



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



In the matter of:)
)
) ISCR Case No. 08-00707
)
)
Applicant for Security Clearance)

Appearances

For Government: Franciso Mendez, Esq., Department Counsel
For Applicant: *Pro se*

February 26, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

On September 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines 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 October 26, 2008, and requested a hearing before an administrative judge. The case was assigned to me on January 22, 2009. DOHA issued a notice of hearing on February 2, 2009. I convened the hearing as scheduled on February 18, 2009. The government offered exhibits (GE) 1 through 8.

Applicant did not object and they were admitted. Applicant offered exhibits (AE) that were marked AE 1 through 7. Department Counsel had no objections and they were admitted. DOHA received the transcript of the hearing (Tr.) on February 23, 2009.

Procedural Matters

Department Counsel amended the SOR on January 22, 2009, by withdrawing allegations 2.a, 2.b and 2.e of the SOR, and adding the following allegation under paragraph 2:

2.g. That information set forth under paragraph 1, above.

Applicant acknowledged the amendment and circled the response that referred to the answer he previously provided.

At the hearing I renumbered the allegations in paragraph 2 of the SOR in sequential order, reflecting the withdrawals and addition. Subparagraph 2.c is now 2.a; 2.d is now 2.b; 2.f is now 2.c; and 2.g which was added is now 2.d.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. Applicant admitted the allegations of the SOR in subparagraphs 1.a, 1.b, 1.d, 1.e, 1.f, 1.g, 1.h, 1.i, and denies the remaining allegations. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 33 years old and works as an information systems security officer for a federal contractor. He was married in 1999 and divorced in 2004. He has an 11-year-old son from a prior relationship. After years of a custody dispute he was awarded full custody of his son in April 2007. Applicant is a high school graduate and has earned some college credits. He also earned different certifications as an information specialist. Applicant served in the Marine Corps from 1994 to 1999 and was honorably discharged.¹

Applicant admitted in his answer to the SOR that he consumed alcohol, at times to excess and to the point of intoxication from 1993 to June 2007. At his hearing he testified that after 2005 he reduced his consumption of alcohol and has not been intoxicated since then. He now drinks one to three times a week; usually it is a drink with dinner.²

¹ Tr. 140-142.

² Tr. 79-80.

In 1993 Applicant was charged with Minor in Possession of Alcohol. He paid a fine.³

In 1994 Applicant was charged with Public Intoxication of a Minor. The charge was dismissed.⁴

In September 1998 Applicant was charged with Driving Under the Influence of Alcohol (DUI) and Driving While Having a Measurable Blood Alcohol in his system. He pled guilty to a reduced charge of Reckless Driving. He was sentenced to three years probation. At the time he was in the Marine Corps and after this arrest he was specifically ordered not to drink and drive and not to let this happen again.⁵ Applicant went to an Article 15 Non-Judicial Punishment Hearing under the Uniform Code of Military Justice (UCMJ) in December 1998 for unauthorized absence and DUI. He received a reduction in rank, restriction, extra duties, and forfeitures.⁶

In November 1998 Applicant was charged with DUI, Driving with a Blood Alcohol of .08% Alcohol, and Driving with a Suspended License DUI. He was found guilty and was sentenced to 10 days of community service in lieu of confinement, five years probation; attend an 18-month Multiple Conviction Program, revocation of his driver's license for a year, and fines and fees totaling approximately \$2,500. Applicant explained that this offense occurred the day after his grandfather died.⁷

Applicant received Non-Judicial Punishment from the Marine Corps in 1999 for offenses related to his November 1998 DUI charges. Specifically he was charged under the Uniform Code of Military Justice (UCMJ) at an Article 15 Hearing with Failure to Report to Appointed Place of Duty, Failure to Obey a Lawful Order, and Wrongfully Operating a Vehicle Under the Influence of Alcohol. He was ordered to be reduced in rank, forfeiture of pay, and restriction. Applicant acknowledged that there is a standing order in the Marine Corps not to drink and drive. Applicant was also directly ordered, after his September 1998 DUI, not to drink and drive, which is the basis for the orders violation. His Failure to Report to Duty was because he was being held by the police on the DUI charge.

Applicant was attended alcohol counseling through the Marine Corps after this incident. He also attended court ordered alcohol treatment and counseling through the state from November 1998 to June 2000. He completed the required alcohol programs.⁸

³ GE 1.

⁴ *Id.*

⁵ Tr. 84-86.

⁶ GE 2.

⁷ Tr. 89; AE 6.

⁸ Tr. 86-88.

Applicant made a sworn statement on May 20, 2004. He references "DUI 98." He does not mention the September 1998 Reckless Driving conviction. Applicant explained "I was drinking beer for a good part of the afternoon and evening when I then decided to stop drinking so that I could take a friend home. I stopped for about 2 hours and thought that I was ok[ay] to drive." He was stopped by a police office while at a stop light because he threw a cigarette out of the window. He was pulled over and given a breathalyzer and blew a .08%. He further stated: "I have no future intentions o[f] driving while under the influence."⁹

In 2004 Applicant was at a bar when a fight occurred outside. There were approximately 11 to 13 men assaulting one man. Applicant knew some of the men were Marines and attempted to break up the fight. Applicant had been drinking alcohol. The police were called and Applicant was arrested along with others. Applicant stated that during the fight he noticed that a ceramic "dolphin" figurine fell on the ground. He picked it up and put it in his pocket for safe keeping. After his arrest, he was searched and it was determined the "dolphin" was a marijuana pipe. Applicant was charged with Public Swearing/Intoxication, Disorderly Conduct, and Possession of Marijuana. Appellant entered into a plea bargain. The plea deal consisted of the case being Nolle Prosequi in June 2005.¹⁰ Applicant stated:

So I was told that if I did the nolle prosequi that it would go off my record in a year, and that I could have this expunged, and my attorney at the time basically told me that this was not a concern to my clearance, because I asked him. I've always been concerned about-I always want to do the right thing. So I asked is this going to affect my clearance. And he said, no, this shouldn't. We are going to get it expunged. It goes off your record.¹¹

In October 2005 Applicant was drinking alcohol with friends. He and his friends moved their activities to another friend's place. He had more drinks while there and it was about 2:00 to 3:00 a.m. He knew he had to drive home so he stopped drinking for a couple of hours and went home about 5:00 a.m. While driving home Applicant had a one vehicle accident and his vehicle ended up on its side in the ditch facing the wrong direction. When the police arrived he was arrested and charged with DUI. He was convicted and sentenced to 60 days, which was suspended, a fine, ordered to attend alcohol awareness education, and probation. Applicant testified he successfully completed the terms of his sentence. He attended and completed a 10-week court ordered alcohol treatment program as was required. He did not attend Alcoholics Anonymous because he considered his latest DUI to be an isolated incident. His driver's license was suspended, but has been reinstated since 2006.¹²

⁹ GE 5.

¹⁰ Tr. 70-73, 91-105.

¹¹ Tr. 73-111.

¹² GE 8.

Applicant believes his alcohol-related incidents relate to his private life. Applicant attempted to gauge how much he had to drink before he would drive. He would try and limit his consumption to approximately one alcoholic beverage an hour before driving.¹³ Applicant referred to his September 1998 and November 1998 DUI's as isolated incidents with alcohol.

Applicant completed a security clearance application (SCA) on February 28, 2001.¹⁴ In response to question 24 which asked if he had ever been charged with or convicted of any offense(s) related to alcohol or drugs, he divulged the November 1998 DUI conviction. He did not divulge his September 1998 arrest and charge of DUI, which was later reduced to Reckless Driving, for which he was convicted. Applicant admitted he was drunk when he was arrested in September 1998. He admitted he was driving under the influence of alcohol at the time of this arrest.¹⁵ In his answer to SOR, he stated:

I did not list the 9/98 incident because I was convicted of a Reckless Driving not an alcohol related conviction. Since going through this periodic reinvestigation I've learned from the Security Investigators that I probably should have listed the charges and explained the outcome even though I thought I was correct in only listing the conviction because the question asks, "Have you ever been charged with OR convicted of any offense(s) related to alcohol or drugs?" [T]herefore since the question used "or" I didn't list this non-alcohol related conviction.¹⁶

Applicant testified he made a mistake when he did not list the September 1998 Reckless Driving conviction, or he was not paying attention to detail, but he did not intentionally fail to report the offense.

Applicant responded "no" to question 26 in his 2001 SCA, which asked him if in the last seven years he had been arrested for, charged with, or convicted of any offense(s) not already listed.

Question 25 asked if he had been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice (UCMJ) in the past seven years. Applicant listed that he went to an Article 15 UCMJ Hearing on December 15, 1998. He listed he was charged with disobeying an order. He listed no other offenses or any additional Article 15 Hearings.¹⁷ In addition to the orders violation, he was also charged

¹³ Tr. 81-83, 88-91, 123-127.

¹⁴ GE 3.

¹⁵ Tr. 113.

¹⁶ Answer to SOR; Tr. 117-121.

¹⁷ GE 3.

with unauthorized absence and operating a motor vehicle under the influence of alcohol. All of these offenses occurred on September 2, 1998. Applicant failed to divulge these offenses. He also failed to divulge he went to a second Article 15 Hearing on July 1, 1999, for failing to report to his appointed place of duty on November 12, 1998; failing to obey a lawful order issued by the Squadron Executive Officer; and wrongfully operating a motor vehicle while under the influence of alcohol.¹⁸

Nowhere on his SCA application did Applicant divulge the September 1998 DUI charge and subsequent conviction of Reckless Driving. Applicant stated he made an honest mistake and does not know why he left out the Reckless Driving charge. This is inconsistent with the systematic way the charge was not divulged in answering any of the questions where it would have been appropriate. I find Applicant intentionally and deliberately failed to divulge his Reckless Driving conviction. He was aware that he was originally charged with an alcohol-related incident in September 1998 and was ordered by his Marine supervisors not to drink and drive after the incident. His attempt to explain away why he did not list this offense under question 24 might be reasonable if he had listed in under question 26, which he did not.

Applicant completed another SCA on September 9, 2003. In response to question 24 requesting information about any alcohol or drug related arrests, charges or convictions, Applicant only listed the November 1998 DUI conviction. In response to question 25 requesting information about any court martial or other disciplinary proceedings, he answered "no." In response to question 26, asking if he had been arrested for, charged with, or convicted of any offense not already listed, he answered "no." In this SCA Applicant continued to be dishonest. He again only listed his November 1998 DUI conviction and not his September 1998 Reckless Driving conviction or either of his Article 15 hearings.¹⁹ His explanation was that he merely copied his answers from his 2001 SCA. He also believed the question was "out of scope". His explanation is not credible because he failed to provide the same answers. Applicant testified he made a mistake by failing to list the above mentioned required information on his 2001 and 2003 SCA. I find Applicant intentionally and deliberately failed to divulge the required information.²⁰

Applicant stated he contacted his attorney to see if had to divulge the 2004 marijuana/disorderly conduct/public intoxication swearing arrest before he completed his SCA in 2007. He stated his attorney told him the charge was not on his record and was expunged. He asked his attorney if the Nolle Prosequi would affect his security clearance and he testified the attorney told him it would not. Applicant did not disclose this arrest on his 2007 SCA. He stated he did not think he had to disclose it and he was following the advice of his attorney. I do not find Applicant's testimony credible.

¹⁸ GE 2.

¹⁹ GE 4.

²⁰ Tr. 128-135.

Question 23(d) states: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant answered "yes" but only listed his 2005 DUI conviction. He did not list his 1998 DUI conviction or his 1998 Reckless Driving conviction, or any of his other alcohol-related arrests.²¹ He also did not list his arrest for marijuana possession/disorderly conduct/public swearing. Although he stated he was following the advice of his attorney for why he did not list this arrest, I find his explanation inconsistent because he failed to list his 1998 DUI and his 1998 Reckless Driving convictions. He also answered "no" to question 23(f) which asked if he had been arrested for, charged with, or convicted of any offense(s) not listed. He clearly was aware he was arrested and charged with the 2004 drug and disorderly conduct offenses, even if the ultimate disposition was Nolle Prosequi. Applicant has exhibited a continuing course of deception beginning with his 2001 SCA continuing through his 2007 SCA.

Applicant provided documents with his answer to the SOR and additional documents at his hearing regarding his Marine Corps service. Also included were a psychological evaluation, an alcohol treatment certificate, and character statements that were considered. Those providing character statements expressed that Applicant is considered a model employee and has many admirable personal and professional characteristics. His work ethic, discipline, and motivation are exceptional. He is considered a dedicated professional and a person of integrity. He was recommended for a position of trust.²²

Two witnesses testified on behalf of Applicant. A former office director of Applicant noted he is very thorough and is attentive to detail. He trusts Applicant and has confidence in his character and judgment. He has seen him mature and grow intellectually and considers him a man of integrity.²³

A former supervisor testified on behalf of Applicant. He considers Applicant to be very professional, hard working, and trustworthy. Applicant has worked in positions of trust in the past and has always been compliant with security guidelines. Applicant told his supervisor about his 2004 arrest for marijuana possession shortly after it occurred. The supervisor would recommend Applicant for a position of trust.²⁴

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

²¹ *Id.*

²² AE 1-7.

²³ Tr. 30-40.

²⁴ Tr. 49-69.

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.

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 numerous alcohol-related incidents beginning as a minor in 1993. He has three alcohol-related convictions, one a reduced charge to Reckless Driving and two DUI convictions, in 1998 and 2005. 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.

I have considered Applicant's testimony that since his 2005 DUI conviction that he has reduced his consumption of alcohol. He is now the custodial parent of his son and has focused his attention on being a good father. It has been more than three years since his last alcohol-related offense. I am somewhat concerned that Applicant attempts to gauge his consumption of alcohol and then attempts to drive. His estimations have been inaccurate and resulted in his last arrest. However, under the circumstances it appears Applicant has changed his lifestyle and with now having the responsibility as a full-time parent, I find enough time has passed and further alcohol-related incidents are unlikely to recur. I find AG ¶ 23 (a) applies.

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. I have specifically considered the following:

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(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.

Applicant deliberately failed to divulge his 1998 Reckless Driving conviction on his 2001 and 2003 SCA. I did not find his explanations credible.²⁵ Applicant consistently and deliberately failed to divulge important required and requested information. I am concerned that Applicant repeatedly attempted to hide damaging information from the government that was required to conduct a background investigation. His testimony was not believable.

Applicant has a history of criminal conduct related to alcohol beginning in 1993. He was arrested six times for alcohol-related offenses. Two of his alcohol-related offenses occurred within two months of each other. He has attended alcohol education. He was on probation for five years after his first DUI conviction and was on probation for a year after his 2005 DUI conviction. Applicant's personal conduct and his attempts to conceal it are causes of concern. I find the above disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct under AG ¶ 17. I have especially considered the following:

²⁵ I have not considered Applicant's other omissions for disqualifying purposes, but did consider them when making a credibility determination and evaluating the "whole person."

(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; and

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

Applicant did not make an effort to correct the omissions and falsifications on his 2001 or 2003 SCA before being confronted. His actions can not be considered minor because he failed to divulge information that was pertinent to his security clearance investigation thereby casting doubt on his reliability, trustworthiness and good judgment. Applicant has a history of questionable personal conduct. He has been arrested numerous times and has two DUI convictions and an alcohol-related Reckless Driving conviction. He was on probation twice, attended alcohol awareness classes. Applicant continues to believe that these were isolated incidents. He has demonstrated a pattern of misconduct and does not seem to grasp its significance. I do not find sufficient evidence has been presented to convince me he has taken action to reduce his vulnerability to exploitation, manipulation, or duress. Based on all of the evidence 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) 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.

Applicant has a good work record and is considered a very good employee. His character witnesses and references believe he has matured and grown. He actively pursued obtaining custodial custody of his son who now lives with him. Applicant has a history of alcohol-related offenses. It appears at this time that he is focusing on being a good father and has minimized his consumption. He has not had an alcohol-related incident since his last DUI conviction in 2005. Applicant had two alcohol-related incidents in a two-month period in 1998, both DUIs, but one was reduced to Reckless Driving. He failed to divulge all of his misconduct as was required. I find these were not oversights or simple mistakes, but rather were deliberate omissions with intent to mislead the government. Applicant has established a pattern of rules violations. I have considered the totality of the events and circumstances and conclude Applicant has mitigated the security concerns raised under Guideline G, Alcohol Consumption, but failed to mitigate the security concerns raised under Guideline E, Personal Conduct. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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: Subparagraphs 1.a-1.i:	FOR APPLICANT For Applicant
Paragraph, Guideline E: Subparagraphs 2.a-2.d:	AGAINST APPLICANT Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge