



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-05854
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel

For Applicant: *Pro se*

September 29, 2009

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on June 18, 2007 (Item 4). On March 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant detailing security concerns under Guidelines J, G and E. 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 April 7, 2009, and requested a decision without a hearing. Department Counsel submitted a File of Relevant Material (FORM) to the Applicant on May 7, 2009. The Applicant received the FORM on May 18, 2009, and was given 30 days to submit any additional information. He elected not to submit any additional information. The case was assigned to me on August 5, 2009.

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

The Applicant is 32 and married. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline J – Criminal Conduct)

Paragraph 2 (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 all the factual allegations in these paragraphs of the SOR, which concern his eight arrests or citations from 1996 until 2006 and, where alleged, related alcohol consumption. Those admissions are hereby deemed findings of fact.

1.a. and 2.a. The Applicant was charged with Illegal Possession of Alcohol in August 1996. He was underage (20) and was drinking with his friends. (Item 9 at 3.)

1.b. The Applicant's second arrest happened in August 1997. He was arrested for Possession of Marijuana and Use/Possession of Drug Paraphernalia. The Applicant denied that the drugs were his (Item 9 at 3), and the charges were eventually dismissed (Item 7 at 2).

1.c. and 2.b. The Applicant was arrested for Driving Under the Influence of Alcohol (DUI) in approximately 1998. According to the Applicant, this arrest occurred because he was "silly." He plead guilty and was sentenced to one year of probation, a fine and required to perform community service. (Item 5 at 4.)

1.d. The Applicant was charged with Public Intoxication in May 1999. The Applicant states, "I was riding with a friend home from a social gathering when [our] vehicle was stopped by the police. During the sobriety test that my friend was undergoing I exited the vehicle and was charged with public intoxication. It was early in the morning hours and the place was not very public." (Item 9 at 4.)

1.e. The Applicant was charged with Battery and Criminal Recklessness concerning an incident in March 2001. The Information shows that the Applicant struck the victim, lacerating his face. In addition, the Applicant also backed his vehicle in a reckless manner, nearly striking the victim. He plead guilty to Battery and was

sentenced to 180 days in jail, suspended, ordered to pay a fine, and placed on supervised probation. (Item 6 at 1-10.)¹

1.f. and 2.c. The Applicant was arrested a year later, March 2002, for Battery Resulting in Bodily Injury, Resisting/Interfering With Police Officer and Disorderly Conduct. He plead guilty to the Battery charge and was sentenced to 365 days in jail, suspended, ordered to pay a fine and placed on supervised probation.

The police report for this arrest shows that the Applicant was involved in a bar fight with another patron. An on-duty police officer attempted to stop the fight and was attacked by the Applicant, who punched the officer in the face, injuring him. The Applicant continued to behave in a violent and belligerent manner even after being subdued and handcuffed by the police. He was drinking at the time of this incident. (Item 6 at 11-21.)

1.g. The Applicant was next charged with a Probation Violation of his 2001 conviction and sentence (1.e.). This occurred three days after the arrest in 1.f. The record is unclear whether the Probation Violation was for that incident, but the Applicant admitted to the violation in open court. (Item 6 at 4, 10.)

1.h. and 2.d. The Applicant's last arrest occurred in July 2006. He was arrested for Alcohol Consumption in a Public Place. He paid a fine for this arrest. (Item 8.)

Concerning this arrest, the Applicant states that he was walking down the street without a shirt or shoes on and must have looked suspicious. This was after a fight with his mother in law. (Item 5 at 4.) The police report indicates that the Applicant was in a loud verbal dispute with another person, in the middle of the street, when the police arrived and he was arrested. (Item 8 at 1.)

Regarding his drinking, the Applicant has stated in 2007, that he continued to drink 6 to 12 beers during the day every other weekend. (Item 5 at 3.) There is no more recent information in the record. The Applicant does admit that he went to an alcohol abuse program in 2002. However, there is no further information about the program in the record.²

Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has made false statements to the Government during the

¹The record also shows that the Applicant was arrested for Battery with Bodily Injury in December 1999. According to the Applicant, he was involved in a bar fight. He paid restitution and the charges were dropped. (Item 9 at 4.) This incident is not alleged in the SOR.

²The record shows that the Applicant answered "No" to Section 25 in his Questionnaire (Item 4). This question asks, "In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?" This possible falsification is not alleged in the SOR.

clearance screening process. The Applicant denied the single allegation under this guideline.

3.a. The Applicant filled out an e-QIP on June 18, 2007 (Item 4). In that Questionnaire the Applicant was required to answer Section 23.d., which asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" He answered this question by setting forth his arrest for Possession of Marijuana in 1997, as well as his two arrests for Battery in 2001 and 2002. He did not admit his DUI arrest in 1997, his two arrests for Public Intoxication in 1999 and 2006, or his Probation Violation in 2001.

The Applicant denies falsifying this answer, stating in his Answer, "I misunderstood the need to list offenses longer than seven years in the past, but thought that illegal drug offenses were required." (Item 3 at 1.)

This argument is undercut, however, by an incident involving the Applicant in 2002. (Item 9 and Item 10.) He was employed by the Defense Department at that time and was dismissed from his job, in part, for falsifying Section 23.d. on an earlier Questionnaire. Regarding that failure he stated in 2002, "I had waited until the last minute to fill out the paperwork and was in a hurry. I did not read over the questions as carefully as I should have." (Item 9 at 5.) This is direct evidence that the Applicant knew, or should have known, that his alcohol related arrests were required to be listed.

In addition, as stated under footnote 2, above, there is at least one other possible falsification of an answer on his most recent Questionnaire. The Applicant has no credibility regarding this issue. I find that his falsification of Section 23.d. on his Questionnaire was deliberate.

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 considered as appropriate 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. 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

Paragraph 1 (Guideline J – Criminal Conduct)

Paragraph 2 (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 has been involved in eight criminal incidents between 1996 and 2006. Of those, five were alcohol related incidents. The Applicant continued to use alcohol up to 2007, after stating he had treatment in 2002. In addition, the Applicant was involved in three acts of battery, two of which were alleged in the SOR. One of the acts of battery, in 2002, involved the Applicant assaulting and injuring a police officer.

Under the Criminal Conduct guideline, the following Disqualifying Conditions are applicable. AG ¶ 31.(a) "a single serious crime or multiple lesser offenses." AG ¶ 31.(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

After considering the evidence in the record, I find that the arguably applicable Mitigating Conditions under Criminal Conduct do not apply to this case. AG ¶ 32.(a), states it may be mitigating where, "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 that it can be mitigating where, "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."

While it has been three years since his last arrest, the Applicant has a long record of excessive drinking with criminal consequences. In addition, several of his criminal incidents, under the influence of alcohol or not, involve violence. As further described below, the Applicant is not a trustworthy reporter of the facts concerning his life. Under the particular circumstances of this case, I cannot find that the Applicant has mitigated the security concerns of his criminal conduct.

Turning to Guideline G, there are two Disqualifying Conditions concerning Alcohol Consumption that apply 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." In addition, AG ¶ 22.(c) applies, "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."

After considering the evidence in the record, I find that the Mitigating Conditions under Alcohol Consumption do not apply to this case. 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." AG ¶ 23.(b) states that it can be mitigating where, "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)."

As stated above, even though the Applicant's last alcohol related arrest was three years ago, he continues to drink alcohol. There is no evidence to show that his excessive drinking has stopped. His conduct by definition does not show reliability, trustworthiness or good judgment.

The Applicant has not mitigated the security significance of his criminal conduct and, where alleged, related alcohol consumption. Paragraphs 1 and 2 of the SOR are found against the Applicant.

Paragraph 3 (Guideline E - Personal Conduct)

The Applicant admitted in his Questionnaire his drug-related arrests. He argues that his failure to list the alcohol offenses, even the most recent one, was an innocent oversight. This argument is overcome by the Applicant's prior falsification of a Government Questionnaire, and related falsifications on this one, concerning his alcohol history. It is obvious that the Applicant is not a trustworthy reporter of the facts concerning his own life.

Disqualifying Condition AG ¶ 16(a) applies to this case, concerning the "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." None of the Mitigating Conditions apply to this case. Paragraph 3 is found against the Applicant.

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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The Applicant has had five alcohol related arrests in 10 years. He has had a total of eight criminal incidents. The acts are frequent and recent. He continues to drink alcohol in a way that shows a pattern of alcohol dependence and/or alcohol abuse. In addition, he falsified a Government Questionnaire concerning his alcohol use and criminal history. In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his prior conduct. As set forth at length above, I find that there have not been permanent behavioral changes under AG ¶ 2(a)(6); and that the likelihood of continuation or recurrence is very high (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has not mitigated the security concerns arising from his criminal conduct, his alcohol-related incidents, and his personal conduct involving falsification of a Government Questionnaire.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 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:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Subparagraph 1.c:	Against the Applicant
Subparagraph 1.d:	Against the Applicant
Subparagraph 1.e:	Against the Applicant
Subparagraph 1.f:	Against the Applicant
Subparagraph 1.g:	Against the Applicant
Subparagraph 1.h:	Against the Applicant

Paragraph 2, Guideline G:	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant
Subparagraph 2.b:	Against the Applicant
Subparagraph 2.c:	Against the Applicant
Subparagraph 2.d:	Against the Applicant
Paragraph 3, Guideline E:	AGAINST THE APPLICANT
Subparagraph 3.a:	Against the 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.

WILFORD H. ROSS
Administrative Judge