



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



In the matter of:)	
)	
)	ISCR Case No. 07-17074
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: *Pro Se*

August 18, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Drug Involvement concerns; but he has not mitigated Criminal Conduct, Alcohol Consumption, and Personal Conduct security concerns. Eligibility for access to classified information is denied.

On February 12, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct; Guideline G, Alcohol Consumption; Guideline H, Drug Involvement; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 provided two answers to the SOR. The first answer was undated; the second answer was dated March 10, 2009. He requested a hearing before an

administrative judge. The case was assigned to me on May 13, 2009. DOHA issued a notice of hearing on June 9, 2009, scheduling the hearing for July 7, 2009. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 9, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through G, which were received without objection. DOHA received the transcript of the hearing (Tr.) on July 15, 2009.

Findings of Fact

Applicant is a 55-year-old employee of a defense contractor. He has worked for his current employer since September 2006. He is a graduate of a technical school and also has an associate's degree. He has been married and divorced twice. He and his second wife have reconciled and are living together but they have not remarried. He has a 23-year-old child.¹

Applicant has a history of alcohol-related arrests, drug use, and criminal activity. He was arrested in August 1999, and charged with driving under the influence (DUI) of liquor/drugs, DUI per se, and unlawful narcotics. The police found psilocybin mushrooms, a controlled substance, in his car. Applicant attended alcohol treatment between October 1999 and January 2000. In about December 1999, he pled guilty to a reduced charge of driving while ability impaired (DWAI) and was fined. He received a two-year deferred sentence on his drug charge. Between February 2000 and September 2000, he participated in 40 hours of court-ordered alcohol education classes.²

Applicant was arrested in March 2001, and charged with DUI, second offense in five years, DUI per se, and negligent child abuse. His 15-year-old child was in the car when he was arrested. Applicant was found guilty of negligent child abuse and the reduced charge of DWAI. Between June 2001 and June 2002, he participated in 68 hours of court-ordered alcohol education classes. He violated the terms of his probation in July 2001, by drinking alcohol. He was found guilty of contempt of court and sentenced to 28 days in jail.³

Applicant worked for the U.S. Postal Service as a letter carrier from 1973 to 2001. In November 2001, Applicant stole some of the mail he was carrying. He was arrested by postal inspectors for mail theft, in violation of 18 U.S.C. § 1709. He pled guilty in July 2002. He received three years probation. Applicant left his employment at the Postal Service shortly after his arrest. He testified that he voluntarily resigned because he was afraid that if he remained in the job and was prosecuted, he might lose his retirement. He told an investigator from the Office of Personnel Management (OPM) on April 12, 2007, that the postal inspectors brought him to the post office where he was

¹ Tr. at 49-50; GE 1.

² Tr. at 33, 50-51; Applicant's response to SOR; GE 1-4, 9.

³ Tr. at 34-35, 51-53; Applicant's response to SOR; GE 1, 2, 5, 9.

questioned. Applicant had been drinking the day of the incident. His personal items were removed from his locker; he was taken home; and he was told he would be removed from his position. He later told the investigator that he was terminated from his position. A signed statement was not provided but the interview was memorialized in a report of investigation (ROI). DOHA sent Applicant a copy of the ROI in an interrogatory and asked him if the ROI accurately reflected the information he provided to the investigator on the day he was interviewed. He was provided the opportunity to explain why the ROI was inaccurate and to add additional information regarding the matters discussed during the interview. He answered that the ROI was accurate with some minor modifications unrelated to his employment at the Postal Service.⁴

Applicant was a sporadic marijuana user during much of his life. He smoked marijuana in about March 2003, while he was on federal probation. He was drug-tested by the probation department and tested positive for marijuana. There is no evidence of any illegal drug use after March 2003.⁵

Applicant was arrested in July 2003, for his third DUI. He pled guilty to DWAI and was sentenced to six months in jail. In January 2004, his federal probation was revoked and he was sentenced to eight months incarceration. Between September 2004 and January 2005, Applicant participated in 24 hours of alcohol education classes, as directed by the Department of Motor Vehicles (DMV).⁶

Applicant was arrested for his fourth DUI in November 2006. He pled guilty to DWAI and was sentenced to six months in jail. He was also required to perform community service.⁷

Applicant submitted a Questionnaire for National Security Positions (SF 86) on February 26, 2007. Question 22 of the SF 86 asked:

Has any of the following happened to you in the last 7 years?

1. Fired from a job.
2. Quit a job after being told you'd be fired.
3. Left a job by mutual agreement following allegations of misconduct.
4. Left a job by mutual agreement following allegations of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.

Question 23f of the SF 86 asked, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e

⁴ Tr. at 38-43; Applicant's response to SOR; GE 2, 8.

⁵ Tr. at 36-37, 54; Applicant's response to SOR; GE 1, 2.

⁶ Tr. at 53-54; Applicant's response to SOR; GE 1, 2, 6, 9.

⁷ Tr. at 27-29, 46-47; Applicant's response to SOR; GE 2, 7, 9.

above (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)” Applicant answered “No” to both questions. In response to other questions, Applicant listed DWAI convictions in 2001 and 2003. He listed a conviction for “[p]ossession of mushrooms” in 1999, and he listed marijuana use on two occasions in March 2003. He did not list the mail fraud conviction, nor did he list his DUI arrest in November 2006. Applicant admitted that he intentionally did not list the mail theft conviction and the loss of his Postal Service job because he did not want his employer to know about the incidents.⁸

Applicant does not own a car. The DMV requires that any car he drives must have a breathalyzer installed, so that he cannot drink and drive. He has not had a valid driver’s license since his 2006 arrest. He was in a car accident in November 2007, while he had a revoked license. He testified that incident was the only time he has driven since the 2006 arrest. Applicant was working overseas for a period. He was arrested for the November 2007 incident when he returned to the United States in April 2008. He was convicted in October 2008, and sentenced to 15 days in jail. He stated that he continues to drink alcohol, but in moderation. He estimated his drinking at about a six pack of beer, or less, about once a week.⁹

Applicant has worked very hard at learning a new trade. He attended school and completed an apprenticeship in the trade. He is now a journeyman. Two of his supervisors wrote letters on his behalf. He is regarded as a valued employee whose attendance and tardiness record is impeccable. He is described as prompt, dependable, reliable, hardworking, and trustworthy. He is recommended for a security clearance.¹⁰

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching 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

⁸ Tr. at 37-38, 43-44; Applicant’s response to SOR; GE 1.

⁹ Tr. at 23-24; 28-32, 35, 55-56. Driving on a revoked license was not alleged as a basis for the denial of Applicant’s security clearance in the SOR and will not be used for disqualification purposes. It will be considered in assessing Applicant’s credibility; in the application of mitigating conditions; and in evaluating the “whole person.”

¹⁰ Tr. at 47; AE A-G.

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

Criminal activity creates doubt about an Applicant’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. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant was arrested and convicted on numerous occasions. He violated the terms of his probation on more than one occasion. All of the above disqualifying conditions have been established. There is insufficient evidence to support the facts alleged in SOR ¶ 1.f, as distinct from the conduct alleged in other allegations. SOR ¶ 1.f is concluded for Applicant.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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 has a long criminal history. He intentionally provided false information on his SF 86 in February 26, 2007, which constituted a federal crime. His most recent conviction was in October 2008, for a November 2007 incident. His criminal acts cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 32(a) is not applicable. His education, job training, and good work record with his current employer are positive signs of rehabilitation. However, insufficient time has elapsed since his last criminal offense for a finding that he is successfully rehabilitated. AG ¶ 32(d) is partially applicable.

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 guideline notes several conditions that could raise security concerns under AG ¶ 22. The following is potentially applicable in this case:

(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.

Applicant has multiple alcohol-related arrests and convictions. AG ¶ 22(a) is applicable. SOR ¶¶ 2.b through 2.e allege that Applicant participated in an alcohol treatment program and alcohol education classes. That is mitigating evidence and does not raise a disqualifying condition. SOR ¶¶ 2.b through 2.e are concluded for Applicant. SOR ¶ 2.e alleges that Applicant “continues to consume alcohol.” Consuming alcohol, standing alone, does not raise a disqualifying condition. SOR ¶ 2.e is also concluded for Applicant.

Three Alcohol Consumption Mitigating Conditions under AG ¶ 23 are potentially applicable:

(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); 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’s last alcohol-related arrest was in November 2006. He has attended several court-ordered alcohol programs. He continues to drink alcohol, but indicated that he no longer drinks and drives and he only drinks in moderation. There is no favorable prognosis by a duly qualified medical professional or a licensed clinical social worker. Based upon Applicant’s extensive history of substance abuse, there is insufficient time without an alcohol-related incident for a finding that Applicant has his alcohol use under control. None of the mitigating conditions are applicable.

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant's drug possession and use are sufficient to raise AG ¶¶ 25(a) and 25(c) as disqualifying conditions.

Two Drug Involvement Mitigating Conditions under AG ¶ 26 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.

There is no evidence that Applicant has used illegal drugs in more than six years. Applicant has established an appropriate period of abstinence. AG ¶ 26(b) is applicable.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 following disqualifying condition is potentially applicable:

(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 intentionally falsified his SF 86 in February 2007. AG ¶ 16(a) is applicable as a disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant discussed his federal arrest for mail theft and the loss of his job at the Postal Service when he was interviewed by an OPM investigator in April 2007. That does not constitute a prompt, good-faith effort to correct the falsification before being confronted with the facts. While he receives credit for being honest with the investigator, it is insufficient to establish a mitigating condition. I find that no mitigating conditions are applicable.

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) 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 common-sense 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. I considered Applicant's hard work at becoming certified as a journeyman in his trade. I also considered the very favorable comments about his job performance and character from his supervisors. However, Applicant has a long history of substance abuse and criminal offenses. He has at least four alcohol-related driving convictions. He lost his longtime job with the Postal Service because he stole mail. He lied on his SF 86. I continue to have serious doubts about his judgment, honesty, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated Drug Involvement concerns; but he has not mitigated Criminal Conduct, Alcohol Consumption, and Personal Conduct security concerns.

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
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g-1.h:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b-2.f:	For Applicant
Paragraph 3, Guideline H:	FOR APPLICANT
Subparagraphs 3.a-3.b:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a-4.b:	Against 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.

Edward W. Loughran
Administrative Judge