



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-03767
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

March 11, 2009

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on November 5, 2007 (Government Exhibit 1). On November 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and G concerning the 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on December 3, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on December 14, 2008. I received the case assignment on December 16, 2008. DOHA issued a notices of hearing on December 16, 2008, and January 15, 2009. I convened the hearing as scheduled on January 16, 2009. The Government

offered Government Exhibits 1 and 2, which were received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits A and B, without objection. The Applicant requested that the record remain open and, on January 30, 2009, he submitted Applicant's Exhibits C and D, which were also admitted without objection. DOHA received the transcript of the hearing on January 29, 2009. The record closed on January 30, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 43 and married. He is employed by a defense contractor and seeks to retain a security clearance previously granted in connection with his employment.

Guideline J – Criminal Conduct

Guideline G - Alcohol Consumption

The Government alleges under Guideline J that the Applicant is ineligible for clearance because he has engaged in criminal acts. The Government further alleges under Guideline G that the Applicant is ineligible for clearance because he uses intoxicants to excess. The Applicant admitted the factual allegations in subparagraphs 1.a., 1.b. and 2.b. of the SOR. Those admissions are hereby deemed findings of fact. He denied subparagraph 2.a.

The Applicant has had two alcohol related incidents - in 2007 and 2008. The Applicant was cited in July 2007 for Possession of Alcoholic Beverage in County Park. He received a fine for this incident. (Transcript at 26-30.)

The Applicant's second alcohol related incident happened in May 2008. On that occasion, the Applicant went to a bar with some friends after playing softball. He had been drinking beer earlier, as well as taking cold medicine. The Applicant drank more beer at the bar, but waited for what he felt was a sufficient time before driving home. The Applicant was subsequently arrested for Driving Under the Influence of Alcohol. The Applicant pleaded guilty to a reduced charge of Reckless Driving and was sentenced to pay a fine, receive alcohol assessments and complete alcohol education classes, pay fees or serve 13 days in jail, and he was placed on three years probation. He successfully completed the alcohol education classes. The Applicant has stated that this was an unusual situation and that he is not an irresponsible person. (Government Exhibit 2 at 8-12; Applicant's Exhibit B; Transcript at 37-46, 51-53.)

The Applicant testified that he is a moderate drinker, and that this incident changed his life. He further testified that his family, including his wife and children, has been very supportive of him. The Applicant has not consumed alcohol since November 2008, and he never drank to excess on a regular basis. (Transcript at 48-51, 53-54.)

The Applicant recently went to his company's Employee Assistance Program because, "I wanted to find out if there was something wrong." (Transcript at 47.) People at the Program recommended that the Applicant receive an alcohol assessment and, if it was determined that there was a problem, that he admit himself to a treatment program. The Applicant agreed and had the assessment. After the assessment, a primary counselor wrote, "Per our face-to-face assessment at . . . Center for Chemical Dependency on January 7, 2009, you do not meet the criteria for abuse or dependence to alcohol. Therefore, you do not meet the criteria for admission to Intensive Outpatient Treatment." (Applicant's Exhibit A.)

Mitigation

Friends and family members submitted letters on the Applicant's behalf. In them he is described as being "helpful," "kind," "loving," and "dedicated." (Applicant's Exhibit C.)

Work associates and supervisors also submitted letters on the Applicant's behalf. The Applicant is a Team Lead at his job, and is viewed as a subject matter expert and expert leader. He is described as someone who has "morals," is "dependable," "trustworthy," and "an asset." (Applicant's Exhibit D.)

Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination 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

Guideline G - Alcohol Consumption

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

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.

The Applicant was involved in two alcohol related incidents in 2007 and 2008. The Applicant has used alcohol from about 1985 until November 2008. He intends to consume alcohol in the future, but not to excess and at a very low rate.

Under the Criminal Conduct guideline, the following Disqualifying Conditions are applicable. AG ¶ 31.(a) "A single serious crime or multiple lesser offenses." AG ¶ 31.(d) "Individual is currently on parole or probation."

After considering the evidence in the record, I find that the following Mitigating Conditions also apply to this case. Under 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." In addition, AG ¶ 32.(d) states, "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."

There is one Disqualifying Condition concerning Alcohol Consumption that arguably applies to this case. 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."

Under the particular facts of this case, the following mitigating condition clearly applies to the Applicant's situation. AG ¶ 23.(a) states that it can be a mitigating condition when, "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."

When viewed in the light least favorable to the Applicant, he has had two alcohol related incidents in the past three years. Only one of those incidents involved drinking and driving. While this is certainly nothing to be taken lightly, there is, in my opinion, no evidence of a pattern of abuse here. His last incident occurred a year and a half before the record closed. I have considered the fact that he is still on probation, as well as his obtaining an alcohol evaluation which states that he is not an alcohol abuser or alcohol dependent. The evidence is clear that the drinking and driving offense was an aberration, out of character and will not be repeated. The Applicant has mitigated the security significance of these incidents.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The Applicant is a hard-working, respected, professional person who has had two alcohol related incidents in the last three years. There is little to no evidence that these incidents show a pattern, or that he is alcohol dependent or an alcohol abuser. In viewing all the facts of this case, I find that the Applicant has mitigated the security significance of his prior conduct. As set forth at length above, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6); and that the likelihood of continuation or recurrence is close to nil (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his alcohol related incidents, and the related criminal conduct.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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

WILFORD H. ROSS
Administrative Judge