



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 07-05032
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esq., Department Counsel
For Applicant: Philip Carter, Esq.

August 20, 2008

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Alcohol and Personal Conduct. Clearance is granted.

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on June 1, 2006. On August 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines G (Alcohol Consumption) and E (Personal Conduct). 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 September 28, 2007. Applicant's attorney submitted a notice of appearance on October 24, 2007. Applicant answered the SOR in writing through counsel on October 27, 2007, which was received at DOHA

on November 2, 2007. Applicant elected to have his case decided at a hearing. Department Counsel was prepared to proceed on November 26, 2007. The case was assigned to another judge at DOHA's Western Hearing Office on December 3, 2007. On January 7, 2008, DOHA's Western Hearing Office issued a notice of hearing scheduling the case for February 6, 2008.

On January 16, 2008, Applicant's counsel requested the scheduled hearing be transferred to the Washington Hearing Office because the Applicant had been transferred to the East Coast on an "urgent basis." On January 18, 2008, DOHA's Western Hearing Office cancelled the hearing scheduled for February 6, 2008. On January 18, 2008, the case file was transferred to the Washington Hearing Office, and was reassigned to me on January 23, 2008. On February 15, 2008, DOHA's Washington Hearing Office issued a notice of hearing scheduling the case for March 18, 2008. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered Applicant Exhibits (AE) A through T, which were admitted without objection, and he testified on his behalf. Tr. 8-10. Applicant also offered a letter (AE U) from a licensed Marriage, Family Therapist, who concluded after evaluating Applicant, "[t]here was no basis to support that [Applicant] has an underlying alcohol dependence problem." Department Counsel objected to the admission of AE U on the basis of foundation. After argument by counsel, I overruled Department Counsel's objection. Tr. 10-13. DOHA received the hearing transcript (Tr.) on March 28, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶¶ 1.a. through 1.f., and denied ¶ 2.a. After a thorough review of the record, I make the following findings of fact.

Applicant is a 34-year-old field service representative, who has been employed by a defense contractor since July 1997. Tr. 26-27. He has continuously held a security clearance since April 1994, which was initially granted to him while he was on active duty in the Navy, discussed *infra*. Tr. 18-19. There is no evidence to suggest, and the Government does not allege, that Applicant has ever compromised or caused others to compromise classified information. Nor does the record evidence show that Applicant has ever failed to follow the rules and regulations required to protect classified information. He seeks to renew his clearance which is required as a condition of his employment. GE 1, Tr. 19-20, 30-31.

Applicant graduated from high school in June 1992. He served in the U.S. Navy from January 1994 to July 1997, and was honorably discharged as an Interior Communications Electrician Third Class (pay grade E-4). He was a "Plank Owner"¹ on an Arleigh Burke-class destroyer, and was awarded a Navy Achievement Medal "for

¹ Original crew member when ship was commissioned.

professional achievement in the superior performance of his duties as primary data multiplexing system technician.” AE N, Tr. 140. Applicant was awarded a Bachelor of Science degree in Information Technology in October 2007, and has also completed numerous professional and work-related courses. AE I, AE J, AE P, Tr. 20-22. He was married to his first wife from April 1994 to August 1998. That marriage ended by divorce. He has been married to his second wife since December 2000. He has two children, a seven-year-old daughter and a five-year-old son from his second marriage. GE 1.

Applicant has a history of episodic alcohol abuse, marked by his involvement in four alcohol-related incidents. In December 1999, Applicant was arrested and found guilty of Operating Motor Vehicle Impaired by Alcohol. When stopped by the police, he refused to take a field sobriety test because “I don’t believe those tests are designed for anyone to pass.” Tr. 42. He was fined \$300. He testified that he believed at the time he was pleading guilty to “some sort of traffic infraction.” Tr. 44. (SOR ¶ 1.a.) He stated he had been drinking before he was arrested but did not think he was drunk. Tr. 42. He testified that he failed to list this arrest on his e-QIP because it did not come to mind when compared to his other alcohol-related arrests, discussed *infra*, which involved jail time, community service or probation. Tr. 40-48, 89-91.

In August 1998, Applicant was arrested and found guilty of Operating a Motor Vehicle under the Influence. He was fined \$750 and ordered to attend a seven-day work program. (SOR ¶ 1.c.) At the time he was stopped, he was given a field sobriety test, which he passed. Referring to his previous testimony, he stated, “[s]o that’s why I say you always fail these things.” Tr. 50. Additionally, he was ordered to attend a seven-week alcohol rehabilitation treatment program in November 1999. (SOR ¶ 1.b.) A Licensed Alcohol and Drug Counselor (LADC) from his treatment program stated in a letter dated December 16, 1999:

[Applicant] participated in the Intensive Outpatient program in November 1999, with 12 hours of treatment. [Applicant] then received 7 individual sessions and two consultations with the staff psychiatrist which successfully addressed his depression. A consult with [LADC] this month documented his continued abstinence since completing I.O.P. We see no need for further treatment sessions. [Applicant] has met the criteria for completion of treatment. GE 3.

Applicant stated that he continued to drink after completing this program explaining (SOR ¶ 1.f.):

I don’t have a legitimate excuse other than that period of my life was just not a good one. I mean, it had to do with age. It had to do with my general state of mind. My life was unhappy, and I didn’t have the focus and clarity that I have today. I was sort of lost. Tr. 50-51, 85-91.

He further explained that he had gotten out of the Navy to save his marriage and ended up getting divorced when his wife left him for another sailor. His parents were going through a “messy divorce” and “both ended up in the psych ward for being abusive to one another. It just, it was a dismal time.” Tr.48- 51-52.

In July 1997, Applicant was arrested and found guilty of Operating a Motor Vehicle under the Influence. He was fined \$250 and ordered to attend a two-day work program. (SOR ¶ 1.d.) He had fallen asleep after drinking and smashed his truck into a tree.

In August 1996, while in the Navy, Applicant was arrested and found guilty of Driving under the Influence. He was fined \$250 and placed on six months probation. (SOR ¶ 1.e.) He was arrested while driving his motorcycle drunk with a friend on the back. He stated, “I can’t think of anything stupider.” Tr. 55. He was awarded non-judicial punishment for being on unauthorized absence during this alcohol-related arrest, and was screened by a Navy Drug and Alcohol Program Advisor. The Advisor did not recommend him for further alcohol-related treatment. Tr. 56, 81-82.

Applicant has not had an alcohol-related incident for eight years. He described the changes that occurred in his life since his last arrest. Those changes include the value he felt in his work life, and the impact he was able to have on those he interacted with. He also bought his first house in 2000, he remarried in 2000, and now has two children. He returned to college in 2003 and graduated in 2007. His current job is more prestigious and technically challenging. He feels a tremendous sense of responsibility towards his family and the need to provide for them. He has no desire to experience being arrested again because of the potential impact it could have on his career and family. He avoids associating with the individuals he drank with in the past and is family-centric in his discretionary free time. He described his life as “much fuller and brighter.” Tr. 56-60.

He stated he is not drinking, and the last drink he had was in December 2007 during the holidays when a co-worker and friend came over for dinner. He felt guilty for drinking and when his friend left, he poured his remaining beer down the drain. Tr. 60-61. He has not gotten behind the wheel of an automobile after drinking since his last arrest in 1999. He has a strict no drinking and driving policy. Tr. 61. When Applicant and his co-workers have socialized after work, he has refrained from drinking and served as the designated driver. AE D, Tr. 63. As a result of the current proceedings, Applicant has seen a counselor through his company’s Employee Assistance Program, discussed *infra*. Applicant plans to continue seeing this counselor to assist him in stress management. Tr. 71-73. Applicant fully appreciates the seriousness of the current proceedings and the Government’s concerns. Tr. 76-77.

Applicant was evaluated by a Licensed Marriage, Family Therapist, who has been in practice since 1983. In a letter dated March 14, 2008, she concluded, “I do not find him to be chemically dependent.” AE U.

When Applicant completed his e-QIP, and executed it on June 1, 2006, he failed to disclose his December 1999 arrest, as required. (SOR ¶ 2.a.) As Applicant explained, he did not consider this arrest as significant as his other three alcohol-related arrests, which he did list on his e-QIP. GE 1. He testified:

At the time of filling out my security clearance application, I don't think that it (December 1999 arrest) came to mind. I mean it was much less significant and much less substantial than my other arrest[s], which did involve jail time, community service, probation. I just, I don't think that I thought of it – up until this year I've always just viewed this as a ticket. I didn't say, gosh, I've had three drinking and driving arrests – which is three too many; that's horrible. But up until this year I've considered myself as having been arrested three times. The fourth was just a ticket, and I didn't think of it at the time of filling out the form.

Adding, when asked whether he was trying to hide this arrest:

No. I wouldn't dare try to hide it. I mean, in 2006 I know there's computers, I know there's databases. I listed the other three (arrests). I listed the driving, the arrests that were beyond a seven-year scope of the form. I felt when I filled out the form that I did completely and honestly. I did not intentionally leave it off. Tr. 45-46.

Applicant submitted seven sworn declaration reference letters. Extracts of those letters follow. “[Applicant] can not only be trusted to hold a position that requires good judgment and a high degree of responsibility, he is already entrusted with such a position. Only the most responsible, conscientious individuals are allowed to travel and represent the good name of [defense contractor].” AE A. Applicant's direct supervisor, stated, “I would entrust [Applicant] with a position that requires good judgment and a high degree of responsibility.” AE B. “In all of the [name] software testing on the [name] project he performed for me, [Applicant] was very thorough and ensured that the final product was ready and reliable for the naval operator.” AE C.

“[Applicant] is an excellent employee and does outstanding work. He is well-respected and well-liked by his team members, and he demonstrates an extraordinary attention to detail.” AE D. “[Applicant] is an exceptional employee who does excellent work. He is the person I consistently go to in order to get a job done. For example, when I was traveling to [employment site] for the specific purpose of accomplishing certain testing within a short period of time, [Applicant] is who I wanted to work with because I knew that he was dependable and would deliver and get the job done quickly and correctly.” AE E.

“I would, and the company does, entrust [Applicant] with a position that requires good judgment and a high degree of personal responsibility. [Applicant] is invaluable in this role and it is imperative that he has security clearance because he must have the clearance in order to board the ships. AE F. “In terms of employment performance,

[Applicant's] work is excellent. I have never had any issues at all with the quality of work he has done on a project." AE G.

All seven individuals know Applicant well, hold clearances at the secret level or higher, they all are familiar with the allegations in the SOR, and know Applicant in a personal and professional capacity. None of these senior employees, who would be in a position to know, have ever seen Applicant using alcohol at work, or intoxicated or impaired. They all strongly recommend Applicant for a clearance.

Applicant's work performance evaluations for the last four years reflect consistent above average performance. AE O. He is also the recipient of 14 separate company awards. AE M. He was in part responsible for the a government agency submitting a Contractor Performance Assessment Report to his defense contractor employer with grades of "Very Good" to "Exceptional" for work performed from March 2006 to March 2007. AE O. He has completed numerous company-sponsored courses during his employment. AE P. Applicant's February 2008 credit report reflects a 742 "PLUS Score" and a credit category of "Excellent." AE R. He is registered to vote, and served on jury duty in 2006. AE S.

Having observed Applicant's demeanor closely, I find his testimony credible. At his hearing, Applicant promptly answered all the questions asked. He was frank, candid, and forthcoming in his answers and explained his answers without hesitation. He readily admitted his bad behavior and apologized numerous times for his questionable behavior. Applicant expressed sincere remorse for his actions.

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

Guideline G, Alcohol Consumption

Under Guideline G (Alcohol Consumption), the Government’s concern is that 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. AG ¶ 21.

The Government established its case under Guideline G through Applicant’s admissions and the evidence presented. Applicant had four separate alcohol-related arrests in 1996, 1997, 1998, and 1999. He also attended a court-ordered alcohol treatment program following his 1998 arrest.

A review of the evidence supports application of two Alcohol Consumption Disqualifying Conditions. AG ¶ 22(a): “alcohol-related incidents away from work, such as driving while under the influence,” applies because of his four alcohol-related arrests. AG ¶ 22(e): “evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is staff member of a recognized alcohol treatment program,” applies because of his evaluation and treatment program in November 1999 following his August 1998 arrest.

Considering the totality of the circumstances in this case, I find application of three Alcohol Consumption Mitigating Conditions is appropriate. AG ¶ 23(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;” applies. Applicant’s most recent alcohol-related arrest was eight years ago. Furthermore, there are no documented alcohol-related incidents of any sort for the past eight years.

AG ¶ 23(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);” in part applies. Although Applicant has never been diagnosed as alcohol dependent or as an alcohol abuser, he has acknowledged and recognizes the deleterious effect the misuse alcohol has had on his life. Two qualified medical professionals have evaluated Applicant and neither indicated he was an alcohol abuser or alcohol dependent. The first evaluation occurred in December 1999 following his 1998 alcohol-related arrest and the second evaluation occurred in March 2008 on Applicant’s own volition in anticipation of this hearing. In particular, his March 2008 evaluation specifically stated there is no basis to support the notion Applicant has an underlying alcohol dependence problem.

AG ¶ 23(d) “(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;” applies.

Applicant presented credible evidence of actions taken to overcome his problem, and established he is currently abstinent and submitted evidence he is not alcohol dependent. He is remorseful for his behavior and has initiated changes in his lifestyle. His performance appraisals, certificates of achievement, awards, and the statements from senior company representatives show Applicant’s work behavior has not been indicative of his having an alcohol problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. His sobriety and responsible use of alcohol is supported by seven senior company officials, who know him personally and professionally, and by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged the problems misuse of alcohol has caused him, demonstrated remorse, and a steadfast commitment to continue lifestyle changes consistent with responsible use of alcohol.

Guideline E, Personal Conduct

Under Guideline E (Personal Conduct), the Government’s concern is 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. AG ¶ 15.

AG ¶ 16 indicates two conditions that could raise a security concern and may be disqualifying in this case, including:

(a) 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, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Posing potential security concerns are Applicant's documented omissions of his 1999 alcohol-related arrest from his e-QIP completed in June 2006. His omissions are attributable to his misunderstanding and oversight. I found Applicant's explanation credible in light of his having listed alcohol-related arrests beyond the seven-year time period required, and his acknowledgment that he knew and understood his answers were subject to verification. His submission of three other alcohol-related arrests put the government on notice that alcohol consumption had been a concern in the past. I found Applicant to be credible and that he acted in good faith. While Applicant could reasonably have been expected to be more diligent and thorough when answering Question 23, his judgment lapses and confusion are not enough to impute knowing and willful falsification under Guideline E.

Applicant's explanation of his omissions is persuasive enough to avert inferences of knowing and willful omission. There being no misconduct substantiated, there is no need to discuss Personal Conduct Mitigating Conditions.

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.

Applicant has been willing to do whatever is necessary to maintain his sobriety, including maintaining voluntary contact with his counselor on a regular basis. He has family support, stable employment and a strong work ethic. His participation in his Employee Assistance Program, and his company support should ensure his continued success. Applicant demonstrated the correct attitude and commitment to being sober. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

Also noteworthy is Applicant's past behavior, which serves as a reliable indicator of future behavior. In particular, he has successfully held a security clearance for the past 14 years. He has not had an alcohol-related incident for eight years. He has been cooperative throughout this process and recognizes the gravity of these proceedings. Applicant is living a different lifestyle from the person who was arrested eight years ago for Operating a Motor Vehicle while Intoxicated. He is married, the father of two young children, a home owner, a responsible and contributing citizen, and a very valued and trusted employee.

I also considered the facts of the case and nine adjudicative process factors listed at AG ¶ 2(a) *supra* relating to Personal Conduct concerns. Falsifications are a core security concern. Inasmuch as Applicant's behavior was not deliberate or willful, no misconduct was established precluding the applicability of further discussion under the Whole Person Concept.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the

²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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 G:	FOR APPLICANT
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Subparagraph 1.a. – f.:	For Applicant
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Paragraph 2, Guideline E:	FOR APPLICANT
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Subparagraph 2.a.:	For Applicant
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Conclusion

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

ROBERT J. TUIDER
Administrative Judge