



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



In the matter of:)
)
) ISCR Case No. 09-03658
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: Stephanie N. Mendez, Esq.

September 15, 2010

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has mitigated the Criminal Conduct, Alcohol Consumption, and Personal Conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct; Guideline G, Alcohol Consumption; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective for cases after September 1, 2006.

Applicant answered the SOR on September 21, 2009, and requested a hearing before an administrative judge. The case was assigned to another judge and then

reassigned to me on July 28, 2010. At the Applicant's request, DOHA issued a notice of hearing on July 28, 2010, and the hearing was convened as scheduled on July 30, 2010. Applicant, through his attorney, waived the 15-day-notice requirement. The Government offered Exhibits (GEs) 1 through 6, which were admitted without objection. It also presented GE 7 for administrative notice, without objection. The Applicant offered Exhibits (AEs) A through S without objection, called one witness, and testified on his own behalf. The record was left open for the receipt of additional documents. Applicant presented AEs T through W on August 12, 2010, without objection. AE T through W were admitted into the record. DOHA received the transcript of the hearing (Tr.) on August 5, 2010.

Findings of Fact

Applicant is 34-years old and has been an employee of a defense contractor since January 2009. He works with explosive ordnances and is an expert in his field. In his civilian capacity, he has deployed to war zones three times: June 2004 to October 2005; February 2007 to September 2007; and November 2009 to May 2010. He received several certificates of appreciation for his service during his deployments. He first was granted a security clearance in February of 1999, when he enlisted in the Air Force. He served from 1999 through 2004. (AE N; AE O; AE P; AE S; GE 1; GE 2; GE 4; Tr.42-44, 82.)

Applicant married in June 2009. His wife's parents are both ministers and have had a profound impact on Applicant's life since their marriage. Applicant is now involved in a church and its functions. Through example, his wife and in-laws have taught him how to exercise patience. For Applicant, his marriage was a "life changing event" which has taught him how to avoid the situations he has found himself in the past. Those situations involve Criminal Conduct, Alcohol Consumption, and Personal Conduct, addressed below. (AE S; Tr. 59, 79, 87.)

Criminal Conduct

The Government alleged that from 1999 through 2005, Applicant was arrested five times. The incidents are as follows:

In April 1999, Applicant was arrested for DUI and Assault with a Deadly Weapon. On this occasion, Applicant was with relatives at a bar. His relatives became involved in an altercation with the bar tender. Applicant grabbed his uncle, who was involved in the altercation and was on parole at the time, out of the bar and left. He had been drinking alcohol at the time of this incident. The police soon stopped his vehicle, as it met the description of the vehicle leaving the bar. Applicant was given a sobriety test, arrested, and held overnight. He was not aware that he had been charged criminally in this incident. However, he received a letter of reprimand from the Air Force for this offense. (GE 3; Tr. 43-45, 59.)

In May of 1999, Applicant was arrested and charged with Battery. This incident occurred when Applicant was at a family reunion with his cousins. Members of a gang

were harassing Applicant and his cousins due to their race, outside of a store. The store clerk interceded and assumed that Applicant's family members were the aggressors. Applicant became frustrated and pushed the clerk. Applicant had been drinking alcohol prior to the incident. Applicant recalls going to court for this incident, but could not recall his sentence. Government records reflect he was convicted of Resisting Public Officer and was sentenced to 20 days in jail and three years probation. He also received a letter of reprimand from the Air Force. (GE 3; GE 4; GE 5; Tr. 45-47, 59.)

In September 2002, Applicant was involved in another altercation which led to charges of violating UCMJ Article 128, Assault. Applicant had been at a bar with a friend. His friend became involved in a physical altercation. Applicant jumped in to assist his friend. He had been consuming alcohol on this occasion. As a result of this incident, Applicant received non-judicial punishment. He was required to forfeit \$150 in pay, and had 15 days base restriction with extra duty. Applicant was also reduced in rank. Applicant's current team lead, who was serving in the Air Force with Applicant at the time of this incident, noted that "through his diligence and constant attention to detail and things like that, and his work ethic, he was able to get his stripe back and continue on in his career" after this incident. Further his Senior Master Sergeant, who was involved in his disciplinary action for this incident, indicated that the disciplinary action was suspended due to his reliability and integrity. (GE 4; GE 5; Tr. 31-32, 47-49, 59.)

In May of 2004, Applicant was arrested for Driving Under the Influence (DUI) of Alcohol, No Proof of Insurance and Obstructing/Resisting Arrest. He had been at a party and was consuming alcohol. He became involved in a verbal argument and decided to leave the party. Shortly after his departure, he discovered he had a flat tire and pulled over. The police that had been called to the party, due to the noise level, stopped him. Applicant resisted arrest. He was convicted of DUI and Obstruction of Public Officer. As a result, he was fined \$1,550, sentenced to ten days in jail with credit for two days served, had his driver's license suspended for six months, and required to complete alcohol education classes. In 2006, he completed three months of an alcohol awareness first offender program, as part of his sentence. (GE 3; GE 4; GE 5; AE L; AE M; Tr. 49-51, 59.)

Applicant's most recent arrest occurred in September 2005. He was charged initially with Battery. Applicant had just returned from deployment in a war zone. He was in-processing back into the country and was staying at a hotel. In the hotel bar, he overheard a conversation in which someone stated "if you go over there, and you die, you deserve it." Having recently lost several friends, Applicant was incensed by the statement and became involved in a verbal altercation with the person who said it. Applicant had been drinking alcohol on this occasion. The bar tender called the police. Applicant was arrested and charged with drunk and disorderly, and disturbing the peace. He was then released. Applicant left the next day, as he was on route to his grandmother's funeral. He never went to court for this incident. When he realized he had ignored this incident, he hired a lawyer to represent him in this incident. He verified the charge was Resisting Arrest. As a result of this charge, he paid \$1,535 in fines and costs. The charge was dismissed in December 2009. Applicant was 29 year-old at the time of this incident. (GE 3; GE 4; GE 5; AE T; AE U; AE V; Tr. 51-54, 59, 68.)

Alcohol Consumption

Applicant's problems with alcohol are not limited to his criminal incidents. In 2002, he was evaluated by the Air Force at the Life Skills Support Center and was diagnosed with "Alcohol Disorder." According to the Diagnostics and Statistics Manual of Mental Disorders (DSM), this category is for "disorders associated with the use of alcohol that are not classifiable as Alcohol Dependence, Alcohol Abuse, Alcohol Intoxication, Alcohol Withdrawal . . ." Applicant participated in a substance abuse awareness seminar, which focused on the Air Force policy towards substance abuse and had a section on anger management. Applicant successfully completed the seminar; however, he continued to consume alcohol. (GE 4; GE 5; GE 6; GE 7; AE Q.)

In addition to Applicant's alcohol related arrests in SOR allegations 1.a., 1.b., 1.d., and 1.e., discussed above, Applicant also was fired from his employment with a government contractor in September 2007 as a result of violating a "no alcohol" policy. Applicant was deployed in Afghanistan as a civilian contractor from February 2007 to September 2007, and was subject to a ban on alcohol use during this time. He violated that policy in September 2007, when after returning safely back to base after a particularly dangerous and unnerving operation, he was enticed to partake in drinking alcohol that one of his men had in his possession. He consumed approximately six shots of alcohol. After drinking the alcohol, Applicant became involved in a verbal altercation with an individual that he felt had placed his team in greater risk than they should have been during the mission. The other employee left the room through a glass door and locked it. Applicant tried to follow him but could not, as the door was locked. Applicant punched the glass door, causing it to crack. The following day Applicant's supervisor approached him about the incident. Applicant claims that he assumed he was going to be fired, so he voluntarily returned home to the U.S. He was never formally fired. (GE 4; GE 5; Tr. 54, 88.)

From November 2009 to May 2010, Applicant was deployed in Iraq. During his deployment, he was also subject to a "no alcohol" policy. He did not violate that policy during this deployment. (Tr. 58, 75.)

As of July 2009, Applicant was consuming alcohol approximately once every three weeks to once a month. Applicant now limits his alcohol use to drinks with his wife. He has not driven after consuming alcohol since his 2004 arrest. He either takes a taxi or does not leave home. Further, while he has stayed in contact with his family members who were present during the majority of his alcohol related criminal incidents; he no longer sees them in person. (Tr. 88-90.)

Personal Conduct

Applicant's judgment as addressed in subparagraphs 1.a through 1.e, 2.a. and 2.c. of the SOR, detailed above, were also alleged under Personal Conduct concerns. In addition, his answers on his Questionnaire for National Security Positions (Questionnaire) were raised under Personal Conduct in the SOR.

Applicant executed his Questionnaire on October 3, 2008. Section 23 of the Questionnaire asked:

Section 23. Your Police Record For this item, report information regardless of whether the record in your case has been “sealed” or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the Court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. a. Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice); b. Have you ever been charged with or convicted of a firearms or explosives offense?; c. Are there currently any charges pending against you for any criminal offense?; d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?; e. In the last seven years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain’s Mast, etc.); f. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, e, or f above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)

Applicant answered section 23.d. “yes” and disclosed his 2004 DUI, addressed above. However, he answered the rest of this question “no.” In answering “no,” he failed to disclose his 2005 arrest for Battery, his 2002 non-judicial punishment for Assault, and his 1999 DUI charge. (GE 1.)

Applicant attributes his omissions on his Questionnaire to unintentional oversight. With respect to the 2005 arrest for Battery, he claims he honestly forgot about the event. He had just returned for a war zone and he was on his way to his grandmother’s funeral. Once he was reminded of the arrest during his personal subject interview, he hired an attorney and paid his fine. His omissions of his 2002 non-judicial punishment and his 1999 DUI charge were unintentional as well. He did not have his records at the time he completed the Questionnaire and he did not specifically recall these events. Further, in his personal subject interview, he reasoned he had disclosed these events on past Questionnaires and that the security clearance update only covered the past seven years since his last investigation. (GE 4; Tr. 62, 74.)

Applicant expressed remorse for his past criminal incidents and alcohol use. He is well regarded by his co-workers and both his past and present supervisors. His current team lead and supervisor testified that the Applicant is “honest to a fault” and is a “consummate professional on duty and off.” In addition, Applicant presented eleven letters of recommendation from supervisors and colleagues who have observed his worth ethic and personal conduct. Each attested that Applicant is trustworthy and shows integrity. A Senior Master Sergeant (retired) who Applicant served under stated “I spent 22 years in the Air Force and [Applicant] was the most reliable person I have ever worked with.” His performance Appraisal reflects that he is “outstanding” in every area.

(AE A; AE B; AE C; AE D; AE E; AE F; AE G; AE H; AE I; AE J; AE K; AE R; AE S; AE W; Tr. 27-40.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 EO 10865 provides that adverse 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 J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following are potentially applicable:

- (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 a history of criminal arrests from 1999 through 2005. Over this six-year time span, he had 5 arrests, which led to two letters of reprimand; non-judicial punishment; a conviction for DUI and Obstruction; and fines incurred for his Resisting Arrest charge. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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's last criminal arrest occurred in 2005. He has not been arrested or charged with any criminal offenses in the past five years. Since his last arrest, he has matured. He is now married and active within his church. Many of his criminal incidents occurred when he was with specific family members and was consuming alcohol. He no longer sees those family members in person, and he now limits his alcohol consumption to drinking with his wife. He does not drive after consuming alcohol. He expressed remorse for his actions in the past and is credible in his testimony regarding the changes in his life since he married his wife in 2009. His credibility is supported by the testimony and letters from those who know him personally and professionally. His

current employment record demonstrated that he is an outstanding employee and trusted by his peers and supervisors. AG ¶¶ 32(a) and 32(d) are mitigating.

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. The following are potentially applicable in this case:

- (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;
- (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; and
- (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.

Since 1999, he has been arrested five times. Of those five arrests, he has been charged with DUI twice, and he admits that alcohol played a role in each of his other arrests. These arrests constitute alcohol-related incidents away from work. Applicant's most recent alcohol related incident occurred in 2007, when he was terminated by his employer for violating the "no alcohol" policy while deployed, and constitutes an alcohol-related incident at work. In 2002, he was diagnosed with "Alcohol Disorder" under the DSM. His consumption of alcohol from 1999 through 2007, demonstrated impaired judgment and led to numerous altercations. AG ¶¶ 22(a), 22(b), and 22(c) are disqualifying.

One Alcohol Consumption Mitigating Conditions under AG ¶ 23 is potentially applicable:

- (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.

Applicant's last alcohol related incident occurred in 2007. It has been three years since he had any alcohol-related problems. During the past three years, he successfully completed another deployment to a "no alcohol" zone, without incident. In addition, he has changed his drinking pattern. He limits himself to consuming alcohol with his wife and no longer drives after consuming alcohol. His marriage in 2009 had a profound effect on his life. He matured and now avoids troublesome situations. He has changed his associations. Applicant's past problems with alcohol are unlikely to recur given the new, positive influences and changes in his life. AG ¶ 23(a) is mitigating.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. The following disqualifying conditions are potentially applicable:

(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; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

Applicant did not deliberately omit or conceal relevant facts from his Questionnaire. He indicated in his testimony that he has a bad memory when it comes to his criminal arrests and honestly forgot about the incidents when he was asked to complete his Questionnaire. His credibility is attested to by eleven different individuals who testified or wrote letters of support. AG ¶ 16(a) is not disqualifying.

The SOR also alleges that Applicant's Personal Conduct is questionable due to his criminal involvement and problems with alcohol. His conduct from 1999 through 2007 is sufficient to raise concern under AG ¶ 16(c).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

(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;

(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.

As noted in the discussions under Guidelines J and G, Applicant has matured. With the help of his wife, her parents, and his faith, he avoids situations that could cause him trouble. He has learned how to practice patience, a trait he did not demonstrate in the past. He monitors his alcohol consumption and avoids in-person interactions with the family members that were involved in several of his criminal arrests. Five years have passed since his last criminal arrest and three years have passed since he had any problems with alcohol. He was successfully able to abstain from alcohol use over his last six-month deployment. AG ¶ 17(d), 17(e), and 17(f) 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, G, and E in my whole-person analysis. Independent of my analysis under Guidelines J, G, and E, I find that Applicant has mitigated the security concerns under the whole-person concept.

After considering all of the nine adjudicative factors listed in AG ¶ 2(a), I find that six are clearly mitigating. Applicant's Criminal Conduct was neither frequent nor recent. He did have five alcohol related criminal incidents from 1999 to 2002, followed by an alcohol related incident at work in 2007, however, three years have passed without incident. At the time of his criminal and alcohol-related conduct he was young and immature. He is now older and has married. He has demonstrated rehabilitation and other permanent behavioral changes such as choosing to avoid troublesome situations and through the reduction of his alcohol consumption. He was motivated to make changes in his life by the influence of his wife, her parents, and through his religion. There is little potential for pressure, coercion, exploitation, or duress. Further, there is little the likelihood of continuation or recurrence.

Applicant has dedicated his life to serving our nation and protecting our armed forces. He has put his life on the line several times for the U.S. during his deployments. He received stellar letters of recommendation from supervisors and colleagues who have interacted with Applicant on a daily basis, covering different time frames. He is an outstanding employee, according to his performance appraisals. There is no question that this Applicant, despite his past record, will act only in the best interest of the United States in the future.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Criminal Conduct, Alcohol Consumption, and Personal Conduct security concerns.

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:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	For Applicant
Subparagraph 1.e.:	For Applicant

Paragraph 2, Guideline G: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 3, Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Jennifer I. Goldstein
Administrative Judge