



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-04986
)	
Applicant for Security Clearance)	

Appearances

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

June 14, 2010

Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on August 28, 2008. On September 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and G for the 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.

The Applicant acknowledged receipt of the SOR on October 18, 2009. He answered the SOR in writing (Answer) on November 11, 2009, and requested a hearing before an Administrative Judge. This case was originally assigned to another Judge on February 18, 2010, but it was reassigned to the undersigned on March 1, 2010. DOHA issued a notice of hearing that same day, and I convened the hearing as scheduled on

April 1, 2010. The Government offered Exhibits (GXs) 1 through 7, which were received without objection. The Applicant submitted Exhibits (AppXs) A through C, which were also received without objection. DOHA received the transcript of the hearing on April 8, 2010. The record closed on April 1, 2010, the date of his hearing. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, the Applicant admitted the factual allegations in Subparagraphs 1.e, 2.b, and 2.c. of the SOR, with explanations. He denied the factual allegations in Subparagraphs 1.a~1.d., 2.a., 2.d., and 2.e. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Guideline E - Personal Conduct

1.a. In 2004, the Applicant was a member of the U.S. Navy. (GX 1 at page 12.) In June of 2004, the Department of the Navy Central Adjudication Facility (DON CAF) issued the Applicant a Letter of Intent (LOI) proposing to revoke his eligibility for access to classified information citing, in part, Personal Conduct and Alcohol Consumption. (GX 7 at pages 17~19.) In August of 2004, the Applicant responded to DON CAF's concerns in writing. (GX 7 at pages 10~12.) However, he did not ask for a hearing; and as such, in January of 2005, the DON CAF denied his security clearance citing, in part, his Personal Conduct and Alcohol Consumption. (GX 7 at page 3.)

1.b. The Applicant answered "No" in the question posited at Section 26.b. on his August 28, 2008 e-QIP. (GX 1 at page 31.) It asks the following: "To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked . . . ?" (*Id.*) As noted above, the Applicant was denied a security clearance in January of 2005; and as a such, the Applicant's answer to Section 26.b. is a wilful falsification.

1.c. The Applicant executed a follow up Office of Personnel Management (OPM) Affidavit in June of 2009. (GX 3.) He swore to the following: "I held a 'Secret' Clearance when I was in the Navy, until I was discharged on 3/15/06." In fact, the Applicant was denied a security clearance in January of 2005; and as a such, the Applicant's written statement is a wilful falsification.

1.d. The Applicant answered "No" in the question posited at Section 23.d. on his August 28, 2008 e-QIP. (GX 1 at page 29.) It asks the following: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" (*Id.*) In fact, the Applicant was charged with an alcohol related offense in 2004, and also convicted of alcohol related offenses in 2001 and 1998. The Applicant avers that he thought he "only had to go back 7 years." (Answer at page 2.) Even if the Applicant is to be believed, he was charged with an alcohol related offense in 2004, only four years prior

to him executing his August 28, 2008 e-QIP. Therefore, the Applicant's answer, even by his own rendition, is a wilful falsification.

1.e. The Applicant answered "No" in the question posited at Section 23.e. on his August 28, 2008 e-QIP. (GX 1 at page 29.) It asks the following: "In the last 7 years, have you been subject to court martial, or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain's mast, etc.)" (*Id.*) In fact, the Applicant received a Captain's mast as a result of his alcohol related offense in 2004. The Applicant avers that he "was told this would not be a matter of public record." (Answer at page 2.) The Applicant's Answer is not believable. The question specifically includes a Captain's mast in its inquiry; and as such, the Applicant's answer is a wilful falsification.

Guideline G - Alcohol Consumption

2.a.~2.e. In March of 1994, the Applicant was cited for an Open Container/Drinking Alcohol in a Vehicle. (GX 7 at page 10.) He was fined as a result of this citation. (*Id.*)

In March of 1996, the Applicant was cited, again, for an Open Container/Drinking Alcohol in a Vehicle. (GX 7 at page 10.) He was also fined as a result of this citation. (*Id.*)

In April of 1998, the Applicant was charged with, and subsequently found guilty of, Driving Under the Influence (DUI). (GX 2 at page 4, and GX 7 at page 10.) He was sentenced to 60 days in jail, of which 58 days were suspended, fined, and placed on probation for 12 months. (*Id.*)

In August of 2001, the Applicant was again charged with, and subsequently found guilty of, DUI. (GX 2 at pages 4~5, GX 4 at page 4, and GX 7 at page 11.) He was sentenced to six months in jail, all of which was suspended, fined, ordered to obtain an alcohol assessment, and placed on probation for another 12 months. (*Id.*)

In May of 2004, the Applicant was charged with Drunk Driving. (GX 6, and GX 7 at page 7.) As a result of the Captain's mast discussed above, he was reduced in rank one pay grade, forfeited pay, was restricted, and performed extra duty. (*Id.*)

The Applicant considers himself as "being a 'social drinker,' consuming 1~2 beverages each hour and only while socializing at venues where alcohol is [a] common practice, such as celebrations and special events." (GX 2 at page 6.)

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 commonsense decision. According to AG Paragraph 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. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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

Guideline E - Personal Conduct

The security concern for Personal Conduct is set out in AG Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form . . .*" may be disqualifying. Under Subparagraph 16(b), "*deliberately providing false or misleading information concerning relevant facts to an . . . investigator, security official, . . . or other government representative*" may also be disqualifying. Here, the Applicant falsified his 2008 e-QIP and his 2009 OPM Affidavit. I can find no countervailing mitigating condition that is applicable. His falsifications are recent and repeated.

Guideline G - Alcohol Consumption

Paragraph 21 of the adjudicative guidelines sets out the security concern relating to Alcohol Consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 22(a) provides that "*alcohol-related incidents away from work, such as driving under the influence . . ., or other incidents of concern*" may be disqualifying. The Applicant has five alcohol related incidents, beginning in 1994 and ending in 2005, the three most recent being DUIs. However, these are countered by the first mitigating condition, as "*so much time has passed, . . . that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.*" His last alcohol related incident was about six years ago, and those who know him best note no current issues with his sobriety. (AppX C.)

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. Under AG Paragraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the

whole-person concept. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of those who know him in the work place (AppX C). However, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance, due to his repeated wilful falsifications. For this reason, I conclude Applicant has not mitigated the security concerns arising from his Personal Conduct.

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 E:	AGAINST APPLICANT
Subparagraph 1.a.~1.e.:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a. ~2.e.:	For 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.

Richard A. Cefola
Administrative Judge