



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-02337
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Tom Coale, Esquire, Department Counsel
For Applicant: *Pro Se*

June 8, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86), on May 29, 2007. On October 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and G 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 acknowledged receipt of the SOR on November 24, 2008 and answered it on the same day. He requested a hearing before an Administrative Judge through Counsel. I received the case assignment on April 2, 2009. DOHA issued a notice of hearing on April 15, 2009, and I convened the hearing as scheduled on May 14, 2009. The government offered Exhibits (GE) 1 through 6, which were received without objection. Applicant testified on his own behalf. He submitted Exhibits (AE) A

and B, without objection. DOHA received the transcript of the hearing (Tr.) on May 26, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated November 24, 2008, Applicant admitted the factual allegations in ¶¶ 1.a- 1.b; and ¶¶ 2.a and 2.b of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 44-years-old. He is divorced and has three children. He has shared custody of his son. He has been employed in his current job since 1986 (GE 1). Applicant has held a security clearance since 1984 except for four years (1999-2002) when his position did not require a clearance (Tr. 24).

In January 2004, Applicant was arrested and charged with lane traveling (an illegal lane change) and driving under the influence of alcohol (DUI) (GE 6). He pled no contest to alcohol-related reckless driving and was sentenced to a fine of \$950 and a 90 day suspended jail sentence. He attended 16 hours of Alcohol Awareness classes and served 24 hours of community service (GE 5). On that particular evening Applicant had three glasses of wine during a meal at a restaurant (Tr. 51). He walked to a club after that and had two whiskey and cokes (Tr. 51). He did not believe the officer complied with correct procedure and Applicant refused to take the Breathalyzer test (Tr. 56). The police report notes the Preliminary Breath Test (PBT) was less than .08 (the legal limit in the state).

Applicant's drinking habits after the 2004 incident changed dramatically. He did not drink and drive for about two years. He then decided not to drive if he had more than one or two drinks (Tr. 61). Applicant's habit was to have some wine one day a week (Tr. 61). He acknowledged that he believed the 2004 alcohol classes to be "superficial." He compared the later 2007 counseling to the classes. After the 2007 court program, Applicant had a better understanding of the effect of alcohol on his behavior (Tr.60).

On April 1, 2007, Applicant was arrested and charged with a DUI and improper lane operation. That evening Applicant had approximately four or five glasses of wine (one bottle) in his home over the course of five hours (Tr. 27). After his dinner, he had a whiskey and coke. He had an argument with his girlfriend on the telephone. After that discussion he drove to a nearby bar. He consumed three whiskey and cokes (Tr. 29). He acknowledges that he was intoxicated at that point. The police pulled him over for an improper left turn.

Applicant pled guilty to the DUI and agreed to participate in a state sponsored substance abuse court program (DASAC) program. The participation in the program permitted the DUI charge to be held in abeyance (no sentencing) provided Applicant

successfully completed the program (Tr. 38). The improper lane charge was dismissed in 2007 and the DUI was dismissed on July 7, 2008 (GE 3).

Applicant takes full responsibility for the 2007 incident. He acknowledges that he put his life and the lives of others in danger. He deeply regrets having done that (Tr. 17). He admits that he argued with his girlfriend and did not show good judgment by driving to the local bar (Tr. 17).

In 2007, an LCSW assessed Applicant upon entering the DASAC alcohol treatment program. He was diagnosed as a chronic alcohol abuser. During the one year treatment program Applicant was tested randomly (four times a month) for the use of illegal substances, including alcohol (AE B). Applicant did not use any illegal substance or alcohol for this period of time.¹

In July 2008, Applicant completed the DASAC program. He attended 30 hour-and-a-half counseling sessions. The prognosis for complete recovery was "good." He reported to court and his probation officer initially every week. His court ordered probation ended in 2008. He now attends AA meetings on a weekly basis.

Applicant describes his present day drinking as very moderate and very infrequent. He believes he makes good choices and he no longer frequents places where he would drink excessively. He has had something to drink on three separate occasions over the last nine months. He limits himself to two drinks and only if there is a special event (wedding, Christmas). In March 2008, he ended the relationship with his girlfriend in part because of pressure to drink. He was uncomfortable with her level of drinking every weekend and did not want to live like that any more (Tr. 18). He discussed his relationship with his counselor who suggested that many people revert to old behaviors. Applicant did not discuss "moderate drinking" with his counselor but did heed the caution about "hanging around people who may lead one to drink to excess." He believes he has truly changed his direction in life. He continues to attend AA meetings voluntarily because it reminds him of what could happen. He does not frequent bars or associate with people with whom he used to drink (Tr. 79). He does not drink and drive (Tr. 78)

Applicant is a systems engineer for a contractor. He is a trusted, reliable professional. He travels frequently for his work. Applicant consistently demonstrates top performance. For the past five years, he has achieved an "Exceeds Expectation" rating which ranks him in the top 30% of approximately 400 employees (AE A).

Applicant provides direction to subcontractor teams with little supervision. He completes every project in an excellent manner. His work quality has been acknowledged by the Air Force customers and upper management in the company. He is one of the most valued and trusted employees. He acts responsibly and has no

¹He reported to the court on one occasion he had half a glass of wine at a dinner. He was tested immediately following that but the test result was negative.

attendance problems. He has never missed deadlines or meetings. His supervisor has traveled with him and has never observed any impairment due to alcohol while on business travel. Applicant's supervisor is aware of the alcohol charges and he recommends him for a security clearance (AE A).

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. . . ." 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.”

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 “(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 has two alcohol-related driving incidents (2004 and 2007). In 2007, he admitted driving with impaired judgment due to the alcohol he consumed that evening. In 2007, he consumed so much alcohol before his DUI, it is considered “binge” consumption of alcohol. Applicant admitted that he was intoxicated in 2007 and then drove his car. Thus, AG ¶ 22 (a) and (c) apply.

In June 2007, Applicant was given a diagnosis of chronic alcohol abuse by a licensed clinical social worker during the court program. Thus, AG ¶ 22(e), “evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program” applies.

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 two alcohol-related driving incidents. Since 2007, he has not had any other alcohol-related incidents. Applicant attended alcohol classes after his 2004 incident. He abstained from drinking and driving for almost two years. He has received counseling and treatment in a court program after the incident in 2007. Applicant has acknowledged that he abused alcohol in the past but now he is committed to a different life style. Applicant attends AA of his own accord. Applicant maintains that his drinking is responsible at this point in his life. He has received a favorable diagnosis from a LCSW. He does not drink and drive. Applicant has mitigated the alcohol consumption concerns under AG ¶¶ 23(b and (d).

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’s criminal conduct consists of the two alcohol-related DUI charges in 2004 and 2007 as discussed under the alcohol consumption guideline. Thus, AG 31(a) and (b) 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 mitigation under this guideline. The events occurred in 2004 and 2007. There have not been any other instances. Applicant completed his court program and his 2007 DUI was dismissed in 2008. His rehabilitative efforts are described under the previous guideline. He understands the impact of consuming alcohol and then driving, and assures this will not occur in the future. Future criminal conduct is unlikely to occur and thus his 2 previous DUIs do not cast doubt on his current reliability, trustworthiness, or good judgment. He continues to excel in his work and expressed remorse for the 2007 incident. Thus, AG ¶ 32(a) and (d) apply in this case.

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 has held a secret clearance for many years. He has no incidents or issues with protecting information. Applicant has excellent references from his employer. He has been charged with two alcohol-related driving incidents. Since that time he completed a court ordered treatment program and modified his drinking. He was diagnosed recently by a licensed social worker of alcohol abuse. He has a good prognosis. He involved himself in AA on his own accord. He left a relationship that could interfere with his commitment to a different life. Applicant has had no other legal problems during his life. The last incident occurred in 2007.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all these

reasons, I conclude Applicant has mitigated the security concerns arising from criminal conduct and alcohol consumption.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	FOR Applicant
Subparagraph 2.b:	For Applicant

Conclusion

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

NOREEN A. LYNCH
Administrative Judge