



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



In the matter of:)
)
) ISCR Case No. 07-17826
)
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: *Pro Se*

February 3, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s security concerns under Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption. Applicant’s eligibility for a security clearance is denied.

On August 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) 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 in writing on September 22, 2008, and elected to have his case decided on the written record. Department Counsel submitted the government’s file of relevant material (FORM) on October 24, 2008. The FORM was

mailed to Applicant on October 29, 2008, and it was received on November 3, 2008. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and did not submit additional material. The case was assigned to me on January 21, 2009.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is 31 years old and has worked for a federal contractor since 2004. He graduated from college in 2001. He is not married. He has a three-year-old daughter.

Applicant was arrested on or about June 8, 1998, and charged with one count of Reckless Handling of a Firearm and one count of Possession of Marijuana. The firearms charge was dismissed and he was found guilty of the marijuana charge. Applicant received a suspended sentence and a fine.

Applicant was arrested on or about July 1, 1999, and charged with Possession of a Controlled Substance with Intention to Distribute (cocaine). He was found guilty and sentenced to five years in jail, with the sentence suspended for all but four months of "shock incarceration." He stated in his answer to interrogatories the following:

I never was a user, manufacturer, or a user of cocaine. The incident which I was arrested for charges me with distribution. Just for the record, I was never a cocaine supplier or distributor. Just someone trying to make some extra money, but went about it the wrong way.¹

Applicant was arrested on or about September 4, 2001, and charged with Driving Under the Influence (DUI). He was fined and received a suspended sentence. His driver's license was suspended for a year and he was ordered to attend an alcohol safety program.

Applicant was arrested on or about April 1, 2007, and charged with one count of Felony Eluding Police and Endangering Police or Police Car; one count of Driving While Intoxicated (DWI); one count of Reckless Driving, and one count of Improperly Stopping Vehicle. The Felony charge was reduced to a misdemeanor and he was fined \$500. He pleaded guilty to DWI and was fined, sentenced to 12 months in jail with all but 20 days suspended. He received three years probation and his driver's license was suspended for three years. He was ordered to attend an alcohol safety program. The remaining charges were dismissed.

¹ Item 6.

Applicant consumed alcohol, at times in excess and to intoxication, between at least September 4, 2001 and at least April 1, 2007.

In his answer to interrogatories Applicant stated he turned his life around and no longer participates in any illegal activities.² He also wrote that he stopped using illegal substances in 2002 because he decided to grow up and he needed to do better.³ He checked the box on the interrogatory question that said he did not intend to consume alcohol beverages in the future.⁴ There was no amplifying information as to what recent steps Applicant has taken regarding his alcohol consumption. He is not participating in Alcoholics Anonymous.⁵ No other amplifying information was provided to show what Applicant has done substantively to change his life or mitigate the security concerns raised.

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

² AE 6.

³ AE 7.

⁴ AE 9.

⁵ *Id.*

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

Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered:

- (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; and
- (d) individual is currently on parole or probation.

Applicant was arrested five times in a nine year period from June 1998 to April 2007. Three arrests were drug related and two involved alcohol. His last arrest was a felony charge of Eluding Police and Endangering Police or Police Car, as well as DWI, Reckless Driving and Improperly Stopping Vehicle. Applicant pled guilty as part of a plea agreement. The felony was reduced to a misdemeanor. He also pled guilty to the DWI, received 12 months in jail (all but 20 days suspended), and was placed on

probation for three years. Applicant is currently on probation. His probation continues until 2010. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and especially considered the following:

(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 a nine-year criminal history for drug and alcohol offenses, the most recent having occurred in 2007. He remains on probation for the most recent offenses until 2010. I find (a) does not apply because Applicant is still on probation and no evidence was offered to show his conduct is unlikely to recur. His repeated conduct over a significant period of years casts doubt on his reliability, trustworthiness and good judgment.

Applicant failed to provide any substantive evidence that he has changed his ways and is successfully rehabilitated. Not enough time has passed to come to this conclusion, nor is there any evidence in the record to reflect the contrary. I find (d) does not apply.

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.

I have considered all of the disqualifying conditions under AG ¶ 22 including:

(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 two alcohol-related incidents in 2001 and 2007, for DUI and DWI. The above disqualifying condition applies.

I have also considered all of the mitigating conditions under AG ¶ 23 and especially considered:

(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.

I have considered Applicant's statements that he has not consumed alcohol since his last alcohol-related arrest in 2007. Applicant did not provide any other credible evidence to show what he has done to overcome his issues with alcohol. He apparently was required to attend an alcohol safety program after his first alcohol-related, but did not heed its warnings. No evidence was presented to confirm any treatment program, attendance at Alcoholics Anonymous or a similar organization or any prognosis from a medical professional. Without supporting evidence Applicant's latest alcohol-related incident is too recent to conclude another is unlikely to recur or that he has overcome his problem or is successfully rehabilitated. I find none of the above mitigating conditions apply.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct;

(8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is 31 years old and has a nine-year history of drug and alcohol abuse and criminal offenses. He remains on probation until 2010 for his latest criminal activity. Insufficient time has passed since his last offense and he has not provided any substantive evidence to convince me he is successfully rehabilitated. Overall the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the Guidelines for Criminal 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 J:	Against Applicant
Subparagraph 1.a-1.e:	Against Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraph 2.a-2.b.	Against 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.

Carol G. Ricciardello
Administrative Judge