



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 08-04825  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Gregg Cervi, Esquire, Department Counsel  
For Applicant: *Pro Se*

July 22, 2009

**Decision**

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LYNCH, Noreen A., Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86), on February 21, 2008. On December 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E 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.

Applicant acknowledged receipt of the SOR on December 23, 2008 and answered it on the same day. He requested a hearing before an Administrative Judge. I received the case assignment on June 2, 2009. DOHA issued a notice of hearing on June 11, 2009, and I convened the hearing as scheduled on July 9, 2009. The government offered Exhibits (GE) 1 through 4, which were received into the record without objection. Applicant testified on his own behalf and presented Exhibits (AE) A

through G, which were received without objection. DOHA received the transcript (Tr.) of the hearing on July 16, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, dated December 23, 2009, Applicant admitted the factual allegations in ¶¶ 1.a and 1.b. He denied the allegation in ¶ 2.a of the SOR, with explanations.

Applicant is a 37-year-old employee of a defense contractor. He is married with two children. After high school in May 1990, he attended technical school (Tr. 17). He has worked in the telecommunications field for more than 14 years (AE) B. He has been employed with his current employer since October 2000.

On January 20, 2005, Applicant was arrested and charged with Driving While Intoxicated (DWI). He pled guilty on December 14, 2006 (almost one year later). He was fined approximately \$1,500 and he was placed on two years probation. The court also ordered 100 hours of community service. Applicant attended a party on the evening of the arrest. He drank alcohol but does not remember the quantity (Tr. 44).

On October 28, 2006, while his 2005 DWI trial was pending, Applicant was charged with DWI and Open Container of Alcohol (GE) 4. Applicant recalled in detail that on the evening of the arrest he was drinking at home. He heard via a police scanner that a car hit a horse on a ranch where he keeps his horse (Tr. 30). He drove to the ranch to check on his horse. He had an open container of beer in the car when the police stopped him. He admits that his judgment was poor and that he should have had someone drive him. He acknowledged that he “probably had too many beers” to drive (Tr. 31). He believes he may have had six or seven beers. This second case was dismissed when he pled guilty to the 2005 DWI.

Applicant attended “life skills classes” as required by the court. He also attended alcohol education classes after the second arrest for DWI. He did not receive any alcohol counseling. He successfully completed his probation on December 14, 2008 (AE) E. His Order of Dismissal, dated January 6, 2009, confirms that he paid all fines and costs.

Applicant completed a security clearance application in February 2008 (GE) 1. In response to Section 23. Your Police Record, concerning alcohol-related charges, he responded “yes” and listed a January DWI. He did not disclose the October 2006 charge for DWI. He testified at the hearing that this was his first security clearance application and he misunderstood the question. He completed his first security clearance application on line. He testified that this was an honest mistake. He explained that since he was only convicted of the first DWI (2005) and the second (2006) was dismissed at the court appearance, he did not feel this incident needed to be reported (GE) 2.

Applicant acknowledges his past mistakes. He realizes the impact that the two alcohol-related incidents had on his life. He admits to bad decisions. He believes he has changed after his second DWI and will make better decisions. When questioned by Department Counsel, Applicant acknowledged that when he completed his security clearance application, he thought that due to dismissal of the second DWI case, there was nothing to report. He realizes that he did not consider the question carefully. He now understands that “charged” and “convicted” are different terms (Tr. 22).

Applicant drinks in a more moderate manner since the 2006 incident. He estimates that he drinks to intoxication (six beers) once a month (Tr. 34). He may drink one or two beers a week. Applicant does not drink and drive (Tr. 48).

Applicant is a highly skilled field services technician. He is a knowledgeable, dependable and responsible team member. He completes complex tasks with little or no direction (AE) C. He is a family man who is involved with his wife and children. Applicant volunteers in many civic activities. He is organized, efficient and extremely competent (AE) D.

Applicant’s direct supervisor considers him a proven asset to the company. He is an integral part of the team. He is reliable, trustworthy and ethical. He works hard and displays great initiative and enthusiasm. He volunteers with emergency response teams in times of natural disasters (AE) A.

Applicant’s performance rating for mid-year 2008 earned him a bonus. He was rated outstanding or strong in all areas of his evaluation (AE) F. He completed his goals and received a bonus for his annual evaluation (AE) G.

### **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. 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 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. 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).

## **Analysis**

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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.

Applicant did not disclose his alcohol-related arrest in 2006 on his security clearance application. He answered “yes” to the question concerning his police record with alcohol but only listed the January 2005 DWI. He misunderstood the question and believed that since the second DWI was dismissed at the time of the first conviction, there was nothing to report. He was credible in his testimony that he had no intent to deceive the government. Thus, AG ¶¶16(a) and 16(b) do not apply.

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to 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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

Applicant has two alcohol-related driving incidents on his record. He was arrested in January 2005 for a DWI and while the case was pending, he was arrested for another DWI in October 2006. He acknowledges that he had been drinking too much to drive in October 2006. Applicant was convicted of the first DWI in December 2006. The second case was dismissed. Applicant received two years of probation beginning in late 2006. This is sufficient to raise security concerns under AG ¶¶ 31(a) and 31(c).

AG ¶ 32 provides conditions that could mitigate security concerns:

(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; and

(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.

Applicant has not had any alcohol-related incidents since 2006. He is sorry for the incidents and the effect on his family. He has a very good work record. His employer recommends him. He successfully completed his probation in late 2008.

Applicant has not provided sufficient mitigation under this guideline. The last alcohol-related incident occurred in October 2006 while Applicant's 2005 DWI was pending. He recently completed his probation in late 2008. There have not been any other instances but under the circumstances it is too soon for mitigation. He continues to consume alcohol to intoxication. Future alcohol-related offenses are likely to occur. His continued excessive alcohol consumption casts doubt on his reliability, trustworthiness and good judgment. Thus, AG ¶ 32(a) and (d) do not apply in this case.

### **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 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. Applicant is a married man with a good employment record. He completed his first security clearance application and did not disclose his 2006 DWI incident. He was credible in his explanation that he misunderstood and did not believe he needed to list the incident. He recorded his 2005 DWI on the application.

Applicant was stopped for DWI in October 2006 while his first DWI in 2005 was pending. He admits this DWI was a bad decision. He admits that he had been drinking too much and should not have driven in October 2006. He just recently completed his probation. The Court dismissal was adjudged January 6, 2009. He continues to drink to intoxication once a month. He has received alcohol awareness classes but has not received any alcohol counseling. I have doubts as to his judgment and reliability at this time.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all these

reasons, I conclude Applicant has not mitigated the security concerns arising from criminal conduct. He has mitigated the concern from personal conduct.

### **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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

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

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NOREEN A. LYNCH  
Administrative Judge