



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-14252
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government:
Melvin A. Howry, Esquire, Department Counsel

For Applicant:
William L. Bruckner, Esquire
Bruckner & Walker

March 17, 2009

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on December 19, 2006 (Government Exhibit 1). On September 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, G and E 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 October 3, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed

on November 13, 2008. The case was assigned to another Administrative Judge on November 17, 2008. I received the case assignment on December 18, 2008. DOHA issued a notice of hearing on January 8, 2009. I convened the hearing as scheduled on February 4, 2009. The Government offered Government Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf, called one additional witness, and submitted Applicant's Exhibit A, also without objection. DOHA received the transcript of the hearing on February 10, 2009. The record closed on that date. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

The Applicant is 39 and single. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment in the Defense industry.

Guideline J – Criminal Conduct Guideline G - Alcohol Consumption

The Government alleges under Guideline J that the Applicant is ineligible for clearance because he has engaged in criminal acts. The Government further alleges under Guideline G that the Applicant is ineligible for clearance because he uses intoxicants to excess. The Applicant admitted the factual allegations in subparagraphs 1.a. through 1.g. of the SOR. Those admissions are hereby deemed findings of fact. Based on statements in his Answer, the Applicant is deemed to have denied Paragraph 2 and its subparagraph.

The Applicant has had five alcohol related arrests or citations from 1989 to 2005. He has been charged with Minor in Possession of Alcohol, has three convictions for Driving Under the Influence, and one conviction for Battery on a Police Officer. In addition, he has twice been charged with Violation of Probation. He is currently on probation for his most recent conviction, and will be on probation until February 2011.

The Applicant was charged with Minor in Possession of Alcohol in 1989. He was 19 and was drinking a 12 pack of beer a weekend at the time he was arrested. (Transcript at 59-60.)

The Applicant's second alcohol related incident happened in April 1996. He was arrested for Driving Under the Influence of Alcohol (DUI) after drinking about eight or nine beers. He stated that his consumption of alcohol was about an 18-pack a week. He was fined, put on three years probation and ordered to attend a Drinking Driver Program. The Applicant testified that, at the time, he did not think the DUI was "a big deal." (Transcript at 60-61.)

The Applicant's third alcohol related incident, and second arrest for DUI, occurred in December 2001. He has stated that he had four to nine beers to drink that

night. (Transcript at 61; Government Exhibit 3 at 6.) In January 2002, he plead guilty and received a sentence including five years probation, a fine, jail time, a Drinking Driver Course and his driver's license was restricted. (Government Exhibit 4 at 13, 17-21.) In addition, one of the requirements of his probation is that he, "Not drink or possess any alcoholic beverages." (Government Exhibit 4 at 19.)

The Applicant was charged with a Violation of Probation in August 2002. According to the Applicant, this occurred because he was stopped for driving without a license and had nothing to do with him drinking alcohol. He had to serve two days in jail for the violation and his probation was reinstated. (Transcript at 62-65; Government Exhibit 4 at 21-22.)

The Applicant was involved in an altercation with the police in August 2005. He was drinking beer, in violation of his probation, with some friends at a restaurant. He had drank about eight beers over a four hour period. Some friends of his got in a fight and, after the police were called, the entire group was asked to leave the restaurant. The Applicant got into an argument with the police and bumped into a policeman. (Government Exhibit 3 at 5-6.) At the hearing, the Applicant first testified that he was "basically in [the officer's] face," and that's why the Applicant was arrested. (Transcript at 53.) He later admitted the physical contact. (Transcript at 65-66.) He plead guilty and received a fine, three years informal probation, and four days work furlough. (Government Exhibit 4 at 24-29.) He was charged with a Violation of Probation on this offense in November 2005, based on his third arrest for DUI, discussed immediately below. His probation was subsequently revoked and reinstated.

The Applicant was arrested for DUI in October 2005. He had eight or nine beers to drink and was arrested. (Transcript at 66-67; Government Exhibit 3 at 5.) Drinking violated his probation for the December 2001 DUI conviction. He plead guilty in February 2006 and received a sentence including five years probation, a fine, jail time, attend a Drinking Driver Program (Multiple Conviction Program) and required use of an ignition interlock device. (Government Exhibit 4 at 30-36.) In addition, one of the requirements of this probation is that he, "Not drink or possess any alcoholic beverages." (Government Exhibit 4 at 34.) This probation is due to run until February 2011. He attended and completed the Drinking Driver Program. (Transcript at 73-75; Government Exhibit 4 at 14-15.)

The Applicant did not drink alcohol for a year and a half after this arrest. He began drinking alcohol again in about July 2007. The Applicant knew when he began drinking that the act violated his probation. The Applicant's explanation is that he likes the taste of alcohol, but knows to limit himself to one beer. He further stated the last time he had a beer was in September 2008. Finally, he testified that he was not going to drink in the future. (Transcript at 71-72, 76-79, 84-85.)

Guideline E - Personal Conduct

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has made false statements to the Government during the

clearance screening process. The Applicant denied the single allegation under this guideline.

1.a. The Applicant filled out an e-QIP on December 19, 2006.¹ In that Questionnaire the Applicant answered Section 23, concerning his criminal record, by setting forth his two arrests in 2005 and his arrest for DUI in 2001. He did not admit his DUI arrest in 1996, or his being charged in 1989 with Minor in Possession of Alcohol.

The Applicant denies falsifying this answer, stating that he had forgotten about these two incidents, since they had occurred 13 and 20 years previously. (Transcript at 52; Government Exhibit 3 at 6.)

Mitigation

The owner of the Defense contractor the Applicant works for testified on the Applicant's behalf. The witness is aware of the Applicant's DUI problems, but not of the arrest and conviction for Battery on a Police Officer. He believes the Applicant has turned things around, and believes in him enough to be willing to pay the extra insurance required for the Applicant to drive company vehicles. (Transcript at 26-47; Applicant's Exhibit A.)

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

¹The SOR was amended to show December 19, 2006, as the date the Questionnaire was signed. This was to comport with the evidence. (Transcript at 15-18.)

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 J – Criminal Conduct

Guideline G - Alcohol Consumption

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

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 five alcohol related incidents between 1989 and 2005. Three were arrests for DUI. The Applicant has used alcohol from about 1985 until at least September 2008. He stated that he does not intend to use alcohol in the future. The Applicant is currently on probation for his last conviction and will be on probation until February 2011. He has violated that probation by drinking alcohol.

Under the Criminal Conduct guideline, the following Disqualifying Conditions are applicable. AG ¶ 31.(a) "A single serious crime or multiple lesser offenses." AG ¶ 31.(d) "Individual is currently on parole or probation."

After considering the evidence in the record, I find that the Mitigating Conditions under Criminal Conduct do not apply to this case. AG ¶ 32.(a), states it may be mitigating where, "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." In addition, AG ¶ 32.(d) states that it can be mitigating where, "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."

While it has been almost four years since his last arrest, the Applicant has a long record of excessive drinking with criminal consequences. In addition, as he testified, he knowingly is violating his probation by drinking alcohol, and has done that for some time. He testified that he only has one beer, but given his history I find that testimony dubious at best. The Applicant has been on probation continuously for the last seven years, and for ten of the last thirteen. Under the particular circumstances of this case, I cannot find that it is in the national interest to give him a clearance while he is on probation, especially when he violated that probation less than a year ago.

There are two Disqualifying Conditions concerning Alcohol Consumption that 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.(g) applies, "Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence."

After considering the evidence in the record, I find that the Mitigating Conditions under Alcohol Consumption do not apply to this case. AG ¶ 23.(a) states that it can be a mitigating condition 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." AG ¶ 23.(b) states that it can be mitigating where, "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)."

As stated above, even though the Applicant's last alcohol related arrest was four years ago, he continues to drink alcohol in defiance of a court order. He testified that he understands he has an alcohol problem and is going to change his life, but his history belies his statements. While it may not be demonstrably false, his testimony was obviously self-serving and entitled to little weight. His conduct by definition does not show reliability, trustworthiness or good judgment.

The Applicant has not mitigated the security significance of his alcohol consumption and related criminal conduct. Paragraphs 1 and 2 of the SOR are found against the Applicant.

Guideline E - Personal Conduct

The Applicant admitted in his Questionnaire his three most recent alcohol-related arrests. The two he did not admit occurred 13 and 20 years in the past. His statement that he simply forgot about the incidents due to the passage of time is credible and worthy of belief. I find that the Applicant did not have the requisite intent to deceive the Government when he filled out this Questionnaire. Paragraph 3 is found 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 has had five alcohol related arrests in 20 years. The acts are frequent and recent. He continues to drink alcohol, in violation of his probation. They also show a pattern of alcohol dependence and/or alcohol abuse. In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his prior conduct. As set forth at length above, I find that the that there have not been permanent behavioral changes under AG ¶ 2(a)(6); and that the likelihood of continuation or recurrence is very high (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude the Applicant has not mitigated the security concerns arising from his alcohol related incidents, and the related criminal conduct.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons. As set forth above, Paragraph 3 is found for the Applicant.

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 THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Subparagraph 1.c:	Against the Applicant
Subparagraph 1.d:	Against the Applicant
Subparagraph 1.e:	Against the Applicant
Subparagraph 1.f:	Against the Applicant
Subparagraph 1.g:	Against the Applicant
Paragraph 2, Guideline G:	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant
Paragraph 3, Guideline E:	FOR THE APPLICANT
Subparagraph 3.a:	For the Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge