



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



In the matter of:)
)
-----) ISCR Case No. 08-09400
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

March 31, 2010

Decision

HOWE, Philip S., Administrative Judge:

On May 2, 2008, Applicant submitted his electronic version of the Security Clearance Application (SF 86) (e-QIP). On September 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G (Alcohol Consumption) and E (Personal Conduct). 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 answered the SOR in writing on October 16, 2009. Applicant requested his case be decided on the written record in lieu of a hearing.

On December 7, 2009, Department Counsel submitted the Department’s written case. A complete copy of the file of relevant material (FORM) was provided to the

Applicant on February 1, 2010. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on February 1, 2010. Applicant filed a Response to the FORM within the 30 day time allowed that would have expired on March 3, 2010, by submitting a Response dated February 1, 2010. The Department Counsel had no objection to the Response. I received the case assignment on February 17, 2010. Based upon a review of the complete case file, pleadings, and exhibits, eligibility for access to classified information is denied

Findings of Fact

Applicant admitted all the alcohol and falsification allegations in the SOR. Those admissions are incorporated into these findings of fact. (Item 4)

Applicant is 30 years old, married and has two children, born in 2004 and 2008. He works for a defense contractor. He served in the U.S. Army from July 1997 to June 2004. He was administratively discharged in June 2004 with a General Discharge under Honorable Conditions, pursuant to Army regulation, for a pattern of misconduct. This action resulted from his non-judicial punishments under Article 15 of the Uniform Code of Military Justice (UCMJ) in November 2002 and September 2003 for failure to go to his place of duty in violation of Article 86 of the UCMJ. He also received an Article 15 in January 2004, for failure to go to his place of duty at the appointed times and dereliction of duty in violation of Article 92, UCMJ. Applicant did not disclose these Article 15 actions in his e-QIP in his response to Question 23 (e) ("In the last 7 years, have you been subject of court-martial or other disciplinary proceedings under ht e Uniform Code of Military Justice? [include non-judicial, Captain's mast, etc.]). Applicant answered the question "no." (Items 5 and 6)

Applicant was arrested on May 17, 1998, on charged with driving under the influence of alcohol, improper use of disabled parking privileges, and illegal consumption of ethyl alcohol by an underage person. Applicant committed these offenses when he was 19 years old and serving in the U.S. Army. Applicant pled guilty to the lesser charge of driving while ability impaired. The other charges were dismissed. Applicant received a 12-month deferred sentence, ordered to pay \$200 in fines and court costs, ordered to perform 24 hours of community service, and had his driving privileges for six months. Applicant did not list this arrest on his e-QIP in answer to Question 23 (d) ("Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"), responding to this question with a negative reply. Applicant also failed to disclose in his response to the March 2009 DOHA Interrogatories this arrest in response to Question 5¹ ("Have you ever been arrested, charged or held by any law enforcement authorities for any reason."). Applicant

¹ The SOR alleges this question is "25," but there are only six questions in the interrogatory marked as Item 7. The text cited in the SOR is Question 5 in the interrogatory. This error is a typing error and not a substantial error.

answered the question with an affirmative reply and disclosed his 2007 arrest, but not this 1998 arrest. (Items 5, 6, 7, 10, and 12)

Applicant was arrested on December 8, 2007, on charges of driving while intoxicated (first offense) (DWI) and failure to maintain a traffic lane. He pled guilty to driving while intoxicated. In February 2008 Applicant was placed on one year of supervised probation, ordered to pay fines of \$85, to attend and complete 24 hours of community service, to attend DWI school, and to attend a victim impact panel. Applicant did not list this arrest on his e-QIP in answer to Question 23 (d) ("Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"), responding to this question with a negative reply. Applicant did not complete the community service ordered, nor pay the fines ordered, nor attend the DWI school and the victim impact panel. The court issued bench warrants on January 14, 2008, January 24, 2008, February 18, 2008, and again on March 24, 2008, to enforce these requirements. Applicant pled guilty to the offenses of failure to attend the DWI school and the victim impact panel and ordered to forfeit his bond on each offense. Applicant explained these failures to attend the required classes as caused by his busy travel schedule which allowed him to be home only one weekend a month. The classes only met during the week when he was not in his home area. (Items 5, 6, 7, 8, 10, and 12)

In May 2006 Applicant was terminated by his former defense contractor employer for being late for work. Applicant was late for work 11 times between January 6, 2006 and April 27, 2006. He was counseled verbally and in writing six times between September 19, 2005 and December 21, 2005. Applicant did not disclose this termination in response to Question 22 on his e-QIP ("Has any of the following happened to you in the last 7 years? 1. Fired from a job; 2. Quit a job after being told you'd be fired; 3. Left a job by mutual agreement following allegations of misconduct; 4. Left a job by mutual agreement following allegations of unsatisfactory performance; 5. Left a job for other reasons under unfavorable circumstances."). He answered the question with a "no." Applicant was interviewed by a government investigator on July 11, 2008. During that interview he stated he voluntarily resigned from his prior employment with the first defense contractor, denied any written warnings were given, denied being terminated, and stated he was eligible for rehiring. His Answer to the SOR admits he was terminated because of tardiness resulting from his 64 mile drive one-way daily from his home to his place of employment. (Items 4, 5, 6, and 13)

Applicant's Answer to the SOR denies any falsification of any of his information on the e-QIP or as given to the government investigator in July 2008. He explained he answered the e-QIP "in a quick manner and forgot to include the information." He also stated he knew his background information would be found during the investigation. Applicant denied that his past actions reflect on his current trustworthiness and says he is a productive employee for his company. (Item 4)

Applicant did not list his first-born child in his response to Sections 14/15 of the e-QIP. That child was born in 2004. He also failed to list a former home address in his e-

QIP. Applicant admitted these failures to the government investigator in July 2008. (Items 4 and 6)

Applicant told the government investigator his current alcohol consumption in July 2008 was “one to three beers with dinner per month.” He told the investigator that his last intoxication, which he did not feel as such, was his December 2007 DWI arrest and his blood alcohol content (BAC) was 0.12%. Applicant also told the investigator he has never received any alcohol counseling nor been referred for treatment. His answers to the March 2009, DOHA Interrogatory state he drank a beer with dinner at home one month prior to completing the interrogatory, and he drinks one to two beers monthly. He also stated he does not drink to intoxication and only at home when he is not going to drive. Drinking has not hampered his work performance, according to Applicant. (Items 6 and 7)

Applicant has had a security clearance since 1997 when he was in the Army. His security access was suspended after his 1998 DWI arrest. It was granted in 1999 after that incident was concluded. (FORM Response; Item 11)

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, the administrative judge applies the guidelines 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.

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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain,

extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and 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 G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

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.

AG ¶ 22 describes seven conditions that could raise a security concern and may be disqualifying. Of these seven conditions, two conditions are applicable:

(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

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant has two DWI arrests with resulting court sentences to his guilty pleas. The two offenses occurred in 1998 and 2007. The second offense is recent and occurred away from work. He was ordered to attend certain classes and a victim impact panel, along with paying fines and performing community service. He did not complete those requirements. Bench warrants were issued by the state court for Applicant to compel compliance. Applicant did not submit any documentary proof he ever complied

with those requirements. Therefore, these two disqualifying conditions apply to Applicant.

AG ¶ 23 provides four conditions that could mitigate security concerns. None of them apply based on the evidence Applicant presented:

(a) 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;

(b) 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);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant does not admit to any alcohol problem. He did not attend any alcohol counseling and has not been referred for any alcohol rehabilitation program. His latest DWI arrest was in 2007, which was recent. It is of concern because of this arrest was his second such arrest in nine years, and his BAC was 0.12%, more than the standard minimum amount for intoxication under state laws. Therefore, none of the mitigating conditions apply to Applicant.

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered:

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another

country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group

Applicant intentionally, deliberately, and repeatedly falsified information about his two DWI arrests and convictions, his prior employment and termination by his former employer, and his Army Article 15 actions and subsequent administrative discharge for a pattern of misconduct under Army regulations on his May 2, 2008 e-QIP. He also gave false and misleading information to the government investigator in July 2008 about his job termination. While the SOR did not allege Applicant's failure to list his child and a prior home address on the e-QIP, they do strengthen the showing that there is a pattern of falsification and failures to disclose perpetrated by Applicant on official government security forms. AG ¶ 16 (a) and (b) apply.

The reasons for Applicant's Article 15, administrative discharge, and workplace termination by his prior employer were credible adverse information showing a pattern of inappropriate workplace behavior and rule violations. Applicant was habitually late for work both as an Army service member and a civilian employee. This conduct creates vulnerability to exploitation, manipulation, or duress because it affects Applicant's ability to retain and obtain other employment in the future. I find AG ¶ 16 (d) and (e) apply.

The guideline also includes seven examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17. None of them apply:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not correct his deliberate falsifications concerning his alcohol-related driving offenses, his failure to complete the sentencing requirements ordered by the state court judge for those offenses, nor his non-judicial punishments under the UCMJ, and the termination by his former employer, until confronted by the government investigator in the July 2008 interview. The omitted information casts doubt on Applicant's reliability, trustworthiness, or good judgment because it is material and substantive in security clearance process. Applicant has not acknowledged any wrongdoing nor obtained any counseling or rehabilitation for his past alcohol use. The information about his termination is substantiated. I find none of the above mitigating conditions apply.

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 relevant 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 facts and circumstances surrounding this case. Applicant was over 18 years old when

he committed the driving offenses, when he received the non-judicial punishment while in the U.S. Army for tardiness, and when he failed to answer the e-QIP questions truthfully.

His historical pattern of misconduct shows he was late for military formations and was derelict in his duty which resulted in his administrative discharge from the Army with a General Discharge under Honorable Conditions, then late for work as a civilian which resulted in his termination, committed two DWI offenses, and lastly failed to disclose all these incidents on his e-QIP when the government asked him to make a full disclosure of his past activities. His alcohol incidents show a pattern of disrespect for the law and a gross lack of judgment. He did not submit any information concerning alcohol rehabilitation. Instead, he minimized his alcohol use and involvement. This inaction leaves him vulnerable to pressure, coercion, exploitation, or duress based on the repeated and serious nature of these offenses and his deliberate failure to disclose them.

His pattern of falsification and deprecation of his past activities continues to this day and is obviously voluntary. His FORM Response attempts to persuade the government to grant a security clearance based on his current work performance and ignoring his pattern of falsifications and workplace tardiness. His actions of this type will continue based on his past performance. Applicant displayed a lack of good judgment in the Army and as a civilian employee of a defense contractor. The Army suspended his security access after his 1998 DWI arrest. In 2007 he committed another serious DWI offense (BAC of 0.12%) and then failed to complete the sentencing requirements. Next, he exhibited a continued lack of appropriate judgment by failing to make proper and complete disclosures on his e-QIP. Applicant displays a pattern of inattentiveness, self-centeredness, and lack of responsibility for his obligations.

Overall, the record evidence leaves me with questions or substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the guideline for Alcohol Consumption. He did not mitigate the security concerns under the guideline for Personal Conduct. I conclude the "whole person" concept against Applicant.

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 G:	AGAINST APPLICANT
Subparagraph 1.a to 1.b:	Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraphs 2.a to 2.o: Against 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.

PHILIP S. HOWE
Administrative Judge