



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 09-03331 |
| SSN: ----- |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Julie Mendez, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

November 9, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On May 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline G (Alcohol Consumption). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a June 1, 2010, response, Applicant admitted two of the four allegations set forth in the SOR under Guideline G and requested a hearing. DOHA assigned the case to me on July 2, 2010. The parties proposed a hearing date of September 14, 2010. A notice setting that date for the hearing was issued on August 6, 2010. That notice was cancelled on August 27, 2010, and the hearing rescheduled for October 1, 2010, as reflected in a notice issued on September 20, 2010. I convened the hearing as scheduled. Applicant gave testimony, introduced six witnesses, and presented 35

documents, accepted into evidence without objection as exhibits (Exs.) A-JJ.¹ Department Counsel offered five documents, admitted as Exs. 1-5 without objection. The transcript (Tr.) of the proceeding was received on October 12, 2010, and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant met his burden of mitigating security concerns related to alcohol consumption. Clearance granted.

Findings of Fact

Applicant is a 46-year-old security guard working for a defense contractor. He served in the U.S. military on active duty from 1982 until 1989. He then served as a reservist for 14 years. While in the military, he had a distinguished career and successfully maintained a security clearance.² Applicant is currently completing an associate's degree and preparing to begin a bachelor's degree program in business communications. He has a side business in which he provides landscaping and pet sitting services for elderly clients. He has a domestic partner, with whom he has resided for four years, and no children.

After Applicant was discharged from active duty, he hoped to get involved in theater. His reservist duties, however, precluded him from pursuing this passion. Instead, he found work in the service industry that provided sufficient flexibility to fulfill his reserve commitments. While in that industry, from 1999 until 2003, he met his future domestic partner. In the interim, in February 2000, he had hard alcohol before a concert. Although he had started drinking beer in high school, alcohol had never been a problem in Applicant's life.³ After the concert, he drank beer. Exhausted from working two jobs for 35 days without a break and full from too much sushi, he headed home.⁴ On his way home, he vomited and went to sleep in his vehicle. The police found him asleep at the wheel. Applicant knew he had consumed too much alcohol. He had a blood alcohol content of 0.13.⁵ He was arrested and charged with Driving While Intoxicated (DWI). He pled guilty, was sentenced to 30 days in jail (30 days suspended), placed on probation for 12 months, and fined.

Applicant later became a registered security guard. One night in April 2007, he consumed some alcohol. He was later stopped for what he thought would be a speeding ticket. He did not think he was impaired. He thought he passed the field

¹ Tr. 19. Ex. HH was withdrawn.

² Tr. 173-176.

³ Tr. 208. Applicant also had periods when he totally abstained, including his deployments while in the service.

⁴ The Government argued that Applicant's recollection of the evening does not "really make a whole lot of sense." Tr. 221. It is also noted that the incident occurred over a decade ago, when Applicant admitted he had been drinking, and that he pled guilty to the intoxication charge.

⁵ Tr. 220.

sobriety test, but he did not.⁶ He was arrested for DWI and DWI-2nd Offense Within 5-10 Years.⁷ He pled guilty, was sentenced to 180 days jail (10 imposed; 170 days suspended), 36 months probation, and, as a restriction on his driver's license, required to use an ignition interlock system.

An ignition interlock device was attached to Applicant's vehicle, as required. He was warned not to drink, eat, smoke, use mouthwash, cough syrup, alcohol-containing products, or apply perfumed body products for at least 15 minutes before using the device.⁸ Applicant abstained from alcohol, as advised, during an 8-10 week alcohol-awareness course.⁹ He kept no alcohol in his home while attending that course. During that period, around noon one day in the spring of 2008, Applicant returned home from a landscaping job for lunch. He parked in the driveway behind his domestic partner's car. She generally left for work around 2:00 p.m. He unloaded his equipment and went into the house. He ate his diet lunch of two yogurts and three prepared packages of chicken while his partner showered. He watched television for about 10 minutes. His partner left the bathroom and said she had to leave in about 10 minutes. Applicant did not think anything about it. He used the bathroom and brushed his teeth and rinsed with Listerine. He told her that because he had just eaten lunch, they needed to wait about 10 minutes before he could move his car and let her out of the garage.¹⁰ She could not move it for him because she could not use a stick-shift.¹¹

After about 10 minutes, Applicant and his partner went outside to their vehicles. Applicant blew into the interlock device and got an unclear reading.¹² The engine stalled because he had been locked out from access to the car.¹³ He then blew again and got another unclear reading, leaving him unable to try for a third time for 15 minutes.¹⁴ His partner could not wait any longer. She expressed her agitation at the wait and "couldn't believe [he] didn't just pop the clutch when [he] moved his car."¹⁵ He then released the

⁶ Tr. 212-213.

⁷ Tr. 186-187.

⁸ Tr. 23.

⁹ When asked whether Applicant had been drinking before this incident, his domestic partner stated with credible incredulity, "No. It was broad daylight. No." She also stated she was unaware of him ever drinking at lunchtime. Tr. 150.

¹⁰ Tr. 27.

¹¹ Tr. 49.

¹² Tr. 28.

¹³ *Id.*

¹⁴ *Id.* Applicant noted that the device gives a pass or fail reading. Tr. 32.

¹⁵ Tr. 29. Applicant noted "She was pissed."

clutch on his truck and pushed, while she steered his truck out of the way of her car.¹⁶ She told him to try blowing into the device again. Applicant tried again when the 15 minutes had passed, and the reading gave him a passing assessment.¹⁷ He drove the truck back into the driveway.¹⁸ He immediately called his appointed probation counselor to advise her of the situation.¹⁹ Within a week, Applicant and his partner met with his counselor. While she believed their description of events, she informed Applicant that the failed reading was a probation violation. He was told that another such violation would lead to his meeting with a judge for additional penalties.²⁰

Applicant never met with a judge about additional penalties, but a second incident did occur which resulted in a verbal reprimand from his probation officer.²¹ Two months later, during a hot summer, Applicant noticed that the sticker on his interlock device had been ripped. Consequently, when he used the device, the adhesive would stick to his chin.²² Applicant had not consumed alcohol that day.²³ He knew he had an appointment about the device within the next two weeks. He removed the rest of the sticker with a razor blade. That process only made the surface stickier. He tried to clean it with Windex, but the product only spread the sticky substance over a larger area. He then used Goof Off, a solvent, which he had in his truck from a recent house project.²⁴ Using Q-Tips to remove the sticky material, he eventually cleaned the surface.²⁵ Knowing the product contained alcohol, Applicant opened the windows to air the truck's interior for about 20 minutes. His partner joined him outside.²⁶ They were about to go to work on the house project for an elderly friend and his truck was already loaded for their job.²⁷ He blew into the device and received an unclear reading, indicating he had failed

¹⁶ Tr. 29, 150.

¹⁷ Tr. 32.

¹⁸ Tr. 30.

¹⁹ Tr. 31, 150-151.

²⁰ Tr. 33.

²¹ Tr. 34-35, 37.

²² Tr. 37. The device manual has a warning that reads, "Warning: Leave the tamper-evident label in place. Any attempt to remove the label is a violation." Applicant had previously read the warning. I thought that the violation was in tampering with the device, not the label itself. Tr. 44-45.

²³ Tr. 154.

²⁴ Tr. 38.

²⁵ *Id.*

²⁶ Tr. 152-153.

²⁷ Tr. 50, 152.

the test. After 45 seconds, he tried again. That time, the motor engaged and they left.²⁸ On their way, he called his counselor and left a message about what had happened. She called him later. She was exasperated by his methods and reprimanded him, but no further action was taken.²⁹

During his probation period, Applicant completed all requirements. He completed an 8-10 week alcohol-awareness program. He also attended Alcoholics Anonymous (AA) about 25 to 30 times and attended a Mothers Against Drunk Driving (MADD) seminar.³⁰ Applicant completed his probation on June 6, 2010. The interlock device was removed. He now has an unrestricted driver's license.³¹ Applicant was never diagnosed as alcohol dependent or referred for examination by a qualified medical professional. There are no other alcohol-related incidents noted in his record.

Applicant characterizes himself as a social drinker, a characterization re-enforced by his partner and character witnesses.³² When he imbibes, his beverage of choice is beer. When he drinks, he usually has two to three beers in a sitting. He and his partner sometimes may have a drink with dinner. Applicant consumes about one six-pack a week, which, while making \$15 an hour, he emphasizes is the most he can afford.³³ His domestic partner, with whom he lives and with whom he usually socializes, confirms that his drinking is moderate.³⁴ He limits his alcohol consumption when away from home.³⁵ When he is acting as the designated driver, he totally abstains from alcohol.³⁶ He is usually accompanied by his partner when he is away from home. They alternate as designated driver if alcohol is consumed.³⁷ She is highly credible and displays considerable maturity.

Applicant has not consumed excessive alcohol since his 2007 DWI.³⁸ He purchased a Breathalyzer that he carries to confirm he has not approached the legal limit for alcohol. It is a safeguard against any potential issues in the future, noting that

²⁸ Tr. 40.

²⁹ Tr. 41.

³⁰ Tr. 184, 208-209.

³¹ Tr. 205-206.

³² See, e.g., Tr. 124, 133-134, 144-146, 158.

³³ Tr. 185.

³⁴ Tr. 145-146.

³⁵ Tr. 202.

³⁶ Tr. 146-147, 202. Applicant's partner recalled one event when both had sufficient alcohol to prohibit them from driving. She noted that on one New Years Eve, they chose to spend the night at the hotel. Tr. 147.

³⁷ Tr. 203.

³⁸ *Id.*

he cannot afford to have another alcohol-related incident.³⁹ With regard to drinking and driving in the future, Applicant stated: “It’ll never happen again because the next time that I’m locked up. . . I would be sentenced to a full year in jail, I would lose my license I think permanently. . . .”⁴⁰

To Applicant, the maintenance of his driving privileges is his paramount concern. It is essential to his landscaping and pet-sitting work, as well as for commuting to and from his job. It is also essential to his two passions, theater and church. Applicant is very involved in local theater, for which he is unpaid. Many of the productions are for charity. He often acts as a producer for plays or revues, which can take 20 to 30 hours of work per week until the show opens, at which time it involves 40 to 60 hours a week of effort in addition to his schedule at work and with his personal business. At other times, he is involved in another capacity, such as singer, actor, or stage hand. Those jobs also have heavy demands on his free time. Applicant finds extraordinary personal satisfaction from his efforts. In addition, he is very active at his church, where he regularly worships and sings with the choir, acts in pageants, has run for church council, serves on a committee, and provides free landscaping services.⁴¹ He spends a considerable amount of his free time in church-related activities. For example, in preparation for the church’s 30th anniversary, Applicant and his domestic partner provided about 30 hours of landscaping over a three-week period. He relies on his vehicle for all of these activities.

Aside from his civic volunteer efforts, Applicant is committed to actively helping those in need. His sideline business was originally devised to assist elderly clients. Through those clients, he has also become a valuable resource for them. He delivers meals for the elderly. In addition, for nine years, he has driven one former client, who cannot drive, to visit her invalid daughter in a distant city.⁴² He also regularly delivers or mails the daughter’s groceries and prescriptions, as well.

At work, Applicant is considered highly effective and reliable. He excels at customer service. His supervisor noted that “everybody likes [Applicant’s] demeanor, his professionalism and the way he just handles himself on the everyday basis.”⁴³ Alcohol has not affected Applicant’s work performance. His supervisor stated, “I did not see anything at all that led me to believe that he had any kind of a drinking problem at all in his daily - - daily behavior, not even a hint.”⁴⁴ He stressed that employees suspected of having an alcohol problem are thoroughly reviewed and, if the findings are adverse, dismissed. “If you even smell [of alcohol], we can dismiss you, period. . . . So

³⁹ *Id.*

⁴⁰ Tr. 204.

⁴¹ See, e.g., Tr. 82-93.

⁴² Tr. 198-201.

⁴³ Tr. 104.

⁴⁴ Tr. 105.

we are very aware and we do look for that.”⁴⁵ Knowledge of the allegations and facts did not sway Applicant’s supervisor’s opinion of Applicant or his trust in Applicant’s abilities as a security guard.

A qualified expert witness provided testimony about Applicant’s ignition interlock device and the effect of certain foods and substances on its operation. The device reads and measures the presence of flammable or volatile substances flowing through it for a prescribed period of time. It then indicates whether any are present.⁴⁶ It is designed to gauge alcohol content on a subject blowing into the device.

Unlike Breathalyzers used by police, interlock devices do not contain a slope detector, a component that searches for external influences affecting its readings.⁴⁷ Therefore, it can also be triggered if certain foods are ingested within a certain time frame before the test is made. Milk products often contain microbial sources which can generate enough alcohol to trigger a positive response, as can proteins.⁴⁸ Products with alcohol trigger a positive response, as do many mouthwashes.⁴⁹ All Listerine mouthwash products can trigger a positive reading.⁵⁰ Mouthwash used within about 15 minutes of an interlock test can trigger a positive reading.⁵¹ Eating two yogurts and three packages of chicken, then using mouthwash within about 15 minutes of using the device would each be sufficient to activate the device.⁵² Using solvents on or near the device could activate it “most of the time.”⁵³ The solvent Good-Off could activate the device because it could read residues remaining around the input section of the device.⁵⁴

Policies

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the revised AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead,

⁴⁵ Tr. 106.

⁴⁶ Tr. 60.

⁴⁷ Tr. 63-65.

⁴⁸ Tr. 62-63.

⁴⁹ Tr. 61, 79-80.

⁵⁰ Tr. 69, 79-81.

⁵¹ Tr. 63.

⁵² Tr. 67, 74-75.

⁵³ Tr. 67.

⁵⁴ Tr. 68-69.

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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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. The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." ⁵⁵ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant. ⁵⁶

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). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁵⁷ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁵⁸

Based upon consideration of the evidence, Guideline G (Alcohol Consumption) is the most pertinent to this case. Conditions pertaining to that AG that could raise a

⁵⁵ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁵⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵⁷ *Id.*

⁵⁸ *Id.*

security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Guideline G – 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.⁵⁹ In this case, Applicant admits he has received two DWIs. He concedes he twice triggered an adverse reading on an ignition interlock device that was imposed as a restriction during his probation following his second DWI. Such facts are sufficient to raise Alcohol Consumption Disqualifying Condition (AC DC) AG ¶ 22(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 AC DC AG ¶ 22(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). Consequently, the burden shifts to Applicant to mitigate related security concerns.

The circumstances regarding the two instances in which Applicant triggered his ignition interlock device were credibly described by both Applicant and his domestic partner. The scenarios described are also credible. They are unlikely to recur because, as Applicant indicated, any further alcohol-related incidents will result in the loss of his license and his career, as well as significant jail time. Given such consequences, it is highly unlikely that he will again merit a requirement for an interlock device. Moreover, Applicant responsibly reported the interlock failures immediately. It appears his explanations to his probation officer, who must be experienced in gauging the veracity of tales regarding such devices, chose not to formally punish him or refer the matters back to the court. Furthermore, over two years have passed since those incidents, the requirement was deemed satisfied, and that restriction has been lifted. With regard to the related allegations, noted at SOR allegations ¶¶ 1.c-1.d, AC DC Mitigating Condition (AC MC) AG ¶ 23(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 individual's current reliability, trustworthiness, or good judgement) applies.

Applicant admits he was legally impaired when he received his DWIs. While he may have downplayed the circumstances of his arrests and the amount of alcohol consumed, or simply not recalled them fully in light of their ages and his condition at those times, his depiction of being discovered by police in 2000 was far from sanitized. His testimony regarding his April 2007 DWI was direct, with no excuses offered except his feeling at the time that he was within the legal limit. Since that time, he has completed all court-ordered requirements. His probation was successfully completed

⁵⁹ AG ¶ 21.

and the ignition interlock device removed. He attended AA meetings, an alcohol-awareness course, and a MADD seminar. He now has an unrestricted license. Applicant has not consumed alcohol to excess since 2007. Since that time, according to his partner, his witnesses, and himself, he has responsibly demonstrated that he is capable of, and committed to, consuming alcohol in moderation. He now possesses a Breathalyzer to double check if his system might trigger a negative response should he be stopped by the police. He and his partner, with whom he invariably socializes when they go out, have a system for alternating responsibilities as designated drivers. His partner provides him with support, significant oversight, and, given her maturity and frankness, appears to act as his second conscience with regard to his behavior and actions. Knowing another incident would jeopardize his driving privileges, he fully understands that responsible drinking is the key to his continued enjoyment of his two jobs, his theatrical ventures, his church work, his community outreach to seniors and their dependents, and other activities through which he derives extraordinary personal satisfaction. Such considerations persuade me that DC AC AG ¶ 23(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)) applies.

Under these specific facts, neither AC MC AG ¶ 23(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 satisfactory progress) nor AC MC AG ¶ 23(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 meeting with [AA] or a similar organization and has received a favorable prognosis by a duly qualified or a licensed clinical social worker who is a staff member of a recognized treatment program) apply.

Applicant has pled guilty to two DWIs, from February 2000 and from April 2007. While those incidents were separated by seven years, Applicant is fully aware of what the repercussions would be should he ever be arrested for a similar incident a third time. Given his reliance on his truck to enable him to work and enjoy his activities, it appears to be his most important possession. Theater and helping others define him. His jobs, in comparison, only pay for his ability to continue them. The continued privilege of driving is something he will not compromise. He has worked out a balanced approach for safe transportation with his partner, who appears to be both highly responsible and highly appreciative of what Applicant will risk if he is again involved in an alcohol-related situation. Applicant has not been reported as having consumed alcohol in excess for over three years. All evidence shows that he has maintained responsible drinking habits since his April 2007 DWI. He provided credible explanations as to the adverse readings on his interlock device, supported by testimony about how such devices work. In light of these facts, I find Applicant mitigated alcohol consumption security concerns.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on 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, as well as the "whole-person" factors. Applicant is a highly credible 46-year-old man who served with distinction in the U.S. military. He is in a happy and supportive domestic relationship with a highly mature and forthright woman. He is a respected employee who has never demonstrated problems with alcohol at work. Applicant thrives within the local theater community. He is highly active with his church, offering his time, services, and free landscaping in thanks for what he derives from his faith and the congregation. He regularly travels great distances to help the elderly and the infirm. He dedicated his sideline job as a service to helping older clients. When faced with his second DWI conviction, he successfully completed the court's requirements, including a three-year probation. He complemented these efforts with attendance at AA and at a MADD seminar. In making his commitment to drink responsibly, he purchased a Breathalyzer to safeguard that he does not operate a vehicle impaired to any degree. His partner, friends, supervisor, and clients are supportive of his goals. He is demonstrably committed to avoiding any activity that would jeopardize his driving privilege.

Applicant has fully complied with all requirements related to his DWIs. He is fully appreciative of the repercussions should another incident occur. He has put in place practices and safeguard to assure no more incidents will occur. He has consumed alcohol responsibly for over three-and-a-half years. The record repeatedly shows that his love of the theater and his need to aid others outweighs his own desires regarding alcohol consumption. He will do what it takes to remain responsible and maintain his driving privileges. Furthermore, Applicant's description of the circumstances surrounding his interlock device issues was plausible and verified by a credible expert witness. In light of the distinct facts in this case, I find that Applicant mitigated alcohol consumption security concerns. Clearance is granted.

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 H: | FOR APPLICANT |
| Subparagraphs 1.a-1.d: | For Applicant |

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge