



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



In the matter of:)
)
) ISCR Case No. 07-17220
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro Se*

March 31, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the security concerns raised by her criminal conduct and alcohol use. Eligibility for access to classified information is denied.

On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct and Guideline G, Alcohol Consumption. 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 answered the SOR on December 10, 2008, and requested a hearing before an administrative judge. The case was assigned to me on February 11, 2009. DOHA issued a notice of hearing on February 25, 2009, and the hearing was convened as scheduled on March 17, 2009. The Government offered Exhibits (GE) 1 through 5,

which were received without objection. Applicant testified on her own behalf, called one witness, and submitted Exhibits (AE) A through C, which were received without objection. DOHA received the transcript of the hearing (Tr.) on March 25, 2009.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. She has an associate's degree. She is single and has a 19-year-old daughter.¹

Applicant was cited in December 1992 for failure to maintain financial responsibility. She did not have car insurance at the time. She was fined \$175. The charge is not listed on the FBI Identification Record submitted in evidence.²

Applicant was charged with disorderly conduct in July 1995. She was found guilty. She does not recall the circumstances surrounding the charge. There is no evidence as to what the sentence was for the charge.³

Applicant was charged with issuing a bad check in September 1996. She admitted that she wrote a check that was returned for nonsufficient funds. The court set up a payment plan for her to pay the check. She missed a payment and a bench warrant was issued. She was arrested for the bench warrant in February 1997. She made all the required payments and the bench warrant was withdrawn.⁴

Applicant was arrested in September 1996, and charged with driving while intoxicated (DWI). Her blood alcohol was tested at .15%, and a short time later at .152%. Applicant pled guilty and was sentenced to probation for 18 months and a \$500 fine. She attended several Alcoholics Anonymous (AA) meetings as part of her probation.⁵

Applicant and a friend were driving aboard a military installation in September 2000. They were coming from a bar and the friend was driving her car. They both had been drinking and she had smoked marijuana. It is unclear if her friend had also smoked marijuana. They were stopped by the military police after he failed to stop at a stop sign. His driver's license was suspended. The officer noted an alcohol smell coming from the vehicle and he was given a breath test, which measured .059%. The car was searched and marijuana was found. Applicant was charged with wrongful possession of marijuana. She pled guilty and was sentenced to probation for two years and a \$1,000 fine. She was not required to attend Alcoholics Anonymous meetings but

¹ Tr. at 26, 40, 44; GE 1.

² Tr. at 27; Applicant's response to SOR; GE 4.

³ Tr. at 28; Applicant's response to SOR.

⁴ Tr. at 28-29; Applicant's response to SOR.

⁵ Tr. at 24, 29-31; Applicant's response to SOR; GE 1, 3.

for approximately a six month period, she voluntarily attended about eight to ten meetings. She has not used illegal drugs since she went to court for this incident in about January 2001. She did not stop drinking, which she did every day.⁶

Applicant was arrested in February 2007, and charged with driving while intoxicated, second offense. The police indicated that she almost hit the police car. The arrest was videotaped. Applicant's blood alcohol was tested at .24%, which is far more than double the legal limit. She pled guilty and was sentenced to a \$2,000 fine and her driver's license was suspended for a year.⁷

Applicant continued to drink after the latest DWI. She admitted that she drank on a daily basis through about May 2007. She drank about six to eight beers a day and would drink to what she considered a level of intoxication, which was about 12 or more beers, about four to five times a month. She stated that after she stopped smoking marijuana, she essentially replaced the marijuana with alcohol. She provided inconsistent information about her current alcohol consumption. She told the background investigator in September 2007 that she had not drunk alcohol since May 2007, and she had no future plans to drink alcohol because of the problems it caused her and her family.⁸ She wrote in her response to the SOR:

I have exercised very poor judgment in the past and have since matured and learned from those mistakes. Unfortunately, much of my poor judgment and bad choices were directly related to my alcohol intake. I never realized that I had a problem until 2007. The last arrest made me realize that I had to change that habit and I have. Since May 2007, I have had only a handful of drinks. I no longer drink every day, not even every weekend. I would estimate that I have drunk approximately a dozen times since then and never to the point of being drunk. I now know that alcohol is something that I must refrain from, and that all the positive changes I have made in my life up to this point would be worth nothing if I didn't change that, and I have.

At the hearing, Applicant initially provided contradictory information:

I do not drink anymore, have not since May. What I do instead is I call my daughter, I call my mother, I call my grandmother. Sometimes I've talked to [witness] about it. I even watch Intervention, just to - - I mean, I did it last night, because I was so nervous. And it's just something that, you know, if I look at and I see, then it reminds me of where I was before and what I could go back to.⁹

⁶ Tr. at 31-35, 44; Applicant's response to SOR; GE 1, 4, 5.

⁷ Tr. at 35-39; Applicant's response to SOR; GE 1, 3.

⁸ Tr. at 39-41; GE 2.

⁹ Tr. at 25.

Applicant also stated that she occasionally watches the videotape of her arrest to deter her from drinking. She is disgusted by her behavior in the video. She was later asked the last time she had any alcohol. She stated it was “[p]robably around the end of January [2009] or beginning of February [2009].” She stated that she had alcohol on about eight to ten occasions since May 2007, but only in small amounts, three to four beers, or less.¹⁰

Applicant has never been diagnosed as alcohol dependent or an alcohol abuser. When asked if she considered herself to be an alcoholic, she replied that she did. While she has not been totally abstinent, she stated that she was “trying to get there.”¹¹

Applicant is highly regarded both professionally and personally. She submitted five character letters and a supervisor testified on her behalf. They are aware of her past alcohol issues and believe she has turned her life around. She is considered to be dedicated, trustworthy, professional, honest, and reliable. She is recommended for a security clearance.¹²

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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

¹⁰ Tr. at 25, 38, 41-46.

¹¹ Tr. at 44-45.

¹² Tr. at 18-21; AE C.

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; and

- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

Applicant’s arrests and convictions are sufficient to raise both of the above disqualifying conditions.

Four Criminal Conduct mitigating conditions under AG ¶¶ 32(a) through (d) 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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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 most serious offenses were related to substance abuse, either marijuana or alcohol. She stopped smoking marijuana in about 2001, but her alcohol consumption increased. Her last DWI arrest was in February 2007, just over two years ago. There is no bright line rule as to what constitutes "so much time has elapsed since the criminal behavior happened" under AG ¶ 32(a), and "the passage of time without recurrence of criminal activity" under AG ¶ 32(d). It depends upon the facts and circumstances of each case. Two years without recurrence of criminal conduct is a very good start on rehabilitation. There is other evidence of rehabilitation including remorse and a good employment record. My remaining concern is Applicant's issues with alcohol, and specifically with her contradictory answers about her alcohol consumption. There is nothing ambiguous about her initial testimony when she said, "I do not drink anymore, have not since May." She later provided totally different information. In order to find complete rehabilitation, there must be complete honesty. It is not clear in this case that I have received that. AG ¶¶ 32(a) and (d) are partially applicable.

Applicant was not pressured or coerced into committing her criminal acts. AG ¶ 32(c) is not applicable. It is unclear if the failure to maintain financial responsibility citation in 1992 was a criminal charge or a civil traffic violation. In either event, it is mitigated under AG ¶¶ 32(a) and (d), as is the bad check offense.

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 are 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; 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.

Applicant was arrested and convicted in 1996 and 2007 for DWI. She drank six to eight beers every day, and more than that four to five times a month. Her alcohol-related incidents and pattern of alcohol consumption are sufficient to raise AG ¶¶ 22(a) and (c).

Two 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; and

(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).

I find that AG ¶ 23(a) is partially applicable under the same rationale discussed above under the Criminal Conduct section. Applicant has never been diagnosed as alcohol dependent or an alcohol abuser, but she admitted that she considers herself to be an alcoholic. Since she has not been diagnosed as alcohol dependent, there is no requirement that she be totally abstinent. She is still trying to become totally abstinent. She reports responsible use. As discussed above, I remain concerned about her contradictory statements about her alcohol use. AG ¶ 23(b) is partially 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. Applicant is 36 years old. Her substance abuse led to at least three convictions. It is unclear if the disorderly conduct conviction was alcohol-related because she does not recall the circumstances surrounding the charge. Applicant drank on a daily basis and acknowledges that she considers herself to be an alcoholic. She has apparently severely cut down on her drinking. Her friends, family, and co-workers have noticed a change in her life since she has reduced her drinking. She is highly regarded at work. While Applicant appeared to be otherwise honest at the hearing, she testified to two diametrically opposite things on the core issue of the case. Moreover, this is a case that when considered in the light most favorable to Applicant, still has Applicant with at least three substance-abuse-related offenses, the most recent just over two years ago. Although she has taken steps in the right direction toward rehabilitation, it is too early to conclude that she has tackled her alcohol problems. As discussed above, I am concerned about the conflicting statements about her current alcohol use and therefore, I cannot find complete rehabilitation and mitigation.

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 has not mitigated the security concerns arising from her criminal conduct and alcohol use.

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:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant

Paragraph 2, Guideline G: AGAINST APPLICANT

Subparagraphs 2.a-2.c: 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