



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



In the matter of:

ISCR Case No. 07-06587

Applicant for Security Clearance

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel

For Applicant: *Pro Se*

April 28, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the security concerns arising from his personal conduct and alcohol consumption. Eligibility for access to classified information is denied.

On November 1, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E, Personal Conduct and Guideline G, Alcohol Consumption. 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 answered the SOR on November 19, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on March 17, 2008. DOHA issued a notice of hearing on March 21, 2008, and the hearing was convened as

scheduled on April 7, 2008. The Government offered Exhibits (GE) 1 through 12, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A and B, which were received without objection. I granted Applicant's request to keep the record open until April 21, 2008, to submit additional matters. Applicant submitted a fax cover sheet and three letters, which were marked AE C through F, and received without objection. Department Counsel's memo is Hearing Exhibit (HE) I. The record closed on April 21, 2008. DOHA received the transcript of the hearing (Tr.) on April 22, 2008.

Procedural and Evidentiary Rulings

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR with explanations, with the exception of ¶ 2.a, which he denied. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 42-year-old employee of a defense contractor. He has never been married and has no children. He is a high school graduate with some community college classes.¹

Applicant was arrested in a state other than where he lived on March 21, 1993, and charged with Driving Under the Influence (DUI). He pled no contest and was fined \$1,428, ordered to spend 48 hours in jail, and ordered to attend an alcohol education class. In 1996, a bench warrant was issued for his failure to complete confinement, failure to enroll in an alcohol education class, and failure to pay his fine. Applicant did not resolve this matter until January 24, 2003, when he returned to the court. He paid his fine, served one day in jail, and was permitted to complete his alcohol class in his state of residence. He attended classes at a counseling center two times per week for three months between February and May 2003. He was apparently diagnosed as an alcohol abuser. The credentials of the individual who diagnosed the Applicant were not provided.²

Applicant was arrested in his state of residence on March 11, 2000, and charged with DUI. He was given two breath tests and registered .195% and .190% blood alcohol content (BAC). He pled guilty to the amended charge of reckless driving. He was fined \$490 plus fees, and ordered to attend DUI School and a Victim Impact Panel.³

¹ Tr. at 45; GE 1, 2.

² Tr. at 21-26; Applicant's Answer to SOR; GE 1, 5.

³ Tr. at 22; Applicant's Answer to SOR; GE 1.

On August 8, 2002, DOHA issued a Statement of Reasons which included security concerns under Guideline G, Alcohol Consumption, based upon Applicant's two DUIs. Applicant returned to the court to address his first DUI on January 24, 2003, four days before his DOHA hearing on January 28, 2003.⁴ Applicant was granted a security clearance by the Administrative Judge on March 28, 2003.⁵

Applicant works at a U.S. Government site away from where he lives. He works four ten-hour days per week, Monday through Thursday, or Tuesday through Friday. When he is working he stays at the job site, where temporary lodging is provided. He arrives at the site the morning of the first work day and goes home after work on the fourth day. The site has facilities such as a gym and a bar. On seven occasions between March and June 2005, Applicant left work early without authorization on the last day of the work week. He submitted incorrect time sheets that listed that he worked a complete week. His company issued Applicant a letter of reprimand in July 2005 for these actions. Applicant estimated that he left about an hour early on each occasion. He repaid the company for seven hours of salary.⁶

In about June 2006, Applicant was directed by his foreman to dump fluid into one of the inactive waste water treatment ponds on the facility that was dry. He dumped about 300 gallons of fluid into an active pond, which created a potential environmental hazard. Applicant did not intentionally dump the fluid into the wrong pond; he had not paid sufficient attention to what the foreman wanted him to do. He received a letter of reprimand in July 2006, and was suspended two days without pay.⁷

In January 2007, Applicant was involved in an incident with two co-workers at the work site. They were drinking in a dorm room and began roughhousing and wrestling. At some point his co-workers told him that it was getting late and that he should leave. Applicant refused to leave and there was some pushing involved. Applicant called security at 911 stating he was in fear of being assaulted by the two other men. Security took a report and escorted Applicant back to his room. After the incident he remained cordial with his two co-workers.⁸

Applicant was issued a letter of reprimand from his supervisor for the above incident. His supervisor asked him to voluntarily seek alcohol rehabilitation through his employer's Employee Assistance Program. He was told that if he had any more alcohol-

⁴ The SOR alleges that the hearing took place on January 23, 2003. The transcript of that hearing and the decision both clearly state that the hearing took place on January 28, 2003.

⁵ Applicant's Answer to SOR; GE 11, 12.

⁶ Tr. at 38-40, 4-9; Applicant's Answer to SOR; GE 2.

⁷ Tr. at 40-43; Applicant's Answer to SOR; GE 3.

⁸ Tr. at 19, 27-28; Applicant's Answer to SOR; GE 4, 5.

related incidents that he would be terminated. Applicant chose not to avail himself of alcohol rehabilitation as he does not believe that he has an alcohol problem.⁹ He stated:

I mean I get up to work every morning, I show up to work shaven, clean; I don't show up to work with alcohol on my breath; I don't need a drink the first thing in the morning; I don't need a drink every day; I don't drink heavy booze.¹⁰

Applicant will usually have at least a couple of beers almost every day. He will occasionally have a few beers after work when he is working at the Government site. Very rarely he will have a shot of tequila from a small bottle that he keeps in his freezer at the site. He will have about six beers on the night he gets home from the work site. He testified that he can drink about a twelve pack of beer on his days off. Applicant is a regular churchgoer and he stated that he does not go to church "hung over or smelling like booze."¹¹

Applicant submitted several character letters from a co-worker, a friend, and the pastor at his church. The co-worker described him as a hard worker, knowledgeable in his craft, dependable, rarely misses a day of work, and he gets along with his co-workers in work situations and personally. His friend stated Applicant always treats others with respect and he can be counted on. His pastor wrote that he is trustworthy, industrious, and friendly.¹²

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.

⁹ Tr. at 31-33; Applicant's Answer to SOR; GE 4.

¹⁰ Tr. at 33.

¹¹ Tr. at 34-38, 44, 46-47; Applicant's Answer to SOR; GE 5.

¹² AE C-F.

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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) 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; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant left work early without authorization on seven occasions in 2005. He intentionally submitted incorrect time sheets that listed hours that he did not work. This dishonest behavior is sufficient to raise AG ¶ 16(d) as credible adverse information that is not explicitly covered under any other guideline, but which supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations. It also raises AG ¶ 16(e) as personal conduct that could affect Applicant's personal, professional, and community standing. There was no specific evidence that it was in violation of a written or recorded

commitment made by Applicant to his employer as a condition of employment. AG ¶ 16(f) is not applicable.

Applicant did not pay sufficient attention to what his foreman wanted him to do and he dumped about 300 gallons of fluid into an active pond, which created a potential environmental incident. While unintentional, it was poor judgment and raises AG ¶ 16(d). Applicant's alcohol-related incident and calling 911 on his co-workers is sufficient to raise AG ¶ 16(e).

Conditions that could mitigate Personal Conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

(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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant's time sheet incident occurred in 2005. He fully admitted the behavior and repaid the salary he dishonestly received from his company. AG ¶ 16(e) is a factor for consideration for that conduct. The dumping was a one-time incident and unintentional. AG ¶ 16(c) is applicable to that conduct. Applicant's alcohol-related incident is also alleged under Guideline G. It raised concerns under Guideline E as personal conduct that could affect Applicant's personal, professional, and community standing. Applicant is once again on good terms with the two co-workers. This has reduced Applicant's vulnerability to exploitation, manipulation, or duress. AG ¶ 16(e) is applicable to that conduct.

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out 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 guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

- (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;
- (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 alcohol dependence and completion of an alcohol rehabilitation program; and
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant's drinking habits, DUIs, and alcohol-related incidents are sufficient to raise AG ¶¶ 22(a)-(c). Applicant admitted to being diagnosed as an alcohol abuser. No reports from the counseling center were submitted as evidence. The credentials of the individual who diagnosed the Applicant were not provided. The Appeal Board has stated that an Administrative Judge should take an expansive view of what constitutes a duly qualified medical professional and a licensed clinical social worker:

ACDC 22(d) and (e) contemplate a broad range of providers who, by education and by position, are qualified to diagnose and treat alcohol dependence and other substance abuse disorders. By its own terms, ¶ 22(d) lists the previously mentioned types of care providers by way of example only.¹³

¹³ ISCR Case No. 07-00558 at 5 (App. Bd. Apr. 7, 2008).

In the case cited by the Appeal Board, the official in question held licenses in counseling and in the treatment of substance abuse and was the Director of a substance abuse counseling center.¹⁴ No such information is available in the instant case. Even under the expansive view directed by the Appeal Board, I am unable to find sufficient credible evidence to find AG ¶¶ 22(d) or (e) directly applicable. Applicant's failure to attend the alcohol education class as ordered by the court in 1993, until 2003, raises AG ¶ 22(g).

Applicant went to a security clearance hearing for his two DUIs and the Administrative Judge granted Applicant a security clearance. This does not raise any independent disqualifying condition under Guideline G. SOR ¶¶ 2.d and 2.f are concluded for Applicant. He did not take his supervisor's advice to voluntarily seek alcohol rehabilitation through his employer's Employee Assistance Program after his last alcohol-related incident. That also does not raise any specific disqualifying condition under Guideline G. SOR ¶ 2.h is concluded for Applicant.¹⁵

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

(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.

Applicant had a DUI in 1993. He did not complete the requirements of his conviction because it occurred in another state. He had another DUI in 2000. He finally

¹⁴ *Id.*

¹⁵ The facts in this paragraph do not raise a disqualifying condition but will be considered when applying mitigating conditions and in analyzing the whole person.

addressed his 1993 conviction in 2003, when his security clearance hearing was imminent. He had another alcohol-related incident in January 2007. Applicant continues to drink regularly and sometimes excessively. None of the mitigating conditions are totally applicable.

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 common sense 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. Applicant had DUIs in 1993 and 2000. He refused to complete the requirements of his 1993 sentence until it became an issue for his security clearance. He committed timecard fraud on seven occasions in 2005. He had another alcohol-related incident in 2007. He continues to drink regularly and at times excessively. I also considered Applicant's favorable character evidence.

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 has not mitigated the security concerns arising from his Personal Conduct and Alcohol Consumption.

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

Paragraph 1, Guideline G:

AGAINST APPLICANT

| | |
|-------------------|-------------------|
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | Against Applicant |
| Subparagraph 1.f: | For Applicant |
| Subparagraph 1.g: | Against Applicant |
| Subparagraph 1.h: | For 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.

Edward W. Loughran
Administrative Judge