



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-01103
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Juliet Boyd, Esq.

November 3, 2008

Decision

HOWE, Philip S., Administrative Judge:

On March 28, 2007, Applicant submitted his Security Clearance Application (SF 86). On April 18, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, H, 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 acknowledged receipt of the SOR on April 24, 2008. He answered the SOR in writing on May 7, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on May 20, 2008, and I received the case assignment on June 3, 2008. The case was reassigned from another administrative judge due to caseload considerations. DOHA issued a Notice of Hearing on June 10, 2008, setting the hearing for July 3, 2008. Applicant retained counsel who

entered her appearance on June 24, 2008, and requested a continuance. I granted the continuance, and rescheduled the hearing to July 21, 2008. An Amended Notice of Hearing was sent on June 26, 2008. I convened the hearing as scheduled on July 21, 2008. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified, offered the testimony of two witnesses, and submitted Exhibits A through E, without objection. DOHA received the transcript of the hearing (Tr.) on July 30, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by deleting ¶ 3.a, alleging Applicant used marijuana after obtaining a security clearance in 1996. (Tr. 7, 8.) Department Counsel also moved to amend the SOR in ¶ 1.f, by deleting the word “drug,” and inserting in its place the word “alcohol.” Applicant had no objection to these amendments, and I granted the motion to make these two changes in the SOR.

Findings of Fact

In his Answer to the SOR, dated May 7, 2008, Applicant admitted the factual allegations in all allegations in the SOR, except in ¶¶ 2.a.1, and 2.a.2, which he denied. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 46 years old, and married with three children. His stepson died in June 2007. His wife had a stroke in November 2006, from which she is recovering. He works for a defense contractor in the engineering field. He started work for this employer 23 years ago in 1985. Applicant has had a security clearance since 1985, and has not had any security violations in that time. (Tr. 50-56, 72, 92, 93)

Applicant’s supervisor for the past 10 years testified on his behalf. The supervisor stated Applicant has a good reputation for truthfulness, and is trustworthy. He considers Applicant to be a man of integrity, who is a conscientious worker and follows the company rules and procedures. Applicant did tell him about his alcohol related arrests in 2006 and 2007. He also knew about the illegal substance arrests because Applicant told him at the time they occurred. He rearranged Applicant’s work schedule so Applicant could go to treatment sessions. (Tr. 20-35)

A co-worker of Applicant testified next on his behalf. He has known Applicant since 1986. He considers Applicant very diligent in his work ethic and practices. The co-worker never saw Applicant intoxicated at work, or arrive at work under the influence of alcohol. He is aware of Applicant’s 2006 and 2007 arrests, his wife’s stroke, and his stepson’s death. The witness also knew Applicant went to treatment for alcohol. (Tr. 37-48)

Applicant submitted his employee evaluations from 1995 to 2007. His evaluations are all high ranking, often in the “exceeds performance requirements” to “outstanding performance.” His 2007 evaluation ranking shows a decrease from the 3 ranking (“exceeds performance requirements”) to a 2.8 ranking, which is a high “meets performance requirements” up to the “exceeds performance requirements” ranking. Applicant also submitted a written character reference from a co-worker on the night shift with him for the past 20 years. The reference cites Applicant’s experience and abilities to perform difficult tasks quickly and efficiently. He also is determined and dedicated to achieving the goals and objectives given him by his supervisors. Applicant also has shown integrity and high ethical standards. Applicant also submitted copies of several incentive awards he earned from his company over the past few years. (Tr. 65, 66; Exhibits A, D, and E)

Applicant consumed alcohol from 1980, when he was in high school, to May 2008. At times during those 28 years, he would consume alcohol to excess and intoxication. He drank beer with friends, usually a six pack, over three hours. It has been one year since he drank that quantity. He abstained in 1992 for about six weeks. He is currently abstaining from alcohol consumption. Applicant has four alcohol-related arrests. First, he was arrested on March 23, 1998, on charges of transportation or possession of alcohol by an auto operator. He pled guilty on April 9, 1998, and paid a fine of \$75. Next, Applicant was arrested on August 4, 2003, on charges of transporting alcohol by an auto driver. On October 10, 2003, the charges were dismissed. His third arrest was on July 27, 2006, on charges of transportation of alcohol by an auto driver. The fourth arrest was on January 11, 2007, on charges of driving while under the influence (DUI), driving under the influence of alcohol with a blood alcohol content (BAC) of .08, operating an uninsured motor vehicle, and improper lane usage. On July 9, 2007, he pled guilty to the DUI charge, and was sentenced to one year supervision, ordered to attend a DUI school, and fined \$2,051.00. Applicant remains on court supervision until July 8, 2009. (Tr. 56, 62, 73-81, 90, 91; Exhibits 2, 3)

Since November 2007, Applicant has attended alcohol education, counseling and treatment with a service provider. This program was part of the court order placing him on supervision. He underwent 10 hours of risk education, and 40 hours of individual and group therapy counseling with the same service provider. The court ordered only 20 hours of counseling. The treatment portion of the program showed Applicant that he should not use alcohol as a reward for his good job performance. He has replaced alcohol with family activities, such as coaching his son’s baseball team and other actions. He joined Alcoholics Anonymous (AA), and has a sponsor. This program includes substance abuse counseling, including drug abuse. The documents submitted diagnoses Applicant with alcoholism, and that he is in the process of “finishing all recommendations”. (Tr. 54-56, 59, 60, 64, 79, 80, 81, 90; Exhibits 2, B and C)

Applicant used alcohol as a reward for his hard work, and to relieve stress. The stress he attributed to his wife’s 2006 stroke, and the death in 2007 of her son. Applicant felt he was under a lot of stress in 2006 and 2007. His wife was upset with his

behavior and threatened to divorce him in 2000. Applicant did not drink alcohol at home, but would go out of his home to consume it. (Tr. 56, 57, 71, 95, 98, 107)

Applicant used marijuana on a monthly basis from his senior year in high school, in 1980. This was about the same time he started consuming alcohol. He used it after he was divorced from his first wife in 1989 until about 1995. He used marijuana alone, and monthly or bi-weekly in that time period. He last used marijuana on March 25, 2007, as he stated under cross-examination at the hearing and in the interrogatories submitted by the Government, which he answered with the March 2007 admission. Applicant stated once during the hearing he last used it in January 2007. Applicant used cocaine once in September 1996. He used the marijuana and cocaine while having a security clearance from August 1996 onward to 2007. He purchased the marijuana for his personal use only from dealers. In September 1996, Applicant was arrested on charges of possession of a controlled substance, possession of marijuana, and possession of drug paraphernalia. No disposition of this arrest is known. Applicant was again arrested on July 27, 2006, on a charge of marijuana possession. In August 2007, Applicant pled guilty and sentenced to two years of probation, ordered to perform five days of community service, and fined \$750. He continues on probation for this offense until September 2009. Applicant was again arrested for possession of marijuana on March 6, 2007, when going to court on the 2006 arrest. He had marijuana in his coat pocket as he was going through the court security system. Applicant received three months probation in June 2007 upon his conviction for this offense. His treatment program includes substance abuse counseling to address his marijuana use. (Tr. 60-64, 82-89, 92, 95, 99; Exhibits 2, B and C)

Applicant completed a security clearance application (SCA) on March 28, 2007. Responding to Question 23(c), "Are there currently any charges pending against you for any criminal offense?", Applicant answered by disclosing his January 2007 DUI offense, but not disclosing his July 27, 2006, arrest for marijuana and his March 3, 2007, marijuana arrest. In answering Question 23(d), "Have you ever been charged with or convicted of any offense(s) related to alcohol and drugs?", Applicant disclosed only his January 2007 DUI offense, not disclosing his September 1996, arrest for marijuana possession, his March 2007 marijuana arrest, and his March 1998, August 2003, and July 2006, alcohol-related arrests. Next, he answered Question 24(a), "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, including marijuana and other controlled substances?", by stating, "Yes" and admitting he used marijuana two times in August 2006, failing to disclose that he used marijuana at least four other times since January 2005. Finally, Applicant failed to disclose on his previous July 3, 1996, SCA that he had used marijuana at least monthly or bi-weekly between 1989 and 1995 in response to Question 27, "Since the age of 16 or in the last 7 years, which ever is shorter, have you illegally used any controlled substance, for example, marijuana, etc." Applicant admitted he deliberately failed to disclose this information on both SCAs because he was embarrassed and in a "state of denial." He did not disclose this information to a Government investigator before being confronted with it. (Tr. 68, 69, 89, 96; Exhibits 1 and 4)

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 and 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. The following two conditions apply in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and,

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant consumed alcohol from high school until May 2008. He drank to excess numerous times during those 28 years. Police authorities arrested him four times for various offenses, including possession of alcohol as a driver in 1998, 2003, and 2006, and then in 2007 for DUI, driving an uninsured motor vehicle, and improper lane usage. The severity of his series of actions while driving while consuming alcohol or with alcohol in the passenger compartment, a violation of law, seemed to have been increasing over time. He also used alcohol outside his house, to avoid displaying his consumption in front of his family. That desire to use alcohol outside his home led to his driving arrests related to alcohol use. He remains on supervision for his most recent DUI conviction until 2009.

AG ¶ 23 provides conditions that could mitigate security concerns arising from alcohol consumption, only one of which may have application:

(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)

Applicant acknowledges he has an alcohol problem, that he relied on alcohol as a reward for his hard work at his corporate employer, and that he should use other rewards in his life. He has recently turned to family activities as a substitute for alcohol. But, despite his long history of alcohol abuse and problems, he never sought any counseling or treatment until forced to do so by the court as part of his DUI conviction

sentencing. His period of abstinence is only two months, too short in comparison to 28 years of irresponsible alcohol abuse. His evaluator states Applicant has alcoholism, and that he is only recently completing the recommendations made by the evaluator, including participation in AA for the past two months. Therefore, it is too early to determine if Applicant has established a firm pattern of abstinence. This mitigating condition has very limited application.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances; and

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Three are potentially applicable:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and,

(g) any illegal drug use after being granted a security clearance.

Applicant also has a 28-year history of marijuana use, during which time he purchased it from drug dealers. He possessed and used it. He was arrested in a state courthouse while going to court on a 2006 marijuana arrest because he had marijuana in his coat pocket. He used marijuana continuously in some pattern over 28 years, and cocaine once in 1996, all while holding a security clearance. He knew using controlled substances was a violation of the regulations pertaining to holding a security clearance.

AG ¶ 26 provides conditions that could mitigate security concerns arising from drug involvement, only one of which may be potentially applicable:

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant is in a court-ordered treatment program resulting from his DUI arrest and conviction. His exhibits do not address the drug treatment component of his program. They only address his alcoholism and the recommendations for that issue. The court apparently did not prescribe a drug treatment program. There is insufficient evidence that he has satisfactorily completed a prescribed drug treatment program or favorable diagnosis by a qualified medical professional. This mitigating condition has no applicability.

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. These three conditions have applicability:

(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; 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 admitted deliberately failing to disclose on his March 2007 SCA his March 2007 marijuana possession, his 1996 marijuana possession, and the alcohol-related arrests in 1998, 2003, and 2006, because he was embarrassed and in a state of denial. He did not correct the information before being confronted with it by a government investigator. His conduct while having a security clearance created a vulnerability to exploitation, manipulation, or duress because, if disclosed, his marijuana use would affect his professional standing.

AG ¶ 17 provides conditions that could mitigate security concerns. These two conditions may have some applicability:

(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 acknowledged his drug use only after the court-ordered DUI treatment program. There is no independent professional verification of his abstinence from 28 years of marijuana use, albeit his assertions of periodic times over the course of those 28 years. His use of family activities to replace his marijuana use is of such short duration and lacking in support from his family, such that it is not persuasive. He failed to provide sufficient evidence of said mitigating conditions to overcome his admissions that he deliberately falsified his answers on his drug and alcohol arrests and use on his SCA in 1996 and 2007.

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 is obviously a good worker and is well regarded by his supervisors and co-workers. He tries to be a good father. But his overall 28-year history of alcohol and drug use, while holding a security clearance, shows he places his personal comfort over the Government requirements regarding classified information. There is a potential for pressure, coercion, exploitation, or duress because of his arrests and use of alcohol and marijuana. While he told his supervisor recently of his usage of these substances, the duration of that use is longer and of more serious concern. The overriding consideration in this case is that Applicant chose to use marijuana while holding a security clearance. He also was involved in multiple alcohol-related driving arrests, while holding a security clearance. This conduct demonstrates that Applicant is not trustworthy, has questionable judgment, and violates laws and rules for his own comfort. His drinking and marijuana use away from his family also shows intent to hide it from those closest to him, and if he would hide it from them, he certainly would hide it from his employer and Government. His recent disclosures came only after being confronted with his history by an investigator.

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his alcohol consumption, drug involvement, and personal conduct. I also conclude the “whole person” concept against Applicant.

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:	AGAINST APPLICANT
Subparagraph 1.a to 1.f:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a to 2.h:	Against Applicant

Paragraph 3, Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Withdrawn
Subparagraph 3.b to 3.e: 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.

PHILIP S. HOWE
Administrative Judge