



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-00573

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

September 15, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On November 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline G 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On December 13, 2010, 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 March 2, 2011. DOHA issued a notice of hearing on March 4, 2011, and I convened the hearing as scheduled on March 30, 2011. The Government offered Exhibits 1 through 9, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through K at the time of hearing, which were also admitted without objection. I granted Applicant's request to keep the record open until April 13, 2011, to submit a one page letter, which had been previously identified and entered into evidence without objection as Exhibit F, although it had not been physically

present at the time of the hearing. DOHA received the transcript of the hearing (Tr) on April 7, 2011. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a. through 1.e., under Guideline G. The admitted allegations are incorporated herein as 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 additional findings of fact:

Applicant is 31 years old. He is unmarried, and he has no children. He served in the United States Navy from 2000 to 2005, when 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.

(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 five allegations as they are cited in the SOR, and as reviewed above, 1. a. through 1.e. have been admitted by Applicant in his RSOR :

1.a. Applicant has "consumed alcohol, at times to excess and to the point of intoxication, from approximately 1997 to at least December 2007."

1.b. On November 29, 2006, a Statement of Reasons was issued to Applicant which alleged two alcohol related incidents. A hearing was conducted, and the findings of the Administrative Judge in his decision included the following:

i. Applicant "consumed alcohol, at times to excess and to the point of intoxication, from approximately 1997 to at least June 2006."

ii. On October 31, 2004, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol and/or Drugs and (2) Driving Under the Influence of Alcohol with BAC of .08 or More. He pled No Contest to Count (2) and he was placed on five years probation, 96 days confinement, four days of volunteer work and to attend and complete a Mothers Against Drunk Driving (MADD) program.

iii. On November 3, 2003, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol and/or Drugs and (2) Driving Under the Influence of Alcohol with BAC of .08 or More. He pled No Contest to Count (2) and he was placed on five years probation, fined \$1,700, ordered to participate in a public service program, complete a three month first conviction program and to finish a MADD program.

1.c. During the period when the Administrative Judge was making his deliberation regarding Applicant's case, and before a favorable decision was issued in August 2007, Applicant was arrested a third time for Driving Under the Influence of Alcohol.

1.d. Applicant received alcohol related counseling on or about January 2004, at a Substance Abuse Rehabilitation Program Applicant through the United States Navy, for a condition diagnosed Alcohol Abuse.

1.e. In July 2007, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol and/or Drugs and (2) Driving Under the Influence of Alcohol with BAC of .08 or More. He pled Guilty. The imposition of the sentence was suspended for five years. He was sentenced to jail, ordered to pay a fine and fees, ordered to complete a multiple conviction program, and attend a MADD program. Applicant's license was suspended and an ignition interlock device was ordered for his vehicle.

Applicant testified that as a result of this conviction, he spent 45 days in a detention facility. He had been sentenced to 90 days because of time served credit and because he enrolled in a work furlough program where he was in a kind of half-way house for 23 or 24 days, when not at his employment. (Tr t 33-34.)

At the hearing, Applicant testified that he still consumes alcohol. The last time he consumed alcohol prior to the hearing was on St. Patrick's Day, March 17, 2011, approximately one month before the hearing. He stated that at that time he drank two beers. Prior to that he estimated that he last consumed three beers on the previous New Year's Eve. He estimated that in 2010, he drank about four times, and he had as many as four beers on at least one or two occasions. After Applicant's arrest in 2007, he drank alcohol on one occasion before he was incarcerated, and then he abstained completely for approximately six months before he began consuming alcohol again. Since that time he estimates that he drinks about three to five times a year on special occasions. (Tr at 27-31, 52-54.) Applicant attends Alcoholics Anonymous meetings not regularly, but approximately once a month. (Tr at 36.)

Applicant testified at the current hearing that he would not get a DUI in the future. His reasoning was because he has been incarcerated and in a work furlough program, neither of which had ever happened to him before, and this would result in a different outcome. However during Applicant's testimony, Department Counsel pointed out that Applicant had promised he would not get another DUI at his previous hearing in 2007, but despite his promise, he did receive another DUI. (Tr at 59-60.)

Mitigation

Applicant submitted a number of documents to attempt to mitigate the SOR allegations. They include but are not limited to the following: four character letters. (Exhibits C, D, and K.) The first is from his supervisor from January 2008 until the present. He wrote about Applicant, "he has not demonstrated any behavior that would indicate irresponsibility or deliberate compromise of classified information or material if granted access." Another letter was from the site leader and program manager for the

facility of Applicant's employer. He wrote Applicant's "dedication and efforts have resulted in both verbal and written compliments." Exhibit E is a letter from a Brigadier General of the United States Air Force in which he congratulated Applicant for the "extraordinary support" given to United States service members.

Exhibit F is a letter from a counselor for the Employee Assistance Program for Applicant's employer, indicating that she met with Applicant after his last DUI, and that his court ordered attendance at the Driving Under the Influence Program is appropriate and sufficient follow up care. Exhibit I is a Notice of Completion Certificate showing that Applicant finished an 18 month Driving Under the Influence Program multiple offender program. Exhibit J includes AA attendance slips establishing that Applicant attended multiple AA meetings. Exhibit K included a Letter of Commendation and two certificates for Navy and Marine Corps Achievement Medals that Applicant's earned during his time in the Navy.

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

(Guideline G - Alcohol Consumption)

Applicant's alcohol consumption has resulted in three DUI arrests and convictions, and a diagnosis of Alcohol Abuse from a substance abuse counselor.

The Government 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 reviewed above, Applicant underwent a security hearing in 2007, during which he promised that he would not receive any further DUI arrests and convictions. Yet before the decision was actually issued, he received his third DUI arrest and conviction. After Applicant served his sentence in the detention facility, he abstained from consuming alcohol for about six months. Yet at the current hearing, he admitted to consuming alcohol again, and he currently drinks alcohol, usually beer, approximately four times a year, consuming as many as three or four beers at one time. This is despite the fact that Applicant has been advised not to consume any alcohol in the future at the AA meetings that he attends sporadically, and he has received a diagnosis of Alcohol Abuse. As a result of this, I do not find that any Mitigating Condition under ¶ 23 applies. Guideline G is found against 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

