



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-09306
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: Roger I. Stein, Esquire

November 19, 2008

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on October 18, 2006 (Government Exhibit 1). On March 18, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline G concerning the 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on April 17, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on May 15, 2008. I received the case assignment on May 19, 2008. DOHA issued a notice of hearing on June 11, 2008, and I convened the hearing as scheduled on June 27, 2008. The Government offered Government Exhibits 1 through 4, which were

received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits A through C, without objection. DOHA received the transcript of the hearing on July 11, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 48. He is employed by a defense contractor and seeks to retain a security clearance previously granted in connection with his employment.

Guideline G - Alcohol Consumption

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he uses intoxicants to excess. The Applicant admitted the factual allegations in subparagraphs 1.b. and 1.c. of the SOR. Those admissions are hereby deemed findings of fact.

He denied subparagraph 1.d. as written. Specifically, the Applicant disputed the blood alcohol levels in the original allegation. The Government agreed that they were incorrect. The evidence showed that the Applicant's blood alcohol level for this incident was .09%. (Government Exhibit 3 at 11.) At the conclusion of the evidentiary portion of the proceeding, with the consent of both parties, this allegation was amended to comport with the facts presented. (Transcript at 80.) The corrected version reads as follows:

d. You were arrested on or about July 4, 2006, in [city and state redacted], and charged with (1) Driving While Under the Influence of Alcohol/Drugs, (2) Driving While Under the Influence of Alcohol with BAC .08% or more, and (3) Hit and Run - Property Damage. Your Blood Alcohol Content was .09%. Pursuant to a plea bargain, you pleaded guilty to Count (3) and Counts (1) and (2) were dismissed. You were found guilty and fined approximately \$500.00, placed on one year probation, and your drivers license was suspended for one year.

The Applicant has had three alcohol related arrests - in 1984, 1997 and 2006. The Applicant was arrested in 1984 for Driving Under the Influence of Alcohol (DUI). He was 23 or 24 years old at the time. He pleaded No Contest to the DUI charge and his sentence included a fine, probation and two weekends of community service. (Government Exhibit 2 at 5.)

The Applicant's second alcohol related arrest happened in November 1997. On that occasion, the Applicant went to a bar with another person who was supposed to be the designated driver on that occasion. When the Applicant was ready to leave, the designated driver was not. After some conversation, the designated driver allowed the Applicant to drive his car. The Applicant was subsequently arrested for DUI and DUI With Blood Alcohol Over .08%. The Applicant pleaded guilty and was sentenced to five

days in jail, fined, ordered to attend DUI school, his drivers license was suspended for four months, and he was placed on five years probation. The Applicant has stated that this was an unusual situation and that he is not an irresponsible person. (Government Exhibit 3 at 12-21; Transcript at 70-71.)

The Applicant's third alcohol related arrest occurred on July 4, 2006. The evidence concerning this last incident is mixed. About three months before the incident occurred, the Applicant began taking the prescription drug Ambien because he had difficulty sleeping. The Applicant has repeatedly stated that he has little to no direct memory of this incident. On the day in question he was repairing his car and drank about six beers. He also stated to the police that he had taken an Ambien that evening. There is evidence that combining Ambien and alcohol can cause a serious reaction, akin to sleep walking. (Applicant's Exhibit C.) Sometime during the evening the Applicant took his car out for a drive and ran into a building. After hitting the building he drove away, then returned to his residence. A neighbor called police to report the Applicant for driving under the influence of alcohol. He was arrested and charged with DUI, DUI With Blood Alcohol Over .08% and Hit and Run - Property Damage. (Government Exhibit 2 at 1-11.) Pursuant to a plea bargain, the Applicant plead guilty to Hit and Run - Property Damage and the other two counts were dismissed. He was fined, placed on one year probation and his drivers license was suspended for one year. (Government Exhibit 2 at 4-5; Government Exhibit 3; Transcript at 33-37, 47-61.)

Since the 2006 incident the Applicant has severely limited his alcohol intake. He does not believe that he has a problem with alcohol, and contends that alcohol does not rule his life. (Transcript at 40, 66-69.)

Mitigation

A co-worker of the Applicant testified that, in his field, the Applicant is an expert. The witness has had to report other co-workers for alcohol problems in the past and has not seen any evidence of that with the Applicant. Finally, the witness finds the Applicant to be a very trustworthy person. (Transcript at 15-27.)

The Applicant also submitted documentary evidence showing that he is a highly respected person and employee. His two most recent annual evaluations from his job show that he "Meets Standards" or "Exceeds Standards" in every category. (Applicant's Exhibit A.)

Several friends and work associates submitted letters on the Applicant's behalf. He is described as someone who has "integrity," is "dependable," "loyal," and "an asset." (Applicant's Exhibit B.)

Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

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 Applicant was involved in three alcohol related incidents in 1984, 1997 and 2006. The first two incidents clearly were solely alcohol-related. Based on the state of the record, it cannot be said with any degree of certainty how much alcohol had to do with the third incident. Obviously the court felt alcohol was involved to a degree, since the Applicant's drivers license was suspended for a year.

The Applicant has used alcohol, occasionally to excess, from 1978 until July 2006. He continues to consume alcohol, but at a much lower rate.

There are two Disqualifying Conditions that arguably apply to this case. AG ¶ 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." In addition, AG ¶ 22(c) states a concern is, "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."

Under the particular facts of this case, the following mitigating condition currently applies to the Applicant's situation. AG ¶ 23(a) states that it can be a mitigating conditions when, "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."

When viewed in the light least favorable to the Applicant, he has had three alcohol related arrests in 22 years. While certainly nothing to be taken lightly, there is, in my opinion, no evidence of a pattern of abuse here. His last incident occurred two years before the record closed and may well have involved an accidental use of Ambien with alcohol. This mitigating condition applies and, when viewed along with the Whole Person Concept discussion below, supports a finding for the Applicant.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The Applicant is a hard-working, respected, professional person who has had three alcohol related incidents in 22 years. There is little to no evidence that these incidents show a pattern, or that he is alcohol dependent or an alcohol abuser. In viewing all the facts of this case, I find that the Applicant has mitigated the security significance of his prior conduct. As set forth at length above, I find that the conduct was not recent (AG ¶ 2(a)(3)); that there have been permanent behavioral changes under AG ¶ 2(a)(6); and that the likelihood of continuation or recurrence is close to nil (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his alcohol related incidents.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Subparagraph 1.c:	For the Applicant
Subparagraph 1.d:	For the Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge