a Security Clearance Application (SF-86) which he signed on February 20, 2004. He previously was granted a Top Secret clearance in February 1998 when he served in the military from July 1997 to November 2001. (Exhibits 1, 2, 5; TR 19-20; 26; 29; 51)

Applicant has never married, but is engaged. (Exhibit 1, TR 28-29)

Alcohol, Criminal Conduct, Personal Conduct

Applicant failed to disclose his non-judicial punishment while in the military in response to Question 25 on his SF 86. In his investigative interview in March 2006, he voluntarily disclosed he went to Captain's Mast three times. (Exhibits 1, 5; Answer) While serving in the military, he received Non-Judicial Punishment under the Uniform Code of Military Justice (UCMJ) in February 1999 for Wrongful Possession/Use of False Military ID after he obtained a false ID show a birth year of 1976 instead of the correct date of 1979 in order to enter clubs and be served alcohol while under the legal age limit. He forfeited \$250 and was restricted for 15 days. However, he was not reduced in rank. (SOR 1.d.; 3.a.(1)) He also received non-judicial punishment in 1999 for viewing pornographic material on a government computer and was restricted for 15 days. (SOR 1.d.; 3.a.(2)) In September 1999 he had non-judicial punishment imposed for Failure to Obey Regulations and forfeited \$500. (Answer; Exhibit 2) Because of this voluntary disclosure to the investigator, he established that he had no intent to falsify by these omissions. Instead, he misinterpreted the questions as he read them too quickly. (SOR 3.a.(1), (2), (3)) (Exhibits 1,2, Answer; TR 25-26; 44-46)

After he served in the military from July 1997 to November 2001, Applicant was granted an honorable discharge. He received two "E" ribbons, an expeditionary medal, two Armed Forces Expeditionary Medals, an Armed Forces Service Medal, two Sea Service Deployment ribbons, and an enlisted surface warfare pin. There was no adverse information recorded on his Certificate of Release or Discharge from Active Duty. (Exhibits 1, 5)

Applicant admitted he consumed alcohol, at times to excess and to the point of intoxication from 1993 to at least March 2006. (SOR 1.a.) However, he never drank in the mornings or during working hours. (Answer; TR 21; TR 29-31)

In response to Question 23 Applicant did not list a February 2004 arrest on his SF-86 since he had not been convicted at the time he completed his security papers in February 2004. However, he did advise his supervisor of the arrest. He volunteered this information in the investigative interview and explained he had no intent to falsify his SF-86 and misinterpreted the question. (SOR 3.a.) (Exhibits 1, 2; TR 24; 41-44)

In a March 2006 investigative interview Applicant admitted he continued to consume alcohol once or twice per week. Then he was having four mixed drinks when he drank. He admitted becoming intoxicated once per month after drinking seven mixed drinks. He did not drink during his group sessions with an Alcohol Safety Action Program (ASAP) counselor (Dr. B.) in 2004. At that time he attended AA beyond what was required and had an AA sponsor. Recently, in 2007 he made a decision to stop drinking; however, he does not attend AA. His girlfriend who does not drink is his "sponsor." The only exception to his 2007 resolution for abstinence was that he had two drinks for his birthday in September 2007. Prior to that, his last drink was for New Years 2007. In those two cases he did not drive after he had these drinks. He no longer has any compulsion to drink. (Exhibit 2; TR 21-22; 34-38; 48-49)

Applicant no longer associates with people who drink. (TR 23) He has matured and been helped by his counseling with the ASAP counselor (Dr.B). (TR 27) Applicant is now able to better manage his relationships since he stopped drinking. (TR 28)

Applicant was arrested in August 2001 in State #1 and charged and found guilty with Driving Under the Influence (DUI), sentenced to 30 days in jail, suspended, and ordered to attend alcohol education classes. (SOR 1.b.) (Answer; TR 21) At that time Applicant was in the military and attended an ASAP program of alcohol education classes which he successfully completed. He paid all fines and met all court requirements. He was not evaluated for alcohol abuse in the military. Everyone in the military was required to go through alcohol and substance abuse programs. (Exhibit 2; TR 36-37)

Applicant was again arrested in February 2004 in State #1 and charged and pleaded guilty to Driving Under the Influence, 2nd Offense, and Speeding. He was fined, sentenced to 12 months in jail, 11 months, suspended, and ordered to attend alcohol

education classes (ASAP). His driver's license was suspended for three years.(SOR 1.c.) He served one month in jail on weekends. When he reported to ASAP he was referred to Dr. B and attended fourteen sessions and successfully completed the program. He also attended the required four Alcoholics Anonymous (AA) meetings and voluntarily went to eight more AA meetings. (Answer; Exhibits 2, 3; TR 21; TR 39-41)

Applicant was never diagnosed as being an alcoholic or having alcohol dependency, but was diagnosed as an abuser of alcohol in 2005. (TR 33-34) Dr. B recommended he abstain from alcohol. Finally, in 2007 Applicant did abstain except for his birthday in September 2007 when he had two drinks. (TR 34-35)

From August to November 2005 Applicant worked overseas to support a military contract. When he returned, he drove his car from his friend's home to his home even though his license was suspended and while he was restricted to driving to and from work. He was stopped in November 2005 for having an expired inspection because he had been overseas on a work assignment and had not noticed his expired sticker. He pleaded guilty to driving on a suspended license in April 2006, a misdemeanor, and was fined \$600 which he paid. (Exhibit 4; TR 23-24; 46)

The ASAP counselor (Dr. B) testified that his credentials include a Ph.D. in criminal justice and marriage and family therapy and a Ph.D. in clinical psychology. He is licensed as a professional counselor and as a family therapist. He is a substance abuse professional as well and runs a program to help individuals with substance abuse issues. He works on the AA model and requires individuals to attend AA weekly while in treatment. He was accepted as an expert in substance abuse. (TR 65-70) Dr B testified that Applicant was in treatment with him for four months from November 2004 to April 2005 when he completed the program. He assessed Applicant as "an excellent participant." His organization fully cooperated in allowing Applicant the time to attend the program. Dr B assessed Applicant as being very dedicated and committed to the treatment program. Part of his program is having individuals assess what are the triggers that caused them to drink in order to avoid relapse. In the subsequent two years Applicant has called Dr. B to discuss issues; Dr. B was impressed that Applicant had not relapsed even in "very low times." He has had no other DUI incidents. Dr. B encouraged people to be realistic in their relapse program and be realistic and to set limits. When they drink, he recommended they be cautious and not drive. He concluded Applicant had been successful in his approach. In conversations with Dr. B subsequent to completing the program, Applicant explained that if he would have a drink he would not drive. (TR 70-77) On cross-examination, Dr. B stated he had diagnosed Applicant as an alcohol abuser, not alcohol dependent. While he preferred abstinence, he encouraged people to only drink in moderation. His preference would be for one drink. He would be concerned about three drinks, but not overly concerned. He considered taking two drinks a "slippery slope" that could indicate potential for relapse for alcoholics or for alcohol abusers. He recommends ongoing involvement in AA. (TR 77-88)

Applicant successfully completed the ASAP program in July 2007. He is no longer on probation and his driving restrictions have been lifted. (Exhibit A; TR 46-47)

References

Applicant's site manager from Defense Contractor #1 knew him during the six years he worked for the organization. He assessed Applicant as a very good, very reliable and hard-working employee. He learned his position well and the organization relied on him to get the job done. He assessed Applicant as being in the top category of workers. Applicant for a time was a shift supervisor. He was aware of the 2004 DUI but that arrest did not cause him any concern. He observed that Applicant came to work on time and never demonstrated any behavior that would indicate an alcohol or other problem. He found Applicant to be completely honest. If Applicant wished to return to the company, the site manager would recommend that he be rehired immediately. He did not formally evaluate Applicant as he was a union employee and nothing in the collective bargain agreement covered evaluation. (TR 51-52; 53-55)

Applicant's immediate supervisor at the facility testified on Applicant's behalf. His supervisor previously knew Applicant when they served in the military together for two and a half years. He hired Applicant and assessed Applicant as being a "great worker." He did an outstanding job in his first assignment and then did an excellent job in the second position. He was his supervisor's "right-hand man." The supervisor knew about Applicant's 2004 DUI, but he never saw alcohol affect his performance. He was on call "24/7" and was always reliable. He noted that Applicant was 100% committed to his job. He viewed Applicant as very honest. He would rehire Applicant.(TR 57-61; 61-64)

Policy

As set forth in the regulation, every recommended personnel security decision must be a fair and impartial overall common sense decision based on all available evidence, both favorable and unfavorable. The decision must be arrived at by applying the standard that the grant or continuance of a security clearance or access to classified information is clearly within the interests of national security.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In all adjudications, national security is the paramount consideration. Any doubt concerning personnel being considered for access to classified information must 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts by “substantial evidence,”¹ demonstrating that it is not clearly consistent with the national interest to grant or continue an Appellant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Appellant to produce evidence to rebut, explain, extenuate, or mitigate facts. Ultimately, Appellant has the burden of persuasion to obtain a favorable clearance decision.

Analysis

Guideline G (Alcohol Consumption)

AG ¶ 21 raises the Government’s concern about alcohol consumption: “[e]xcessive 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.”

Seven Alcohol Consumption disqualifying conditions may raise a security concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

- (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (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;

¹ “Substantial evidence” is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence. *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(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;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and,

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶ 22(a) clearly applies as Appellant was found guilty of two DUIs in 2001 and 2004. While he engaged in binge drinking in the military [AG ¶ 22(c)], Applicant has not continued to drink to excess after he completed the ASAP program in 2005. The clinical psychologist and alcohol abuse counselor he saw in 2004-05 diagnosed Applicant as an alcohol abuser, not alcohol dependent [AG ¶ 22(d)]. While the clinical psychologist testified he preferred abstinence, he encouraged people in his program to develop realistic relapse programs and to drink only in moderation, but not to drive. Applicant successfully chose abstinence in 2007 except for having three drinks on New Year's Day and two drinks for his September 2007 birthday.

AG ¶¶ 22(b), 22(e), and 22(g) do not apply: Appellant did not have any alcohol-related incidents at work; a licensed clinical social worker did not evaluate his alcohol problem; Applicant complied with all court orders and received and completed alcohol counseling in 2004-05. He completed probation in 2007. No court orders concerning alcohol treatment were violated. While Department Counsel argued that 22(f) applies, there is insufficient information to determine whether his ASAP counseling constituted an "alcohol rehabilitation program" and whether or not two drinks on his birthday constitute a relapse. Clearly, he did not drive after drinking and has a better understanding of the importance of limits.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-(d) potentially apply:

(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) partially applies because his alcohol offenses were relatively infrequent and he has not had any alcohol-related offenses since February 2004, over three years ago. His reliability, trustworthiness and good judgment were affirmed by two individuals for whom he worked at the time of the incident. They never saw any indications of alcohol abuse at work. Indeed since he was on call “24/7” because of the nature of his job, he was always punctual and reliable. Both the site manager and his supervisor praised him as an outstanding worker whom they would rehire immediately.

AG ¶ 23(b) does apply. Appellant addressed his alcohol issues and fully complied with all the court orders and completed the ASAP program in July 2005 and completed probation in July 2007. Dr B assessed Applicant as being very dedicated and committed to the treatment program. While Applicant continued to drink after he finished the court-ordered program, in 2007 he made a commitment to abstinence. While he slipped twice, even on those two occasions where he did drink moderately, he made a decision not to drive. He no longer associates with individuals who drink and is engaged to someone who is a non-drinker. Thus he has met the guideline as he has established his responsible use (if an alcohol abuser); a pattern of abstinence is required only if an individual is diagnosed as alcohol dependent which is not the case with Applicant.

Applicant’s expert did not give him a “prognosis,” but he highly commended Applicant’s commitment to the program both while he was required by the courts to attend and subsequently as Applicant has called him for further guidance.

AG ¶¶ 23(c) and 23(d) do not apply.

Weighing against mitigating is his recent alcohol-related behavior on his September 2007 birthday, but even then he demonstrated moderation which is sufficient to mitigate the Guideline G conduct. After his second DUI in 2004, Appellant acknowledged his alcohol problem and changed his behavior. While he had an arrest

in 2005 for driving on a suspended and restricted license, that incident was not alcohol-related. To his credit he has had no subsequent alcohol-related incidents. He has demonstrated he has significantly changed his consumption of alcohol and now has a commitment to sobriety and abstinence.

Guideline J (Criminal Conduct)

AG ¶ 30 describes security concerns about criminal conduct, “[c]riminal 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 lists two conditions that could raise a security concern and may be disqualifying in Appellant’s 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.

Appellant was arrested in 2005 for a misdemeanor traffic offense, not a felony. He pleaded guilty and paid his fine. (SOR 2.a.) While his omissions from his security form were also alleged as criminal conduct, I do not conclude that he had the requisite intent to falsify to establish that allegation under SOR 2.b.

AG ¶ 32 describes conditions that could mitigate security concerns including:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;
- (c) evidence that the person did not commit the offense; and,
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Appellant falls with AG ¶ 32(a) as so much time has elapsed since this misdemeanor occurred. Also, there were special mitigating and unusual circumstances that would not recur, such as his having this incident just after he returned from an overseas trip. His not noticing that his registration had expired led to the stop; while driving on a suspended license is serious, he has completed his probation in 2007 and has reformed his conduct that led to the suspended license; so such an arrest is unlikely

to recur. Also he has established AG ¶ 32(d) as he has had no subsequent questionable conduct. His reliability, trustworthiness and good judgment were attested to by two supervisors from the facility where he worked for over five years.

Guideline E (Personal Conduct)

Under AG ¶ 15, “[c]onduct 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.”

With respect to the four omissions alleged, the pertinent disqualifying condition is AG ¶ 16(e)(1), which states, “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” Certainly, failing to reveal his 2004 DUI arrest and three UCMJ Article 15 issues on his security forms is a security concern. However, Applicant admitted only that he read the questions too quickly. He established that he had no intent to falsify as he voluntarily told the security investigator about all of these incidents.

Even if one were to view these omissions as intentional, Applicant has mitigated these concerns. AG ¶¶ 17(c)-17(f) details three conditions that mitigate personal conduct security concerns in this case:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and,

AG ¶ 17(c)-17(e) mitigates the misdemeanor and article 15s: Two of the four offenses were alcohol-related. He received counseling for his alcohol abuse as discussed above and has reformed his conduct. He understands the implications for his future if he commits another alcohol-related offense. These offenses are unlikely to recur; and they do not cast doubt on his reliability, trustworthiness, or good judgment.

Whole Person

Also, I considered the specific factors listed in AG ¶ 2: “(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 was 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” of the conduct at issue.

Appellant was convicted of two DUIs in 2001 and 2004, which are misdemeanors. He acknowledged his problem with alcohol. He complied with the court-ordered ASAP counseling, and has alleviated the circumstances or factors to reduce or eliminate his vulnerability to exploitation, manipulation, or duress with respect to committing DUIs and other alcohol-related offenses. He provided a solid presentation of his character and loyalty in the endorsements of his supervisors. It is very unlikely he will have another DUI. He focused his efforts and made substantial progress on correction of his alcohol abuse.

Having reviewed the guidelines and assessed him as a “whole person” in order to evaluate Appellant’s risk and vulnerability in protecting our national interests, I find Appellant has mitigated all security concerns.

Formal Findings

ALCOHOL CONSUMPTION:	For Appellant
CRIMINAL CONDUCT:	For Appellant
PERSONAL CONDUCT:	For Appellant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

Kathryn M. Braeman
Administrative Judge