



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



In the matter of:)
)
-----) ISCR Case No. 07-03272
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Carolyn H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro Se*

February 26, 2008

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on September 21, 2005. On September 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct) for Applicant. 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 acknowledged receipt of the SOR on October 15, 2007. He answered the SOR in writing on November 2, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on November 9, 2007. Department Counsel was prepared to proceed on December 14, 2007, and I received the case assignment on December 19, 2007. DOHA issued a notice of hearing on December 19,

2007, and I convened the hearing as scheduled on January 10, 2008. The government offered Exhibits (Ex.) 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through I, without objection. DOHA received the transcript of the hearing (Tr.) on January 22, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by adding ¶ 2.c under Guideline E, alleging Applicant falsified his answer to a Government investigator's question about an arrest for driving while intoxicated (DUI). The motion also added Paragraph 3, with three subparagraphs, under Guideline G (Alcohol Consumption), alleging Applicant used alcohol in the commission of the criminal conduct alleged in Paragraph 1, continued to consume alcohol, and did not currently attend Alcoholics Anonymous. Applicant had no objection to the amendments, and I granted the motion. Applicant then answered the amendments on the record. (Tr. 9)

Findings of Fact

In his Answer to the SOR, dated November 2, 2007, Applicant admitted all the factual allegations in ¶ 1 and ¶ 2 of the SOR, with explanations. He admitted the allegations contained in the amendments. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 48 years old, unmarried, and a military veteran. He served on active duty from 1978 to 1984. Applicant works as a structural technician for a defense contractor. He also serves in the National Guard, and his duty is as an aircraft technician. (Tr. 12-19; Exhibits 1, 2)

In March 1981, while on active military duty, Applicant struck the wall of his barracks with his fist, putting a hole in it. He also used "provoking" words. A Special Court-Martial found him guilty of both allegations, and sentenced him to hard labor without confinement for one month, restriction to base for 10 days, and forfeiture of \$100 of his pay. This incident arose when Applicant drank alcohol at a barracks party. (Tr. 23, 24; Answer)

In April 1981, Applicant received non-judicial punishment under the Uniform Code of Military Justice (NJP) for violating the 10 day restriction of his court-martial punishment. His commander imposed punishment of a suspended reduction in grade, forfeiture of \$100 of pay for two months, and 30 days of correctional custody (15 days of which were suspended). (Tr. 24; Answer)

Applicant was arrested three times between 1983 and 2000 for DUI. The first arrest occurred while he was on active military duty in February 1983. Applicant received a NJP for operating a motor vehicle while intoxicated. The second offense occurred on January 1, 1985. The charge was reduced to reckless driving, and he was sentenced to 90 days in jail (time served), 90 days attendance at an alcohol information school, and required to pay a fine. The latest DUI arrest was November 14, 2000. He was found guilty of DUI on November 15, 2000, and fined \$675. He paid the fine in full by December 2000. (Tr. 22, 27; Answer)

Applicant completed his SCA on September 21, 2005. In answer to Question 23 D, concerning any charges or convictions relating to alcohol-related offenses, Applicant answered, "no." Applicant deliberately failed to disclose his January 1985 and November 2000, DUI arrests. Also, during an interview with a Government investigator on July 25, 2006, Applicant stated he was arrested in November 2000, only for having an open alcohol container, not for DUI. Applicant did not disclose his November 2000, arrest and conviction for DUI to the investigator. Applicant claims he did not want his DUI arrests revealed to his fellow employees or supervisors because the information that was typed into the SCA was exposed to public view on the desk of the typist. He claims he was confused about the 2000 DUI arrest when the investigator asked him about it, and for that reason he did not fully disclose the details of the arrest. (Tr. 27, 28, 31-37; Answer; Exhibits 1, 3, 4)

Applicant abstained from alcohol consumption from 1985 until 2000. He resumed drinking alcohol and got his 2000 DUI at that time. Applicant attended Alcoholics Anonymous (AA) meetings from 1985 until 1987. He started drinking alcohol when he was 16 years old. He continues to drink a 12-pack of beer on weekends at his home when he is alone. He starts drinking Friday nights and continues until Sunday afternoon. His latest drinking was the weekend before the hearing. He admits he has a "slight" alcohol problem. Applicant told the Government investigator in July 2005, that drinking alcohol makes him sleepy, and he considers himself intoxicated after drinking three beers. Applicant claims he now controls his drinking, and is tapering off from alcohol. He claims he does not drink and drive at present on the weekends when he drinks alcohol. (Tr. 20-23, 26, 27, 42; Exhibits 2, 4)

Applicant submitted copies of his DD 214, Honorable Discharge Certificates, proof of employment and longevity from his employer, a 2007 certificate of achievement, and a sheriff's certificate of no criminal record from 2005. (Exhibits A to I)

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, the administrative judge applies the guidelines 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

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

Conditions that could raise a security concern and might be disqualifying (DC) are contained in ¶ 31(a) (a single serious crime or multiple lesser offenses). Applicant has three DUI offenses, and a Special Court-Martial conviction for actions resulting from alcohol consumption. He received NJP punishment in April 1981 for violating the restriction portion of his court-martial punishment.

The Mitigating Conditions (MC) applicable are ¶ 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), and ¶ 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). Applicant's DUI offenses occurred more than seven years ago, and the earliest ones were in 1983 and 1985. His drinking occurs at his residence on weekends, and he does not drink and drive on those occasions. His successful rehabilitation includes the passage of years of time without any recurrence of the DUI, and a good employment record. These factors outweigh the earlier offenses.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set forth in AG ¶ 15:

Conduct 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.

Under the facts of this case, DC ¶16.a (involving deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, or determine trustworthiness), and ¶16.b (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, or other official government representative) apply. Applicant admitted he did not disclose his DUI arrests in Question 23 of the SCA, because he did not want his co-workers or supervisors to know about his past actions. He admitted he did not disclose to the Government investigator his 2000 DUI arrest and conviction. His explanation of confusion is not persuasive or credible.

I considered the MC in AG ¶ 17. In view of Applicant's admissions of deliberate withholding of information for his personal reasons, I decided that none of the MC apply.

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set forth in AG ¶ 21:

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 DC applicable to Applicant's alcohol consumption pattern and history are contained in ¶ 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 incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent), and ¶ 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). Applicant has three DUI incidents in his life, though they did occur years ago. He was court-martialled for actions at a barracks party in 1981 which involved punching a wall, and using provoking words (as defined under the UCMJ), all actions which fit within the general terms of "fighting, disturbing the peace, or other incidents of concern." All of these incidents occurred at least seven and no more than 26 years ago, so they are attenuated. However, Applicant continues to drink regularly a 12-pack of beer on weekends while alone in his residence,. He told the Government investigator he is intoxicated after three beers. This pattern is "habitual consumption of alcohol to the point of impaired judgment."

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) 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." 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. The most serious items of concern

in this case are Applicant's regular consumption of alcohol, although he has not had any DUI arrests since 2000. However, he drinks every weekend. Based on his life experiences, he should know better than to indulge in the behavior which resulted in three DUIs in the past 26 years, and a court-martial conviction for disorderly conduct, to use a general characterization of his 1981 incident. He voluntarily drinks his 12-pack on the weekends. He voluntarily and knowingly failed to disclose his DUI arrests on his SCA, and then misled the Government investigator when questioned about the 2000 arrest. His personal interest was the motivation for both types of conduct, creating potential for pressure, coercion, exploitation, or duress. Based on his history, it is very likely his drinking will continue, and his reasons for falsifying his SCA will remain unless he overcomes his own personal concerns about disclosing the information requested by the Government.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his personal conduct and alcohol consumption. I conclude these security concerns against Applicant, along with the "whole person concept." I conclude Applicant did not mitigate the criminal conduct security concern.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge