



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 09-02423
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

January 18, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns under Guideline J (criminal conduct).
Clearance is granted.

Statement of the Case

On October 20, 2008, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On April 18, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J. 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 after September 1, 2006.

Applicant answered the SOR on May 7, 2010, and DOHA received his answer on May 12, 2010. Department Counsel was prepared to proceed on August 31, 2010. The case was assigned to me on September 1, 2010. On September 20, 2010, DOHA

issued a notice of hearing scheduling the case for October 12, 2010. On September 24, 2010, DOHA issued an amended notice of hearing rescheduling the case for October 13, 2010. The hearing was convened as rescheduled.

The Government offered Government Exhibits (GE) 1 through 6, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through W, which were received without objection, and he testified on his own behalf. Applicant also called one witness, his wife, to testify on his behalf. DOHA received the hearing transcript (Tr.) on October 21, 2010.

Findings of Fact

Applicant admitted and denied in part the allegations in SOR ¶ 1.a., and admitted the allegations in SOR ¶¶ 1.b. and 1.c. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 46-year-old security systems engineer, who has worked for a defense contractor since October 2008. (GE 1, Tr. 25, 34.) He seeks a security clearance, which is a condition of his continued employment. (AE T, Tr. 32-33, 35.)

Applicant graduated from high school in May 1982. He attended college from September 1984 to May 1987. He resumed his studies at a different college from September 1994 to May 1997 and was awarded a Bachelor of Science Degree in Business Information Systems. (GE 1, GE 4, AE N, Tr. 34.) Applicant was previously married from March 1986 to May 1991. That marriage ended by divorce. He remarried in February 1996. Applicant has two children from his previous marriage, a 23-year-old son and a 20-year-old daughter. He has a 7-year-old son from his current marriage. (GE 1, Tr. 15-16, 25.) Applicant's wife works in "sales" and earns \$146,000 per year. Applicant earns \$130,000 per year. Their combined total annual income is \$276,000. (Tr. 15-16.)

Criminal Conduct

Security concerns were identified based on Applicant's two alcohol-related driving convictions in 2005 and 2008, and a 2009 driving infraction.

In 2005, Applicant was convicted of driving with a blood alcohol level of .08 or more. He was sentenced to pay a \$1,500 fine, to complete six days of community service, and to three years probation. Applicant was at a company party and had too much to drink. (SOR Response, GE 2, GE 5, Tr. 38-44.)

In 2008, Applicant was convicted of driving under the influence (DUI) of alcohol and refusal to submit to a breathalyzer. He was sentenced to pay a \$1,600 fine and to complete ten days of community service. Recognizing that he had too much to drink after being out with a friend at a local sports bar, Applicant called his spouse to pick him up, but was unable to reach her. His back-up plan was to call a cab if he did not hear

back from his wife. Applicant then fell asleep in his car. He was awoken by a police officer, who ordered him to perform a field sobriety test, which he failed. Applicant never drove his car, but was arrested for DUI because his “key was in the ignition.” (SOR Response, GE 2, GE 4, GE 5, Tr. 27-30.)

In 2009, Applicant was convicted of a driving infraction for driving without a license. He was sentenced to pay a \$250 fine. Applicant testified that he was unaware that his license was suspended because of conflicting information he received from his Department of Motor Vehicles (DMV). (SOR Response, GE 6, Tr. 49-56.)

Applicant’s long-time family physician stated by letter dated October 4, 2010 that he “does not suffer from alcohol abuse or dependence.” (AE J, AE W, Tr. 30.) Since his latest DUI arrest, Applicant has made significant lifestyle changes. Although not diagnosed as alcohol dependent, he has chosen to live a life of sobriety. He explained that he does not want alcohol to affect his life or reputation adversely again. He attends Alcoholic Anonymous (AA) Meetings on a regular basis, has changed his acquaintances to those who are “family-focused,” and has become more involved with his church. His church involvement includes a greater spiritual involvement as well as a personal involvement with church-related activities. (GE 4, Tr. 30-32, 44-46.)

Although not required, Applicant took the additional step to demonstrate his commitment to a life of sobriety by executing a statement of intent to never use alcohol again with the understanding that failure to abide by his commitment would result in the automatic revocation of his security clearance. (AE O, Tr. 33.) Applicant also attended an alcohol education program consisting of 12 hours of education classes, 54 hours of process groups, 26 15-minute interviews, and 3 transition or re-entry self-help groups. He completed that program on December 7, 2010. (AE I, Tr. 18-19, 30.)

Character Evidence

Applicant’s wife confirmed that he no longer drinks. After Applicant’s second DUI arrest, she informed him that if he did not quit drinking, she would leave him. She stated that she is “very proud of him” because he no longer drinks. She confirmed Applicant’s involvement in their church and the fact that he has consulted their family doctor about his drinking. Applicant’s wife testified convincingly that his life changes are permanent. (Tr. 14-25.)

Applicant submitted ten reference letters from a cross-section of individuals to include long-time family friends, family members, past and present co-workers, and associates from church. The collective sense of these letters supports the notion that Applicant is an individual who is trustworthy, hard-working, a dedicated family man, and a productive member of society. (AE A – H, P - Q.) Applicant’s 2009 work performance evaluation reflects a record of solid performance. (AE R.) Applicant is also a member of his employer-sponsored Leadership Development Organization, a member of the American Society for Quality, and was awarded the Certified Information Systems Security Professional credential in May 2005. (AE K – N.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each Guideline, the 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 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.

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 for 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

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 list two potentially disqualifying 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.

The Government established through Applicant’s admissions and evidence presented that AGs ¶¶ 31(a) and 30(c) apply. “Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.” ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (citing *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)). Because the Government has met its initial burden concerning criminal conduct security concerns, the burden now shifts to Applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;
- (c) evidence that the person did not commit the offense; and
- (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.

Considering the totality of the circumstances in this case, I find AG ¶¶ 32(a) and 32(d) apply. Applicant’s most recent alcohol-related arrest was two years ago. Noteworthy is the fact that his most recent DUI arrest in September 2008 indicates that he did not drive while intoxicated. Recognizing he was intoxicated, Applicant made the

decision not to drive, but had the misfortune of being in his vehicle asleep with his keys in the ignition while intoxicated when discovered by a police officer. His first documented DUI occurred over five years ago in 2005.

Applicant presented credible evidence of actions taken to overcome his problem, and established he abstains from alcohol and submitted evidence he is not alcohol dependent. He is remorseful for his behavior and has initiated lifestyle changes. His performance appraisals, certificates of achievement, awards, and the statements from company representatives show Applicant's work behavior has not been indicative of his having an alcohol problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. His sobriety is supported by company officials, by his friends and family, who know him personally and professionally, and by his own credible testimony.

The passage of time also plays a role in this analysis. Applicant has not been involved in any subsequent alcohol-related incident since his 2008 DUI. At his hearing, Applicant acknowledged the problems misuse of alcohol has caused him, demonstrated remorse, and a steadfast commitment to continue lifestyle changes. His 2009 driving infraction does not rise to the level of a misdemeanor. Applicant had a reasonable basis to believe that his license was not suspended because of the conflicting information provided by his DMV.

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 established by the record evidence. 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.

Applicant has been willing to do whatever is necessary to maintain his sobriety, including regularly attending AA meetings even though he was not diagnosed as alcohol

dependent or as an alcohol abuser. He has family support, stable employment, and a strong work ethic. His participation in an alcohol education program and support mechanisms in place consisting of his family, friends, church, and work should ensure his continued success. Applicant demonstrated the correct attitude and commitment to being sober. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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: FOR APPLICANT

Subparagraphs 1.a. – 1.c.: For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge

¹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).