

On December 31, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).² Applicant signed his notarized Answer to the SOR on January 29, 2009, in which he admitted to all allegations in the Statement of Reasons under Guideline G and denied the two allegations under Guideline E. He also requested a decision before an administrative judge. Department Counsel was prepared to proceed on March 20, 2009, and the case was assigned to me on March 25, 2009. DOHA issued a Notice of Hearing on April 24, 2009 and I convened the hearing as scheduled on May 14, 2009.

During the hearing, Department Counsel offered five exhibits, Government Exhibits (GE) 1 through 5, which were admitted. Applicant testified and presented the testimony of four witnesses. Applicant exhibits (AE) A through I, were admitted. He offered two documents for administrative notice, identified as Administrative Hearing Exhibits (AHE) I and II. DOHA received the transcript (Tr.) on May 26, 2009.

Findings of Fact

Applicant's admissions to the SOR allegations are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 25 years old, holds an associate's degree in computer programming and hopes to complete a bachelor's degree in the next two years. He has been employed by the same defense contractor since 2001, and currently holds the position of software developer (Tr. 93-96).

Applicant started consuming alcohol approximately once per month at about the age of 17. After turning 21, his use increased when he started going to bars. He became intoxicated about once per month, on weekends, after approximately six beers. In October 2006, he and a friend went to two bars and he drank approximately ten beers over the course of about four hours. After leaving the bar, he was stopped by police and failed the field sobriety test. He was arrested, spent several hours in jail, and was charged with Driving/Attempting to Drive Vehicle While Under the Influence of Alcohol, Driving while Impaired by Alcohol, and Negligent Driving. Applicant informed his supervisor about his arrest, and his supervisor wrote a letter of recommendation for Applicant's court hearing.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Applicant's attorney arranged a plea bargain under which Applicant would participate in a 12-week alcohol education program, and plead guilty to Driving/Attempting to Drive Vehicle While Under the Influence of Alcohol. On January 11, 2007, he pled guilty to the charge and the remaining charges were not prosecuted. Applicant received Probation before Judgment. The court ordered him to complete the 12-week alcohol program. He was sentenced to 60 days in jail, suspended. His driving privileges were restricted for 45 days to work, school and alcohol classes. He was placed on unsupervised probation for two years, which he completed in January 2009 (GE 2, 4, 5; Tr. 39, 96-100, 104).

Applicant began the alcohol education classes in January 2007. He was not required to attend consecutive weeks, and completed the program in August 2007.³ He did not receive individual or group counseling. He did not attend Alcoholics Anonymous meetings because he did not believe he had a problem controlling his alcohol use. He was not diagnosed as an alcohol abuser or as alcohol-dependent. His prognosis upon completion was "Good." Applicant listed his DUI arrest on his security clearance applications of May 5, 2007 and July 24, 2007 (GE 1, 2, 4, 5; AE F; Tr. 100-105).

In June 2007, while on vacation, Applicant and his friends were drinking at a bar. Applicant consumed "probably not even six beers" between 8 p.m. and 2.a.m. He and his friends took a bus back to their hotel room. While he was sitting in front of his room with a beer in his hand, talking to several people, the police arrived and arrested everyone in the group. Applicant testified that he was not intoxicated when he was arrested. He remained in jail overnight. The next morning, "The commissioner said that I could do 20 hours of community service and I would not be charged." Applicant performed the community service by working in a homeless shelter. The shelter forwarded paperwork to the court reporting completion of the required hours. Applicant was not required to appear in court and in July 2007, he received notice from the district court that the charge would not be prosecuted. He did not report the open container charge to his supervisor at the time it happened. He testified that he did not know he was required to report it because he did not think the open container charge was criminal (GE 4, 5; Tr. 106-113).

Applicant believes that he did abuse alcohol in the past. Following the DUI arrest, he decided to decrease his alcohol consumption. He has not been intoxicated since that time, and does not drive after consuming alcohol. He volunteers to be the "designated driver" if his friends drink so they do not have to drive. His sister, who is also his roommate, confirmed Applicant's decreased alcohol consumption in her testimony. They have not kept alcohol in their home since New Year's Eve of 2007-2008. She does not drink alcohol. The friends with whom Applicant drank alcohol are also now drinking less or not at all. After August 2008, Applicant eliminated alcohol use entirely because of the effect it could have on his career. He found that eliminating alcohol from his life was not difficult. He expects that he will occasionally drink alcohol in the future on special

³ Applicant mistakenly entered October 2007 as the completion date in his response to Interrogatories, GE 2 at page I-16. The correct date of August 8, 2007 appears on the supervisor's status report in GE 2 at page I-20.

occasions. Since he stopped frequenting bars, he spends his free time involved in four-wheeling and video gaming. He is also more focused on his career. He has been assigned new responsibilities, including overseeing the work of junior developers (GE 5; AE H, I; Tr. 83, 88-89, 105-106, 120-128).

Applicant submitted his first security clearance application in 2004, and received an interim security clearance. In early 2007, a new Assistant Facility Security Officer (FSO) joined Applicant's company. He testified at the hearing that he discovered Applicant's security application had not been processed to completion. When he checked on the status, he was told to have Applicant re-submit an application. Applicant completed this second security clearance application on May 5, 2007, and was granted an interim clearance on May 14, 2007. After a short time, the Assistant FSO learned that this second application contained an error related to the signature. He instructed Applicant to re-submit his application to correct the signature error. In his Interrogatory response, Applicant stated, "However, I was instructed by my FSO to fix only the corrections identified by them. For example, I was instructed to resign the SF86 to include my middle initial in the signature. I was not under the assumption nor was I instructed to update my SF86 with new information." Applicant completed his third application online. Most of the information he provided in the May 5 application, such as employment and residences, still appeared in the online version. However, the checkmarks he had inserted for all the "Yes/No" questions did not carry over. He re-entered his "Yes/No" responses and submitted this third application on July 24, 2007. Applicant's arrest on the open container charge occurred June 9, 2007, which was after the May 5 application, and before the July 24 application (GE 1, 5; AE F; Tr. 48-57, 73). He testified he did not list it on his application of July 24, 2007 because,

I was not aware the open container violation was a charge. I didn't understand. I never pled guilty to it. I never went to court for it. My understanding was if I completed community service I would have nothing to worry about and I would not have to think about it again. (Tr. 117).

The Assistant FSO testified that, before he assumed the position of Assistant FSO in early 2007, the company had no policy or training regarding what information should be reported. Although employees with final security clearances received an online briefing for holders of full security clearances, holders of interim clearances did not receive training in reporting requirements. As a holder of an interim clearance, Applicant did not receive such training before submitting any of his security clearance applications (Tr. 52-53, 70).

The Assistant FSO also testified that when he told Applicant to re-submit the application on the July 24, 2007,

A The only thing I told him to do was update the information that was in the JPAS system and check the yes or no boxes.

Q And when you say update the information in the JPAS system, what does that mean?

A The error that I got sent back.

Q The signature error?

A Yes sir. (Tr. 66-67)

When asked if it was appropriate for Applicant to omit the open container arrest on his application, the Assistant FSO responded,

No sir, I don't believe it was appropriate for him not to disclose that but under the instructions that I gave him, at this time, after the fact, were vague, I don't believe he knew to put that in there. (Tr. 61).

As part of his security clearance investigation, Applicant was interviewed by an investigator on October 11, 2007. On January 23, 2008, Applicant had a second interview, which focused on the open container charge. When asked why he did not list the incident on his security clearance application, Applicant stated that he filled out the May application before the incident occurred, and it was subsequently returned for corrections, and was not completed until after the incident (GE 5).

Applicant did not report the open container incident to his supervisor when it happened for the same reason as on his security clearance application: he thought it was not a crime and therefore, he was not required to do so. Applicant reported the open container charge to his supervisor on the day of the second security interview. He told the Assistant FSO about the charge when the Assistant FSO helped him answer the DOHA Interrogatories in October 2008. Applicant testified that he did not deliberately conceal the information either on his July application or in his first interview (GE 5; Tr. 54-55, 112-114, 119-120).

Applicant's performance evaluations for 2005 through 2008 indicate that he was promoted from programmer to software developer, and that he received increasing numbers of "Excellent" ratings during that time. Applicant's friend, who has known him for ten years, testified that several years ago, she used to see Applicant about four times per week when they would go to bars with friends. However, since the DUI, she sees him only about once per month because he no longer goes to bars with the group. She considers him to be completely trustworthy, and has given him a key to her home (Tr. 77-83). Another close friend of ten years, who used to be a drinking companion, submitted a letter stating that Applicant now rarely goes to bars with their friends, and has not been intoxicated since the DUI. His supervisor of more than three years testified that Applicant is now a role model for younger staff. Although his supervisor admitted that Applicant's not disclosing the open container charge raised questions, he has never doubted Applicant's honesty and integrity. He has seen Applicant at company social functions where alcohol is available, but has never seen him consume alcohol. Applicant is allowed to work from home because of his reliability. The Assistant FSO testified that Applicant is a very honest and trustworthy person. Friends and a co-worker also

submitted letters attesting to Applicant's honesty and integrity. Applicant has received numerous performance awards from 2003 through 2008 (AE A through E, G-I; Tr. 35-44, 55-56, 66).

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the “whole person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under the cited guidelines.

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁷

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

The security concern about alcohol consumption is that “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 ¶ 21).

AG ¶ 22 includes the following relevant conditions that can raise security concerns 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;

- (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 pled guilty to DUI in 2006 and was charged with possessing an open container of alcohol in public in 2007. In addition, he consumed alcohol to the point of intoxication, on weekends, about once per month, starting at about age 21. These facts support application of AG ¶¶ 22(a) and 22(c).

AG ¶ 23 provides conditions that can 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);

Applicant had a DUI conviction and another alcohol-related charge about eight months later. These events occurred in 2006 and 2007, between two and almost three years ago. After the DUI, Applicant realized that he must change his behavior. He decreased his consumption, did not drink to intoxication, did not drive after drinking, stopped frequenting bars, and limited his association with people with whom he drank alcohol in the past. These changes reflect favorably on his good judgment, and make it

unlikely he will be involved in future negative alcohol-related events. AG ¶ 23(a) applies.

Applicant completed a 12-week alcohol program, and his prognosis was reported as “Good.” Although he was not diagnosed as either an alcohol abuser or alcohol-dependent, Applicant believes that he did abuse alcohol in the past, and in summer 2008, he decided to further curtail his use of alcohol. As of the date of the hearing, he had not had alcohol since August 2008. Although he expects that he will have it at times in the future, it will be on infrequent special occasions. Based on Applicant's changed behavior, and his record of responsible alcohol consumption over the past two years, AG ¶ 23(b) applies. I find for Applicant on Guideline G.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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.

The Guideline E allegations implicate the following disqualifying conditions under AG ¶ 16:

(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;

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

The SOR alleges that Applicant deliberately falsified his answer to question 28(f) on his July 24, 2007 security clearance application, which implicates AG ¶ 16(a), and that he deliberately failed to disclose the same violation during his first security interview, which involves AG ¶ 16(b). Application of these two disqualifying conditions requires a deliberate intent to conceal. Here, Applicant did not intentionally hide relevant information from the government.

Applicant submitted two applications, one on May 5 – before the open container violation occurred – and one on July 24, after the violation. He listed the alcohol arrest on the first application, but did not list the open container arrest when he re-submitted on July 24. As holder of an interim clearance, Applicant had no training in reporting requirements, and did not realize he needed to list the open container violation. He was confused about the legal nature of the incident because it did not result in a court hearing, a plea, or similar proceedings that would indicate to him it was a criminal offense. Moreover, he was not informed that he should enter new information on the July 24 application. The Assistant FSO credibly testified that he provided “vague” instructions on how to complete the July 24 form, and based on those instructions, he would not expect Applicant to have known that the incident should be listed. Applicant also did not disclose the open container charge when he met with the investigator for his first security interview because he did not realize that the violation was criminal. It should be noted that when he did know that he committed a criminal offense—the DUI—he revealed it, both in his application, and in his first security interview.

If Applicant had intended to conceal his alcohol-related involvement with the police, it is unlikely he would have disclosed his arrest for DUI in the May 5, 2007 application, and in his first interview. Thus, Applicant disclosed a more serious violation. He recognized it as criminal conduct, because it involved retaining an attorney, appearing in court, probation, and attending an alcohol program over a period of several months. Applicant also disclosed other alcohol-related information in the application, and in his first interview, when he listed his alcohol classes and provided details about why he had attended that program. Applicant's disclosure of his DUI put the government on notice that alcohol use was an issue to be further investigated. I conclude Applicant did not have the requisite intent to establish deliberate falsification of his security clearance application or the information he provided to the investigator. AG ¶ 16 (a) and (b) do not apply. As there was no intent to falsify, mitigation is not required.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant is 25 years old, and his DUI occurred when he was 22. His decision to increase his alcohol consumption once he turned 21 stemmed, in part, from his youth and immaturity. His choice resulted in a DUI. Subsequently, Applicant participated in a 12-week education program, after which he received a prognosis of "Good." He took stock of his situation and made positive life changes by limiting his alcohol consumption, avoiding drinking to intoxication and driving after drinking, avoiding spending his time in bars on weekends, limiting his association with those with whom he drank alcohol, and becoming involved in sports. Although he was never diagnosed as an alcohol abuser or alcohol-dependent, and is not required to be abstinent, his decision to abstain from alcohol for the past nine months shows serious commitment to avoiding the mistakes of the past. Applicant disclosed his DUI and alcohol classes during his security processing. His failure to list his open container violation resulted from his belief that it was not criminal in nature, as well as vague instructions from his Assistant FSO. If he had wished to deceive, he would not have disclosed the DUI. Applicant's supervisor, co-worker, friends, and Assistant FSO attested to his trustworthiness. He has had no alcohol-related incidents in the past two years, and his behavior changes since the DUI make future incidents unlikely.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for a security clearance. I conclude Applicant has mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline G	FOR Applicant
Subparagraph 1.a. - 1.d.	For Applicant
Paragraph 2, Guideline E	FOR Applicant
Subparagraph 2.a. – 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 interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge