



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



In the matter of:)	
)	
)	ISCR Case No. 08-10037
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Denny Holloway, Esquire

June 3, 2009

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on April 10, 2008. On February 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct, for Applicant. 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.

On February 25, 2009, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 11, 2009. The case was assigned to me on March 20, 2009. On March 31, 2009, a Notice of Hearing was issued scheduling the hearing for April 22, 2009. The hearing was held, as scheduled. The Government offered three exhibits which were admitted as Government Exhibits (Gov) 1 - 3 without objection. The Applicant testified, and offered three exhibits which were admitted as Applicant Exhibits (AE) A – C without objection.

The transcript was received on May 7, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, Applicant admits all of the SOR allegations.

Applicant is a 68-year-old employee with a Department of Defense contractor seeking to maintain his security clearance. He is a program manager and has been employed with his company for over 20 years. Prior to his employment with the company, Applicant served 30 years on active duty with the United States Army. He retired as a Command Sergeant Major. He has held a security clearance for over 50 years. He is divorced and has two adult daughters. (Tr at 12-13, 20, 29, 49; Gov 1)

Applicant started drinking alcohol when he was 20 years-old. He drank beer and had an occasional cocktail. His alcohol use never made him late for work. He has never suffered from blackouts or hallucinations because of his alcohol use. He has never suffered from alcohol withdrawal symptoms. (Tr at 20-21)

In 2006, Applicant was divorced from his second wife. He describes the following two years as a low point in his life. He started drinking more alcohol than he should. He would drink approximately eight beers at his heaviest level of drinking. (Tr at 13, 25-26)

On November 7, 2006, Applicant was drinking at a bar with some friends/co-workers. They were celebrating because they had been awarded a contract. He admits that he had too much alcohol to drink. The bar where he was drinking was approximately two to three miles from his home. He lives in a rural area. He was stopped at a traffic stop. The police officer noticed that he smelled like alcohol. He was given and failed a field sobriety test and was subsequently arrested for Driving Under the Influence of Alcohol. A blood alcohol content (B.A.C.) test taken at the police station indicated a 0.18 alcohol level in Applicant's system. (Tr at 18) On April 11, 2007, he pled not guilty to the offense but was found guilty and sentenced to a \$1,000 fine, \$142.50 in court costs, 365 days jail (suspended) and two years probation. He appealed the conviction. The appeal is still pending. (Tr at 38; Gov 2; Gov 3)

On February 9, 2008, Applicant was drinking in a local bar with friends between 2 pm and 7 pm. He drank approximately 8-9 beers during that time period. He was driving home when he was pulled over by a state police officer for speeding. The police officer noticed the smell of alcohol on Applicant's breath. He was arrested and charged with Driving Under the Influence of Alcohol, Reckless Driving, and Speeding. A B.A.C. taken at the station registered at 0.21. On April 29, 2008, Applicant pled not guilty to Driving Under the Influence and Reckless Driving. He pled guilty to Speeding. He was found guilty of Driving Under the Influence of Alcohol and Reckless Driving. His sentence consisted of fines, court costs, 365 days in jail (suspended) and he was ordered to attend an alcohol awareness program. His license was suspended. He appealed his

convictions for Driving Under the Influence of Alcohol and Reckless Driving. His appeal was denied in early April 2009. (Tr at 19, 34-38; Gov 3)

On May 10, 2008, Applicant was cited for Driving While his License was Suspended. On that day, Applicant drove to a convenience store located down the road from his house. The state trooper who arrested him for DUI pulled into the parking lot and recognized him and cited him for Driving While his License was Suspended. (Tr at 41-42)

After both of his arrests, Applicant occasionally drank alcohol. He does not believe that he has a drinking problem. His normal drinking patterns was four to six beers on Fridays or Saturdays. He describes an alcoholic as someone who physically depends on alcohol. He does not need alcohol. On the advice of his attorney, he enrolled in a court referral program and attends Alcoholics Anonymous meetings. He stopped drinking alcohol in early March 2009 because it was a condition of the program. He enrolled in the court referral program on his own because he knew he would eventually have to attend the program. The program began about six weeks ago. He began to attend AA meetings three weeks prior to the hearing. He has attended two meetings. (Tr at 21-27)

A defendant progress report from the Court Referral Officer Program indicates that Applicant is in compliance with the recommendations of the program. He has completed three of nine monitoring sessions. (AE A) He has not received a diagnosis of alcohol abuse or alcohol dependence from a duly qualified medical professional (e.g. physician, clinical psychologist, or psychiatrist) or from a licensed clinical social worker.

The Senior Vice President of Applicant's company wrote a letter on Applicant's behalf. He has known Applicant for over 20 years. He states during those 20 years Applicant has accepted increasing roles of management responsibility and authority. He has always excelled. He can attest to Applicant's great integrity, credibility, and trustworthy values. He notes Applicant is a true leader in the company. (AE C)

The Vice President of Applicant's division and his direct supervisor for the past four years states that Applicant accomplishes his duties in an outstanding manner. His abilities and management skills are truly exemplary and set the example for the sixty employees he supervises on a daily basis. He states Applicant is a very talented, hard working individual. His character and credibility are beyond reproach. He indicates Applicant works in a job where security is of paramount importance. He ensures that all employees are aware of the security aspects of their positions. Applicant's supervisor has complete confidence in Applicant's judgment and character. He has been in the business for over thirty years and Applicant is a truly exceptional individual and employee. (AE B)

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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. 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 applicant or proven by Department Counsel. . . ." The Applicant 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

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 disqualifying conditions that could raise security concerns. The following disqualifying conditions are relevant to Applicant's case:

Alcohol Consumption Disqualifying Condition (AC DC) ¶ 22(a) (alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent) applies. Applicant was arrested and charged with Driving Under the Influence on two occasions. The first arrest occurred on November 7, 2006. The second arrest occurred on February 9, 2008.

AC DC ¶22(c) (habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the person is diagnosed as an alcohol abuser or alcohol dependent) applies. Applicant admits that he was drinking heavier than usual between 2006 to 2008. He usually drank on the weekends. He drank up to eight beers in one sitting at his heaviest level of consumption. Drinking this amount of alcohol in one sitting can impair a person's judgment.

The guideline also includes examples of conditions that could mitigate security concerns arising from alcohol consumption.

Alcohol Consumption Mitigating Condition (AC MC) ¶ 23(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 and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) applies. While serious concerns are raised pertaining to Applicant's two arrests for Driving Under the Influence in November 2006 and February 2008, he has not had any alcohol-related issues in over 14 months. He never had any alcohol-related issues during his 30 years of active duty in the United States Army. These two arrests were the only alcohol-related issues that occurred during his twenty years of employment with a defense contractor. There is no record evidence that indicates he is alcohol dependent. His alcohol use has not affected his employment performance. These alcohol arrests are the product of Applicant's difficulty adapting after his 2006 divorce as opposed to a chronic alcohol problem.

AC MC ¶ 23(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) applies. Applicant admits that he consumed a heavy amount of alcohol in the recent past. However, he decreased his alcohol consumption and completely stopped drinking when he enrolled in the Court Referral Officer Program because it was a requirement of the program. He does not need to consume alcohol. He has attended two AA meetings but only in anticipation of future court requirements. After his divorce, he underwent a period where his alcohol use was a concern. Applicant's issues with alcohol have stabilized.

AC MC ¶ 23 (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) applies. Applicant is making satisfactory progress in the Court Referral Officer Program. He has no previous history of alcohol treatment or relapse. His 30-year track record of military service and lengthy favorable employment history indicate the issues related to alcohol consumption were a departure from his usual standard of conduct.

Applicant mitigated the security concerns raised under alcohol consumption. Guideline G is found for Applicant.

Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant's case, CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). Applicant was arrested and convicted for Driving Under the Influence on two occasions. Driving Under the Influence is a serious criminal offense. Although the appeal of his November 2006 is pending, Applicant admitted that his B.A.C. was over the legal limit on the night of his arrest. He was also cited in May 2008 for Driving on a Suspended License.

The Government produced substantial evidence by way of exhibits and testimony to raise CC DC ¶¶ 31(a) and 31(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns (Directive ¶E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005).)

The following Criminal Conduct Mitigating Conditions (CC MC) are relevant to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) applies. More than 14 months have passed since Applicant's second DUI offense. He has no alcohol-related incidents since that time. While he showed poor judgment when he decided to drive while his license was suspended in May 2008, the incident occurred over a year ago and did not involve alcohol. He has had no subsequent arrests. Applicant went through a rough period after his divorce and has learned a difficult lesson as a result of his past drinking and driving. It is unlikely that he will repeat similar behavior again. His past conduct, while serious, no longer casts doubt on Applicant's reliability, trustworthiness or good judgment.

CC MC ¶ 33(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) applies. More than one year has passed since Applicant's last offense. He is making satisfactory progress in the Court Referral Officer Program which he enrolled in before the court ordered him to do so. His job performance has not suffered as a result of his arrests. While Applicant is still on probation, it is likely he will successfully complete the terms of his probation. Applicant appeared to be honest and straight-forward during the hearing. He made no excuse for his past actions. He has an excellent employment record. Applicant has mitigated the criminal conduct concern.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's thirty years of active duty service in the United States Army and his twenty years of employment with a Department of Defense contractor. While Applicant's two DUIs within the past

three years raise serious issues about his alcohol consumption, I also considered the impact of Applicant's 2006 divorce. Applicant proactively entered the Court Referral Officer Program in anticipation of the court requiring him to attend the program. He is making satisfactory progress in the program. Applicant was forthright and honest during his testimony and acknowledges the error of his ways. More than one year has passed since his last offense. The letters from his superiors indicate that his alcohol use never affected his job performance. His alcohol use never raised a concern during his 30 years of active duty military service nor during his 20-year career with a defense contractor. He is taking steps to get his life back on track. The two Driving Under the Influence arrests appear to be an exception to an otherwise stellar career. Although Applicant has not completed the terms of his probation, the likelihood that he will successfully complete probation is high. There is substantial evidence to conclude that Applicant mitigated the concerns related to his alcohol use. He is aware that future problems with alcohol use could jeopardize his ability to maintain a security clearance. Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct, are found for 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

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

ERIN C. HOGAN
Administrative Judge