



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-01822

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: David P. Price, Esquire

February 27, 2008

Decision

MALONE, Matthew E., Administrative Judge:

After reviewing the results of Applicant's most recent background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to continue Applicant's security clearance. On August 28, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)² under Guideline E (personal conduct) and Guideline J (criminal conduct).

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on November 16, 2007, and I scheduled a hearing to be held on December 12, 2007. The parties appeared as scheduled. Without objection, I admitted five exhibits offered by the government (Gx. 1 - 5). Applicant testified in his own behalf, offered 49 documents, which were sorted by topic into three exhibits and admitted without objection as Applicant's Exhibits (Ax.) A - C. DOHA received the transcript (Tr.) on December 20, 2008. Based on the facts and conclusions set forth below, Applicant's request for continued access to classified information is granted.

Findings of Fact

Under Guideline J, the government alleged in SOR ¶ 1.a that Applicant was arrested in January 2006 and charged with and pleaded guilty to driving under the influence (DUI), obstruction of justice, and cruelty to a child. The government further alleged that Applicant was given jail time for each offense, but the sentences were suspended for three years. He admitted this allegation.

Under Guideline E, the government alleged in SOR ¶ 2.a that when he was arrested as described in SOR ¶ 1.a, Applicant's 15-year-old stepson had been driving the car, but Applicant had switched seats with him to mislead the police officer into thinking Applicant had been driving the car when it was pulled over. Applicant admitted this allegation. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 36 years old and employed as a consulting analyst by a defense contractor in support of a Navy program. He has worked for his current employer since February 2006. From May 2000 until February 2006, he worked at the same facility but for a different defense contractor. From 1990 until May 2000, he served in the United States Navy as a fire controlman. But for a medical discharge due to asthma (Tr., 59), he would have stayed in the Navy until he retired. Applicant's discharge was honorable, and he left the service as a first class petty officer (paygrade E-6). His performance evaluations were above average throughout his career, he has numerous personal awards and citations to his credit, and his conduct throughout his service was unblemished by misconduct of any kind. His evaluations from his civilian employers have also been very good. References from co-workers and supervisors past and present show Applicant to be an outstanding employee, and each recommend him for a position of trust based on his honesty, integrity, and reliability. (Gx. 1; Ax. A; Ax. B)

Applicant lives with his wife, who he married in October 2001, and her 17-year-old son from a previous marriage. Applicant and his stepson have a very good relationship, but Applicant generally defers to the boy's mother in most decisions about him. (Tr., 60 - 61) Since January 29, 2006, however, he and his wife have engaged in a more collaborative process when it comes to family decisions. (Tr., 74) That evening, all three drove in his wife's car to a friend's house for dinner. Applicant and his wife each consumed alcohol with dinner, and they originally had intended to stay the night. Late in the evening they decided to drive home, which was about 10 miles away, as Applicant's stepson had school the next day. After much badgering, Applicant's then-15-year-old stepson convinced his mother to let him drive them home, even though he did not yet

have even a learner's permit. Applicant questioned the decision, but did not interfere. (Tr., 34, 49 - 51)

On the way home, they were pulled over by the police. After he stopped the car, Applicant's stepson jumped into the back seat with his mother, and Applicant jumped into the driver's seat. The evidence is conflicting on whether the boy did so on his own or his mother told him to do it. What is clear is that it was not Applicant's idea for his stepson to drive the car in the first place, or for the boy to get in the back seat when they were stopped. But Applicant decided without prompting to get behind the wheel for no other reason than to not have to explain why there was no driver when the police officer came to the driver's side door. Subsequently, the police officer determined Applicant had been drinking and administered a field sobriety test, which showed Applicant's blood alcohol content to be .08%, which is the legal limit for driving after drinking. Only after he was informed that he was being arrested and charged with driving under the influence of alcohol (DUI), did Applicant try to convince the arresting officer that his stepson had been driving the car. Applicant was held in jail until late the next day. (Gx. 2; Tr., 40, 66, 84; Ax. B)

Applicant disclosed his arrest to his facility security officer the next day at work. When he reported to his new job with his current employer the following month, he again disclosed his arrest. (Tr., 79 - 80)

The day after Applicant was released from jail, the arresting officer came to his house and arrested him again. The officer had reviewed the video tape of the traffic stop and confirmed that Applicant's stepson had been driving the car. (Tr., 44 - 46; Gx. 2) Additional charges of obstruction of justice and cruelty to a child were entered against him. In court on July 5, 2006, Applicant pleaded guilty to reckless driving, obstruction of justice, and contributing to the delinquency of a minor. He was sentenced to a total of one year and 90 days in jail, all of which was suspended for three years conditioned on good behavior. He was also fined a total of \$900, \$300 of which was suspended, and he was ordered to complete an alcohol safety awareness program (ASAP). Applicant's driving privileges were also suspended for six months. Applicant has paid all fines and costs, and he has completed all other requirements of his sentence. He has also completely abstained from alcohol since his arrest. (Gx. 2 - 5; Ax. C; Tr., 79)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).³ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines.⁴ The presence or absence of a disqualifying or

³ Directive. 6.3.

⁴ Commonly referred to as the "whole person" concept, these factor are:(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

mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties at hearing require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct), at AG ¶ 15, and Guideline J (criminal conduct), at AG ¶ 30.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁷

Analysis

Criminal Conduct.

Under Guideline J, "[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 ¶ 30) The government's exhibits, along with Applicant's admissions and testimony, are sufficient to support the SOR allegations in SOR ¶ 1.a. Applicant pleaded guilty to three charges in connection with his arrests in January 2006. He received suspended jail terms, paid fines and costs, completed ASAP, and lost his license for six months. These facts require consideration of the disqualifying condition listed in AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*).

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.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Applicant's jail sentences were suspended until July 2009 conditioned on his continued good behavior. There is no direct information showing Applicant was actually placed in a probationary status, and a review of the records of the court's disposition of his charges shows the boxes specifically reserved for an imposition of probation as part of his sentence were left blank. Nonetheless, the disqualifying condition listed in AG ¶ 31(d) (*individual is currently on parole or probation*) applies because the effect of Applicant's suspended sentence is similar – if he is arrested and/or charged with another criminal offense before July 2009, he may be incarcerated for all or part of the time originally suspended.

The facts also support consideration of the mitigating conditions listed in 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 or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) (emphasis added) and 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*). The circumstances surrounding Applicant's arrest were unusual. It is also the only incident of its kind in his background. Applicant has more input into decisions about his stepson, and, aside from the incident in question, his judgment has been above reproach. While Applicant is still subject to the terms of a possible jail sentence, the totality of available information about Applicant's conduct, reliability, job performance, and character is sufficient to conclude that he is not likely to engage in criminal conduct in the future. Insofar as the adjudicative factors are not to be applied inflexibly or in a way that would produce an unfair result, that information is also sufficient to justify an exception to the AG ¶ 31(d) disqualifying condition. On balance, the security concerns about Applicant's criminal conduct are mitigated.

Personal Conduct.

The security concern about Applicant's personal conduct, as expressed in AG ¶ 15, is that "[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." Available information supports the allegation in SOR ¶ 2.a that Applicant switched seats with his stepson when they were stopped by the police on their way home after a dinner party. This conduct resulted in an obstruction of justice charge to which Applicant pleaded guilty. Applicant was also charged with cruelty to a child, and Applicant pleaded guilty to the lesser included offense of contributing to the delinquency of a minor.

Aside from being a clear instance of poor judgment and dishonesty, the conduct at issue is addressed by the disqualifying condition in AG ¶ 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*) (emphasis added) is applicable here. Applicant's conduct in getting behind the wheel when he did and his failure to tell the police his stepson had been driving until after he knew he would be charged with DUI were intended to mislead the arresting officer. By contrast, the mitigating condition AG ¶ 17(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) (emphasis added) must also be considered. This is the only instance of such poor decision making evident in the available information. For the same reasons as discussed in support of AG ¶ 32(a) and AG ¶ 32(d), above, I conclude Applicant is not likely to repeat this conduct. The security concerns about Applicant's personal conduct are mitigated.

Whole Person Concept.

I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors under Guidelines E and J. I have also reviewed the record in the context of the whole person factors listed in ¶ AG 2(a).⁸ Applicant is a mature adult who honorably served his country in the Navy until he was forced to leave the military for medical reasons. He also has a solid record of performance and potential as a civilian employee in the defense industry. In his personal life, Applicant has become an excellent father figure and mentor for his wife's son. He has no known vices or financial problems and, apart from the adverse information presented here, he has been a responsible adult possessed of sound judgment and good character. In short, there is nothing in the record to suggest Applicant will ever find himself in such trouble in the future. A fair and commonsense assessment⁹ of all of the available information shows his criminal and personal conduct do not present an unacceptable risk should he be granted access to classified information.

⁸ See footnote 4, *supra*.

⁹ See footnote 3, *supra*.

Formal Findings

Formal findings 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

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MATTHEW E. MALONE
Administrative Judge