



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



In the matter of:)	
)	
)	ISCR Case No. 08-01930
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

May 12, 2010

Decision

HEINY, Claude R., Administrative Judge:

Applicant was arrested in 2004 for failure to stop and give information following an automobile accident. The charge was dismissed. In 2006, Applicant was arrested for driving while intoxicated (DWI), which resulted in a 2009 conviction. Applicant has rebutted or mitigated the Government's security concerns under criminal conduct and alcohol consumption. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ 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 adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Statement of Reasons (SOR) on July 27, 2009, detailing security concerns under criminal conduct and alcohol consumption.

On September 21, 2009, Applicant answered the SOR, and requested a hearing. On October 15, 2009, I was assigned the case. On November 5, 2009, DOHA issued a Notice of Hearing scheduling the hearing, which was held on November 18, 2009. At the hearing, the Government offered Exhibits (Ex.) 1 through 5, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through I, which were admitted into evidence. On December 1, 2009, the transcript (Tr.) was received.

Findings of Fact

In Applicant's Answer to the SOR, he admits the factual allegations in the SOR, with explanations. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is 45 years old, has worked for a defense contractor since September 2007, and is seeking to obtain a security clearance. On September 1, 2007, Applicant retired from the United States Air Force with 25 years honorable service. (Tr. 32) Coworkers and friends indicate Applicant demonstrates good work ethics, has sound judgment, is reliable, and trustworthy. (Ex. A—E)

From 1981 through 2008, Applicant, at times, consumed alcohol to excess. In 2004, Applicant was arrested for failure to stop and give information. Applicant was involved in a vehicle accident where his vehicle struck another car, which spun the other car around before it struck the guard rail. (Ex. 3) Applicant was in a pool league and had been drinking prior the accident. (Tr. 51) His attention was directed at his car's radio/tape deck when he noticed he was quickly approaching the car in front of him. He was unsuccessful in his attempt to swerve to keep from striking the other car. (Tr. 35) His vehicle also spun around striking the guard rail and doing damage to his door and the rear door. (Tr. 35) He indicated he was scared and disoriented and kept driving following the accident. (Tr. 36) Ten minutes later, he was arrested eight to ten miles away as he continued to drive home. (Ex. 3, 5, Tr. 36) Applicant was administered and passed a field sobriety test. (Tr. 36)

In August 2004, Applicant divorced from his wife of ten years. While going through the divorce, Applicant admitted he would drink more often. (Ex. 3, Tr. 35) He went to bars with friends three to four times a week and on weekends. (Ex. 3)

In April 2006, Applicant was arrested for driving while intoxicated (DWI). Applicant fell asleep while driving home and hit a parked car. (Tr. 38) Prior to the accident he was playing pool and had three or four beers in a four hour period. He then went to another bar, had two more beers and three shots of tequila during an hour and

a half period. (Ex. 3) At the time of the accident, Applicant's blood alcohol content (BAC) was .12, which exceeded the legal limit (Ex. 5, Tr. 39, 72)

Applicant received a letter of reprimand from his commander and his base driving privileges were revoked for one year. (Ex. 2, Tr. 66) With the loss of driving privileges, Applicant did much walking and soul-searching. (Tr. 40) The walking gave him plenty of time to think about things. (Tr. 41) In April 2006, Applicant underwent a comprehensive psychiatric evaluation for alcohol abuse and was deemed not to have a substance abuse disorder. (Ex. 2) In May 2006, Applicant completed the one-day Alcohol Drug Abuse Prevention and Treatment (ADAPT) training at his air base. (Ex. 2, Tr. 65) Applicant decided to abstain from drinking. He completed the state approved defensive driving course. He attended school and completed his Bachelor of Science (B.S.) degree in social psychology. (Ex. 2)

In August 2006, Applicant was interviewed about his drinking. (Ex. 3) He stated he had stopped drinking on April 18, 2006, because he felt he might have had a problem with drinking, but did not believe he was an alcoholic. (Ex. 3, Tr. 57) Applicant saw his 2006 arrest as a "wake-up" call. (Tr. 59) From April 2006 through early 2008, Applicant abstained from drinking alcohol. In early 2008, Applicant resumed drinking limiting his alcohol consumption on occasion. (Tr. 68, 74) In July 2009, following the receipt of the SOR, he decided to quit drinking for health reasons. (Ex. 2, Tr. 42) He does not intend to drink in the future. (Tr. 64)

In September 2008, Applicant made a signed, sworn statement in which he stated:

Since the arrest in 2006, I consume no more than four beers a week. I have been intoxicated, but do not know how many times. I do not have a problem with alcohol and intend on drinking responsibly in the future. I no longer consume to the level of intoxication . . . (Tr. 5, page 3 of 4)

On November 16, 2009, two days before his security clearance hearing, the failure to stop charge was dismissed and Applicant was sentenced for his DWI conviction. (Ex. F, G) There was no explanation as to why the matter did not go to court sooner. Applicant was sentenced to a \$300 fine, \$399 in court costs, \$90 supervisor fee for probation, and 180 days in the county jail (suspended). (Ex. G, Tr. 28) Applicant paid the court \$781. (Ex. I) Applicant was required to perform 24 hours of community service, ordered to complete a certified DWI Education Program (AIDE), to complete an Alcohol Treatment Evaluation (ATPE), and complete DWI Victim Impact Panel (DIP). Starting November 16, 2009, he was sentenced to six months probation. As of the hearing, Applicant had yet to meet with his probation officer, start his community service, or complete AIDE, ATPE, or DIP. (Tr. 46)

Since his arrest, Applicant has become more involved with his parents, siblings, his fiancé, and five children ranging in age from two to twenty-six. (Tr. 49) He often acts as the designated driver when he goes out with others.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 overarching adjudicative goal is a fair, impartial, and commonsense 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.

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 to obtain 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 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

Adjudicative Guideline (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. Potentially disqualifying conditions are:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;

Applicant was arrested in 2004 for failure to stop and give information following an automobile accident. The charge was dismissed. In 2006, he was charged with DWI. In November 2009, he was sentenced on his DWI conviction to pay \$781 for a fine, court costs, and supervisory fee. His 180 days jail sentence was suspended. He was sentenced to six month probation. AG ¶¶ 31(a), 31(c), and 31(d) apply.

AG ¶ 32 provides conditions that could mitigate security concerns. Those that are potentially mitigating are:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (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; and,

Although only recently sentenced—two days before the hearing—the most recent offence occurred more than two and a half years earlier. AG ¶ 32(a) applies. Although Applicant was divorced in August 2004 and was going out drinking more often while the

divorce was proceeding, this is not the type of pressure contemplated in AG ¶ 32(b). AG ¶ 32(b) does not apply. There is evidence of successful rehabilitation including his work performance and his completing his B.S. degree. There has been no additional criminal activity in more than two and a half years and he is well respected at work. AG ¶ 32(d) applies.

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.

Applicant was arrested and convicted of DWI. AG ¶ 22(a) "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other criminal incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," applies.

Prior to his 2004 arrest for failure to stop and give information following an automobile accident, Applicant had been playing pool and drinking beer. Following his arrest, he successfully passed a field sobriety test. No alcohol related charges arose out of the accident. It was Applicant's inattention and not his alcohol consumption that caused this accident.

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns. Those that potentially apply are:

(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;

(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's sole alcohol-related arrest occurred more than two and a half years ago. Applicant has admitted to being intoxicated on other occasions, but there is no evidence these periods of intoxication led to any involvement with the law or other

adverse action when these periods of intoxication occurred. The record fails to indicate when these periods occurred. Following his most recent arrest, Applicant did not drink from April 2006 until early 2008. From early 2008 to July 2009, he limited his drinking. In July 2009, following his receipt of the SOR, he again chose to abstain from drinking. Even though abstinence is required only for those diagnosed as alcohol dependent, Applicant has established a pattern of abstinence. He received ADAPT counseling while in the Air Force. AG ¶¶ 23(a) and 23(d) apply. AG ¶ 23(d) does not fully apply because Applicant has not received a favorable prognosis as required in the AG ¶ 22(d). Applicant realized his drinking did not improve his life.

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 motivated to refrain from all use of alcohol and is committed to maintaining abstinence. The evidence of successful rehabilitation including obtaining his B.S. degree was also considered.

Applicant has had a single alcohol related arrest—the 2006 DWI. He has been involved in no additional adverse action in more than two and a half years. He currently abstains from alcohol use. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the criminal conduct and alcohol consumption security concerns.

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, Criminal Conduct: FOR APPLICANT

Subparagraph 1.a and 1.b: For Applicant

Paragraph 2, Alcohol Consumption: FOR APPLICANT

Subparagraph 2.a and 2.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge