



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-01735
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

June 18, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On July 21, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, E, 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 August 4, 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 September 16, 2009. DOHA issued a notice of hearing on November 16, 2009, and I convened the hearing as scheduled on December 22, 2009. The Government offered Exhibits 1 through 11, which were received 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 January 7, 2010. Based upon a review of the case file, pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

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 57 years old. He is not currently married, but he was married from 1973 to 1993, and he has three children. Applicant is employed by a defense contractor, for whom he has worked for more than 38 years, 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. In March 2006, Applicant was arrested and charged with (1) Burglary, (2) Assault with a deadly weapon-semiautomatic firearm, and (3) Discharge firearm in public. Applicant was under the influence of alcohol at the time of the incident. In November 2006, Applicant was found guilty of count (2) and sentenced to three years confinement-suspended. He was ordered to serve a formal probation for 3 years, during which time he was also ordered to abstain from possession or consumption of alcoholic beverages. In his RSOR, Applicant admitted this allegation.

At the hearing, Applicant testified that on the day of this event he and some friends had been celebrating St. Patrick's day at a restaurant, and thereafter he returned home by taxi at approximately 1:30 or 2:00 P.M. He has no recollection of what occurred during the rest of the night. He was informed the next day, by the police, that his next door neighbor had informed them that Applicant threatened her with a gun, and shot two rounds into the ground in front of her porch. The police officer went with Applicant to examine Applicant's gun, and they found that two rounds were missing from the clip. Applicant had no explanation for the missing rounds. While he testified that he had no memory of the incident, he did admit that bullet holes were found in the ground of his neighbor, which helped to verify her story. (Tr at 31-37.)

Applicant entered a plea bargain, and he was convicted of charge (2) Assault with a deadly weapon-semiautomatic firearm. Applicant was ordered to attend a residential rehabilitation clinic, where he remained full-time for four months and 20 days. He subsequently stayed at a transitional living facility for six months during the night and was allowed to resume employment during the day. He attended counseling meetings three or four time a week at this facility. Additionally, Applicant was ordered to attend Alcoholics Anonymous meetings over a two year period.

1.b. In March 1995, Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI). In his RSOR and during his testimony, Applicant admitted that he was guilty. He thereafter plead No Contest to the charge and paid a fine of approximately \$1,000. (Tr at 49.)

1.c. In December 1986, Applicant was arrested and charged with DUI. In his RSOR, Applicant denied this allegation. In a signed, written statement made to a Defense Investigative Service investigator on March 25, 1988, (Exhibit 1), Applicant stated that he was arrested in 1986 for DUI. However, when he took a Breathalyzer test, his alcohol level was determined to be below the legal limit so the charges against him were ultimately dropped when he went to court. During his testimony, Applicant did concede that he had consumed several beers before his arrest. (Tr at 63.)

1.d. The SOR alleges that Applicant continues to consumes alcohol in violation of his probation. He testified that after his arrest in 2006, he abstained from alcohol consumption for two years until 2008, when he began consuming alcohol again. Since that time he continues to consume alcohol, and he has drunk as many as five beers in one evening on more than one occasion. (Tr at 41-46.)

Applicant testified that his probation continued from 2006 until November 1, 2009. (Tr at 47.) Since he continued drinking alcohol in 2008 and 2009, during the time that he was on probation, the evidence established that he drank while he was still on probation. Applicant testified that he was not aware that his probation prohibited him from consuming alcohol, or he would not have done it. (Tr at 59-60.) However, Exhibit 5 indicates that Applicant was not to drink or possess any alcoholic beverage during his three year probation. Therefore, I find that Applicant did violate his probation requirements.

In an affidavit made to a Government investigator and signed by Applicant on October 23, 2007, he stated, "I no longer drink and intend to remain sober in the future." In a later affidavit Applicant made to an investigator and signed on March 23, 2008, he reiterated, "As previously discussed, I no longer drink and I don't intend on having any alcohol or other problems in the future." Since Applicant began consuming alcohol again in 2008, he violated his own stated intention to abstain from alcohol consumption in the future. Applicant testified that he has been consuming beer for approximately 37 years. After some equivocation, Applicant conceded that both counseling programs he attended, and Alcoholics Anonymous, advised him and every person attending their programs, to abstain from consuming alcohol. (Tr a 83-84.) When he was asked why he continues to drink alcohol, considering the problems alcohol has created in his life, he was unable to furnish an answer. (Tr at 67-70.)

Paragraph 2 (Guideline E - Personal Conduct)

The SOR alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. The SOR alleges that Applicant's conduct that is set forth under paragraph 1.a. through 1.d., above, constitutes Personal Conduct violations.

2.b. Applicant executed a signed Security Clearance Application (SCA) on October 20, 2008. (Exhibit 9.) Question 23.d. of the SCA asks, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? Applicant answered "Yes," and he listed one arrest that is the subject of 1.a., discussed above. It is alleged that Applicant failed to include the alcohol related charges, listed and discussed above as 1.b. and 1.c.

Applicant testified that he did not include the arrest in 1986 because the charges were dismissed. He could not explain his failure to include the arrest in 1995, but he appeared surprised that he had not included it on his SCA, and he averred that he did not intend to mislead the Government by omitting this information. (Tr at 58.) He also explained that he did tell the security officer of his company about each of his arrests. I do not believe that Applicant intended to mislead the Government, or he certainly would have omitted the more recent and far more serious arrest in 2006, which he did include on his SCA. (Exhibit 5.)

Paragraph 3 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts.

3.a. The SOR alleges that Applicant's conduct that is set forth under paragraph 1.a. through 1.d., above, constitutes criminal actions.

Mitigation

Applicant introduced a Confidential Patient Form (Exhibit C), which confirmed that he was admitted on January 8, 2007, and discharged on May 8, 2007, and he fulfilled the residential requirements of the rehabilitation center that he attended as a result of paragraph 1.c., above. He participated in a program that consisted of group and individual counseling, 12-step recovery meetings, and additional counseling sessions.

Applicant also submitted a character letter from the Quality and Mission Success Manager of his employer, who wrote that Applicant has worked for him since March 20, 2006, and he is considered a professional at all times. "His positive can do attitude is always appreciated. I can count on him to always do what's right." (Exhibit E)

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. 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 one arrest and No Contest plea to Assault with a deadly weapon-semiautomatic firearm in 2006, and one DUI arrest and conviction in 1995.

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 stated above, Applicant admitted to currently drinking beer, and to consuming as many as five beers at one time on more than one occasion. This is despite the fact that Applicant has been advised not to consume any alcohol in the future by the two rehabilitation programs that he attended, and after he averred in two statements that he intended not to consume alcohol in the future. As a result of this, I do not find that any Mitigating Condition under ¶ 23 applies. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

With respect to Guideline E, I find that Applicant testified credibly that he did not knowingly provide incorrect material information to the Government on the SCA regarding his DUI arrest and conviction in 1995, and his arrest and subsequent dismissal of a DUI in 1986.

I do find that Applicant's resumption of alcohol consumption in 2008, despite alcohol contributing to the incident in 2006, receiving the advice from two treatment centers to abstain from alcohol consumption, and Applicant making two written affidavits, in which he stated his intention not to consume alcohol in the future, establishes ¶ 16(d) "a whole-person assessment of questionable judgement, untrustworthiness, unreliability" under this guideline. I therefore, resolve Guideline E against Applicant.

Paragraph 3 (Guideline J - Criminal Conduct)

The Government also established that Applicant engaged in criminal conduct, by his acts that are listed under paragraphs 1.a., 1.b., and 1.d. I do not find that the conduct listed under paragraph 1.c. is criminal.

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 continues to consume alcohol, which was the underlying cause of Applicant's criminal conduct, I do not find any Mitigating Condition under ¶ 32 is applicable. Paragraph 3, Guideline J 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 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 Disqualifying Conditions apply and the Mitigating Conditions do not apply, I find that the record evidence leaves me with significant questions and 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 not 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:	AGAINST APPLICANT
Subparagraphs 1.a., 1.b., 1.d.:	Against Applicant
Subparagraph 1.c.:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	For Applicant
Paragraph 3, Guideline J:	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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge