



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-10395
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Stephan Math, Esquire

September 9, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on July 26, 2006. On March 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and G 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 replied to the SOR (RSOR) in writing on April 8, 2008, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on May 15, 2008. DOHA issued a notice of hearing on June 13, 2008, and the hearing was scheduled to be heard on July 2, 2008. At the request of Applicant's counsel, the case was continued, and I convened the hearing on August 4, 2008.

The Government offered Exhibits 1 through 10, which were received without objection. Applicant and two additional witnesses testified on Applicant's behalf, and he

submitted Exhibit A, which was admitted without objection. DOHA received the transcript of the hearing (Tr) on August 14, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR, Applicant admitted the SOR allegations 1.a., through 1.c., under Guideline J, and 2.b. and 2.c., under Guideline G. He denied allegation 2.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 28 years old. He is unmarried and has no children. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleges that Applicant has engaged in criminal acts.

1.a. On April 14, 2001, Applicant was arrested and charged with Disorderly Conduct. He pled guilty to the charge of Disorderly Conduct, and he was sentenced to serve two days in jail, which was suspended upon payment of a fine, one year of unsupervised probation, and he was fined \$300.

Applicant testified that he was with a group of friends on a boat, and after they exited the boat, he had to use the restroom, but since there were no facilities immediately available, he relieved himself behind some bushes, and out of sight. When he emerged from the bushes he was arrested. Applicant testified that he had not consumed any alcoholic beverages on the day prior to this incident, and that alcohol did not influence his conduct. Also, no alcoholic restrictions were placed on his probation as a result of this incident.

Applicant submitted a declaration, signed under penalty of perjury, from one of the individuals who was with him during this incident (Exhibit A). She verified that Applicant had not consumed any alcohol before the incident, and that since he was unable to locate facilities where he could relieve himself, he simply went behind some bushes to do so.

1.b. On March 19, 2005, Applicant was arrested and charged with (1) Misdemeanor Battery and (2) Disturbing the Peace. Applicant plead Nolo Contendere to Count 2, and Count 1 was dismissed. He was placed on 12 months of summary probation, fined \$100, and sentenced to serve two days in jail; but he was given credit for two days served.

Applicant testified that this incident occurred when he was with a group of friends at a restaurant, when he go into an altercation with another individual at the facility and Applicant struck the other individual in self-defense, as the other individual was trying to harm Applicant. Applicant testified that he had only consumed one beer prior to this incident, and that alcohol did not influence his conduct in this altercation. No alcoholic restrictions were placed on his probation as a result of this incident.

Applicant submitted a declaration, signed under penalty of perjury, from one of the individuals who was with him during this incident (Exhibit A). He verified that Applicant been involved in an altercation, but Applicant did not start it, and he had not consumed any more than one beer before the incident occurred. Finally, this witness stated that for the past 10 years that he has known Applicant, he “never observed him to drink alcohol to excess,” and he described “his demeanor to normally be one of calm.”

1.c. On December 2, 2006, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol or Drugs (DUI), (2) Driving with a Blood Alcohol Content of 0.08% or Above. Applicant plead Guilty to Count (2). He was placed on 36 months summary probation, fined \$390, and sentenced to serve three days in jail; but he was given credit for one day served. He also attended 12 weeks of Alcoholics Anonymous.

Applicant testified that this incident occurred after he was at a bar and grill with friends, during which he had consumed “a few drinks that night.” As he was driving home, he was stopped by the police for speeding, during which he received a field sobriety test.

Applicant stated that he had met all of the requirements of his probation, and that shortly after the hearing he would be attending his last court required class. His probation is scheduled to end in February 2010.

Paragraph 2 (Guideline G - Alcohol Consumption)

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption. The following are the allegations as they are cited in the SOR, and to which, as stated above, Applicant admitted:

2.a. The Government alleges that Applicant consumed alcohol prior to the arrests referenced in subparagraphs 1.a. and 1.b., above. As discussed above, Applicant testified credibly that he had consumed no alcohol before the first arrest, 1.a., and he had only consumed one beer before the second arrest, 2.a.

2.b. The SOR alleges that Applicant’s conduct that is set forth under subparagraphs 1.a. through 1.c., above, constitutes excessive alcohol consumption. Only the conduct that resulted in the DUI arrest discussed in 1.c., above manifests excessive alcohol consumption.

2.c. Applicant continues to consume alcohol despite the conduct that resulted in subparagraphs 1.a. through 1.c., above.

Applicant testified that he continues to consume alcohol, but only in moderation, “once every couple of weeks or so.” He also testified credibly that since the DUI, he has not driven and will never drive again after consuming alcohol. After his one DUI he is far more aware and concerned about alcohol related conduct, specifically related to driving a vehicle.

Mitigation

Two character witnesses, who have known Applicant professionally, testified on his behalf. They were both quite laudatory, describing Applicant “as very reliable” with “very reasonable judgement,” neither witness had ever seen the Applicant intoxicated or under the influence of alcohol.

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 J - Criminal Conduct

The Government has established that Applicant engaged in criminal conduct, as he was arrested for, and convicted of a DUI criminal offense and two lesser offenses.

In reviewing the Disqualifying Conditions (DC) under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, and (d), individual is currently on probation, apply in this case. Under Mitigation Conditions, I find that MC 32. (d) applies to this Applicant, as there is evidence of successful rehabilitation; including but not limited to the sincere remorse of Applicant, which I base on Applicant’s testimony, and his good employment record, which has been verified by the two additional witnesses at the hearing. Applicant has mitigated this allegation. Paragraph 1 is found for Applicant.

Guideline G - Alcohol Consumption

Applicant's alcohol consumption has resulted in one DUI arrest and conviction, occurring in 2006.

The Government established that Applicant was involved in an alcohol-related incident away from work, and binge alcohol consumption to the point of impaired judgement on one occasion. Disqualifying Conditions (DC) 22. (a) and (c) apply to this case.

As stated above, Applicant admitted to currently drinking, two times a week “once every couple of weeks or so,” but in moderation, and he never drives after drinking. I find that Mitigating Condition (MC) 23. (a) applies as the behavior was so infrequent, only one DUI in his life, for which he is extremely sorry, that it is unlikely to recur and does not cast doubt on the individual’s current reliability and trustworthiness. Paragraph 2 is found for 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. Based on all of the factors discussed above, including the character letters and the testimony of both witnesses, plus Applicant’s credible sincere remorse, I find that Applicant is a responsible person, who will continue to control his alcohol consumption, so that in the future, he will not find himself in the position of driving after he has consumed alcohol.

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
Paragraph 2, Guideline G	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	For Applicant
Subparagraph 2.c.:	For Applicant

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.

Martin H. Mogul
Administrative Judge