



**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. 07-02239

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: Michael V. Davis, Esquire

January 31, 2008

Decision

MALONE, Matthew E., Administrative Judge:

On January 30, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to request a security clearance needed to renew a security clearance he held since about 1996 as part of his employment with a defense contractor. After reviewing the results of the ensuing 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 give Applicant a security clearance. On August 17, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns

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

addressed in the Revised Adjudicative Guidelines (AG)² under Guideline J (criminal conduct).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on October 2, 2007, and I scheduled a hearing to be held on November 5, 2007. However, on October 18, 2007, Applicant's attorney requested a continuance due to a schedule conflict. I subsequently rescheduled the hearing for November 19, 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, and offered four exhibits, which were admitted without objection as Applicant's Exhibits (Ax.) A - D. He also presented two witnesses. DOHA received the transcript (Tr.) on November 28, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant's request to renew his security clearance is **denied**.

Findings of Fact

The government alleged in SOR ¶ 1.a that Applicant was arrested on August 29, 2002; that he had a blood alcohol content of .12% and was charged with driving or attempting to drive a vehicle while under the influence (DUI); and that he was found guilty, fined and placed on probation for one year. In SOR ¶ 1.b, the government alleged Applicant was arrested on March 18, 2005, and charged with the same offense as specified in SOR ¶ 1.a; and that he was found guilty and placed on probation for two years effective in December 2005. In SOR ¶ 1.c, the government alleged Applicant was arrested on July 15, 2006, was charged with second degree assault, and that the charge was nolle prosequi in October 2006.

In response to the SOR, Applicant admitted without explanation all of the allegations therein. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 51 years old and has worked for the same defense contractor since 1996 as a facilities technician. He has held a security clearance throughout his tenure at the company. Before 1996, Applicant was self-employed in the trucking business and other occupations for about 15 years. By all accounts, he has been an exemplary employee. People who know him in the workplace and in the community speak highly of his reliability, honesty, integrity, and professionalism. According to an associate and a supervisor at work, there have been no incidents or problems with Applicant's handling of classified information or with his access to classified facilities. (Ax. A)

Applicant's arrest in 2002 occurred after he and friend had been drinking at a local establishment. Part of his sentence included mandatory alcohol counselling at a

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.

local treatment center. Applicant attended 12 sessions of outpatient counselling over 12 weeks.

Applicant has three brothers. His parents are both deceased, with his father having passed away in October 2005 after a long battle with heart disease. Applicant lives in a house on a five-acre tract of land where his father's house also sits. It was not unusual for Applicant to drive rather than walk to his father's house. In doing so, he did not drive on any public roads.

Applicant was his father's primary caregiver in the last year of life, and was often stressed and upset over his father's condition. When Applicant was arrested in March 2005, he had been drinking at his father's house after taking his father to the doctor. His father was being tested and treated for a serious heart condition that would prove fatal later that year, and they had received a poor prognosis that day. Applicant had at least two or three mixed drinks before leaving his father's house in the evening. He got into his car and sat there for a few minutes with the lights on. As Applicant started to drive away from his father's house, two police officers who had observed him the state road along which his property sits, drove onto the property and stopped him. They determined he had been drinking and arrested him. Applicant insisted he had not broken any laws because he was driving on private property, so he refused a breathalyser test.

After several continuances, Applicant was convicted at a bench trial and sentenced as alleged in SOR ¶ 1.b. (Gx. 5) He served seven days of a ten-day jail sentence. Beginning in December 2005, Applicant was placed on two years of supervised probation. He was ordered to attend 26 weeks of outpatient counselling, which he completed at the same center he attended in 2002. Applicant attended nearly 90 Alcoholics Anonymous meetings. A device was placed on his car until September 2006 that would prevent him from starting the car if there were alcohol in his system.

As part of his supervised probation, Applicant was ordered to report to a probation officer once a month, and to submit to random urinalysis testing. He was also ordered to abstain completely from alcohol. As of October 2007, his probation officer expected Applicant would be released from his probation on time as he had complied with all of the terms of his probation. (Ax. D)

All of the urinalysis tests administered to Applicant during his probation were negative for alcohol or drugs. However, Applicant has acknowledged drinking alcohol in moderation on occasion during his probation. (Tr., 52 - 53, 68)

Applicant has been legally separated from his wife since 1995. They were first married in November 1977. In 2006, Applicant had a girlfriend who was prone to erratic behavior. After they got into an argument one day in July 2006, she tried to take his car after she had been drinking. Applicant tried to physically restrain her, but she managed to drive away. Applicant reported the incident to the police. When they found his girlfriend, she reported she had been assaulted. Applicant was then arrested and charged with assault. The charge was never prosecuted, and the incident did not violate his probation.

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 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 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

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 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).

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 presented sufficient information to support the allegations of criminal conduct in SOR ¶¶ 1.a and 1.b. There is not sufficient information to show that Applicant engaged in criminal conduct when he was arrested in July 2006, as alleged in SOR ¶ 1.c. Applicant's arrests in 2002 and 2005, and his probationary status as of the hearing require consideration of the disqualifying conditions listed in AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(d) (*individual is currently on parole or probation*).

In response to the government's information, Applicant's position is that, because he was not on a public road when he was charged with DUI in 2005, he was not engaged in criminal conduct. However, the courts in his state have ruled on such arguments and have held the laws against driving under the influence do not limit such conduct to public roads.⁸ Thus, the issue is whether (a) enough time has passed since Applicant's last instance of criminal conduct, (b) circumstances have changed such that it is unlikely he will again engage in such conduct, and (c) Applicant is sufficiently rehabilitated from his earlier conduct. If answered in the affirmative, 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;*) 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*) should be considered.

Applicant was on probation at the time of his hearing on November 19, 2007. He was due to be released from that status on December 16, 2007, because, as his probation officer wrote, “[Applicant] has followed his order of probation with no violations.” (Ax. D) However, because Applicant did not “[t]otally abstain from alcohol” (Ax D.) as required by the terms of his probation, it appears his probation officer was misinformed. The Directive's adjudicative guidelines, such as AG 31 (d), are not to be applied in an inflexible or unreasonable manner. Without more, the fact Applicant was on probation for another three weeks after the hearing may not have been disqualifying. However, Applicant's willing disobedience of a court order that addressed the underlying source of the charges of which he was convicted. Based on the foregoing, Applicant has failed to present information sufficient to mitigate the government's concerns about his criminal conduct.

⁸ See, *Rettig v. State*, 34 __ 419; 639 A. 2d 670 (1994). Applicant's attorney argued that if he had represented Applicant in the 2005 case, he surely would have appealed the verdict. However, such an appeal more probably would have focused on whether the police had probable cause to enter Applicant's property and detain him in the first place.

Whole Person Concept.

I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guideline J. I have also reviewed the record before me in the context of the whole person factors listed in ¶ AG 2(a).⁹ Applicant is a mature adult who is well-respected in his community and at work. He has been a responsible and reliable employee since 1996, and there is no indication he has ever mishandled classified information or access to classified facilities. However, the positive information about his job performance and personal life is insufficient to mitigate the ongoing doubts about his suitability for continued access raised by his criminal conduct and failure to abide by the terms of his probation. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the national interest.¹⁰

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is **denied**.

MATTHEW E. MALONE
Administrative Judge

⁹ See footnote 4, *supra*.

¹⁰ See footnote 7, *supra*.