



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-02404
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel

For Applicant: *Pro se*

March 12, 2009

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant signed a Standard Form (SF-86), Questionnaire for Sensitive Positions, on July 20, 2007. On October 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns regarding criminal conduct (Guideline J) and alcohol consumption (Guideline G). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and 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.

On October 28, 2008, Applicant signed a notarized document in which he admitted one of five allegations under Guideline J and failed to admit or deny the sole allegation raised under Guideline G. He also requested a hearing before an Administrative Judge. DOHA received the request on December 9, 2008, and I was assigned the case on January 9, 2009. Department Counsel and Applicant agreed to a

February 4, 2009, hearing date. A notice to that effect was issued by DOHA on January 16, 2009.

The hearing was timely convened. As a preliminary matter, it was noted that the SOR incorrectly cited to the counties in which allegations 1.a, 1.b, 1.d, and 1.e took place. The parties agreed to the removal of the reference to counties in those allegations. Consequentially, Applicant admitted allegations 1.a and 1.b in addition to allegation 1.c, to which he admitted previously. He also entered a denial to allegation 2 regarding alcohol consumption. Department Counsel introduced eight documents, accepted into the record as exhibits (Exs.) 1-8 without objection. Applicant was accompanied by his wife and infant daughter. Applicant gave testimony, his wife appeared as a witness, and he was given until February 16, 2009, to submit any documents for consideration. Seven documents in a package dated February 6, 2009, were received by Department Counsel and reviewed. With no objections, I accepted them into the record as Exs. A-G upon my receipt of the documents on February 12, 2009. The transcript (Tr.) was received on February 19, 2009, and the record was closed. Based upon a review of the limited case file and exhibits presented, Applicant mitigated security concerns. Clearance is granted.

Findings of Fact

Applicant is a 28-year-old systems analyst employed by a Defense contractor. He had a high school diploma and attended some college. Appellant is married. The couple recently had a child. He has two older children from a prior relationship.

In February 2002, Applicant worked at a sporting goods store. A co-worker reported that he had stolen a pair of shoes. The police were called. Applicant was charged with petit theft. At trial, the government presented its case. Applicant argued he had paid for the shoes and apparently produced receipts for the items. The jury found him not guilty.¹ Department Counsel concedes that the SOR allegations notes the verdict: "Sir, the allegation itself indicates that after a jury trial he was acquitted. So the Government doesn't -- agrees that he was acquitted or acknowledges he was acquitted, so that's not a concern of the Government. It's the underlying conduct that he committed that resulted in the arrest."² With regard to the relevance of the not guilty verdict, Department Counsel concluded that "the Government's concern is just because someone is found not guilty . . . not guilty does not translate to innocence."³

Applicant was inebriated when he was arrested for Driving Under the Influence (DUI) of alcohol on or about January 11, 2004. He pled no contest, was sentenced to six months probation, 80 hours of community service, and had his driver's license

¹ Tr. 18-20; Ex. G (2002 Court Record) at 1.

² Tr. 20.

³ *Id.*

suspended for six months. Applicant completed all ordered requirements and his probation ended on February 3, 2005.⁴

In February 2004, Applicant was moving into a new house with a female roommate. His girlfriend, now wife, was helping him unpack. She and the female roommate had words, and Applicant took his then-girlfriend aside to calm her down. The police were summoned. One of the people present told police that Applicant had struck his girlfriend.⁵ Both Applicant and his girlfriend were arrested and taken to headquarters. Applicant's then-girlfriend denied being hit, but the police arrested him for Battery – Touch or Strike.⁶ At trial, Applicant was found not guilty of the charge.

On April 2, 2006,⁷ Applicant finished an auto detailing job which he occasionally did to supplement his income. On his way home, he was in a car accident which totaled his car. The extent of the damage left him thoroughly distraught. The police thought he was intoxicated, noting alcohol could be smelled. He felt he was not inebriated.⁸ He was given a field sobriety test, which Applicant assumed he passed. Instead, he was charged with DUI. He was taken to the police station where he was eventually asked to take a Breathalyzer test. Applicant refused, stating that he should have been administered the test contemporaneously with his arrest, not after a long delay.⁹ In the police report, the officer noted that he smelled alcohol.¹⁰ A few weeks later, he appeared before the Department of Transportation to see if he could keep his driver's license pending trial. His request was granted. In August 2007, the case was set for trial. At court, the charge was dismissed for lack of evidence.¹¹

On or about May 27, 2006, Applicant got home around 6:30 p.m. He and his former girlfriend, now wife, went out around 10 p.m. to meet friends at a club. Both of them had drinks.¹² Applicant was not intoxicated. Applicant's girlfriend and another female had words. Applicant steered his girlfriend away, hoping to end the escalating

⁴ Ex. D (Letter, dated Feb. 6, 2005).

⁵ Tr. 29.

⁶ Tr. 28-29.

⁷ The available evidence is unclear as to whether the arrest took place on April 2, 2006, or April 3, 2006.

⁸ Tr. 32.

⁹ Ex. 3 (Interrogatories) at 3.

¹⁰ Tr. 38.

¹¹ Tr. 24; Ex. 3 (Interrogatories) at 3. As noted by Department Counsel, "The Government does not know why it was dismissed, the incident was dismissed. Again, it's not for DOHA hearings to litigate that." Tr. 54.

¹² In an interview with investigators, Applicant stated that "both of them had been drinking." Ex. 3 (Interrogatories) at 3. What he had been drinking is not specified. At hearing, he denied "drinking," as in "drinking alcohol." Rather, he suggested that he may have been drinking cola since he was the designated driver and they were at the club for about two hours. Tr. 35-37.

exchange. Both Applicant and his girlfriend were charged with disorderly conduct. Applicant pled no contest and was fined.

Applicant concedes one of the allegations involved alcohol – specifically, the January 2004 DUI. He does not dispute that he was under the influence. He continues to consume alcoholic beverages, but denies over-consumption of alcohol.¹³ “. . . I wouldn’t say I have a problem with alcohol. But, you know, on occasion, you know, I do drink a beer or two.”¹⁴ Applicant last had beer while watching the Superbowl. He usually has a couple of light beers on Fridays and Saturdays. He has never been diagnosed with having an alcohol problem. He regrets the incident and has no intention of driving after consuming alcohol.

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. Under AG ¶ 2(c), this 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by

¹³ Tr. 33.

¹⁴ Tr. 32.

Department Counsel. . . .”¹⁵ The burden of proof is something less than a preponderance of evidence.¹⁶ The ultimate burden of persuasion is on the applicant.¹⁷

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁹ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Analysis

Based upon consideration of the evidence, I find Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) to be the most pertinent to the case.

Guideline J – 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. With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits he was convicted of Disorderly Conduct in 2006, arrested for suspicion of DUI in 2006, and pled no contest to DUI in 2004. The record also shows he was arrested for suspicion of battery

¹⁵ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁸ *Id.*

¹⁹ Executive Order 10865 § 7.

in 2004 and of petit theft in 2002. Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and CC DC AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”) apply.

In 2002, a jury acquitted Applicant of the charge of petit theft, SOR allegation 1.e. In 2004, he was acquitted of battery, as noted at SOR allegation 1.d. An arrest is sufficient to raise criminal conduct security concerns and initiate inquiry. Verdicts of not guilty, however, speak highly in favor of the Applicant. Moreover, these incidents occurred five to seven years ago. Therefore, with regard to these two allegations, Criminal Conduct Mitigating Condition (CC MC) AG ¶ 32(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”) applies, as does AG ¶ 32(c) (“evidence the person did not commit the act”).²⁰

As for SOR allegation 1.a (Disorderly Conduct), the 2006 incident to which Applicant pled no contest, Applicant and member(s) of his party may have been disorderly, but it was his intent to bring order to a conflict between his then-girlfriend and another woman. Rather than fight a relatively minor charge, he pled no contest. The incident occurred nearly three years ago. Since that time, Applicant and the young woman married and have become parents. He has found stable employment which he enjoys and where he has earned the support of his employer, which sponsored his application for a security clearance. Given his intention at the time of the incident and signs of subsequent maturation, AG ¶ 32(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”) applies to allegation 1.a.

SOR allegation 1.c (DUI), to which Applicant pled guilty, and SOR allegation 1.b (DUI), a charge which was dismissed, occurred in 2004 and 2006. As for the former, Applicant satisfied all court ordered requirements by 2005. In the latter situation, Applicant maintained his innocence. The evidence shows a clear division between Applicant’s credible testimony about the event and the notes of the police officer involved. There is no objective evidence indicating which side is correct or more credible. The Government, however, made the decision not to prosecute or the court dismissed the charge *sua sponte*. A dismissal is generally indicative of a situation in which it is decided that the state does not have a strong enough case to obtain a conviction. With DUIs, such a situation often results in a reduction of the charge to reckless driving or some similar charge. Here, however, there is no indication Applicant was even cited for the accident. With regard to the dismissed DUI cited at SOR allegations 1.b, AG ¶ 32(a) (“so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur

²⁰ Although an acquittal may not “translate to innocence,” it does provide evidence that the appropriate legal tribunal determined that Applicant’s guilt had not been established.

and does not cast doubt on the individual's reliability, trustworthiness, or good judgment") applies, as does AG ¶ 32(c) ("evidence the person did not commit the act").

With regard to SOR allegation 1.c (DUI), Applicant was convicted of DUI. He was, however, permitted to keep his license for business purposes pending trial. Within a year of his conviction, he had completed all court-ordered requirements. He has expressed his regret over the incident and his intention never to drink and drive again. Other than an unproven charge of DUI in 2006 which was ultimately dismissed, there have been no other alcohol-related or otherwise unmitigated criminal incidents. Since that time he has married. The couple has since had a baby. Applicant holds a responsible position which he enjoys. Given these facts and other indications of maturation, CC MC AG ¶ 32(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") applies.

Guideline G – 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. Here, Appellant pled no contest to the charge of DUI in January 2004. He was sentenced to six months probation, 80 hours of community service, and had his driver's license suspended for six months. Two years later, in April 2006, Applicant was arrested for DUI. In that situation, however, Applicant did not enter a guilty plea or a non contest plea. The facts remain in conflict between Applicant and the arresting officer's report. Applicant was subject to a field sobriety test but did not take a Breathalyzer test. No objective evidence exists indicating inebriation. He was granted use of his license pending trial. At trial, the matter was dismissed for some unknown reason. There is little to no evidence that alcohol was a contributing factor in the other allegations at issue.²¹

Alcohol Consumption security concerns arise based on certain conditions. Multiple alcohol-related incidents (e.g., Alcohol Consumption Disqualifying Condition (AC DC) 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 incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*)) or other evidence of an alcoholic nature (e.g., AC DC AG ¶ 22(d) (*diagnosis by a duly qualified medical professional [e.g., physician, clinical psychologist, or psychiatrist] of alcohol abuse or alcohol dependence*)). Here, we have a singular alcohol-related incident that has been established. It stands alone despite an arrest and charge which was ultimately dismissed by a court of law. Applicant credibly

²¹ Regarding the May 2006 incident of disorderly conduct, Applicant's interviews elude to he and his girlfriend having something to drink at a club. Department Counsel makes a not illogical jump and equates drink with alcoholic beverage. Applicant testified, however, that if he had anything to drink, it would have been a cola. Reading the interviews, one cannot discern what he was drinking. Given his credible testimony, his recent brush with the law in April 2006, and all the record facts, however, the evidence tilts in his favor.

testified that his use of alcohol is generally moderate and that he is more careful since receiving his DUI. There is no indication that he has been determined to be an abuser or dependent of alcohol. Consequently, no AC DC is raised and related security concerns are sustained.

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 public trust position 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 the facts and circumstances surrounding this case, as well as the "whole person" factors. Applicant is a young, but maturing and intelligent man who, in the past seven years, has been arrested five times. The earliest two of those arrests resulted in acquittals, are not recent, and have only a tenuous nexus to any of the subsequent incidents.²² Of larger concern is the 2004 DUI conviction. He completed his sentence requirements in 2005, four years ago. Viewed within the context of these distinct facts, four years without further incident could prove sufficient to dispel remaining security concerns regarding this conviction.

Since that conviction, however, Applicant was again arrested for DUI in 2006 following an accident. The charge, however, was dismissed and he was not tried on any lesser charges nor cited for the accident, itself. Consequently, there is no evidence that Applicant was guilty of any criminal conduct.

With the exception of the 2004 DUI, Applicant seems to be an individual with a knack for being in the wrong place at the wrong time or with the wrong people. Now in his late 20s, Applicant has matured considerably. His testimony was direct and candid. In the past couple of years, he married. The couple has an infant child. Applicant has a job he enjoys and performs it in a professional setting. Although he continues to consume alcohol, he is guarded in its use and has no intention of mixing it with driving. While some reservations may have remained had the SOR cited to issues regarding

²² Although the 2006 Disorderly Conduct incident somewhat resembles the earlier battery charge, there is no need to further examine these two incidents in light of the findings below.

personal conduct, security concerns regarding criminal conduct and alcohol consumption have been mitigated. Clearance is granted.

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
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	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 continue Applicant's eligibility for a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge