



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-01545
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro Se*

March 31, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on June 8, 2007. On August 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, G and E 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 requested a hearing before an Administrative Judge. I received the case assignment on December 16, 2008. DOHA issued a notice of hearing on January 13, 2009, and I convened the hearing as scheduled on February 18, 2009. The Government offered Exhibits (GE 1-6), which were received without objection. Applicant testified on his own behalf and presented the testimony of one witness. He did not submit any Exhibits at the hearing. I held the record open until March 12, 2009, so that

Applicant could submit documents. The submission was timely received, marked as (AE) A and entered into the record. Department Counsel did not object to the documents. DOHA received the transcript on March 23, 2009. Based upon a review of the record, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated September 17, 2008, Applicant admitted the factual allegations in ¶¶ 1.a. through 1.g, 2.a. and 2.b, and 3.a. and 3.b of the SOR. He provided additional information to support his request for eligibility for a security clearance.

Applicant is a 26-year-old employee of a defense contractor. He graduated from high school in June 2000. From January 2002 until May 2006, he served on active duty in the United States Army (USA) as a tank crew member, including one year in Iraq as a combat veteran. He was injured in combat and received a disability when he was discharged. Applicant did not hold a security clearance during his military career (Tr. 26).

Applicant married in 2004. He has two young children. He is currently attending college classes working toward a degree. He has worked for his current employer since November 2006 (GE 2).

In 1996, when Applicant was in high school, he associated with gang members. On one occasion, he took his father's shotgun and used a hacksaw to cut off the barrel which resulted in a 14 inch barrel, a dangerous weapon under the state law. His mother found the weapon in his bedroom while he was at school. She reported the incident to school officials. Applicant was 14-years-old at the time (Tr. 31). He was arrested and charged with (1) Possessing a Dangerous Weapon, felony, and (2) Theft. He pleaded guilty to Count (1) and was sentenced to three days detention, two years probation, and an alcohol and drug treatment program. This charge has been expunged from Applicant's record (GE 6; Tr. 19).

In 1999, Applicant left a hunting rifle in his car after he and his father had been hunting. He forgot about the rifle when he returned home. The rifle was unloaded and packed in a case in the trunk of the car. He parked his car on school premises. His girlfriend alerted school officials that he had a weapon. The police found the rifle in the trunk of the car. He was arrested and charged with (1) Unlawful Possession of Weapon on School Grounds and (2) Criminal Mischief. He pleaded guilty to Count (1) and was sentenced to 45 days detention, 39 days suspended, two years probation, community service, and restitution. Count (2) was dismissed (GE 5).

On November 23, 2002, Applicant was out drinking in a bar or restaurant with some of his Army friends. It was the night before his deployment to Iraq. The group became loud and rambunctious. A police officer arrived but Applicant did not believe he was charged with any offense (Tr. 21). He was let go about fifteen minutes after the

police arrived. Applicant was charged with (1) Menacing and (2) Disorderly Conduct (Tr.21).

On November 30, 2002, Applicant was driving home very early in the morning from a party at a friend's house. He had slept at the friend's house that evening but he had to go to work. He fell asleep at the wheel and hit another car. The driver of the other car sustained minor injuries. Applicant was arrested and charged with (1) Driving Under the Influence and (2) Careless driving-Cause Death/Injury. He pleaded guilty to Driving While Ability Impaired and was sentenced to 180 days, one year probation, community service, and an alcohol evaluation. Count (2) was dismissed (GE 5).

In January 2003, Applicant was partying with some friends. After having a couple of drinks, he decided to drive back to his parent's home. He was pulled over on two occasions by a police officer. Applicant was charged with (1) Driving Under the Influence, (2) DUI Per Se, (3) Lane Usage Violation, and (4) Alcohol-Underage Possession/ Consumption. All charges were dismissed on a technicality (Tr. 35). However, Applicant acknowledged that he was drunk (Tr. 33).

In June 2004, Applicant was charged with (1) Driving Under the Influence, (2) DUI over .10, (3) Instruct Permit, and (4) Safety Belt Use. He was sentenced to attend alcohol classes, fines, and the loss of his driver's license for one year. There are no specific details about this incident in the record. (GE 4; GE 6).

On March 25, 2007, Applicant had been drinking at home all day and he admitted that he was intoxicated (Tr. 38). He and his wife had a verbal argument. His wife and two children left the house (GE 6). He heard a noise outside and wanted to check for any intruders. He took a shot gun outside and pointed it in the air. He was yelling. His neighbor saw him, became alarmed and called the police. When his wife returned to the home, she stated that he had punched a hole in the closet door (GE 6). Applicant was charged with (1) Menacing, felony, and (2) Prohibited Use of Weapons-Drunk W/Gun. He pleaded guilty to Count (2) and was sentenced to one year probation, alcohol evaluation, and fines.

Applicant completed a Security Clearance Application on June 8, 2007. He answered Section 23(b) by listing a 1999 weapons offense. He did not list the underage weapons offense in 1996 because he had been advised that since the charge was expunged in 2006, it was no longer on his record and he did not have anything to report (Tr. 42). He did not list the 2007 weapons/drunken offense because he misread the question. He did not understand that he had to list any *charges*. He was still in the court process and had not been convicted of the weapons offense (Tr.24).

Applicant answered Section 23(d) concerning charges or convictions of any offenses relating to alcohol or drugs by listing the June 2004 DUI offense. He did not list the other alcohol related offenses from November 2002 and January 2003, because he did not have any paperwork from the Department of Motor Vehicles (DMV) and he was not clear on any charges or convictions. He did not realize that he could update his

security clearance application at a later time. He claimed he was rushing to get the application completed. He did not list the March 25, 2007, for the same reasons as stated for Section 23(b). Applicant was credible at the hearing that he told his employers about the incidents but he had a difficult time completing the questionnaire on line. He completed the questions to the best of his ability. He was not trying to hide anything about his police record because he listed two charges from his police record.

Applicant completed interrogatories in April 2008. He admits to having had a problem with alcohol. He claims he has not had any alcohol since March 25, 2007 (GE 5; Tr. 24). Applicant completed an alcohol/drug evaluation in April 2008. The certified therapist interviewed Applicant and screened him using various instruments. He was diagnosed as "alcohol dependent" (AE A). One screening for alcoholism indicted "high alcoholism probability." He completed 12 sessions in chemical dependency groups (Tr.40). Recommendations from the 2008 report include attendance at a monthly individual session to address immediate needs and assess sobriety progress (AE A at 4). Random urinalysis is recommended and a followup/aftercare plan. Applicant was tested on March 10, 2008 for all substances and the findings were negative.

Applicant claims he does not drink any more because he wants to improve the quality of his life. He acknowledges his mistakes. He believes the 2007 incident was a wake up call. He understands the seriousness of the misuse of alcohol in his life. He does not participate in any support groups. He does not see a therapist or a counselor on a regular basis. He explained that he was told if he felt the need - just call. He called the therapist twice in the past year when he felt a relapse (Tr. 63).

Applicant is a hard-working employee. He is very reliable and has displayed a great degree of initiative in his current position. He has shown dedication and professionalism in the workplace. He is recommended for a security clearance by his manager. His manager knows about Applicant's 2007 alcohol incident and believes there is no reason he should not have a security clearance (Tr. 54).

Applicant's evaluations rate him as "consistently exceeds" or "meets/occasionally exceeds" in all categories. He contributes to a high customer satisfaction and effective team performance. He has an in-depth knowledge of the mission and technical performance. He trains fellow employees (AE A).

Applicant is entitled to wear the following: Army Commendation Medal; Army Achievement Medal; Army Good Conduct Medal; National Defense Service Medal; Iraq Campaign Medal, Global War on Terrorism Medal; Army Service Ribbon; and Overseas Service Ribbon (GE 3).

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, 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 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 was arrested in 1996 and 1999 for weapons charges when he was in high school. In 2002, 2003 and 2004, Applicant was arrested for alcohol/driving incidents. He was convicted of Driving While Intoxicated (DUI) in 2004. In 2007, Applicant was arrested, charged and pleaded guilty to an incident of weapons/drank with gun. AG ¶ 31(a) and (c) apply in this case.

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 some mitigation under this guideline. His youthful incidents of criminal conduct occurred ten years ago. The 1996 incident has been expunged. He was young and associating with the wrong crowd.

Applicant had three incidents involving alcohol/driving in 2002, 2003, and 2004. The 2003 charges were dismissed on technical grounds. He was convicted for the other offenses. He completed probation successfully. He attended alcohol classes. His last driving offense that involved alcohol occurred in 2004.

In 2007, Applicant was intoxicated and took a shot gun outside of his home one evening. He had a verbal altercation with his wife and she left the home with the two young children. He alarmed his neighbor when he had the shot gun in the air and was yelling.

Applicant's last incident of criminal conduct was the March 2007 incident. He has abstained from alcohol which was involved in that 2007 incident. He completed a 12 session chemical dependency group in 2008. He completed his probation in March 2008. However, two years of abstaining from alcohol is not sufficient when compared with the more than five years from 2002 to 2007 of alcohol related offenses, to mitigate the government's case. He has shown that he is on the right track but it is too soon to find that he is successfully rehabilitated. Thus, AG ¶ 32(a) and (d) do not apply in this case

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 "22(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 admitted to his arrests involving alcohol. Some of the charges were dismissed but Applicant pleaded guilty to DUI. He admitted to consuming alcohol, at times to excess, from at least 2002 to March 2007 as described above. AG ¶¶ 22 (a) and (c) apply.

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 acknowledged his problem with alcohol. He claims he has been abstinent since March 2007. He completed his probations successfully. He attended and completed a 48 hour alcohol education program. His April 2008 evaluation reflects that prior to his abstinence, he would be in an "alcohol dependency diagnosis". He attended and completed a 12 session chemical dependency group. He is not in an aftercare program and does not attend any support groups. He consults a therapist if he believes he needs the support. He tested negative in March 2008 for all substances.

Applicant has a very good work record with his current employer. He is recommended for his fine work. Applicant does not want alcohol to ruin his life. He values his work and now admits that he made mistakes. The last alcohol-related incidents is two years old. Given the poor judgment shown in that incident, the severity of the incident, and only two years of no alcohol-related incidents there is still an issue of concern. Applicant has not mitigated the alcohol consumption concerns under AG ¶¶ 23(a), (c) and (d).

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(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 eligibility or trustworthiness, or award fiduciary responsibilities" is potentially disqualifying.

Applicant listed certain offenses on his security clearance application in response to Section 23 concerning his police record. He acknowledged that he omitted other offenses. He denied, however, that he had a deliberate intent to falsify his answers to

the questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine where there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.

Applicant testified credibly that he did not list the other offenses because he did not understand the question. He did not list the 1996 offense because it was expunged. He only listed the 2004 alcohol-related incident. I find that he did not intentionally falsify his answers to the above-referenced questions.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant served in the Army for a number of years. He served in a combat situation. He was injured and discharged with a disability. He is married with two children. He supports his family. He is working steadily and is highly recommended for a security clearance.

Applicant admits his mistakes in judgment. He completed alcohol counseling and his probation. Applicant's patterns of criminal conduct and problems with alcohol span a long period. His last incident was in 2007. He has taken steps in the right direction but at this time, Applicant has not met his burden of proof to overcome the government's case.

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

