



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-03877
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: *Pro Se*

February 19, 2009

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on August 21, 2007. On September 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline 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.

The Applicant responded to the SOR on a date uncertain, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on October 29, 2008. A notice of hearing was issued on October 30, 2008, scheduling the hearing for December 10, 2008. At the hearing the Government presented seven exhibits, referred to Government Exhibits 1 to 7. The Applicant presented no exhibits but did testify on his own behalf. The official transcript (Tr.) was

received on December 19, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

MOTION TO AMEND

Department Counsel moved to amend the SOR by adding Guideline E, Personal Conduct, paragraph 2(a). The specific allegation under this guideline alleged that the Applicant intentionally and deliberately provided false information to a law enforcement officer during his arrest of April 18, 1982, (previously referenced in Guideline G, paragraph 1(b)), when he was charged with (1) Driving Under the Influence of Alcohol - Causing Death or Injury to Another, a felony, and (2) Driving Under the Influence of Alcohol with .10% or more. The Applicant had no objection to the amendment and when offered additional time to respond to the allegation, rejected such. (Tr. pp 37-39). The motion to amend was granted.

FINDINGS OF FACT

The Applicant is 51 years old and has a high school diploma and an Associate of Science Degree in Aviation Maintenance Technology. He is employed by a defense contractor as an Aircraft Flight Line Inspector, and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant began consuming alcohol at the age of twenty one in 1978. His history of excessive alcohol abuse continued off and on until at least 2006. During this thirty year period, the Applicant was charged, arrested and convicted for six alcohol related offenses that include, five DUI's and one Drunk in Public, among other related charges. Over the years, the Applicant has tried to abstain from the use of alcohol but has always relapsed. Applicant did not believe that he was an alcoholic or even that he had an alcohol problem until his most recent arrest in 2005. The following facts outline each arrest.

The Applicant was arrested on April 18, 1982, and charged with (1) Driving Under the Influence of Alcohol - Causing Death or Injury to Another, a felony, and (2) Driving Under the Influence of Alcohol with .10% or more. Applicant contends he and a friend had been consuming alcohol at the drag races. (Tr. p. 36). He states that he was not driving the vehicle, but was a passenger at the time. He "bit the bullet" for the driver because the driver did want to lose his security clearance and he was promised a job if he did. (Tr. p. 29). The driver hit a car and injured several people in it. Upon impact,

the ice chest in the back of his car came out and beer went all over the place. The Applicant pled nolo contendere to Count (1) and was ordered to pay fine/fee of approximately \$600.00, serve 100 hours of community service, make restitution of approximately \$8,537.48, complete the first offenders program, and his driver's license was restricted for 90 days. Count 2 was dismissed. Upon successful completion of three years of formal probation, the charge was reduced to a misdemeanor. (Government Exhibits 3 and 4).

Applicant second arrest occurred on July 3, 1986. He was charged with (1) Drunk in Public and (2) Possession of Marijuana. Applicant explained that he had tented his house for termites, and was sitting in his car at a park where he had consumed two beers. Four beers were still unopened on the seat. There were no keys in the ignition. A police officer came to the Applicant's car door. Applicant stated that at some point, the officer put a gun to his head. Applicant was searched for weapons and then placed in the police car. Marijuana was confiscated. Applicant later learned that an officer was killed at a gas station just up the street from where he was arrested and he was a possible suspect. The Applicant was found guilty of Count 1 and ordered to pay a fine of approximately \$340.00 and was placed on three years probation. (Government Exhibits 4 and 5).

Applicant's third arrest took place on October 26, 1989. He was charged with (1) Driving Under the Influence of Alcohol/Drug. Applicant had been drinking at a company party before he was arrested. He pled nolo contendere to Reckless Driving - Alcohol Related. He was found guilty and ordered to pay a fine of approximately \$364.00. (Government Exhibits 5 and 6).

Applicant was arrested a fourth time on September 19, 1994, and charged with (1) Driving Under the Influence of Alcohol/Drug. Again, the Applicant had consumed too much beer before driving his vehicle. He pled guilty and was placed on three years probation, fined \$1,114.00, his drivers license was restricted for 90 days and he was ordered to enroll and complete an alcohol program. (Government Exhibit 7).

The Applicant was ordered by the court to participate in an alcohol treatment program. He attended a program from July 1994 to at least November 1994. He completely abstained from the use of alcohol during this six month period. (Tr. p. 50). Applicant states that his priest believed that he should quit drinking. (Tr. p 52). Applicant stopped for a while and then returned to social drinking.

On July 6, 1996, Applicant was arrested a fifth time. He was arrested and charged with (1) Driving Under the Influence of Alcohol, and (2) Driving Under the Influence of Alcohol with .10% or more. He pled nolo contendere and was placed on three years probation, sentenced to serve fifteen days in jail and fined \$1,249.00, his driver's license was restricted for one year and he was ordered to complete an 18 month second offender alcohol program. (Applicant's Answer to SOR).

The Applicant attended a court ordered alcohol counseling program from February 12, 1997, to at least September 4, 1998. Following this treatment program he abstained from using alcohol almost nine years from 1996 to 2005.

Applicant's sixth and final arrest occurred on June 4, 2005. He was charged with (1) Driving Under the Influence of Alcohol/Drugs with Priors, (2) Driving Under the Influence of Alcohol with Blood Content .08% or Higher with Priors, and (3) Possession of Marijuana. Applicant believes that he was targeted and set up for this arrest. Applicant explained that his father had died and he was coming back from Las Vegas, when he was stopped for swerving and for an expired registration. Applicant has consumed part of a bottle of champagne as a toast to his father and poured the rest on his father's uniform. After the Applicant was arrested and taken to jail, he was asked to sign the report which he refused to do. Applicant states that the officer then put a taser to his testicles to force him to sign. The Applicant signed. Applicant indicates that he did not press charges against the police officer because he did not want retribution. (Tr. P. 56-58). He pled guilty to Count 2 and was sentenced to a conditional and revocable release for a period of three years, to serve 30 days in jail with credit for one day served, pay a fine/fee of approximately \$1,513.00, attend and complete a multiple offender alcohol program. His driver's license was restricted for 18 months and he was ordered to report to a rehabilitation center for weekender/work release program. Counts (1) and (3) were dismissed. (Government Exhibits 2 and 3).

The Applicant attended another court ordered alcohol counseling program from March 10, 2006, to October 8, 2007.

Applicant last consumed alcohol sometime in 2006. He no longer consumes it and does not miss it. (Tr. P. 65). He does not attend Alcoholics Anonymous nor is he involved in any alcohol treatment program. He lives with his girlfriend in a mountain cabin and has no friends. Most of them are dead from the war or law enforcement. (Tr. P. 71). His two dogs are his therapy. He now admits that by definition he is an alcohol.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about his ability to protect classified information.

The Applicant intentionally and deliberately provided false information to a law enforcement officer during his arrest of April 18, 1982, when he was charged with (1) Driving Under the Influence of Alcohol - Causing Death or Injury to Another, a felony, and (2) Driving Under the Influence of Alcohol with .10% or more. Applicant told the officer that he was the driver of the vehicle when he was the passenger in the car at the time of the incident. (Tr. pp. 39 - 40). The Applicant admitted that he lied to the officer as a favor to the driver of the vehicle since that person had promised the Applicant a job.

Policies

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline G (Alcohol Consumption)

21. *The Concern.* 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.

Conditions that could raise a security concern:

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;

22. (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.

Conditions that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Condition that could raise a security concern:

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

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in 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."

CONCLUSION

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore

appropriately concerned when available information indicates that an Applicant for clearance may be involved in alcohol abuse and dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in alcohol abuse (Guideline G) and dishonesty (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines G and E of the SOR.

Under Alcohol Abuse, Guideline G, disqualifying conditions 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"* and, 22(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"* apply. None of the mitigating conditions are applicable. Accordingly Guideline G is found against the Applicant.

The Applicant's history of alcohol abuse began over thirty years ago and has resulted in numerous incidents of intoxication, some of which he was arrested for, others he was not. His alcohol history involves six alcohol related arrests, including five arrests for DUI and one Drunk in Public. His last arrest occurred in 2005, just three years ago. Applicant contends that he has now permanently stopped drinking. He attended three separate court ordered treatment programs for his alcohol problem. Since then, however, he is not working a structured recovery program that includes Alcoholics Anonymous meetings or any other recognized alcohol rehabilitation program. He has moved into a remote location in the mountains where he has no friends for emotional support. Other than spending time with his dogs he does not have much else. He has tried to stop in the past and has not been successful. Presently, he has abstained from the use of alcohol for the past two years and is commended for doing so. However, given the extent of his alcohol abuse, more time is needed in rehabilitation to assure the government that he will not relapse once again. Hopefully, this time, the Applicant will be able to completely abstain from excessive alcohol abuse.

Although there is no formal diagnosis in the record of alcohol dependence, the Applicant's pattern of alcohol abuse is clearly indicative of a serious alcohol problem that he still has not gained a true understanding of. Based upon his long history of alcohol abuse and its related effects on the Applicant there is insufficient evidence in the record to show that he is sufficiently trustworthy for access to classified information at this time.

Under Personal Conduct, Guideline E, disqualifying *condition 16.(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative* applies. None of the mitigation conditions apply.

The Applicant intentionally and deliberately lied to the law enforcement officer during his arrest in April 1982, without giving it a second thought. This conduct was in violation of Title 18, United States Code, Section 1001, a felony.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of poor judgement, untrustworthiness, unreliability, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

Considering all of the evidence presented, it does not come close to mitigating the negative effects of his alcohol problem and the impact that it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, and 2 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

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|----------------|------------------------|
| Paragraph 1: | Against the Applicant. |
| Subpara. 1.a.: | Against the Applicant. |
| Subpara. 1.b.: | Against the Applicant. |
| Subpara. 1.c.: | Against the Applicant. |
| Subpara. 1.d.: | Against the Applicant. |
| Subpara. 1.e.: | Against the Applicant. |
| Subpara. 1.f.: | Against the Applicant. |
| Subpara. 1.g.: | Against the Applicant. |
| Subpara. 1.h.: | Against the Applicant. |
| Subpara. 1.i.: | Against the Applicant. |

Paragraph 2: Against the Applicant.
Subpara. 2.a.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey-Anderson
Administrative Judge