



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



In the matter of:)	
)	
-----, -----)	ISCR Case No. 07-11018
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: David B. Gates, Esquire

August 26, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant committed a DUI in 2002, and was convicted of a lesser offense after completing a pretrial diversion agreement and alcohol treatment. He falsely reported identity theft in 2005 to avoid a phone bill, and ran away from the scene of a minor accident in 2006. He deliberately omitted being charged with the false reporting offense on his clearance application. He mitigated alcohol security concerns, but not those arising from his criminal and personal conduct. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on May 10, 2006. On January 25, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E, G, and J 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 February 6, 2008. He answered the SOR in writing (Answer) on March 15, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on April 16, 2008, and the case was assigned to me on April 25, 2008. DOHA issued a notice of hearing on May 6, 2008, and I convened the hearing as scheduled on May 29, 2008. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified on his own behalf, and submitted exhibits (AE) A and B, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on June 5, 2008.

Findings of Fact

In his answer to the SOR, Applicant admitted the truth of all of the factual allegations set forth in the SOR. Applicant's admissions, including those contained in his response to DOHA Interrogatories (GE 3), are incorporated in the following findings.

Applicant is a 37-year-old employee of a defense contractor. He has worked as a mechanic with a security clearance for about ten years. He served on active duty in the Navy for nine years before that. He is divorced with two sons, who live with his former wife. He currently resides with his girlfriend and her teenage daughter. He has been screened and approved to help coach that daughter's recreational softball team.

On October 5, 2002, Applicant was arrested and charged with driving under the influence (DUI), after he drove his truck off a road and down an embankment. SOR ¶ 1.c incorrectly identifies the name of the county in which this took place, but is otherwise accurate. He initially testified during the hearing that he was arrested while walking several blocks away from his vehicle, and that some other person had been the one driving it after they left the casino where they had been drinking. He said he pled guilty to get the charge reduced as part of a pretrial diversion agreement, and that he was only arrested because the vehicle was registered to him. He further stated that he could not recall his blood alcohol content (BAC), but that the .08% BAC level stated in the SOR was "fairly accurate." (Tr. at 53-55, 63-66.) In later testimony, Applicant admitted that he had been the driver when the truck left the road shortly before he was arrested, and his BAC was .145% when tested after his arrest. He explained his earlier version of events was given because he did not understand Department Counsel's questions. (Tr. at 78-80; GE 3 at 97-99.)

Applicant successfully completed the pretrial diversion agreement, resulting in the DUI charge being reduced to first degree negligent driving. He was convicted of this lesser offense, and sentenced to 90 days in jail and a \$1,000 fine, both of which were suspended, and two years of unsupervised probation on February 23, 2005. (GE 3 at 83-96.) As part of his diversion agreement, he underwent an alcohol assessment and

treatment program. On June 3, 2004, the social worker/chemical dependency professional who evaluated him found sufficient evidence to establish a DSM IV diagnosis of 305.00, Alcohol Abuse, that by Applicant's self-report appeared to be in remission. Applicant successfully completed the prescribed four-point outpatient treatment plan on October 6, 2004. (AE A; GE 3 at 105-111.) He abstained from drinking during the treatment program, but resumed drinking in moderate amounts thereafter and stated that he planned to continue to drink socially in the future. (Tr. at 46, 56-59; GE 3 at 5-6.)

Applicant and his wife went through a bitter separation and divorce from early 2004 until March 2005. During this time, his wife filed many complaints against Applicant, none of which was sufficiently substantiated to support prosecution after investigation. As alleged in SOR ¶ 2.c, she did obtain an *ex parte* temporary restraining order against him that was dismissed once he was able to respond to the allegations at a hearing on whether the order should be continued. Her allegations were not substantiated on this occasion either. (GE 1 at 16; GE 3; Tr. at 42-45.)

In late November 2004, Applicant was contacted by a collection agency regarding a past due \$274.50 account with a cell phone company. He claimed that he had never had service with that company, and filed an identity theft complaint with the police. In connection with the investigation, his wife provided the police with copies of account statements related to this telephone account which Applicant had opened in 2000, maintained at two addresses where they had lived, and subsequently closed. She also reported that he had cashed a \$150 rebate check from the company. When confronted with this information by the investigator, Applicant reportedly insisted it was a "refund" vice "rebate" check, a distinction he repeated during the hearing for some undetermined reason. (GE 3 at 45; Tr. at 82.) The investigator explained to Applicant that he was going to charge him with false reporting, and Applicant reportedly understood that. This criminal complaint was filed on May 10, 2005. On September 1, 2005, the district court judge dismissed the charge without prejudice on motion of the prosecution due to insufficient evidence. (GE 3 at 32-50.)

On February 23, 2007, Applicant was asked about this false reporting charge in a personal subject interview by an OPM investigator. On October 19, 2007, in his sworn response to written interrogatories, he attested to the accuracy of the information contained in this interview report. He told the investigator that his wife had obtained the cell phone in his name without his knowledge or permission. He acknowledged receiving notice of the pending charges in the mail from the court. He stated that he appeared in the district court, told his side of the story, his wife was not present, and the charge was dismissed by the court due to lack of evidence. He stated that he did not list this charge on his e-QIP in response to question 23f because it had been dismissed and he misunderstood the question asking whether he had been arrested for, charged with, or convicted of any offenses in the past seven years. During the hearing, Applicant testified that he never knew he was charged with any offense in connection with this false report, but got notification by mail that it was dismissed. (GE 1 at 24; GE 3 at 10-11, 112-114; Tr. at 33-36, 50-53, 82-84.)

On August 6, 2006, Applicant was driving his SUV out of the parking lot after another night at the casino. He ran into the rear of a car in front of him at a stop sign. His girlfriend was in the front passenger seat and two very intoxicated friends were riding in the rear passenger seat. Applicant's version of subsequent events differs in some particulars from those of the other participants, as recorded in the police report he provided. It is not disputed, however, that he fled the scene on foot, crossed a major road into a wooded area, and was later found by police lying with his head atop and body stretched down the embankment at the shoulder of the road. He was apprehended and hand-cuffed. (The findings concerning this incident are based on GE 3 at 13-23, 112-113, and Tr. at 32-33, 49-50, 73-78, and 80-81.)

Applicant's girlfriend was apprehended by a responding police unit as she drove the SUV some distance away from the casino. She and one of the other passengers both reported that Applicant was driving at the time of the collision, then got out of the SUV and told the girlfriend to take the car and leave. The girlfriend reported seeing Applicant go into the casino before she left. The occupants of the other car also reported that he first ran into the casino, then ran back out and crossed the road into the woods. Applicant testified at the hearing that he did not go into the casino, but ran directly across the road and into the woods because four guys jumped out of the back seat of the other car, tried to attack him and chased him across the road. The police report documents that the car held three men, one of whom was driving, and three women. In his subsequently adopted OPM interview, Applicant stated that he had consumed one alcoholic drink between 8:30 and 9:00 that evening, but nothing else between then and the 1:30 a.m. accident because he was the designated driver. (GE 3 at 112.) During the hearing, he testified that he had been at the casino dancing, not drinking or gambling. "No. I did not have anything to drink that night, sir." (Tr. at 50, 78.) The police officer who arrested Applicant and held him in custody until the following morning reported that, after being informed that he was under arrest, Applicant "stated he didn't do anything wrong and seemed to be intoxicated." (GE 3 at 21.)

Applicant provided a copy of the formal charging document filed against him in district court on November 2, 2006. (GE 3 at 13, 14, 16.) He told the OPM interviewer and testified during the hearing that the charges were dropped after he and his insurance company paid for the damages to the other car. Unlike the documents provided relating to other criminal complaints against him, however, he provided no documentation corroborating his assertion that the charges were dropped. (Tr. at 74.)

Applicant provided evidence showing that his supervisors delegate him authority to serve as the maintenance building day-shift hourly group lead during temporary absences of his group's regular supervisor. He also provided performance reviews and letters of recommendation from supervisors and co-workers documenting his good work performance, integrity, trustworthiness and loyalty. There is no evidence of any security problem or violation involving Applicant during the period he held a clearance. (AE B; Tr. at 31-32, 39-41, 66-67.) Based on the inconsistencies noted above, some apparent evasions of direct questions, and observation of his demeanor during the hearing, Applicant's testimony was less than credible.

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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant 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."

A person applying for access to classified information seeks to enter 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.

Procedural Issues

On motion of Department Counsel, and without objection by Applicant or his counsel, the SOR was amended to insert ¶ 2.d, "That information set forth in paragraph 1.c above." This amendment incorporated the 2002 DUI incident under the Guideline G, alcohol consumption, allegations in addition to its original allegation under Guideline J for criminal conduct. Applicant's counsel stated they had sufficient notice of both the criminal and alcohol-related nature of this incident. (Tr. at 70-72.)

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "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." AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions asserted by the Government were: "(a) a single serious crime or multiple lesser offenses;" and "(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." (Tr. at 89.) Applicant admitted that he committed DUI in 2002 with a BAC of .145, resulting in his eventual conviction of first degree negligent driving. He also admitted to his 2006 hit and run offense, in which he fled the scene to hide in the woods after rear-ending another car at a stop sign. He denied being intoxicated at the time, despite the arresting officer's report to the contrary. His conduct on this occasion, even if not alcohol-related, supports significant concerns about his judgment, reliability and willingness to comply with laws and rules. Although the prosecution moved for and was granted dismissal of the false reporting charge without prejudice, substantial evidence establishes that Applicant did commit this offense as well, attempting to evade a legitimate financial obligation through false accusations of wrongdoing by others. These offenses, individually and collectively, raise security concerns under the aforementioned disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. Applicant's completion of an outpatient alcohol treatment program, community involvement and good work performance were offered to establish some mitigation under two of them: "(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 "(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 offense occurred almost six years ago, but his criminal history must be evaluated as a whole, not piece by piece. His attempt to establish mitigation

under ¶ 32(c), “evidence that the person did not commit the offense,” with respect to the false reporting offense was not persuasive. Although his criminal actions in 2005 and 2006 are not considered individually to be serious offenses, the pattern precludes reaching a conclusion that “such conduct is unlikely to recur and does not cast doubt on Applicant’s current reliability or good judgment.” He has pursued constructive community involvement in youth sports, and performed well at work. However, barely two years have passed since his last criminal offense, which actually occurred after he submitted the security clearance application under present adjudication.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption: “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 ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The disqualifying conditions asserted by the Government in this case are: “(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;” “(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;” and “(e) evaluation of alcohol abuse or dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.”

Applicant admitted to consuming alcohol, at times to excess and to the point of intoxication, from approximately 1986 until at least October 2007, and that he continues to consume alcohol in his answer to the SOR. The clinical social worker in his court-ordered alcohol treatment program diagnosed him with alcohol abuse. Although his spouse obtained a temporary protection order based on allegations of threatening and violent behavior toward her when Applicant consumed alcohol, those accusations were never substantiated. He committed a DUI offense, with a BAC reading of .145, in October 2002. The Government has established security concerns under this guideline, shifting the burden of proof to Applicant to mitigate those concerns.

AG ¶ 23 provides conditions that could mitigate security concerns:

(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 established mitigation under ¶ 23(a) with respect to his single 2002 DUI incident. His 2006 hit and run was not processed as an alcohol-related incident despite the arresting officer's report that Applicant appeared intoxicated. He acknowledged his alcohol abuse diagnosis and successfully completed the prescribed treatment program in 2004, without further documented alcohol-related incidents. There is no evidence of anything other than moderate and responsible alcohol use since he completed that program, and the program completion report contained a generally favorable prognosis. These matters generate further mitigation of alcohol consumption security concerns under ¶¶ 23(b) and 23(d). The allegation in SOR ¶ 2.c, although admitted, does not support alcohol consumption security concerns because the reported accusations were not substantiated.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 disqualifying condition alleged in the SOR and raised by the evidence in this case is:

(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.

Applicant omitted responsive information about his 2005 false reporting charge, in response to question 23 on his May 2006 e-QIP. He certified the completeness and accuracy of his answers, acknowledging the obligation to be truthful. He provided documentation showing that he was formally charged with this offense, and the police investigator who brought the charge informed him in person that he intended to do so. His rationale during his hearing for failing to report this charge differed markedly from the one he gave to the OPM investigator and later ratified as being true in his interrogatory response. Neither attempted justification for the omission was persuasive. The final court action on this charge, to which he had to respond and which he seemed to consider unjust, occurred just over eight months before he certified the accuracy of his e-QIP. The weight of evidence in this record leads to the conclusion that his omission of relevant information concerning this criminal charge in response to question 23 was deliberate.

Applicant did not disclose any information about this criminal charge until he was asked about it by the OPM investigator during his February 23, 2007 personal subject interview. This does not establish the personal conduct mitigating condition set forth in AG ¶ 17(a): “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” His conflicting statements about why he omitted this information significantly undermine the credibility of his assertion that he did not intend to mislead the Government about the existence of this charge and his underlying actions that gave rise to it. He neither asserted nor established any other personal conduct mitigating condition with respect to this omission.

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 established by the record evidence. 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. Applicant's conduct of potential concern involved a relatively serious DUI offense in 2002, when he drove his truck off the road and down a steep embankment with passengers involved. Fortunately, no injuries were reported, but his BAC at the time was .145%, almost twice the legal limit of .08%. Neither of his subsequent criminal offenses was particularly serious, but both involved intentional wrongful conduct in attempts to avoid fulfilling his legal responsibilities. The most recent of these incidents was only two years ago, and occurred after submission of the clearance application that is under present consideration. All of these incidents took place while Applicant was fully mature and accountable for his choices. He demonstrated alcohol rehabilitation through successful completion of a treatment program, and responsible use subsequent to his diagnosis of alcohol abuse. However, he did not establish either rehabilitation or permanent behavioral changes with respect to his pattern of criminal violations or the falsification of his security clearance application. In fact, he presented less than credible testimony concerning several aspects of these incidents during the hearing. This record demonstrates Applicant's susceptibility to choosing to violate laws and rules when pressured to do so in his own self-interest, and he did not establish that recurrence of such behavior is unlikely. His good work performance, community involvement, and absence of past security violations are commendable, but are not sufficient to outweigh the security concerns established by his admissions and the evidence as a whole.

Overall, the record evidence leaves me with substantial doubt 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 criminal conduct and personal conduct.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant

Paragraph 3, Guideline E:

AGAINST APPLICANT

Subparagraph 3.a:

Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge