



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-03571

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: Jesse Lilly, Esquire

July 20, 2010

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access classified information is granted.

Statement of Case

On November 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and DOHA recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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 (AGs).

Applicant responded to the SOR on December 11, 2009, and requested a hearing. The case was assigned to me on March 15, 2010, and was scheduled for hearing on April 14, 2010. A hearing was held on the scheduled date. At the hearing,

the government's case consisted of ten exhibits (GE). Applicant relied on two witnesses (including himself) and five exhibits (AE). The transcript (Tr.) was received on April 22, 2010.

Summary of Pleadings

Under Guideline G, Applicant is alleged to have (a) consumed alcohol, at times to excess and to the point of intoxication, from at least high school to at least May 2008 and (b) was twice-arrested for driving under the influence of alcohol (DUI): (i) in January 2005, to which he pleaded guilty and was fined \$300 and ordered to perform ten hours of community service, complete a DWI screening, and attend a DWI school and (ii) in May 2008, for which he was found guilty and was sentenced to 90 days in jail (suspended), placed on supervised probation for one year, and ordered to use an ignition interlock for one year when driving, attend DUI school, perform community service, attend a victim impact panel, complete an alcohol substance abuse screening program, and make a \$100 contribution to DARE.

In his response to the SOR, Applicant admitted each of the allegations. He provided no explanations.

Findings of Fact

Applicant is a 46-year-old principal engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant married his wife in May 1983 and divorced her in July 2008. GE 1; Tr. 29, 61. They have two children, ages 23 and 21. GEs 1 and 2. Applicant earned a bachelor of science degree in engineering from an accredited university and has been employed by his same employer since June 1986. See GE 1; Tr. 28, 33. He has no military experience.

Applicant was introduced to alcohol in high school. See GE 7. He continued to drink at a light to moderate rate between 1979 and 2008. GE 7. When he drinks, he typically does so in social settings and estimates he consumes about 3 to 4 beers a week. Occasionally, he gets intoxicated from his drinking. GE 7. Every three or four months he consumes hard liquor. He drinks primarily for relaxation with friends and not for the purpose of becoming intoxicated. GE 7. He has never been diagnosed for abusing alcohol or alcohol dependency. He consumes alcohol on a light to moderate basis and commits to avoid abusing alcohol in the future. See GEs. 5, 7, and 8.

In January 2005, Applicant frequented a local bowling alley in his state of residence after work to socialize with coworkers. He consumed a couple of drinks. While driving home, he was pulled over by local police for speeding. After questioning Applicant, the officer attempted to perform field sobriety test on him. When Applicant could not successfully perform the test, the officer transported him to a local station

where he was administered an intoxilyzer. See GE 6. Applicant registered a .11 blood alcohol content (BAC) level and was charged with DUI and speeding. GE 5. He pleaded guilty to the DUI charge, and he was found guilty of DUI in September 2005. See Ges 4 and 5. The court fined him \$300, and ordered him to perform ten hours of community service, complete a DUI screening, and attend a DUI school. See GEs 5 and 6. Applicant's documentation reflects his completion all of the imposed court conditions. See GEs 7 and 8; Tr. 45.

In May 2008, Applicant visited a local tavern after work, where he consumed a few beers with friends. Tr. 45-46. On his way to meet his wife to celebrate their anniversary, he was stopped by local police and arrested for DUI and speeding. See GEs 7 and 9; Tr. 46. While he had been experiencing some work-related and family-related stress in his life, he did not attribute his DUI arrest to stress. Tr. 61-62.

Applicant pleaded guilty to DUI in January 2009. See GEs 7 and 10. The court accepted his plea and sentenced him to 90 days in jail (suspended). The court fined him \$500 (suspended) and placed him on probation for one year. See GEs 4, 7, and 10. The court also ordered Applicant to install an ignition interlock for one year, attend DWI school, perform 24 hours of community service, attend a victim impact panel, complete an alcohol/substance abuse screening program, and pay \$100 to a local alcohol-education program: DARE. See GEs 4, 7, and 10. The court dismissed the speeding charge. GE 10.

Applicant has since completed all of the conditions set by the court at his January 2009 trial. See AE B. He still maintains an interlock device on his vehicle; even though, he is no longer required to so. Tr. 46-49. Applicant has received counseling with Dr. A (a licensed substance abuse counselor) since December 2009. See GE D; Tr. 66. His employment assistance group referred him to Dr. A for counseling. Tr. 64, 68.

Applicant sought guidance from Dr. A, not just for his dealing with alcohol, but for help in addressing his stress levels. Tr. 50-52. Dr. A consulted with Applicant in December 2009. AE D. He discussed Applicant's May 2008 DUI incident, but did not make an alcohol diagnosis. AE E. Dr. A noted Applicant's therapy attendance (three times a month) and confirmed that Applicant had not missed any therapy sessions. AE D. Dr. A also noted Applicant's positive changes in his drinking patterns and sleeping habits. AE D.

Alcohol has never affected Applicant's work performance. See AE A; Tr. 56-57. With the counseling assistance he has received from Dr. A, Applicant has been able to reduce his alcohol consumption considerably. He currently consumes alcohol no more than once a month and is continuing his counseling sessions with Dr. A for the foreseeable future. Tr. 54-55.

From his alcohol-related driving experiences, Applicant has learned important lessons about the risks of drinking and driving. Tr. 50-55. When he does drink, he limits his alcohol intake to beer. Tr. 62-63.

Applicant is highly regarded by his supervisors and co-workers who have worked with him for many years. See AE A. His facility security officer (FSO) characterizes his honesty and trustworthiness as beyond reproach AE A. Members of his management team credit him with honesty, reliability, and trustworthiness. AE A. His co-workers credit him with exceptional dedication and professionalism. They cite his volunteer efforts with key charitable organizations as strong indicia of his good character. AE A.

A close friend and counsel sees Applicant several times a year at social functions. His friend (who also represented him at hearing) has never observed Applicant in an intoxicated state. He considers Applicant to be a very responsible person. Tr. 72-73.

Policies

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and all of the "[c]onditions that could mitigate security concerns," if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(a) factors:: (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.

Viewing the issues raised and evidence as a whole, I conclude the following individual guidelines are pertinent herein:

Alcohol Consumption

The Concern: 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. See AG ¶ 21.

Burden of Proof

By virtue of the principles and policies framed by the revised AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a highly-regarded employee of a defense contractor with a history of recurrent alcohol-related arrests (two in the past five years). Applicant's exhibited alcohol abuse raises security concerns covered by Guideline G of the Adjudicative Guidelines.

Applicant's two alcohol-related arrests covered in the SOR raise security concerns over his risk of recurrent alcohol abuse. On the strength of the evidence

presented, two disqualifying conditions (DC) of the Adjudication Guidelines for alcohol consumption (AG ¶ 21) may be applied: MC ¶ 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 MC ¶ 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.”

Despite the recurrent pattern of his alcohol-related arrests (two over a five-year period), Applicant has never been diagnosed for alcohol dependency or alcohol abuse and does not believe he is an alcoholic. He assures that he has reduced his drinking to occasional consumption since his last DUI conviction in 2008, and his assurances are corroborated somewhat by his counselor (Dr. A) and his close friend who testified on his behalf. Neither indicated any awareness of Applicant’s ever being publicly intoxicated outside of the two covered alcohol-related incidents.

Applicant’s lack of any diagnosed alcohol dependency or abuse history provides support for his claims of reduced drinking since his last DUI offense in May 2008 and are important considerations in determining what weight to assign to Applicant’s rehabilitation claims. See ISCR Case 02-03186 (App. Bd. Feb. 16, 2006); ISCR Case 01-20579, at 5 (App. Bd. Apr. 14, 2004).

With no family history of alcohol dependence or abuse and no additional alcohol-related incidents since his last DUI incident in May 2008, Applicant has shown considerable improvement in his use of alcohol. Safe predictions can be made that Applicant is at no foreseeable risk to a recurrent alcohol-related incident or episode. Under these special circumstances, MC ¶ 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 the individual’s current reliability, trustworthiness, or good judgment,” is applicable to Applicant’s situation.

Taking into account both Applicant’s history of alcohol abuse, his strong work record, the applicable guidelines and a whole person assessment of his most recent alcohol moderation efforts, conclusions warrant that his overall efforts reflect strong evidence of sustained commitment to a program that provides optimum protections against recurrent alcohol abuse. Because of his ability to avert any recurrent abuse problems in the two years that have elapsed since his last alcohol-related incident, his two DUI offenses can be considered isolated and unlikely to recur in the foreseeable future.

Considering the record as a whole, Applicant makes a convincing showing that he has the resource support at his disposal to avert any recurrent problems with judgment lapses related to alcohol. Applicant’s mitigation efforts are sufficient to warrant safe predictions that he is no longer at risk for judgment impairment associated with alcohol abuse. Favorable conclusions warrant with respect to the allegations covered by the alcohol guideline of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in ¶ 2(a) of the AGs.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE G (ALCOHOL CONSUMPTION): FOR APPLICANT

Subparas. 1.a and 1.b: For Applicant

Conclusions

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

Roger C. Wesley
Administrative Judge