



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 08-11648
)
)
Applicant for Security Clearance)

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

July 20, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is denied.

On August 22, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On January 13, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered (AR) the SOR in writing on February 18, 2010, and requested a hearing before an administrative judge. On March 15, 2010, DOHA assigned the case to me and issued a Notice of Hearing on March 24, 2010. The case was heard on April 28, 2010, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence without objection. Applicant testified and called two witnesses. He offered three exhibits marked as Applicant Exhibits (AE) A through C into evidence without objection. DOHA received the hearing transcript on May 6, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a, 1.b, 1.d, and 1.e of the SOR. He denied the allegations contained in ¶¶ 1.c, 2.a and 2.b. His admissions are incorporated into the following findings:

Applicant is 29 years old and unmarried. He has three children, ages six, four, and two, with his long-term girlfriend. He grew up in a military environment as his father served in the Army for 31 years. He graduated from high school in 2000 and started working for defense contractors in February 2002. He has been steadily employed, except for a six month period from October 2007 to April 2008. In May 2008, he started his present position as an engineering technician. He was laid off from his position in March 2010 pending the disposition of this case.

Applicant has a criminal history, involving five arrests and four convictions. In May 1998, Applicant was arrested and charged with Burglary of a Vehicle, a felony, after he and his friends stole a fishing pole out a truck. He pleaded guilty and was placed on probation for one year. He was 17 years old. (Tr. 58; GE 2) In September 1998, he was arrested and charged with Burglary of Habitation, a felony, after he and friends stole items out of an open garage. He pleaded guilty, served 30 days in jail, placed on probation for five years, fined \$1,000, and paid \$216 in court costs. The probation terminated early in May 2001. (Tr. 59; GE 2 at 2.) He attributed both incidents to immaturity and associating with the wrong friends. (*Id.*)

In November 2003, Applicant was approached by a man, who claimed that he needed money to buy medicine for his children. The man asked Applicant to pawn a television for him because he was unable to do so with his out-of-state identification. Applicant agreed to help the man. After learning that the television was stolen, he was arrested and charged with Burglary of Habitation, a felony, in March 2004. Applicant was released from jail after five days and the charges were dismissed. (Tr. 53; GE 2 at 4.) Applicant's father was present at the time the man approached his son. Both Applicant's father and Applicant had previously seen the man in the neighborhood before the incident. His father was not alarmed by the man's request and suggested that his son help the man. (Tr. 41-44.)

In December 2004, Applicant was arrested and charged with Driving While Intoxicated (DWI), a misdemeanor, after he and his friend were stopped by the police.

He pleaded guilty to the charge and was fined \$3,000, payable in \$1,000 increments per year. His driver's license was suspended for six months. (GE at 4.)

In May 2008, Applicant was arrested and charged with another DWI. He consumed about six alcoholic drinks at a club before getting into his car and bumping into a parked car. On September 19, 2008, he pleaded guilty to DWI, a misdemeanor. He was sentenced to 120 days in jail, fined \$1,000, ordered to attend repeat alcohol offender class, and placed on supervised probation for 18 months. He was required to have an Ignition Interlock system placed on his automobile and undergo monthly urinalysis screenings. (GE 2 at 4; GE 7.) On March 19, 2010, the court entered an order terminating the probation and allowing him to remove the Ignition Interlock system. (Tr. 72; AE 3.)

The court did not require Applicant to undergo an alcohol evaluation after the last conviction, but did require him to participate in Alcoholics Anonymous meetings. In 2009, he attended three two-hour meetings and two educational sessions per week for six weeks. (Tr. 67, 75-76.) He has not obtained any counseling or participated in any other alcohol educational program. He does not believe he has a drinking problem or that his previous consumption of alcohol has affected his family. (Tr. 69, 70, 73.)

Applicant admitted that on occasion between 1999 and 2008, he consumed alcohol to excess. (Tr. 65.) He began drinking when he was 18 years old. For four years, Applicant regularly drank 15 to 20 beers over the weekend with friends. Since 2003, he has attempted to moderate his consumption. (GE 2 at 5.) Presently, he consumes 12 to 18 beers throughout the week, or possibly over a weekend. (Tr. 65, 74-76.) He considers himself a social drinker. (Tr. 77.) He no longer drives after consuming alcohol. (Tr. 73, 76.) As a consequence of the DWI convictions, he had to spend a large amount of money and learned that "it's not worth it" to drink and drive. (Tr. 76.)

Applicant's father testified. He is a retired Army staff sergeant with an impressive service record, who honorably served for 31 years and deployed to locations throughout the world. For the past 11 years, he has worked for defense contractors. Currently, he is a weapons tactics instructor. He held a security clearance during his military years and while working for defense contractors. He is aware of his son's criminal history, but believes he has matured since the last incident and is responsibly managing his life. He and his son have a close relationship and speak frequently because his son and family live in the same neighborhood. He believes that his son "has tremendous potential to be a good, productive citizen if he's only allowed or given the opportunity to do so." (Tr. 36.)

Applicant's mother testified. She was present when the man requested her son to pawn the television. (Tr. 20.) She verified that the matter was dismissed. (Tr. 21.) She was supportive of her son.

Applicant was remorseful about his criminal behavior and previous immaturity. He acknowledged that alcohol created problems for his employment, but is uncertain

why he continues to consume it. (Tr. 78.) He presented a letter from his landlord, who considers him to be a good tenant and family man. (AE B.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Adjudicative Guidelines. In addition to brief introductory explanations for each guideline, the Adjudicative Guidelines (AG) 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 AG ¶ 2(a), describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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."

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.

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. Two 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; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuse or alcohol dependent.

Applicant has two alcohol-related incidents in his history. In 2004 and 2008, he was arrested and convicted of DWI. Based on those incidents, the Government raised a security concern under AG ¶ 22(a). Applicant admitted that from 1999 up to May 2008, he consumed alcohol at times to excess and to the point of intoxication. That evidence is sufficient to raise the disqualifying condition under AG ¶ 22(c).

After the Government produced substantial evidence of those disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation. Conditions that could mitigate those disqualifications are provided under AG ¶ 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 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.

AG ¶ 23(a) provides some mitigation because Applicant's last DWI occurred in May 2008, approximately two years ago. However, it was his second offense, raising questions about his judgment and precluding the full application of said mitigating condition. AG ¶ 23(b) provides minimal mitigation. Applicant acknowledged his previous immature behavior. He denies that he has an alcohol problem. The only evidence he presented documenting actions taken to address the issue, was his recent release from probation and testimony that he no longer consumes alcohol and drives. He did not provide any independent evidence establishing a pattern of sobriety or responsible drinking, which is also referenced under this guideline. In addition, he admitted that he drinks 12 to 18 beers during the week or on a weekend, indicating that he has not significantly reduced his alcohol consumption. There is no evidence in the record to support the application of AG ¶ 23(c) or AG ¶ 23(d), which require active participation in formalized treatment programs.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying:

(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.

From 1998 to 2008, Applicant was arrested five times, convicted four times, and sentenced four times. The evidence raised both disqualifications.

AG ¶ 32 provides a condition that could mitigate disqualifications arising under this guideline:

(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 expressed remorse for his criminal history. He was arrested and convicted of two burglary charges in 1998, when he was 17 years old. His next arrest occurred in 2003, when he was 22 years old. That charge was later dismissed. A year later, in 2004 at the age of 23, he was arrested and convicted of DWI. His next offense occurred in 2008, when he was again arrested and convicted of DWI. In March 2010, the court entered an order terminating his probation and authorizing the removal of the breathalyzer lock system from his car. Since that last arrest, he has not been charged with criminal misconduct. He has worked for his current employer for eight years. His remorsefulness, work record, and successful completion of all probationary terms are evidence of rehabilitation. However, given that he completed his third and most recent probationary term within the past three months, the evidence of rehabilitation presented is insufficient to fully mitigate his criminal history that spans ten years. He has only been outside the legal system for three months, which is insufficient to conclude that his pattern of criminal conduct is in the past.

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). They include the following:

(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 include 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 intelligent 29-year-old man, who possesses potential for success in his career and strong parental support. He expressed a commitment to his job and changing his behavior. He asserted that he is careful not to drink and drive any more. However, his change in attitude is recent and does not adequately mitigate the concerns raised by the Government. While he appears

honest and dedicated to moving forward with his life, he has not established a track record of exercising good judgment, outside of a court-ordered probation, sufficient to persuade me that he appreciates the havoc excessive alcohol consumption and criminal conduct has played in his life and family. Other than assertions that he consumes alcohol responsibly (which based on the quantities he drinks is questionable), he provided no independent evidence to corroborate his testimony that similar problems are unlikely to recur. In fact, he feels that he does not have an alcohol problem, or understand why he continues to routinely drink alcohol despite two convictions for DWI. Since his second DWI arrest, he has chosen not to participate in any form of counseling or rehabilitation, other than attending several mandatory Alcoholics Anonymous meetings. Absent such evidence, his testimony and recent release from criminal probation does not adequately document permanent behavioral insight and changes.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from alcohol consumption and criminal 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge