



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



In the matter of:)
)
-----, -----) ISCR Case No. 08-01855
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

November 5, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant has three arrests and two convictions for underage possession of alcohol since October 2006. He falsified his security clearance application and his first security interview about this history. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted his electronic Questionnaire for Investigations Processing (e-QIP), on November 17, 2006. On June 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines G (Alcohol Consumption), E (Personal Conduct), and J (Criminal Conduct).¹ 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

¹Item 1.

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 July 14, 2008, and requested that his case be decided by an administrative judge on the written record without a hearing.² Department Counsel submitted the Government's written case on September 5, 2008. A complete copy of the file of relevant material (FORM)³ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of his copy of the FORM on September 12, 2008, and returned it to DOHA. He provided no further response to the FORM within the 30-day period he was given to do so, did not request additional time to respond, and made no objection to consideration of any evidence submitted by Department Counsel. I received the case assignment on October 23, 2008.

Findings of Fact

Applicant is a 20-year-old employee of a defense contractor. He has no military service, and has never held a security clearance. He is single with no children. His present job started in August 2006.⁴

In his answer to the SOR, dated July 14, 2008, Applicant admitted the truth of all of the factual allegations in the SOR. He has regularly consumed alcohol since turning 18 in 2006, even though his state's minimum legal drinking age is 21. All record evidence indicates that he has continued to drink underage, although he told an investigator in November 2007 that he planned to stop drinking to avoid further trouble.

On October 24, 2006, Applicant was stopped by police while driving erratically. He had consumed three beers at a friend's house before driving, and had an empty beer can in his car. He was charged with, and subsequently convicted of, unlawful possession of an alcoholic beverage, a class 1 misdemeanor. On February 15, 2007, he was sentenced to pay a \$100 fine, a six month suspension of his driver's license, and two years of unsupervised probation.⁵

On November 17, 2006, he signed his e-QIP and certified that his answers were true, complete and correct to the best of his knowledge and belief. Question 23d on that form asked if he had ever been charged with or convicted of any offense(s) related to alcohol or drugs. He answered this question "No," and admitted in his answer to the SOR that he deliberately failed to list the October 24, 2006 criminal charge noted above.

²Item 3.

³The government submitted six items in support of the allegations.

⁴Item 4.

⁵Item 5 at 3; Item 6 at 1.

During an October 1, 2007, interview with an Office of Personnel Management (OPM) investigator, Applicant attributed his failure to list his October 2006 criminal charge as an oversight. During that interview, he also admitted that he had been charged with a second underage possession of alcohol offense on April 24, 2007. He was charged in May 2007 and convicted in June of that year. He was sentenced to six months confinement, all suspended, another six month suspension of his driver's license, 20 hours of community service, and a \$500 fine.⁶ He also affirmatively told the investigator that he had not had any other criminal charges related to alcohol.⁷

Applicant, in fact, had been charged with underage possession of alcohol again on September 26, 2007. This charge arose when the car in which he was riding with his friend was stopped for running a red light, and the police discovered three beers in the car. When interviewed again about this incident on November 7, 2007, he offered no reason for his failure to disclose this charge during the earlier interview. After several continuances, this charge was dismissed on January 4, 2008.⁸

Title 18 § 1001 of the United States Code provides, in pertinent part:

Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Applicant offered no explanation, rebuttal, or extenuating evidence in response to the SOR or the FORM. Since he elected a determination on the written record, no in-person evaluation of his character or credibility was possible.

⁶Item 5 at 3; Item 6 at 2.

⁷Item 5 at 4.

⁸Item 5 at 5; Item 6 at 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 to be used 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

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 disqualifying condition asserted by the Government in this case is: “(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 admitted to possessing and consuming alcohol in violation of his state's minimum drinking age laws on a regular basis. He was charged with this offense three times, and convicted of it twice, within less than a year. The Government has established security concerns under this guideline, shifting the burden of proof to Applicant to mitigate those concerns.

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 neither asserted nor provided any evidence to support application of any of these potentially mitigating conditions. Since the record evidence does not raise any of them, alcohol consumption security concerns raised by Applicant's pattern of alcohol-related arrests and ongoing disregard for legal restrictions on his alcohol consumption continue to cast doubt on his reliability, trustworthiness and good judgment.

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. The disqualifying conditions alleged in the SOR and raised by the evidence in this case are:

- (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; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative.

Applicant deliberately omitted responsive information about his October 2006 unlawful possession of alcohol charge in response to question 23 on his November 2006 e-QIP. He certified the completeness and accuracy of his answers, acknowledging the obligation to be truthful. He did admit to this charge, as well as the second charge from April 2007, to the OPM investigator when confronted about them on October 1, 2007. However, he stated during that interview that he had not had any other criminal charges related to alcohol despite having again been stopped and charged with underage possession of alcohol only five days previously. The weight of evidence in this record and Applicant's admissions in response to the SOR establish that his falsifications and omissions of relevant information concerning these criminal charges on his e-QIP and during that interview were deliberate.

Applicant did not establish mitigation by his subsequent admissions to the OPM investigator because AG ¶ 17(a) requires that, "the individual made prompt, good-faith

efforts to correct the omission, concealment, or falsification before being confronted with the facts.” He offered no plausible explanation for these falsifications, and in fact admitted that they were deliberate. He neither asserted nor established any other personal conduct mitigating condition with respect to these security concerns.

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. The disqualifying condition asserted by the Government is, “(a) a single serious crime or multiple lesser offenses.” Although Applicant's alcohol-related offenses and admitted underage drinking on a regular basis are mentioned by Department Counsel and would support application of several disqualifying conditions, only his falsifications of his e-QIP and during his October 1, 2007, OPM interview were alleged in ¶ 3a of the SOR. Those falsifications are felonies under Title 18 U.S.C. § 1001. His conduct on those occasions supports significant concerns about his judgment, reliability and willingness to comply with laws and rules. These admitted offenses, individually and collectively, raise security concerns under the aforementioned disqualifying condition.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. Applicant neither asserted nor established any of the potentially mitigating conditions listed therein. His demonstrated willingness to engage in a pattern of illegal conduct precludes their application.

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 is a young and relatively immature individual who is nevertheless responsible for his choices and conduct. He knowingly participated in all of the conduct alleged against him, which was both frequent and recent. He submitted no evidence of rehabilitation or permanent behavioral change, or demonstrating that risk of coercion or duress is not significant. His ongoing disregard of lawful obligations, especially after receiving notice of the security concerns raised thereby, creates continuing doubt about his trustworthiness and reliability. He offered no other evidence about his character or responsibility to mitigate these concerns, or tending to make their continuation less likely. Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his alcohol consumption, personal conduct, and criminal 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 G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	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.

DAVID M. WHITE
Administrative Judge