



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



In the matter of:)
)
) ISCR Case No. 08-09986
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: *Pro Se*

December 31, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government's security concerns under Guidelines G, Alcohol Consumption, J, Criminal Conduct, and E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G, J, and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by 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 August 25, 2009, and requested a hearing before an administrative judge. The case was assigned to me on October 22, 2009. DOHA issued a Notice of Hearing on the same day, and I convened the hearing as scheduled on November 10, 2009. The government offered Government Exhibits

(GE) 1 through 6. Applicant did not object and they were admitted. Applicant testified and offered Applicant Exhibits (AE) A and B and they were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 18, 2009.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 29 years old and has been employed with a federal contractor since October 2008. He has previous employment with a different federal contractor. He is not married and has no children. He earned bachelors and associates degrees. His present job is as an information systems specialist.¹

In February 2004, Applicant was arrested for driving while intoxicated (DUI). He was with high school friends and all of them consumed alcohol. He was drinking Southern Comfort. He dropped his friends off at their homes and proceeded to go to his home when he was stopped by police. He stated he had consumed about three to four alcoholic drinks over a three-hour period. A breathalyzer was administered and Applicant's results were .12%. Applicant admitted that he knew he was driving under the influence of alcohol and should not be driving, but did not believe he was drunk. He was convicted of DUI and sentenced to 30 days in jail, which was suspended. In addition, his driver's license was restricted for one year and he was ordered to attend the state's alcohol and safety awareness program (ASAP). He completed the program and stated he learned about the effects of alcohol on the body.²

Applicant stated that he considers himself a social drinker. He believed he could handle driving after he had been drinking and did not believe he was over the legal limit when he drove. He admitted he felt the effects of the alcohol he had consumed, but felt he had control over his motor functions. Once he was stopped by police, he knew he was over the limit.³

In July 2007, Applicant was visiting friends in another city. He consumed one drink at the hotel. He and his friends then went to a lounge and he consumed "a couple of drinks." His friend felt light-headed so he took her back to the hotel in a horse drawn carriage. When they arrived, he realized he left his automatic teller bank card (ATM) at the lounge and did not have money to pay the carriage driver. He did not think the driver would take him back to the lounge without first receiving payment, so he drove his friend's car back to the lounge. He was stopped by the police because he was driving on a street that was designated for a monorail. He received five tickets. Applicant stated he did not feel drunk and he did not notice the effects of alcohol. He stated he panicked

¹ Tr. 80-82.

² Tr. 22-28.

³ *Id.*

when he realized he did not have his ATM card. He disputes that a roadside sobriety test was administered. He was taken to the police station where he was given a breathalyzer. It was determined he was over the legal limit, but he does not know what the reading was. He was arrested and charged with DUI. He remained in the city for five days to resolve the charges. He pled guilty and his license was suspended for one year in the state and he received a fine. He stated he contacted his manager at work and told him he needed to take time off from work. He told him about his arrest. He stated his manager told him to keep it quiet and not report it to the company.⁴

A couple of days before his birthday in December 2007, Applicant went to a bar by himself. He consumed two to three drinks and then the bartender made him a special drink for his birthday. He stated he felt he had his alcohol consumption under control. He left the bar to get something to eat and fell asleep while driving and hit a parked car. His airbag deployed. He stated he was going the speed limit. He did not have his cell phone with him, so he moved his car out of the street and walked home. Shortly thereafter, the police arrived at his house and asked him about the accident. He admitted he hit the car. He was taken to the police station and given a breathalyzer which recorded .16%. Applicant did not consider himself drunk when he left the bar. Applicant was found guilty of DUI, second offense and hit-and-run not reported. He was sentenced to one year in jail and nine months were suspended. He served 60 days and the remaining 30 days was suspended for good conduct. He took leave without pay during his sentence. Applicant's license was suspended for three years. The suspension expires in April 2011. He was ordered to attend ASAP. He stated he learned a great deal from ASAP. He learned the scientific information about how alcohol affects the body. He was ordered to attend Alcoholics Anonymous (AA) for 20 sessions. He stated he admitted at the meetings he was an alcoholic, but does not believe he is one. He never engaged in a 12-step program. He stated he does not believe he is alcohol-dependent. He believes he can control his alcohol consumption. He completed two ASAP courses, one for ten weeks and one for six weeks. Applicant believes he is on unsupervised probation until 2011. Applicant has only attended court-mandated counseling. When Applicant returned to work, his employer could not permit him to work in the same position and could not find a position for him within the company due to the adverse conduct, so Applicant resigned. He was unemployed for a period of about four months before he found another job.⁵

Applicant stated he has "cut back significantly"⁶ on his drinking and he believes he can control his alcohol consumption. He stated that everything bad that has happened to him involved alcohol consumption. He stated his last drinks were at a wedding in August 2009, where he consumed three drinks of whiskey at an open bar.

⁴ Tr. 29-38, 54.

⁵ Tr. 19, 38-48, 55-60, 70-72.

⁶ Tr. 20.

He stated he rarely goes to bars, but will have a drink at a restaurant. He may drink three times a month and have about one to three drinks, if it is a special occasion.⁷

Applicant completed a security clearance application (SCA) on March 30, 2008. In response to question 23d, which asked if he had committed any alcohol-related offenses, Applicant responded "Yes," and divulged the 2004 offense and the July 2007 offense. He did not divulge the pending charges for the December 2007 DUI and hit-and-run offenses. He answered "No" to question 23c which asked if he had any charges currently pending. Applicant was aware at the time he had an upcoming court date on April 30, 2008, to resolve his December 2007 charges. He stated he did not know why he did not divulge his most recent offenses that were pending. He stated he did divulge it to the investigator when he spoke to him on April 28, 2008, days before he was to appear in court. I find Applicant intentionally and deliberately withheld requested information from his SCA that he was required to divulge.⁸

Applicant stated that his parents were concerned about his alcohol consumption and wished he would not drink. They do not approve of his consumption because of the problems it has caused him.⁹

Applicant is very involved with his church and is a mentor to young adults. He has used his experiences to help his siblings not make the same mistakes he has made.¹⁰

Applicant provided certificates of completion for educational programs he completed. He also provided two character letters. One letter from his pastor, who believes Applicant is an intelligent, capable, dedicated, and trustworthy young man who has learned from his mistakes. A second letter is from a friend who describes him as a hard worker and amazing human being whose opinion is valued.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.

⁷ Tr. 48-52.

⁸ Tr. 63-69, 84-86.

⁹ Tr. 69-71.

¹⁰ Tr. 20-21.

¹¹ Tr. 20-21; AE A and B.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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.

Directive ¶ E3.1.14 requires the government to 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 applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable clearance 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.

I have considered all of the disqualifying conditions under AG ¶ 22 including:

(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.

Applicant has three alcohol-related arrests and convictions. One occurred in 2004 and two occurred in 2007. The above disqualifying condition applies.

I have also considered all of the mitigating conditions under AG ¶ 23 and especially considered the following:

(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); 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 has three DUI convictions. His last alcohol-related arrest involved a single vehicle hit-and-run accident. Each time he drove his vehicle after consuming alcohol, he believed he was not intoxicated. His breathalyzer readings were considerably higher than the legal limit, especially his most recent DUI reading. He attended ASAP after his first arrest, but apparently it had little impact on his decision-making process, and he did not heed its warnings. Applicant completed the required court-mandated alcohol safety programs and attended AA as ordered. Although he acknowledges that everything bad that has happened in his life has involved alcohol, he continues to believe that he can be a responsible drinker. That may be the case, but his track record reflects the opposite. Applicant makes poor decisions when he consumes alcohol, and he continues to consume alcohol. No evidence was presented to confirm any treatment program, voluntary attendance at Alcoholics Anonymous, or a similar organization, or any prognosis from a medical professional. Although it has been approximately two years since Applicant's last alcohol-related arrest, I am not convinced

that he grasps the true impact alcohol has on his life. He appears to believe that he was merely unlucky and can control his behavior. There is no evidence that Applicant is alcohol-dependent; however, there is overwhelming evidence that Applicant's judgment is impaired when consuming alcohol. After his first alcohol-related incident, he was on notice that he could not gauge his level of intoxication. He did not learn and proceeded to have two more incidents. Applicant is an educated man who is making bad choices. Based on his past, I am not convinced at this juncture, that Applicant has fully embraced the corrective measures necessary to avoid future alcohol-related problems, and that future problems are unlikely to recur. I find none of the above mitigating conditions apply.

Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

From 2004 to 2007, Applicant had three DUI convictions and a conviction for a single vehicle hit-and-run. He has completed his jail sentences and his driver's license remains suspended. Applicant is on probation until 2011. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and especially considered the following:

- (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 has three DUI convictions for incidents that occurred in 2004 and 2007. His latest incident involved a single vehicle accident when he fell asleep at the wheel while driving home from a bar. He remains on probation until 2011. I find (a) does not apply because Applicant is still on probation and no evidence was offered to show his conduct is unlikely to recur. His repeated criminal conduct casts doubt on his reliability, trustworthiness and good judgment.

Applicant failed to provide sufficient substantive evidence that he has changed his alcohol consumption and is successfully rehabilitated. He continues to consume alcohol and believes he can be responsible. Applicant is remorseful for his actions because of the negative impact it has had on his life. He testified that he has modified his consumption of alcohol. Based on the character letters and certificates of completion he provided, it appears he has constructive community involvement. However, due to Applicant's repeated conduct, not enough time has passed to convince me that he is rehabilitated and there is insufficient evidence to conclude such. I find AG ¶ 23(a) and 23(d) do not apply.

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.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 16 and especially considered the following:

- (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
- (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.

When completing his SCA Applicant failed to divulge he had pending DUI and hit-and-run charges. He was arrested in December 2007 and his court date was April 30, 2008. He knew when he completed his SCA on March 31, 2008, that he had pending charges. He did not provide any credible explanation for why he failed to divulge this information. I find that the both of the above disqualifying conditions apply.

The guideline notes several conditions that could mitigate security concerns. I have considered all of them under AG ¶ 17 and especially considered the following:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

There is no evidence Applicant made a prompt, good-faith effort to correct the omission. He did not divulge the pertinent information until he was interviewed by an investigator, two days before his court date. I find mitigating condition (a) does not apply. Applicant had two prior DUIs and failed to disclose his third DUI and hit-and-run charges that were pending. His concealment of this information is not considered minor and it casts doubts on his judgment, reliability, and trustworthiness. I do not find there were any unique circumstances. I find mitigating condition (c) does not apply. There is no evidence to support the application of mitigating condition (d) in connection with his false answers on his SCA. Applicant did not provide a credible explanation for his concealment of important information he failed to provide on his SCA. Applicant's family, friends and employer are aware of his criminal and alcohol history, which reduces his vulnerability to exploitation, manipulation, or duress. However, there is no evidence that they are aware of his falsification on his SCA, so mitigating condition (e) only partially applies.

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 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. Applicant is an educated man. He provided evidence that he is involved in his community. He has three DUI convictions and a hit-and-run conviction, the last incident occurring in December 2007. Each time Applicant drove his car after drinking alcohol, he did not believe he was intoxicated. His breathalyzer results showed he was well over the legal limit. He continues to consume alcohol and believes he can do so responsibly. Applicant intentionally and deliberately failed to divulge his most recent DUI and hit-and-run charge that was pending at the time he completed his SCA. He remains on probation until 2011. Based on his repeated conduct, I am not convinced that he has made permanent behavioral changes and it is too early to conclude otherwise. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the Guidelines for Alcohol Consumption, Criminal Conduct, and Personal Conduct.

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 |
| Subparagraphs 1.a-1.c: | Against Applicant |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Paragraph 3, Guideline E: | AGAINST APPLICANT |
| Subparagraph 3.a: | 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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge