



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
-----)	ISCR Case No. 08-06480
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

April 22, 2009

Decision

GALES, Robert Robinson, Chief Administrative Judge:

Applicant failed to mitigate the security concerns regarding criminal conduct and alcohol consumption. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On January 17, 2006, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application. On November 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). The SOR alleged security concerns under Guidelines J (Criminal Conduct) and G (Alcohol Consumption), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for

Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It should be noted that on December 29, 2005, the President promulgated revised *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*, and on August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing implementation of those revised Adjudicative Guidelines (hereinafter AG) for all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation), in which the SOR was issued on or after September 1, 2006. The AG are applicable to Applicant's case because his SOR was issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on December 5, 2008. In a sworn, written statement, dated December 19, 2008, Applicant responded to the SOR allegations and requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on February 5, 2009, and the case was assigned to me on February 6, 2009. A Notice of Hearing was issued on March 5, 2009, and I convened the hearing, as scheduled, on March 24, 2009.

During the hearing, five Government exhibits were admitted into evidence without objection. Applicant testified, but offered no exhibits. The transcript of the hearing (Tr.) was received on March 31, 2009.

Procedural Matters

At the conclusion of the Government's case, Department Counsel moved to amend the SOR ¶ 1.b. to conform to the evidence presented. There being no objection, the motion was granted.¹

Findings of Fact

In his Answer to the SOR, Applicant admitted three of the factual allegations in the SOR (¶¶ 1.a., 2.a., and 1.b.). He denied the one remaining allegation.

Applicant is a 21-year-old employee of a defense contractor, and he is seeking to retain the SECRET security clearance which was granted to him in about June or July 2006.² Applicant has never been married.³ He has been gainfully employed by the same defense contractor since January 2006, and currently serves as a building support specialist.⁴ His employment history since 2003 includes various periods of

¹ Tr. at 16-18.

² *Id.* at 22.

³ Government Exhibit 1 (e-QIP, dated January 17, 2006), at 16.

⁴ Tr. at 21.

unemployment (October 2003-August 2004, August 2004-July 2005, and December 2005-January 2006).⁵

Criminal Conduct & Alcohol Consumption

Applicant is an alcohol abuser. He was a frequent consumer of alcohol from the time he was about 15 or 16, while in high school.⁶ He initially drank beer and/or hard liquor with older friends, once or twice a month, generally at their homes or at his home.⁷ On the occasions when he drank at the home of friends, he would remain there overnight.⁸ Once or twice a year, his parents would catch him drinking and they would ground him.⁹ Over time, Applicant's alcohol consumption increased in both frequency and quantity. Frequency-wise, it increased to three times per month.¹⁰ Quantity-wise, it increased from four or five beers (enough to get him drunk),¹¹ to five to seven beers.¹² In May 2005, Applicant graduated from high school, and his drinking habits remained unchanged.¹³

Applicant's consumption of alcohol resulted in at least one incident involving law enforcement authorities. In November 2007, when he was 20 years old, after having Thanksgiving dinner with his parents, Applicant drove to a friend's house for an evening of drinking with four or five other underage drinkers.¹⁴ Over the next four hours, he estimated he consumed either approximately 80 ounces of beer¹⁵ or two to three pints of beer.¹⁶ At some point, Applicant decided to return home. While he remembers being slightly impaired,¹⁷ he did not feel he was intoxicated.¹⁸ While driving home, his

⁵ Government Exhibit 1, *supra* note 3, at 12-15.

⁶ Tr. at 22-23.

⁷ *Id.* at 23-24.

⁸ *Id.*

⁹ *Id.* at 26.

¹⁰ *Id.*

¹¹ *Id.* at 23.

¹² *Id.* at 26.

¹³ *Id.* at 27-28.

¹⁴ *Id.* at 31-32.

¹⁵ *Id.* at 33. During the hearing Applicant estimated his consumption was two 40-ounce bottles of beer. That is the equivalent of about five pints or two and one-half quarts.

¹⁶ Government Exhibit 2 (Interrogatories and answers to interrogatories, dated August 8, 2008), at 3. In March 2008, Applicant's estimation was two or three pints of beer. That is the equivalent of between 32 and 48 ounces, or between one quart and one and one-half quarts.

¹⁷ Tr. at 34.

attention was temporarily diverted to change a song on his iPod¹⁹ when he crashed into the rear of a parked vehicle, causing damage to both vehicles and injuries to himself.²⁰ Instead of stopping at the accident scene and calling the police, Applicant drove off.²¹ At approximately 4 a.m., the police eventually located him in a parking lot some distance from the scene.²² He had the “strong smell of alcohol” with “red, watery eyes.”²³

Applicant was charged with (1) leaving the scene of an accident with death or personal injury, (2) driving under the influence of liquor, drugs, or vapors (slightest degree), and (3) liquor violation (underage consumption).²⁴ He was transported to the hospital for treatment for his injuries and administered a blood alcohol examination which revealed a blood alcohol concentration (BAC) level of 0.215.²⁵ In January 2008, he appeared in court. Count 1 was dismissed by the prosecutor, count 3 was dismissed by the court, and Applicant was, upon his plea, convicted of count 2.²⁶ He was sentenced to one day in jail, fined \$1,800, his license was suspended, and he was ordered to attend traffic school, participate in counseling, and required to have a breathalyzer ignition system installed.²⁷ That system remained in place until April 2009.²⁸

There was one earlier purported alcohol-related incident which occurred in June 2007. Applicant and some friends were driving around when they decided to go out into a field and sit around drinking beer by a bonfire. Applicant decided against having any alcohol.²⁹ A complaint was filed by someone and the police arrived and administered a breathalyzer test to everyone. All the tests come up with zeros.³⁰ Nevertheless, he was charged with a liquor violation (underage consumption).³¹ The charge was dismissed upon the prosecutor’s motion.³²

¹⁸ *Id.* at 31, 33-34.

¹⁹ *Id.* at 31-32.

²⁰ Government Exhibit 3 (Police Report, dated November 24, 2007), at 4-5.

²¹ Tr. at 32.

²² Government Exhibit 3, *supra* note 20, at 4.

²³ *Id.*

²⁴ *Id.* at 1; Government Exhibit 5 (Public Access to Court Information, dated June 25, 2008), at 1.

²⁵ *Id.* Government Exhibit 3, at 9.

²⁶ Government Exhibit 5, *supra* note 24, at 1.

²⁷ Tr. at 40-43.

²⁸ *Id.* at 42.

²⁹ *Id.* at 47-48.

³⁰ *Id.* at 48.

³¹ Government Exhibit 4 (Public Access to Court Information, dated June 25, 2008).

In March 2008, while undergoing an interview conducted by the Office of Personnel Management in connection with his security clearance application, Applicant claimed that his consumption of alcohol ceased with his arrest in November 2007, and he stated he had no intention to drink alcohol again at least until he turns 21 years old.³³ He added that he never plans to drive after consuming alcohol.³⁴ His stated plans have had a short shelf-life. On at least four occasions, after consuming alcohol,³⁵ Applicant attempted to start his car, but was prevented from doing so by the breathalyzer ignition system installed in his vehicle. In June 2008, after four or five hours of sleep after drinking the night before, he was probably legally intoxicated, but was not paying attention to how he felt because he was “just trying to get to work.”³⁶ He went to work 20 minutes later.³⁷ He estimates he was slightly impaired, but not intoxicated,³⁸ in July 2008, October 2008, and November 2008.³⁹

Applicant continues to consume beer, but no hard liquor.⁴⁰ His most recent consumption of alcohol occurred two weeks prior to his hearing when he had one 16-ounce beer.⁴¹ Despite the occasions of his alcohol impairment and intoxication, Applicant continues to believe he can handle alcohol,⁴² a belief he held in November 2007 and June 2008.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”⁴³ As Commander in Chief, the President has the authority to control access to information bearing on national

³² *Id.*

³³ Government Exhibit 2, *supra* note 16, at 3-4.

³⁴ *Id.*

³⁵ Tr. at 53.

³⁶ *Id.* at 47, 50-51, 53.

³⁷ *Id.* at 57-58.

³⁸ In other words, he would have registered a BAC of between 0.04 and 0.08. Applicant did not believe he was impaired and did not feel he was impaired.

³⁹ Tr. at 46-47, 51-52.

⁴⁰ *Id.* at 54.

⁴¹ *Id.* at 55.

⁴² *Id.*

⁴³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."⁴⁴

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."⁴⁵ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.⁴⁶

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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

⁴⁴ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

⁴⁵ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁴⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”⁴⁷

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁴⁸ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline J, Criminal Conduct

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 guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), “a single serious crime or multiple lesser offenses” is potentially disqualifying. Similarly, under AG ¶ 31(c), an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” may raise security concerns. Applicant’s history of criminal conduct, involving at least one arrest and conviction, numerous violations of underage drinking law, and a June 2007 complaint, later dismissed, is documented in his police and court records, his answers to interrogatories, and the evidence, including his testimony, presented during the hearing. The Government has established AG ¶¶ 31(a) and 31(c).

The guidelines also include examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated 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, when there is “evidence that the person did not commit the offense,” AG ¶ 32(c) may apply. Similarly, AG ¶ 32(d) may apply when “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.”

⁴⁷ *Egan*, 484 U.S. at 531

⁴⁸ See Exec. Or. 10865 § 7.

AG ¶¶ 32(a) and 32(d) do not apply because Applicant's largely unalleged (in the SOR) criminal conduct commenced when he was about 15 or 16 years old and continued until he could legally drink alcohol in October 2008, and his most recent SOR-alleged criminal conduct occurred in November 2007, a little over one and a quarter years ago. Furthermore, there is no evidence of successful rehabilitation despite there being no further SOR-alleged criminal conduct. Had it not been for the breathalyzer ignition system installed in his vehicle, Applicant might have experienced another alcohol-related incident in June 2008. While a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future.

AG ¶ 32(c) applies to his alleged offense in June 2007. While Applicant may have been charged with a liquor violation for underage drinking, his explanation and the subsequent prosecution-driven dismissal support my conclusion that there is insufficient evidence to indicate Applicant committed any offense. This particular criminal offense, without more, is unsubstantiated.

Guideline G, Alcohol Consumption

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 guideline notes several conditions that could raise security concerns. Under 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" is potentially disqualifying. Similarly, under AG ¶ 22(b), "alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," may raise security concerns. In addition, "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, may apply under AG ¶ 22(c). AG ¶ 22(a) is established by Applicant's DUI conviction; AG ¶ 22(b), by his June 2008 attempt to rush to work while intoxicated, and actually going to work 20 minutes later; and AG ¶ 22(c), because he habitually consumes alcohol to the point of impaired judgment.

The guideline also includes examples of conditions that could potentially mitigate security concerns arising from alcohol consumption under AG ¶¶ 23(a)-(d). But in this instance, none of the mitigating conditions apply. Furthermore, after careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude

Applicant's continued alcohol consumption to the point of impairment or intoxication after his DUI conviction indicates he is unwilling or unable to curtail his alcohol consumption. As such, his conduct demonstrates a lack of judgment and/or a failure to control impulses which is inconsistent with the holder of a security clearance.

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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines J and G in my analysis below.

While in high school, Applicant associated with the wrong crowd and developed bad habits. In part, due to peer pressure, he illegally consumed alcohol, sometimes to excess. That alcohol abuse eventually resulted in an arrest and conviction for DUI. His sentence included one day in jail, a fine of \$1,800, his license was suspended, and he was ordered to attend traffic school, participate in counseling, and required to have a breathalyzer ignition system installed in his vehicle, a system that remained in place until April 2009. That system has admittedly saved him from further, more recent, negative alcohol-related incidents.

Despite his March 2008, claim that his consumption of alcohol ceased with his arrest in November 2007, and his stated intentions not to drink alcohol again at least until he turns 21 years old, and that he never plans to drive after consuming alcohol, he has continued to consume alcohol and then attempt to drive his vehicle on at least four occasions. Using the analogy from the Appeal Board in financial cases, Applicant has not established a "meaningful track record" of alcohol abstinence or more responsible alcohol consumption. To the contrary, his continued alcohol consumption and attempts at driving while impaired by alcohol, establish irresponsibility, immaturity, a cavalier attitude towards the law, and absence of rehabilitation, and vitiate any other mitigation such as the otherwise rehabilitative efforts of completing his counseling and serving his sentence. (See AG ¶¶ 2(a)1, 2(a)(2), 2(a)(3), 2(a)4, 2(a)(5), 2(a)(6), 2(a)(7), and 2(a)(9).)

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the criminal conduct and alcohol consumption security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against 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.

ROBERT ROBINSON GALES
Chief Administrative Judge