



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



In the matter of:)	
)	
)	ISCR Case No. 07-16940
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

August 7, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted his Electronic Questionnaires for Investigations Processing (E-QIP, which is the SF 86) on July 26, 2006. The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E on February 19, 2009 and an amended SOR detailing security concerns under Guideline G on May 12, 2009. These actions were 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 26, 2009. He answered the SOR in writing on March 11, 2009, and requested a hearing before an administrative judge. DOHA received the request on March 13, 2009. Department Counsel was prepared to proceed on May 28, 2009, and I received the case assignment on May 31, 2009. DOHA received his response to the amended SOR on June 2, 2009. DOHA issued a notice of hearing on June 3, 2009, and I convened the hearing as scheduled on June 23, 2009. The government offered five exhibits (GE) 1 through 4, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted two exhibits (AE) A and B, which were received and admitted into evidence without objection. The record closed on June 23, 2009. DOHA received the transcript of the hearing (Tr.) on July 6, 2009.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on June 10, 2009, less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the hearing notice 15 days before the hearing. Applicant affirmatively waived his right to 15 days notice of the hearing. (Tr. 7-8.)

Exclusion of evidence

Department Counsel submitted GE 5, a copy the investigator's summary of medical information on the Applicant. The Applicant disagreed with information in this document. Since the government did not call the investigator to testify and authenticate the contents of the document, I excluded GE 5 from the record. See ¶ E3.1.20 of the Directive.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR, with explanations, and in the amended SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 24 years old, works as an assistant project manager for a Department of Defense contractor. He began his employment with this employer about a year ago.¹

Applicant attended a community college for one year, then transferred to a four-year college in his sophomore year. He graduated from this college with a Bachelor of Science degree in business management in May 2008. During his years in college, he played on his school's hockey team. He now participates in an adult hockey league one

¹GE 1; Tr. 19-20.

night a week. He received a level three coaching certificate in hockey, which qualified him to coach hockey.²

After transferring to the four-year college, Applicant started consuming alcohol socially. He drank alcohol regularly and, at times, to excess. He usually became intoxicated when he drank, often three times a week. In the fall 2005, Applicant and friends played an alcohol drinking game in the dorm room of one friend. They became loud and noisy. The resident aide for the dorm cited (known as a strike) all but one individual in the room for unauthorized activity, drinking alcohol. As a result of this citation, Applicant paid a \$150 fine and attended a mandatory alcohol awareness program developed and operated by his college. He compared the program to driving classes, only about alcohol. The program lasted six hours and included slides, videos, and other information which made him aware of the effects of alcohol on him, but received no one-on-one counseling. He did not recall completing any forms or paperwork about himself when he participated in this program. He did not consider this program counseling.³

In early 2006, several of Applicant's friends came to his room. Two 21-year-old friends brought alcohol with them. The group ordered pizza and Applicant left the room to pick up the pizza. While he was gone, the 21-year-old friends started drinking beer. When Applicant returned to his room, two resident aides stood by his room door and advised the campus police had been called. The school, not the police, charged everyone in the room with possession of alcohol and alcohol use. All appealed the charges, or "strike", which were dropped. He had not consumed any alcohol in this incident.⁴

On January 13, 2006, the night before a hockey game or a travel day to a hockey game, Applicant and his hockey teammates met to play cards. During the evening, Applicant consumed two beers. A female friend called him and asked him to walk her home. When she arrived at the card game, he realized she was very intoxicated. He proceeded to walk her home. While walking, she tripped and fell in front of a city police officer. The police officer conducted a breathalyzer test on both of them. Applicant's test results showed a .06, which resulted in a charge of underage possession of alcohol for him. The police officer took the female friend to jail. The underage charge resulted in a third "strike" under school policy.⁵ The school required him to participate in a school-sponsored alcohol counseling program. Applicant completed forms about his alcohol use for this program. He participated in one-on-one counseling session with an intern. He attended two to four sessions, which he finished prior to completing his security clearance application. In his statement to the security investigator, he opined that this

²*Id.*

³GE 4; Tr. 25-26, 35-37, 43-44.

⁴GE 4; Tr. 46-47.

⁵Since his college dropped the second strike, his third strike became a second strike.

program was not an alcohol treatment program. At the hearing, he acknowledged that the second college program was an alcohol counseling program.⁶

Applicant appeared in state court on the above charge. The prosecution gave him the option of appearing before a judge or attending the state's alcohol safety action program (ASAP), paying a \$65 fine, and having the charges removed. Applicant chose the second option. He completed the paperwork to attend ASAP; however, he did not receive the notice showing when and where his class would be held until after the class had concluded. He rescheduled the ASAP classes and completed the classes as required in the early spring of 2007. He did not consider this program alcohol counseling or treatment. The court docket sheet and record showed that on February 27, 2006, the court took his case under advisement for 12 months, and if there were no violations, the case would be dismissed. On May 17, 2007, the court ordered the charge dismissed. The court entered no other orders in this case.⁷

Applicant acknowledged that he twice drove a car when alcohol impaired. By his senior year of college, he began to slowly reduce his consumption. During the summer of 2008, Applicant and friends spent casual time together, which included drinking. Now that he works full-time, Applicant drinks far less than he did in college. He drinks one or two beers on the weekend or one drink with dinner in the company of his girlfriend or with his father. He spends less time with his friends and drinking, although he still drinks socially. He gets drunk maybe once a month. Applicant has never been told he suffered from alcohol abuse and the record contains no evidence which reflects such a diagnosis by a professional.⁸

When he completed the e-QIP on July 26, 2006, Applicant answered "no" to the following questions:

Section 24. Your Use of Illegal Drugs and Drug Activity

- a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (Opium morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs?;
- b. Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or

⁶GE 4; Tr. 26-29, 42, 44.

⁷GE 4; AE A; AE B; Tr. 29-32.

⁸Tr. 39, 44-45.

courtroom official; while possessing a security clearance; or while in a position directly or immediately affecting public safety?; and

- c. In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen or cannabis for you own intended profit or that of another?

and

Section 25. Your Use of Alcohol

In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?

Applicant used marijuana on a few occasions in college. He last used marijuana on January 1, 2006. He does not intend to smoke marijuana ever again in the future. He also used Adderall, a prescription drug of a friend, on two separate occasions while studying for exams as a college student. He last used Adderall in 2007. He did not list his marijuana use on his e-QIP because his father reviewed his e-QIP and he did not want his father to learn about his use. When he met with the security investigator in November 2006, the investigator reviewed the e-QIP questions with him. During the course of the interview, the security investigator provided no indication of any knowledge of drug use by Applicant. Applicant provided information on his drug use when they discussed question 24. His parents know about his Adderall use, but not his marijuana use.⁹

Concerning his failure to list alcohol treatment, Applicant did not consider the ASAP class or the first class he took at college as alcohol counseling or treatment programs. Rather, he viewed both programs as alcohol awareness programs. He could not provide an explanation for why he did not acknowledge the second college alcohol awareness program as a treatment program. He did acknowledge treatment in his answers to interrogatories. His parents know about the alcohol counseling.¹⁰

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition

⁹Tr. 21-24, 51.

¹⁰GE 3; Tr. 25-26, 29-30, 43-44.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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 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:

(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.

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The government established that Applicant omitted a material fact from his e-QIP when he answered "no" to the questions about his past drug use and alcohol counseling. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response and at the hearing, Applicant denies, however, that he had an intent to hide information about his drug use from the government. He could provide no explanation for the omission of information about his drug counseling. When a falsification allegation is controverted, the government has the burden of proving the omission was deliberate. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹¹ For DC ¶ 16(a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

At the time he completed his e-QIP, Applicant knew he had used marijuana and Adderall in college. The government has established that Applicant intentionally hid his marijuana use at the time he completed his security clearance application. The disqualifying condition in AG ¶ 16(a) applies to SOR allegation 1.a.

Concerning SOR allegation 1.b, Applicant indicated in his 2006 interview that he did not perceive the second college alcohol program as an alcohol treatment. He knew his college required that he participate in this program because he had been cited a second time for an alcohol-related incident at school. Given his perception of the second program in 2006, Applicant did not intentionally hide this information from the

¹¹See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

government when he completed his e-QIP. Thus, the government has not established intentional falsification for this allegation. Allegation 1.b is found in favor of Applicant.¹²

SOR allegation 1.c fails to allege any personal conduct issue under Guideline E. The court docket sheet and record does not indicate that the court ordered Applicant to attend ASAP. Rather, the court took the case under advisement in February 2006 and 15 months later, entered the only order of record, a dismissal of the charge against Applicant. Allegation 1.c is found in favor of Applicant.

I have considered all of the mitigating conditions under AG ¶ 17 and conclude that the following mitigating conditions are raised in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

(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.

Applicant clearly did not provide information about his marijuana and Adderall use when he completed his e-QIP. He intended to hide his marijuana use from his father, who reviewed his application. When he met with the security investigator, he provided this information when they discussed the question about drug use. Without Applicant providing this information, the security investigator had no way to know he used illegal drugs in college. Applicant had never been arrested either at school or as a citizen for possession of drugs or drug paraphernalia, and the record contained no information from witnesses which indicated drug use. Applicant has not used marijuana in more than three years and Adderall in more than two year. He does not intend to use either in the future. He has changed both his attitude and behavior towards marijuana and Adderall. Applicant's decision not to provide information on his security clearance application about his past drug use occurred for a unique reason and does not cast doubt on his reliability, trustworthiness, or good judgment. Based on this information, I find that Applicant has mitigated the government's security concerns under Guideline E.

¹²Even if I found the government established this allegation, I would find the information was unsubstantiated under AG ¶ 20 (f).

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:

(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; and

(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.

When he entered college, Applicant began drinking alcohol as part of his social life. He consumed alcohol to excess and his consumption led to impairment on a regular basis. His alcohol consumption resulted in two citations or strikes by his college for possession of alcohol or drinking on campus. The police cited him on one occasion for possession of alcohol as a minor. He also acknowledged driving a car on two occasions while intoxicated. The police did not stop or arrest him on either occasion. The government has established its case under AG ¶¶ 22(a) and 22(c).

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.

Applicant's only incident with police occurred in February 2006, more than three years ago. Likewise, the college last cited him in 2006 for alcohol-related behavior, again more than three years ago. Applicant's excessive alcohol use occurred while a college student. He has not been diagnosed as either an alcohol abuser or as alcohol dependent.

Applicant continues to drink, but in moderation. He has significantly reduced his alcohol consumption and the frequency of alcohol impairment. His life focuses on hockey, his career, his family, and his girlfriend. Alcohol does not have the same role in his life as it did when he was a college student. His alcohol use and conduct as a college student does not cast doubt on his current reliability, trustworthiness, or good

judgment. Applicant has mitigated the government's security concerns under Guideline G.

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 an 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) 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The mitigating evidence under the whole person concept is more substantial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case as well as all the evidence of record. As a college student, Applicant started consuming alcohol socially. His alcohol consumption became excessive, often resulting in impairment and led to three citations during his first year at his four-year college. After this year, he received no additional school citations, although he continued to consume excessive amounts of alcohol. As he matured, he realized in his senior year of college that he needed to change his drinking habits. Since graduation and career developing employment, he changed both his attitude and behavior towards alcohol. He still drinks, but at a much reduced level. His current drinking patterns show generally responsible drinking and are not a security concern. He focuses on his job, hockey, coaching, and family, not getting drunk on a regular basis.

Applicant purposefully did not reveal his marijuana use on his e-QIP because he was scared to reveal this conduct to his father, not because he wanted to hide the

information from the government. He provided the information to the investigator during his interview, when his father was not present. His fear about his father learning of this past conduct is not enough to raise a security concern because others know about the conduct and there is little likelihood that he could be pressured, coerced, or exploited to reveal protected information.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant 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:	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
Subparagraph 2.d:	For 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.

MARY E. HENRY
Administrative Judge