



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



In the matter of:)
)
-----) ISCR Case No. 08-11842
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

September 10, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On September 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G and J 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 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 October 8, 2009, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on December 1, 2009. DOHA issued a notice of hearing on March 2, 2010, and I convened the hearing as scheduled on March 17, 2010. The Government offered Exhibits 1 through 10, which were entered into evidence without objection. Applicant testified on his own behalf and submitted Exhibits A through F, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on March 30, 2010. I granted Applicant's request to keep the record open until March 31, 2010, to submit additional documents, Applicant timely submitted three additional documents, which have been identified and entered into evidence without objections as

Exhibit G. Based upon a review of the case file, pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 24 years old. He is not currently married, but he is engaged to be married, and he and his fiancée are expecting their first child. Applicant served in the United States Air Force from November 2003 to November 2007, and he received an Honorable Discharge. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline G - Alcohol Consumption)

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption. The following are the allegations as they are cited in the SOR:

1.a. Applicant is alleged to have “consumed alcohol, at times to excess and to the point of intoxication, from approximately 2004 to at least 2009.”

At the hearing, Applicant testified that he first consumed alcohol at the age of 19, when he was in technical training in the Air Force in 2004, after high school. He started out drinking about two weekends each month, three or four drinks at a time. He then increased his consumption of alcohol to one time each weekend, three to five drinks per occasion. This pattern of alcohol consumption continued until May 2006, when the incident that is the subject of 1.b., below occurred. (Tr at 43-49.)

Since May of 2008, after he began his current employment and he became engaged, his alcohol consumption has been significantly reduced. He now consumes one beer on Thursday with his coworkers, as a company tradition, and he also has two or three beers, once a month. (Tr at 76-79.) He testified that he now takes classes at a college and coaches a high school wrestling team, and with a baby on the way, he does not want to go back to his old way of life. (Tr at 79-82.)

1.b. In May 2006, Applicant received a Non-Judicial Punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for Consuming Alcohol Beverages While Underage, being Drunk and Disorderly and Making Unwanted Sexual Advances. He received punishment consisting of forfeiture of pay, reduction in grade, being restricted to base and being required to perform extra duty.

Applicant testified that this incident initially occurred when he was at a party with his co-workers, including a young woman who was a friend of his and in the same Squadron as he. With her permission, he stayed in her room for the night. He averred that they kissed for a period of time, and after consuming “a little too much” alcohol he passed out. When he woke up, she gave him a ride back to his dorm, and everything

seemed alright to him. He even spent some time with her the next night in her room, and there did not seem to be any problem. Approximately two weeks later, when he was on leave, he became aware of her allegations that he that he made unwanted sexual advances to her. He was also accused of drinking alcohol, when he was under the legal age limit, and he conceded that this allegation was correct. After the incident he had no further contact with the woman. He testified that after three months his reduction of grade was mitigated and reversed. Applicant conceded that after the 30 days punishment, he began consuming more alcohol every weekend, for four or five months. (Tr at 49-55.)

1.c. In January 2007, Applicant received a Non-Judicial Punishment under Article 15 of the UCMJ for Assault, being Drunk and Disorderly, and Using Provoking Words. He received punishment consisting of forfeiture of pay, reduction in grade, and he was ordered to attend an alcohol awareness program.

Applicant testified that this incident occurred when he was at an enlisted bar with four of his friends. All of them had consumed alcohol, and he estimated that he had consumed one pitcher of beer and two mixed drinks, and he was "a little intoxicated." A fight ensued among some of the friends, and he became involved to defend one of his friends from another friend. Eventually the incident ended, and he went back to his room. He was thereafter confronted by security officers, and he gave a statement of what transpired. He stated that by the next night all of the friends were together at the same bar. (Tr at 55-60.)

1.d. Because of the incidents listed as 1.b. and 1.c., above, Applicant was ordered to attend an alcohol awareness program. He received treatment from April 2006 to August 2007, for a condition that was diagnosed as Alcohol Abuse. Applicant attended two meetings a week during the period of his treatment, and he averred that he never missed a scheduled meeting, and he completed the program. He abstained from alcohol consumption during his treatment period. (Tr at 60-64.) Exhibit 5 consists of the records from the treatment facility. In the final treatment page, dated September 4, 2007, his supervisor indicated that his goals were met, and he was an "Excellent Performer. Consistently produces high quality work."

1.e. In December 2007, Applicant was arrested and charged with (1) Felony Grand Theft, (2) Receiving Stolen Property, (3) Resisting Arrest, and (4) Driving While Intoxicated (DWI). Applicant had consumed alcohol prior to the arrest.

Applicant testified that this incident, which occurred after he had been discharged from the Air Force, happened when he and his friends had been coming home from a bar. His friend was driving and Applicant was asleep in the passenger seat. Another friend was also asleep in the back seat. Their vehicle was struck from the rear and when the police arrived they arrested the driver of the other vehicle and the driver of the vehicle in which Applicant was riding, both for DWI.

Applicant explained that after his friend was arrested, and the vehicle was going to be impounded, he attempted to take some of the items of his friend from the car. He was accused of handling stolen property, and Applicant conceded that rather than go

back to the station and explain the situation to the police, he began arguing in a belligerent manner. (Tr at 64-75.)

On May 16, 2008, Applicant plead Nolo Contendere to Count 3 Resisting Arrest, and he was convicted. He was sentenced to perform 45 days of community service and three years of summary probation, which has not yet been completed.

Paragraph 2 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts:

2.a. The SOR alleged that Applicant's conduct that is set forth under paragraph 1.b. through 1.e., above, constitutes criminal actions. At the hearing, the SOR was amended so that SOR allegation 1.d. was removed from this paragraph. The amended SOR now alleges that Applicant's conduct that is set forth under subparagraphs 1.b., 1.c, and 1.e., above, constitutes criminal actions.

Mitigation

As stated above, Applicant introduced three post hearing documents. (Exhibit G.) The first is a letter, dated March 31, 2010, from a Ph.D., who is the mental health professional for Applicant's current employer and a state licensed psychotherapist. He stated that he performed a mental health assessment of Applicant, and he found, "[Applicant's] use at present is 1-2 beers over the course of a two week period. No General symptoms, no physical symptoms, no behavioral symptoms . . . No indication of chemical dependency or abuse apparent. No reason to refer client for evaluation or care."

Applicant also submitted an evaluation from his current employer, dated April 21, 2009. (Exhibit E.) Applicant received Outstanding or Exceeds Performance Requirements in each of 10 categories. It was stated that Applicant's "military training and your ability to work with others makes you a great addition to the 2nd shift organization. You are always looking ahead and completing tasks assigned. Keep up the good work!"

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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

Paragraph 1 Guideline G - Alcohol Consumption

Applicant's alcohol consumption has resulted in two Non-Judicial Punishments under Article 15 of the UCMJ, and one arrest and Nolo Contendere plea for resisting arrest. The Government has established that Applicant was involved in “alcohol-related incidents away from work,” and binge consumption of alcohol to the point of impaired judgement.” Disqualifying Conditions AG ¶ 22(a) and (c) apply to this case.

As stated above, Applicant has drastically reduced his consumption of alcoholic beverages, and he has received an evaluation from a licensed clinical psychologist that there is “No indication of chemical dependency or abuse apparent.” As a result of this, I find that Mitigating Condition ¶ 23(b) “the individual acknowledges his 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. Paragraph 1 is found for Applicant.

Paragraph 2 Guideline J - Criminal Conduct

The Government also established that Applicant engaged in criminal conduct, by his acts that are listed under paragraphs 1.b., 1.c., and 1.e. I find that ¶ 31(a), “a single serious crime or multiple lesser offenses,” applies in this case. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is also applicable to this case.

Because Applicant’s consumption of alcohol, which was the underlying cause of Applicant’s criminal conduct, has been greatly reduced, I find Mitigating Condition under ¶ 32(d) is applicable. There is evidence of successful rehabilitation; including but not limited to the sincere remorse of Applicant, which I base on Applicant’s testimony, and his good employment record. Additionally, Applicant is now involved in improving his life by taking classes, coaching a high school wrestling team, and preparing for marriage and fatherhood, Applicant’s criminal activity has been mitigated. Paragraph 2, Guideline J is found for Applicant.

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. Based on all of the reasons cited above as to why the Mitigating Conditions apply, considered with all the steps Applicant has taken to improve his life, I find that the record evidence leaves me with no significant questions or doubts as to Applicant’s eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the 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 G:	FOR APPLICANT
Subparagraphs 1.a. -1.e.:	For Applicant

Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	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.

Martin H. Mogul
Administrative Judge