



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



In the matter of:)	
)	
)	ISCR Case No. 09-02495
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

December 14, 2010

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I grant Applicant's eligibility for access to classified information.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on June 30, 2008. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on May 11, 2010 detailing security concerns under Guideline F, Financial Considerations, and Guideline E (Personal Conduct), that provided the basis for its preliminary decision to deny him a security clearance. 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) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on May 17, 2010. He answered the SOR in writing on June 26, 2010 and requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on July 12, 2010. I received the case assignment on August 17, 2010. DOHA issued a notice of hearing on August 30, 2010, and I convened the hearing as scheduled on September 16, 2010. The Government offered seven exhibits (GE) 1 through 7, which were received and admitted into evidence without objection. Applicant testified. He submitted one exhibit (AE) A, which was received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on September 23, 2010. I held the record open until September 30, 2010, for Applicant to submit additional matters. Applicant timely submitted AE B through AE D, without objection. The record closed on September 30, 2010.

Procedural Ruling

Notice

Applicant received the hearing notice around September 9, 2010, less than 15 days before the hearing. (Tr. 9.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (*Id.*)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.h of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.i and 2.a of the SOR.¹ After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 51 years old, works as an equipment specialist for a Department of Defense contractor. He began his current employment in February 2007. The record contains no evidence of problems with his job performance or conduct at this job.²

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 20-21.

Applicant enlisted in the United States Marine Corps in December 1976 and retired in December 2005 as a Master Gunnery Sergeant (E-9) after 29 years of honorable service. During his military service, he received the Meritorious Service Medal, nine Good Conduct medals, three Navy and Marine Corps Achievement medals, two Navy and Marine Corps Commendation Medals, two National Defense Medals, a Global War on Terrorism Medal, and other citations and ribbons. He served in Iraq and Afghanistan. He held a security clearance during his entire military career without incident. At the direction of the Marine Corps, he attended a substance abuse seminar in July 1995.³

Applicant married in 1977 and divorced in 1996. His sons are 34 and 22. His daughter died in March 2010. Applicant is single, although he has a girlfriend, whom he has been dating for four years.⁴

Applicant began consuming alcohol as a teenager, following the example of his parents, who drank alcohol. In the late 1970s, the police arrested Applicant and charged him with driving under the influence of alcohol (DUI).⁵ The police arrested and charged Applicant with DUI in 1982, August 1987, August 1988, May 1989, September 1997, March 2001, and June 2007. The police also charged him with reckless driving and refusal in 2001 and with failure to stop at a stop sign in 2007. Applicant pled guilty to a reduced charge of reckless driving in 1997, 2001 and 2007. The State nolle prossed the DUI charge in 1989. He pled nolo contendere to a reduced charge of reckless driving in 1988. In 1982, he was cited by his military unit and his license was suspended for six months. In 1982, the court found him guilty of DUI and sentenced him to 2 days in jail. The court fined him in all these cases and he paid the fines. The disposition of his late 1970s DUI arrest is unknown.⁶

Applicant admitted to drinking, at times to excess, until 2008. He described himself as a social drinker. He normally drank alcohol at home while working on his car, mowing the lawn, or cooking outdoors. He acknowledged that he drank alcohol at home alone. His usual drinks were rum and coke or beer. At times, he consumed Courvoisier® and coke. After his last DUI and after a conversation with his girlfriend about his alcohol consumption, he decided to stop drinking alcohol in early 2008. He stopped and has not consumed alcohol since. He now drinks soda and water.⁷

³AE A; Tr. 19-20.

⁴GE 1; Tr. 19, 32.

⁵Applicant denied SOR allegation 1.i because he did not believe he was arrested in 1977. He believed his first DUI arrest occurred in 1978 or 1979. He is not sure of the exact date, but admitted the arrest. Tr. 21-22.

⁶GE 2- GE 6.

⁷GE 2; AE B-AE D; Tr. 20, 22, 26-28, 31-32.

At the hearing, Applicant testified that at times in the past he stopped drinking. He stated that:

No, I mean as far as I'm concerned, I am fine. I do admit to having alcohol - - drinking alcohol in excess, but it mainly came, like I said, upon stress or any other things of the nature.

Now, I stopped on numerous occasions, and my willpower - - I even had bets where an individual would ask me about how long I could stop, I told them I could stop anytime I get ready; it's just the fact that I was not ready to stop, but when I decided to stop, when I wanted to stop, that's all I had to tell, was tell myself exactly that. (Tr. 28-29)

Applicant has not sought counseling for alcohol consumption. He has not been evaluated by an alcohol counselor nor does he attend alcoholic anonymous (AA) meetings. He stated that his will power is the reason he no longer drinks. His girlfriend submitted a signed, sworn statement, indicating that he had not consumed alcohol since early 2008. Two long-time friends submitted signed, sworn statements that to the best of their knowledge, after committing to no additional alcohol consumption, Applicant has not consumed alcohol. Applicant is happy with his decision and is proud of his ability to remain alcohol free.⁸

When he completed his security clearance application, Applicant answered "yes" to the following question:

Section 23: Your Police Record

- d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?

Applicant continued to read and answer the remaining two questions in this section, which asked for information about events in the last seven years. When he reached the location to provide specific information on his arrests, he only listed his 2007 DUI arrest. As he thought he only needed to list the arrests for the last seven years and did. He knew that his earlier arrests were known by the Government.⁹

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 list potentially

⁸AE B- AE D; Tr. 22, 27-30, 33.

⁹GE 1; GE 2; Tr. 23-25.

disqualifying conditions and mitigating conditions, which are used 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.

Under 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 applicant or proven by Department Counsel. . . ." An 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 an 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

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.”

AG ¶ 22 describes conditions that could raise a security concern and the following conditions may be disqualifying 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 abuser or alcohol dependent.

Applicant began consuming alcohol as a teenager. His alcohol consumption led to his first DUI arrest in the late 1970s. Over the next 30 years, the police arrested him seven times for DUI. He acknowledged regularly drinking alcohol until 2008. He also admitted that at times, he drank alcohol to excess. Applicant has never been diagnosed as an alcohol abuser or as alcohol dependent. Based on Applicant's pattern of alcohol consumption and his DUI arrests, the above disqualifying conditions apply.

AG ¶ 23 provides conditions that could mitigate security concerns and the following may be applicable in this case:

(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 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.

Applicant acknowledged that he drank to excess, but he does not acknowledge that he is an alcoholic. He does not participate in any alcohol counseling programs and has not done so in the past, although he attended one substance abuse education program in 1995. He stopped consuming alcohol in early 2008 on his own without assistance from professionals. He girlfriend verified that he had not consumed any alcohol since he stopped drinking, and two friends do not believe he drinks anymore. The friends do not see him every day, although he and his girlfriend spend many days each week with each other. Applicant admitted he consumed alcohol in the past when he was stressed. His daughter died six months before the hearing, a highly emotional and stressful event. Based on his girlfriend's statement, he has not consumed alcohol to cope with his daughter's death. Although he has been arrested and charged with DUI seven times, his last court conviction for DUI occurred in 1982. Since he has not consumed alcohol for two and one-half years and avoided using alcohol to cope with the stress of his daughter's death. He has mitigate the Government's security concerns about his alcohol consumption.¹⁰

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that

¹⁰Even if it is determined that Applicant has not mitigaed the security concerns under Guideline G, I find that he has mitigated the Government's security concerns under the whole-person analysis.

country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

For AG ¶ 16(a) to apply, Applicant's omission, concealment or falsification in his answer must be deliberate. Applicant completed his e-QIP on August 30, 2008 and acknowledged being arrested for an alcohol-related offense. He listed only his most recent DUI arrest. Thus, he omitted material facts from his e-QIP about his alcohol arrests. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response, he denies, however, that he had an intent to hide this information from the Government. When a falsification allegation is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹¹

When he completed his e-QIP in August 2008, Applicant answered each question in Section 23. After answering the questions, he listed only his May 2007 DUI arrest because the last two questions requested information for the last seven years and all his prior arrests occurred more than seven years earlier. He mistakenly thought the entire question asked for seven years only. His misunderstanding does not show that he had an intent to hide information from the Government about his earlier DUI arrests. He knew that the Government was aware of his early arrests from his military records and previous security clearance applications.. Overall, I find the evidence of record failed to show that Applicant intentionally falsified his answers to the e-QIP. The Government has not established intentional falsification under Guideline E. Guideline E is found in favor of 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 an applicant's conduct and all relevant 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

¹¹See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant consumed alcohol, and at times to excess, for more than 30 years. The police arrested and charged him with DUI seven times over this time; however, the courts only convicted him of DUI one time - in 1982. Applicant attended one alcohol abuse seminar at the direction of the Marines. He has not otherwise received any alcohol education or alcohol counseling.

Applicant served honorably in the Marine Corps for 29 years. He achieved the highest non-commissioned officer rank by the time he retired. He received nine good conduct medals, an indication that his alcohol consumption did not interfere with his work performance. He successfully served in two war zones, and the Marines recognized his service. Applicant's daughter died at a young age, a highly stressful event for any parent. He did not use alcohol to relieve his emotional pain or the stress of this event. Although he used alcohol to excess for many years, his strong-willed determination not to drink alcohol has worked. He is happier now and proud of his ability to stop drinking alcohol.

Applicant credibly testified about how he read and answered the questions in his security clearance application about his alcohol-related arrests. After reading all the questions, he mistakenly thought that the seven-year time frame mentioned in the last two questions applied to how far back in time he needed to list his alcohol-related arrests. His misreading of the questions as a whole is insufficient to show that he intentionally falsified his e-QIP.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alcohol consumption under Guideline G and his personal conduct under Guideline E.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2, Guideline E:	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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge