



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



In the matter of:)
)
) ISCR Case No. 08-00589
)
)
Applicant for Security Clearance)

Appearances

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

October 23, 2008

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

On May 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, G and E. 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 June 21, 2008, and elected to have his case decided on the written record. Department Counsel amended the SOR on August 4, 2008. Department Counsel submitted the government’s amended SOR and file of

relevant material (FORM) on August 6, 2008.¹ The FORM was received on August 12, 2008. On August 24, 2008, Applicant responded to the amended SOR and admitted the amended allegations.² He 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 information. The case was assigned to me on October 7, 2008.

Findings of Fact

Applicant admitted the allegations in the SOR and amended SOR. In addition, after a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is 20 years old and graduated from high school in 2006. He attended a vocational/trade school as part of high school and has been employed by a federal contractor since November 2006.

Applicant began drinking alcohol when he was 17 years old. On one occasion he blacked out from drinking too much alcohol. In October 2006 Applicant was arrested for Driving Under the Influence (DUI) of alcohol and Felony Maiming Resulting from DUI. His blood alcohol content at the scene of the accident was .12% and at the hospital was .14%. He was driving his car and rear ended another vehicle. A person in the other vehicle was injured and hospitalized for two days. On November 16, 2006, Applicant was found guilty of DUI and the felony maiming charge was dismissed. He was sentenced to 30 days in jail, with 25 days suspended, fined approximately \$450 in court costs and fees, ordered to complete an alcohol safety program, and awarded probation for a year. In addition, his driving privileges were suspended for one year. He completed the court requirements of his sentence.

On June 4, 2007, Applicant was charged with a misdemeanor for Unlawful Purchase/Underage Possession of Alcohol. He was found guilty and sentenced to 30 days in jail, which was suspended, fined approximately \$566 including court costs, and his drivers license was suspended for an additional six months. Applicant was a passenger in a vehicle. He drank about three to four beers. When the car was pulled over the police officer opened the door of the vehicle and a 40 ounce beer fell out of the car.

¹ The amendments are as follows: "A. to reflect the correct date of Applicant's convictions for underage possession of alcohol in subparagraph 1.c. to wit: June 4, 2007 (vice May 7, 2007)." Applicant agreed with the change. "Amendment B. "Add the following allegation under new Paragraph 3, Guideline G: 3.: 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. Available information raising this concern shows that: a. That information set forth under paragraph 1, above. B. When you were 17 years old you drank too much beer at a party and blacked out."

² Applicant's response to the amended allegations was dated but was not signed. The amendments were individually admitted and were initialed.

Applicant does not believe he has a drinking problem. In his interview in August 2007 with an Office of Personnel Management (OPM) investigator it stated he had not had any alcohol to drink since November 2006. This statement is inconsistent with the OPM investigation where it states he consumed three to four beers when he was stopped and charged with underage possession of alcohol.³ Applicant did not provide any amplifying information in mitigation.

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

³ Item 5 reflects Applicant's confirmation that the OPM investigation is accurate and correct. He made a statement correcting the information that his DUI was a misdemeanor and not a felony. He did not make any other changes.

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 J, 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 all of the criminal conduct disqualifying conditions and especially considered AG ¶ 31(a) (a single serious crime or multiple lesser offenses) and AG ¶ 31(c) (an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). Applicant was convicted of a DUI and several months later was convicted of underage possession of alcohol. I find both of the above disqualifying conditions apply.

I have considered all of the criminal conduct mitigating conditions under AG ¶ 32(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 and 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 began drinking alcohol when he was 17. He had been drinking alcohol when he was involved in an accident in 2006, in which he and another person were injured. He pled guilty to DUI and was sentenced. Approximately eight months later he was charged and convicted of underage possession of alcohol. In his interview with an OPM investigator he stated he had not had any alcohol since his DUI incident. This is inconsistent with another part of the investigation that reflects he had consumed three to four beers when he was charged with underage possession of alcohol. It has been approximately 23 months since his DUI conviction and 16 months since his misdemeanor conviction for underage possession of alcohol. Applicant did not offer sufficient information to mitigate the security concerns raised by his illegal actions. Applicant has demonstrated a continuing course of conduct as it relates to alcohol and abiding by the law. I find none of the mitigating conditions 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 alcohol consumption disqualifying conditions under AG ¶ 22 and especially considered (a) (“alcohol-related incidents away from work, such as driving 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 had two alcohol-related incidents in a short span of time. One is a DUI conviction and the other is a misdemeanor conviction for underage possession of alcohol. He also admitted he blacked out from drinking alcohol when he was 17. Applicant does not believe he has a problem with alcohol. I find (a) applies to the facts.

I have considered all of the alcohol consumption mitigating conditions under AG ¶ 23. I 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”). I do not have any other information as to Applicant’s actions regarding his alcohol related incidents. His OPM statement reflects that he had not consumed alcohol since his DUI convictions. He has a misdemeanor conviction for underage possession and the police officer who stopped observed Applicant’s eyes and he appeared to have been drinking. He has not offered any amplifying information about this discrepancy, or sufficient information to mitigate the alcohol consumption concerns. I have considered the above mitigating condition as it relates to the alcohol issues raised. There was a relatively short period of time between Applicant’s DUI conviction and his underage possession conviction. No evidence was presented to mitigate the security concerns raised by Applicant’s alcohol use. Under the circumstances of this case I find no mitigating conditions apply.

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.”

I have considered the personal conduct security concerns. I find, based on the facts, AG ¶ 16 (e) (“personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and

may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group”) applies. Almost every aspect of a person’s life can be evaluated generally as a security concern under Personal Conduct. I have considered all of the facts in this case from that Personal Conduct perspective. I find Applicant’s conduct from a whole person analysis does raise questions as to his judgment, reliability and trustworthiness, which could be exploited. Applicant did not provide sufficient information to consider in mitigation.

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 a 20-year-old young man who already has two alcohol-related convictions. He received a DUI conviction and shortly thereafter another conviction for underage possession of alcohol. He did not offer any evidence in mitigation. His second conviction occurred months after his DUI conviction, which is a cause for concern. Without substantive information the security concerns remain. 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 from criminal conduct, alcohol consumption, and personal 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.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