



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-09482
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

May 17, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guideline G (alcohol consumption). Clearance denied.

Statement of the Case

On May 30, 2006, Applicant submitted his Questionnaire for National Security Positions. On April 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline G. 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 29, 2009. He answered the SOR in writing on May 14, 2009, and DOHA received his answer on May 18, 2009. Department Counsel was prepared to proceed on July 27, 2009. The case was

previously assigned to two other administrative judges before it was assigned to me. The first assignment occurred on July 28, 2009, the second reassignment occurred on September 18, 2009, and the third assignment to me occurred on September 28, 2009. On October 20, 2009, DOHA issued a notice of hearing scheduling the case for November 17, 2009. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 10, which were received without objection. Applicant offered Applicant Exhibits (AE) A through X, which were received without objection, and he testified on his behalf. DOHA received the hearing transcript (Tr.) on November 24, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the allegations alleged. After a thorough review of the record, I make the following findings of fact.

Applicant is a 47-year-old parachute rigger, who has been employed by a defense contractor since October 2000. (GE 1, Tr. 15-16.) Applicant seeks to reinstate his security clearance. Maintaining a clearance is a condition of his continued employment. (Tr. 16-17.)

Applicant graduated from high school in June 1980. (Tr. 23.) He served in the U.S. Army from October 1989 to August 1998, and was honorably discharged as a private first class (pay grade E-3). His military occupational specialty was 43E (parachute rigger). He was awarded an associate's degree in general science and business in June 2007. (GE 1, Tr. 17-18, 24.)

Applicant married in April 1993. He has two adult daughters from a previous relationship as well as an adult stepdaughter. Applicant and his wife have a 13-year-old daughter. (Tr. 18-23, 25.)

Alcohol Consumption

Applicant has a history of episodic alcohol abuse, marked by an extensive history of six alcohol-related arrests spanning a 16-year period from March 1989 to August 2005. This hearing was Applicant's second DOHA hearing in which alcohol formed the basis of security concerns.

His previous hearing was held on July 21, 2004, and five alcohol-related concerns were substantiated. They are: (1) he was arrested in March 1989 for driving under the influence. He was convicted and fined; (2) he was charged in September 1993 with driving while impaired, with a blood alcohol level of .07%. He was in the Army serving overseas at the time. His commander issued him a letter of reprimand; (3) he was apprehended in December 1996 for driving under the influence. He was serving in the Army stateside at the time. His commander awarded him 45 days extra duty at nonjudicial punishment; (4) he was apprehended in May 1998 for driving under the

influence. He was serving in the Army stateside at the time. His commander awarded him a reduction in grade at nonjudicial punishment. This reduction in grade was a career-ending event for him; and (5) he was arrested in January 2000 for driving while intoxicated. He was convicted and his driver's license was suspended. (SOR ¶¶ 1.b.i. – v.) (GE 1 – 10, Tr. 25-41.)

He stated at his July 2004 hearing that he had quit drinking since January 2004, and that he intended to abstain from alcohol. (GE 5, pgs. 35-36.) The following colloquy occurred between Applicant and his counsel at his July 2004 DOHA hearing:

Q. And do you understand how controlling your alcohol consumption, and controlling the impulses that make you want to consume alcohol, is important for you to be eligible to maintain, or receive a security clearance?

A. Most definitely. Like, I don't think I'm going to have a major problem controlling, because I've stopped for six months. And I have stopped before, for four, and I don't have a problem stopping. But I always go back.

Well this time, I'm thinking, me and my wife have talked. And I think what's going to help me the most is, I'm seeking God in my life right now. I'm going to church every Sunday. And I'm just trying to learn more about the Bible, to turn my life over to Him.

And I think the only reason I haven't right now is I don't know as much about religion. And that I know I'm going to have to give up drinking. So when I'm ready to do that, I want to be sure that I know exactly what I'm doing. And I don't feel like it will be a problem.

Q. And you're ready to give up drinking, correct?

A. Yes, sir. (GE 5, pgs. 47-48.)

Following his hearing, the Administrative Judge granted Applicant's security clearance. Applicant testified at his second hearing, "I believe after we had the hearing, me and my wife, we flew back home and probably that weekend I had a beer or two, not getting drunk but a beer. And then over time, I was drinking two and three beers again." (Tr. 41.)

Since Applicant's previous 2004 DOHA hearing, he was arrested again for driving under the influence in August 2005. He was convicted and sentenced to jail, fined, and referred for alcohol screening and counseling. Applicant testified that he "was held overnight and saw the judge the next morning. He (the judge) released me on my own and I went back to court and the jail sentence was suspended. I had to pay I think \$1,100 in fines and I went through a[n] alcohol program." (Tr. 42.)(SOR ¶ 1.c.)

The evidence also established that Applicant consumed alcohol from 1984 to 2009, at times to excess and to the point of intoxication. He admitted to experiencing blackouts from drinking. (SOR ¶ 1.a.) (Response to SOR, GE 1-10, Tr. 48-49, 59.)

Applicant testified that he presently consumes alcohol and that the last time he consumed alcohol was the weekend before his second DOHA hearing. He admitted being intoxicated that weekend. He later clarified his answer stating that he was not “intoxicated,” but “buzzed.” (Tr. 45-48.) When asked by Department Counsel if he intended to continue drinking alcohol in the future, he responded, “If – I need to stop, I would. If it was appointed by this proceeding or if I had to, yes, ma’am. I would stop. But had I thought about stopping? Yes. On my own, but I don’t think unless I’m told to by this proceeding that I would stop.” (Tr. 46.)

Department Counsel and Applicant engaged in the following colloquy:

Q. How are you going to avoid getting a DUI in the future?

A. By not getting in the wheel (sic) when I have been drinking.

Q. Now, didn’t you essentially give that same answer in 2004?

A. Yes, and I believed – on myself, I believed I had control of that in 2004. But the way I was thinking about it is when I go somewhere, my wife is driving. Well, I can’t depend on her. I have to depend on myself. And that’s why I say if I’m anywhere and I’ve been drinking, I’m not driving. I’ve picked up golf now. I don’t drink when I’m playing golf. Other guys do. I take them home and pick them up when they call me and ask. That’s how I’m changing. (Tr. 52.)

When I queried Applicant about how he viewed alcohol today, he responded, “I think I’ve made bad decisions with drinking. I don’t think I drink too much or I’m an alcoholic. I think I’ve made very poor decisions by drinking and driving.” (Tr. 58.) Applicant is not in a treatment program adding that he thought about going to Alcoholic Anonymous meetings, stating “[b]ut I fight with myself on that because I don’t believe I have a problem.” (Tr. 59-60.)

Applicant submitted ten work-related reference letters. All of the authors of the reference letters were positive in their assessment of Applicant and view him as trustworthy and reliable. AE B – J. He also submitted 14 work-related certificates reflecting his contributions as a defense contractor employee. AE K – X.

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 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 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. 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 for 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 articulates the Government's concern concerning alcohol consumption, "[e]xcessive 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."

Two alcohol consumption disqualifying conditions could raise a security concern and may be disqualifying in this case. Guidelines ¶¶ 22(a) and 22(c) provide:

(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.

Applicant's six alcohol-related arrests from 1989 to 2005, admitted periodic excessive drinking from 1984 to 2009, and admitted blackouts warrant application of AG ¶¶ 22(a) and 22(c). The Government produced substantial evidence supporting these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government.¹

Two alcohol consumption mitigating conditions under AG ¶ 23 are potentially applicable:

(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; and

(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).

AG ¶ 20(a) does not define the sufficiency of the passage of time, and there is no "bright-line" definition of what constitutes "recent" conduct. Based on my evaluation of

¹See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

the record evidence as a whole² and Applicant's having been granted a clearance following a DOHA hearing in July 2004 and his return to drinking despite assurances he would not do so, I am unable to apply AG ¶ 20(a).

Applicant appeared to have acknowledged his drinking problem at his July 2004 hearing and stated that he had quit drinking in January 2004. He returned to drinking the first weekend after his July 2004 and continues to drink to the present. AG ¶ 20(b) does not apply. Applicant's return to drinking lead to his August 2005 arrest for driving under the influence 13 months after his July 2004 DOHA hearing.

Applicant did not provide sufficient corroborating evidence suggesting he has overcome his problem. His assurances that he does not have a drinking problems ring hollow given his record of six alcohol-related arrests with the most recent arrest occurring after his last DOHA hearing. I am left with doubts regarding his continuing to drink and whether his alcohol consumption problems are "unlikely to recur."

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) 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.

Applicant was honorably discharged from the Army after serving over eight years. He has been a valued employee for the past ten years working for a defense contractor. Other than his past alcohol-related arrests, he is a law abiding citizen. He submitted statements of positive work-related references.

However, Applicant's lengthy history of alcohol abuse and the related problems that alcohol consumption has caused him and others leaves me with doubt regarding

²See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)).

his eligibility to hold a security clearance. Particularly troubling is his prior history of having gone through this hearing process in 2004 and his return to drinking which resulted in a subsequent alcohol-related arrest. Given his history, more is required than his assurances that he does not have a drinking problem.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to alcohol consumption. The evidence leaves me with doubts about Applicant's security eligibility and suitability.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"³ and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

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. to c.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT J. TUIDER
Administrative Judge

³See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).