



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-17383
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: Herbert M. Silverberg, Esquire

November 25, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86), on May 16, 2006. He submitted an earlier security clearance application on May 4, 2002. On April 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, E, and J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on May 19, 2008 and answered it on the same day. He requested a hearing before an Administrative Judge through Counsel. I received the case assignment on August 22, 2008. I denied Applicant's request for an initial postponement for an unavailable witness but continued the case for a second day of hearing to accommodate the witness by video-conference. DOHA issued a notice

of hearing on September 3, 2008, and I convened the hearing as scheduled on September 24, 2008. The government offered Exhibits (GE) 1 through 7, which were received without objection. Applicant testified on his own behalf and presented the testimony of five witnesses at the first hearing. He submitted Exhibits (AE) A through C, without objection. The hearing was continued on October 21, 2008 for the testimony of the final witness. DOHA received the transcript of the first hearing (Tr.) on October 2, 2008 and the second transcript (Tr. 2) on October 28, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated May 19, 2008, Applicant admitted the factual allegations in ¶¶ 1.a- 1.g; ¶¶ 2.a and 2.b; and ¶ 3.a of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 48-years-old. He is divorced with no children. After college in 1984, he joined the United States Air Force (USAF) where he became a helicopter pilot. He served on active duty until 1996 and on active reserve duty from 1996 until March 2005 (GE 1). He has been an instructor pilot for a government contractor for approximately 12 years (Tr. 124). He has held a security clearance since 1984.

Applicant started drinking alcohol in college with his friends in a social setting. He did not drink every weekend but he consumed alcohol (mixed drinks), at times to excess and to the point of intoxication from 1980 to at least November 2005. Applicant drank four to eight mixed drinks on average when he was out with friends (Tr. 129).

In 1990, while in the USAF on active duty, he was charged with Drunk and Disorderly Conduct. He had been drinking that evening (8-10 drinks) and set off the alarm for a fire extinguisher in the barracks as a joke (Tr. 127). Applicant elaborated at the hearing that the Navy base was a "little more uptight, nothing exciting happens, so when the alarm went off, five fire trucks show up, five police cars show, everything there - the whole rescue is there" (Tr. 126). Applicant received a letter of admonishment from his USAF Commander (GE 7).

Applicant's drinking habits from 1990 until 1996 included drinking on Friday nights and sometimes on a Wednesday evening with his military friends at a club. He would consume approximately eight or ten drinks (Tr. 128). On October 14, 1996, Applicant was arrested for Driving While Intoxicated (DWI). He completed an alcohol driver awareness program ordered by the state, and attended a victim impact panel (GE 4). The DWI charge was later dismissed.

In 1999, Applicant was diagnosed with diabetes and he stopped drinking until early 2002 (Tr. 133). He had stopped drinking for medical reasons one other time. He acknowledged that he started drinking again gradually and seldom to intoxication. He

explained that he increased his drinking in 2002 due to his divorce and a stressful situation at work due to a strike (Tr. 135). Applicant also explained at the hearing that he enjoys the taste of alcohol and if he were cutting the grass, he might enjoy a few cold beers (Tr. 134). He also described his enjoyment of wine with pizza.

On April 10, 2002, Applicant was arrested for DWI -First offense and Failure to Maintain a Traffic Lane. His breath-alcohol level was .14%. He acknowledged that he had been drinking that evening after receiving a phone call from his wife that she wanted a divorce (Tr. 135). He was also stressed due to a strike at work. He believes he had about eight drinks. He pleaded guilty to charge one and attended an alcohol screening. He paid court fees of \$328. He completed DWI school and attended another Victim Impact Panel (GE 6).

Applicant completed a security clearance application in May 2002 (GE 2). In response to Question 24 regarding any alcohol offenses, Applicant listed his 1996 DWI. He did not list the 2002 DWI charge from one month prior because he did not want to "muddy up the paperwork" (Tr. 137). He wanted to wait a few months to see the actual court outcome. He testified at the hearing that he did report his DWI to his command about one month later (Tr. 138). His statement is inconsistent with the written information provided to an investigator in November 2002. At that time, Applicant stated he had not informed USAF and did not believe he was required to do so (GE 4).

In 2005, Applicant drank every day after work and on the weekend. He admitted drinking to intoxication several times a week with his friends after work. He usually consumed eight mixed drinks. He last drank to intoxication in late 2005. He noted on his answer to the SOR, that November 2006 is not the correct date for consumption of alcohol. He claims he did not drink during his probation.

On August 2, 2005, Applicant was charged with Aggravated Driving While Intoxicated - Second offense, and Driving Within Traffic Lane. He pleaded guilty to an amended count (DWI - First Offense and was sentenced to 30 days house arrest (reduced to 15 days for good behavior). He paid fines and fees of approximately \$719 and completed 48 hours of community service. His driver's license was revoked from October 2005 until October 2006. He was required to install an ignition interlock system on his vehicle before he could drive. He was required to attend Alcoholics Anonymous (AA) three times per week for a period of time and one group counseling meeting per week. A licensed clinical social worker confirmed that Applicant enrolled and attended 52 counseling sessions in the substance abuse program (AE B). He was placed on supervised probation for one year. Applicant was successfully completed probation in March 7, 2007 (AE C).

Applicant continued to drink after probation ended on March 7, 2007. He drank two drinks of bourbon at home (Tr. 157). He acknowledged that he had a problem and he needed to "control" it. At this point in time, he started praying about the problem and speaking to his pastor. Applicant immersed himself in church activities (Tr.142). His current drinking is perhaps one or two bourbons twice a month (Tr. 158). He reports this

is done at home. Although one witness described Applicant may have a drink at his house but waits hours before he drives himself home.

Applicant's colleagues attest to his honesty and integrity (Tr. 27). He is reliable and has performed his duties with exceptional dedication. He has favorable recommendations from his colleagues and his supervisor. Applicant has volunteered in the community to perform charitable activities for at least ten years (Tr. 43). Applicant's longtime friends testified that he has changed his drinking habits. He has a glass of wine at dinner sometimes (Tr. 46). He is described as responsible about his drinking and driving. There are occasions that Applicant does not drink at all when he is out with his friends (Tr. 25).

In March 2007, Applicant was interviewed as part of his security clearance process. During that interview, he told the investigator that he did not intend to drink in the future. He acknowledged that drinking had a negative impact on his life and he feared losing his job due to his alcohol arrests and his past use of alcohol (GE 3).

At the hearing, Applicant explained that information concerning "fearing the loss of his job" may have been taken out of context. He understands the importance of the past history of alcohol use and the seriousness of it as well. He also stated that he has paid for his mistakes legally and financially.

Applicant was evaluated for substance abuse as part of his security investigation. He admitted to a history of significant alcohol use. He attended AA meetings in late 2005, 2006, and 2007. He attended the same meeting on Wednesday evenings for about one year and a half. He was an active participant in AA (Tr. 63). A fellow AA member testified that Applicant was sincere and participated in meetings. He attended the same Wednesday night meeting as Applicant (Tr. 62). He heard Applicant talk about going to church and his commitment to the church. He also felt that Applicant's minister acted as a "sponsor" to Applicant (Tr. 68). At some point after probation, Applicant decided to stop attending AA meetings, continue involvement with his local church and receive counseling from his minister (Tr. 90).

Applicant's former pastor has known him since 2003 (Tr. 91). He regards Applicant as a highly committed individual who is reliable, especially with his church volunteer activities (Tr. 96). Applicant met with his pastor in the recent past to discuss questions of life choices. Applicant talked about AA and drinking in a responsible manner with his pastor. Applicant believed at this time that he did not have a craving for alcohol, did not have a problem with alcohol, and that he did not need the AA meetings (Tr. 98). He told his pastor that he drinks on social occasions. His pastor recommends Applicant for a security clearance and has no reservations about his trustworthiness (Tr. 101).

Applicant's current pastor counsels him on a regular basis. Applicant shared his past history of alcohol use with him (Tr. 112). Applicant is an active member of the congregation and was recently baptized. He volunteers in a variety of community

activities. The pastor believed Applicant is a social drinker but he acknowledged that he does not know how much Applicant does drink at this time (Tr. 113; 119). He recommends Applicant for a position of trust and responsibility.

Applicant describes his present day drinking as perhaps once or twice a month. He drinks one bourbon or maybe two at the most. He drinks at home and sometimes at a friend's house (Tr. 158). He waits for a few hours before he drives home. He relies on his spirituality to guide him to make good choices concerning alcohol. He also has a list of phone numbers from AA members who he can call for support (Tr. 160). He believes he has truly changed his outlook on life. In the past six months, Applicant states he drinks even less due to the strength derived from the church and support from AA members he can call (Tr. 158).

In May 2008, Applicant met with a psychiatrist who interviewed him for approximately three hours and completed a clinical evaluation. He reviewed some records that were furnished to him by Applicant's counsel. The psychiatrist diagnosed Applicant with mild depression with a history of alcohol abuse in partial full remission (Tr. 2. 17). He testified that Applicant now engages in asymptomatic drinking (Tr.2 18). He described this as controlled drinking which does not cause any occupational or social problems. Applicant reported drinking a couple times a month, three or four drinks (Tr. 2. 40). The evaluator reported Applicant's prognosis was good because he had attended AA and was involved in a spiritual counseling and volunteer work (Tr.2 19). He explained that Applicant is strongly committed to his church, religion and volunteering, and that would outweigh a commitment to alcohol. The psychiatrist acknowledged that it would be better if Applicant did not drink at all due to his medical condition (diabetes). He did not think Applicant would be a security concern at this time (Tr.2 23).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(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 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.”

In this case, Applicant has a documented history of problems with alcohol from 1990 until 2005. He has three-alcohol related driving incidents and four arrests (one for

drunk and disorderly). His last DUI was in 2005. He admitted he has a history of significant alcohol use which has led to impaired judgment while driving. Applicant admitted that he was a habitual drinker. Thus, AG ¶ 22 (a) and (c) apply.

In May 2008, Applicant was given a diagnosis of mild depression with a history of alcohol abuse in partial full remission by a psychiatrist. The legal and substance abuse treatment history was deemed significant. Thus, AG ¶ 22(d), “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) is diagnosed as an alcohol abuser or alcohol dependent” applies.

AG ¶ 23 provides conditions that could mitigate security concerns:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and,

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant has a lengthy history of alcohol abuse, and his last DUI was in 2005. He had an ignition interlock on his vehicle until October 2007. He successfully completed his probation. Since 2005, he has not had any other alcohol-related incidents. He has received counseling and treatment on several occasions since 1990. Applicant did not see a need to abstain from alcohol after his treatments. He received alcohol treatment and counseling in the past and did abstain from drinking for almost two years due to medical problems in 2002. Applicant has acknowledged that he abused alcohol in the past but now he is committed to a more spiritual life. Although he no longer attends AA, he has a phone list of AA members available for support. He speaks to his pastor about issues. Applicant maintains that his drinking is responsible at this point in his life. A psychiatrist stated that Applicant is an asymptomatic drinker. He

has received a favorable diagnosis from a psychiatrist in 2008 on the condition that he maintain his support system. Applicant has mitigated the alcohol consumption concerns under AG ¶¶ 23(a), (b) and (d).

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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant did not disclose his alcohol related arrest in 2002 on his security clearance application. He did not forget about it but rather decided that he would just wait until the court outcome. He admitted that this was probably the wrong thing to do. Thus, AG ¶¶16(a) and 16(b) apply.

Under AG ¶ 17, the following conditions could mitigate the government's security concerns:

(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 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.

I do not find that he has mitigated the personal conduct concern in this case. He deliberately omitted the information on his security clearance application. Applicant stated that he was completely candid with the investigators during his interviews and later investigation. Applicant did not come forward after the 2002 court outcome. He was asked why he did not list the April 2002 incident on his May 2002 security questionnaire by an investigator in November 2002. He did not misunderstand the question. He decided on his own accord that since the arrest had just occurred, he would wait to see the legal outcome. Although he stated, he did not intend to conceal his arrest, that is exactly what he did. The question is clear. He deliberately omitted information that would have impacted his clearance. The fact that he was more candid during the November interview does not mitigate the falsification. In his answer to the SOR, Applicant admitted the allegations under criminal conduct and agreed that his delay in relaying the information about the April 2002 alcohol arrest was “technically a crime” but he also realized that the matter would have to be reported in due course when it became official. This gives me doubts about the trustworthiness of Applicant. He even acknowledged that it was probably the “wrong thing” to do but he did it anyway. Applicant was not completely candid at his hearing about the reason he failed to disclose his DWI arrest. I do not believe his explanation was credible at the hearing.

In his November 2002 statement to investigators, Applicant stated he had not informed his command about his 2002 DUI and did not believe he was required to do so. At the hearing, he testified that he had done so. His explanation was confusing because he stated that he may have mixed up the dates and then stated that he was not sure because he was in civilian status and not on duty. He admitted the allegation in his answer to the SOR. Based on the inconsistency, I conclude that Applicant did not notify his command. Applicant has not mitigated the concerns under the personal conduct guideline.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, “(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 admitted that he did not list his 2002 DUI arrest on his security clearance application. He intentionally omitted this information. He was not credible concerning his reporting to his command. He admitted that the delay on his part was

“technically a crime” and realized that the matter would have to be reported in due course when it became official.” His deliberate falsification with respect to Question 24 constituted a violation of 10 U.S.C. Section 1001. The government has established its case for falsification. This is a violation of Federal Law, Title 18, United States Code, Section 1001, a felony.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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;

(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 provided mitigation under this guideline. The event occurred in 2002, about six years ago. The federal statute of limitations is 5 years. There have not been any other instances. Thus, AG ¶ 32(a) and (d) apply in this case.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant served in the USAF and held a secret clearance. He has no incidents or issues with protecting information. Applicant has a history of problems with alcohol. He has been arrested for DUI three times with the last incident occurring in 2005. He was also arrested for drunk and disorderly in 1990. Since that time he completed court ordered treatment programs and modified his drinking. He was diagnosed recently in 2008 by a licensed psychiatrist as an asymptomatic drinker with a history of alcohol abuse in partial full remission. He has

involved himself in his church and committed himself to a different life. Applicant's criminal offenses are alcohol-related and omission of relevant information concerning a DUI. He has not had any legal problems since 2005.

Applicant did not disclose his 2002 in his security clearance application one month later. He rationalized that he would wait until the legal outcome before he would disclose the information. This was an intentional falsification. He also did not report information to his command, but there is no proof that he is required to do so. He told an investigator that he did not believe he was required to do so. At the hearing, Applicant's explanation was not credible. I have confirming doubts about Applicant's credibility.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from personal conduct. He has mitigated the concern under alcohol consumption and criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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

Conclusion

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

NOREEN A. LYNCH
Administrative Judge