



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



In the matter of:)
)
) ISCR Case No. 08-09997
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

July 31, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s available information is not sufficient to mitigate the security concerns arising from his drug involvement and alcohol consumption. Eligibility for access to classified information is denied.

Statement of the Case

On January 7, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).¹ On February 3, 2009, 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*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

¹ FORM Item 3.

dated January 2, 1992, as amended, modified and revised.² The SOR alleges security concerns under Guideline H (Drug Involvement) and Guideline G (Alcohol Consumption). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be denied or revoked.

On February 10, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 2). A complete copy of the file of relevant material (FORM), dated March 25, 2009, was provided to him by letter dated March 26, 2009. Applicant received the FORM on March 31, 2009. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He failed to submit any materials, comments, or objections in response to the FORM. The case was assigned to me on June 12, 2009.

Findings of Fact

Applicant admitted all the SOR factual allegations with explanations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 26-year-old hydraulics engineer working for a defense contractor.³ He graduated from high school and attended college from August 2001 to May 2005. He received a Bachelor of Science degree in mechanical engineering. As of the submission of his e-QIP (January 2008), Applicant was pursuing a Master of Science degree in mechanical engineering on a part-time basis.

Applicant has never been married and has no children. His security clearance application shows he was employed as a "security assistant" from January 2004 to May 2004. From September 2004 to May 2007 he worked as a research and teaching assistant. He has worked for his current employer, a defense contractor, from June 2007, to the present. There is no evidence that he has ever been fired from a job or that he had to leave a job under unfavorable circumstances.

In his 2008 security clearance application, Applicant disclosed that he had been involved in three alcohol-related incidents. In April 2007, he was convicted of public drunkenness. He was attending a fraternity house party and consumed an unrecalled amount of alcohol. He set off some fireworks and the police were called. He ran away from the police officers and was arrested, charged with, and convicted of public drunkenness. In September 2005, he was convicted of public disturbance. He invited

² On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

³ Item 3 (2008 e-QIP) is the source for the facts in this decision, unless stated otherwise.

members of his Frisbee team to a party in his apartment. The neighbors called the police because of the noise level. Applicant had consumed three to four shots of hard liquor. He claimed he was not intoxicated and that alcohol was not a factor in this incident.

In April 2004, Applicant was admitted overnight into a hospital because of his over-consumption of alcohol. Applicant was at a fraternity party and consumed approximately 25 shots of hard liquor. He passed out in a bathroom and his friends could not wake him up. Emergency medical personnel and police officers were called to assist. Applicant was hospitalized overnight. He was charged with and convicted of underage alcohol consumption. As a result of this incident, he was evaluated by a college advisor and placed on probation. He has not participated in any alcohol-related counseling or treatment.

Applicant's first use of alcohol was at age 17. He characterized his alcohol consumption during college as significant, and described himself as a heavy drinker. He typically drank alcohol twice a week until his senior year in college. Around September 2004, he drank alcohol three times a week. He knew that his excessive use of alcohol was not good for him, and he admitted the possibility that he had an alcohol problem during that period. Applicant drove his car while under the influence of alcohol two or three times.

In his February 2008 statement to a government investigator, Applicant stated that, at the time he was consuming two to three mixed drinks per weekend. Once a month he would drink to the point of intoxication, consuming 10 to 15 shots of hard liquor in a period of three to four hours. Since May 2007, Applicant has been drinking alcohol only when going out to dinner or sometimes at home while watching TV. He does not believe he has an alcohol problem or alcohol dependency.

In his November 18, 2008, response to DOHA interrogatories, Applicant stated that he was currently drinking alcohol weekly, anywhere from 2 to 15 ounces, depending on the occasion. He drank wine on a monthly basis, about one to three glasses per occasion. He typically would drink to intoxication about every other weekend. The last time he was intoxicated was three days before answering the interrogatories, while attending a friend's wedding. He intends to continue consuming alcoholic beverages. He has not received any alcohol counseling.

Applicant also stated that his change of lifestyle - from a student to having a full-time job and moving to another city - has significantly reduced his alcohol consumption. He stated his "alcohol consumption has been reduced from becoming intoxicated two to three nights a week, to three to five nights a month" (Item 5).

In his 2008 security clearance application, Applicant also disclosed that he used marijuana illegally from August 2001 to April 2007. He illegally used marijuana approximately 10 to 12 times during this period. In his statement to a government

investigator (Item 4) and in his answer to the SOR, Applicant clarified that his use of marijuana started in the spring of 2003. His last use of marijuana was in February 2008.

The first time Applicant used marijuana was out of curiosity. All of the other times he used marijuana, he was under the influence of alcohol. While in college, he used marijuana with his fraternity and Frisbee team friends. He still associates with some of the same college friends with whom he used marijuana. Since April 2007, Applicant has used marijuana once. In February 2008, he was visiting friends still at college and illegally used marijuana at a party. He claimed this was a unique incident, and before he became aware that having a security clearance prohibits the use of illegal substances. He used marijuana after he submitted his security clearance application.

Applicant claimed he never purchased marijuana and never possessed any drug related paraphernalia. Applicant stopped using marijuana because he never had a drive to use it. He does not intend to use illegal drugs again in the future. He offered to sign a statement of intent to never use illegal drugs again if that would improve his eligibility to receive a security clearance. He did not submit the statement of intent.

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 required to be considered 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 controlling 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.

In the decision-making process, the government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”⁴ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁵

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

⁴ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the 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).

⁵ “The administrative judge considers the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a): “any drug abuse;”⁶ and AG ¶ 25(c): “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Appellant admitted he illegally used and possessed marijuana with varying frequency between 2003 and February 2008. His behavior triggers the applicability of AG ¶¶ 25(a) and 25(c).⁷ The other disqualifying conditions listed in AG ¶ 25 are not applicable.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements,

⁶ AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

⁷ AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Having considered all the mitigating conditions I find that none is fully raised by the record evidence. Applicant's illegal use of drugs is recent. His last possession and use of illegal drugs was in February 2008, after he submitted his security clearance application. Applicant knew, or should have known, that the use of marijuana is illegal. He was confronted with his past use of marijuana when he completed his e-QIP. Notwithstanding, he chose to continue his use of marijuana when he visited his college friends in February 2008. Applicant's actions do not demonstrate a clear intent to refrain from any involvement with illegal drugs, a disassociation from drug-using friends, or an appropriate period of abstinence. I find the drug involvement concerns are not mitigated.

Alcohol Consumption

Under Guideline G the government's concern is that 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 ¶ 21.

The government established its case under Guideline G by showing that from 2000 until at least November 2008, Applicant established a history of excessive consumption of alcohol, at times to the point of intoxication. He was involved in three alcohol-related incidents in 2004, 2005, and 2007. Additionally, he drove while under the influence of alcohol in at least three occasions. Applicant's excessive alcohol consumption resulted in his exercising questionable judgment. Guideline G disqualifying conditions AG ¶ 22(a): "alcohol-related incidents away from work, such as driving while under the influence," and AG ¶ 22(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," apply.

There is no evidence that Applicant has been involved in any alcohol-related misconduct since April 2007. However, available evidence shows Applicant has continued consuming alcohol and he intends to do so in the future. There is no evidence Applicant has received any alcohol counseling or treatment or that he has made any lifestyle changes to avoid future alcohol-related problems.

There are four Alcohol Consumption Mitigating Conditions under AG ¶ 23 potentially applicable to these disqualifying conditions:

- (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.

Considering the totality of the circumstances in this case, I find none of the Guideline G mitigating conditions apply. Applicant's sparse favorable evidence is not sufficient to fully raise the applicability of any of the mitigating conditions, or to show it is unlikely his questionable behavior will recur. I specifically considered that Applicant's last alcohol-related misconduct was in 2007. Notwithstanding, because of his current pattern of alcohol consumption and his continued association with his illegal drug and alcohol using friends, I cannot find that his behavior was infrequent or that it happened under such unusual circumstances that it is unlikely to recur. Applicant continues to exercise questionable judgment. His behavior raise questions about his reliability and trustworthiness.

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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is 26 years old. Apparently, he did well while in college and is pursuing an advanced degree. Some of his questionable behavior occurred while he was attending college. He receives credit for his two years working for a government contractor. He also receives favorable credit for disclosing his questionable behavior in his security clearance application. These factors show some responsibility and mitigation.

Notwithstanding, security concerns remain about Applicant's current responsibility, reliability, and judgment. The sparse record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his alcohol consumption and drug involvement 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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a - 2.d:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge