



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 09-05532  
)  
)  
Applicant for Security Clearance )

For Government: Gregg A. Cervi, Esquire, Department Counsel  
For Applicant: *Pro se*

July 20, 2010

**Decision**

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DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is denied.

On February 3, 2009, Applicant submitted a Public Trust Position Application (SF 85P).<sup>1</sup> On January 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). 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 for SORs issued after September 1, 2006.

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<sup>1</sup> Applicant also completed an Electronic Questionnaires for Sensitive Positions (SF 86) on March 24, 2009. (GE 1.)

Applicant answered (AR) the SOR in writing and requested a hearing before an administrative judge. On March 26, 2010, DOHA assigned the case to me and issued a Notice of Hearing the same day. The case was heard on April 29, 2010, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence without objection. Applicant testified. DOHA received the hearing transcript on May 9, 2010.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a through 1.d of the SOR, and denied the allegations contained in ¶¶ 2.a, 2.b, and 3.a. His admissions are incorporated into the following findings:

Applicant is 24 years old and single. In August 2008, he earned a bachelor's degree in applied sciences with a minor in construction management. He has an associate's degree in applied sciences with a minor in automotive repair. In December 2008, he began a position with his current employer, a defense contractor. He analyzes products for the military. He enjoys his job. (Tr. 14.)

Applicant has a history of arrests for Driving While Intoxicated (DWI). On April 29, 2007, Applicant was arrested and charged with DWI. On May 9, 2007, Applicant was arrested and charged with DWI. On August 25, 2007, he was arrested and charged with DWI. These three charges were consolidated into one case and resolved in early November 2007. He pleaded guilty to a misdemeanor for the May 2007 charge, and the April and August 2007 charges were dismissed. He paid a \$1,300 fine. The court did not order an alcohol assessment or participation in alcohol counseling. He was 21 years old at the time, and admitted that he had consumed more than five beers with his friends prior to each of the three arrests. (GE at 3 at 76; Tr. 15.)

On November 19, 2007, shortly after this conviction, Applicant was arrested and charged with his fourth DWI. After breaking up with his girlfriend, he consumed more than four glasses of wine and drove his car. In May 2008, he went to court on the charge. He was ordered to pay a \$700 fine and \$398 in court costs. His driver's license was suspended for six months, but he was allowed to drive to work and school. He was not ordered to undergo an alcohol assessment. (Tr. 19; GE 3 at 77.)

Applicant began consuming alcohol when he was 19 or 20 years old, during his second year of college. He drank seven to ten beers, 10 to 15 times per month. (Tr. 30.) Since the last arrest in November 2007, Applicant has modified his alcohol consumption. He sometimes consumes four to seven beers, two to three times a month on weekends with friends if they are in town. (Tr. 21.) He does not drink and drive, but instead calls a friend or a taxi if he has consumed alcohol. (Tr. 32.) He has not been arrested for any other criminal conduct since his fourth arrest. He has not had any alcohol-related problems at work, home, or with his finances. (GE 2 at 82.) He no longer associates with the people who were involved in the first three alcohol-related incidents.

He testified that “I realized I needed to slow down and stay away from certain people and I have had a clean track record since then.” (Tr. 19, 36.)

On February 3, 2009, Applicant completed an on-line SF 85P for the first time. In response to “*Section 16. Your Police Record: In the last 7 years, have you been arrested for charged with, or convicted of any offense(s),*” he disclosed the November 2007 and May 2008 convictions. He did not disclose the April 2007 and August 2007 arrests. He explained that the on-line form, which he did at home in one day, did not provide sufficient space for more than two incidents and he determined that it was more important to disclose the two convictions, one of which resolved three arrests.<sup>2</sup> In his answer, he denied that he intentionally withheld information about the two DWIs.<sup>3</sup> (Tr. 20, 24; GE 3 at 75.)

The SOR alleged that Applicant falsified his answer to Section 16, because he failed to disclose the April and August 2007 arrests. He testified that he did not falsify the SF 85P. He was not familiar with the process, and did not appreciate the importance of full and accurate disclosure. He filled it out at home without any assistance. (Tr. 34.) Under Section 7. *Your Employment Record*, Applicant disclosed that he had been fired from a position in June 2005 due to a conflict with his supervisor. (GE 2 at 3.) He stated:

I tried to fill it out to the best of my knowledge, I was young, new to the workplace, eager to get started working, and it was definitely not on purpose to falsify any documents, and I just filled it out to the best of my knowledge on how to fill something out like that. I’ve never filled out a document like that before, that extensive. (Tr. 34.)

On May 5, 2009, a government investigator interviewed Applicant at work about his answers to Section 16 on the SF 85P. Applicant provided further details about the November 2007 and May 2008 convictions. He stated that he went to court in November 2007 for the May 2007 charge and again in May 2008 for the November 2007 charge. He admitted that he had consumed alcohol before the arrests. He told the investigator that he had routinely been consuming seven to eight beers, ten to fifteen times a month. He became intoxicated eight to ten times a month. The interview lasted 15 to 20 minutes. (Tr. 29, 33; GE 3 at 81.) He did not mention the April 2007 or August 2007 DWIs, and only discussed the two convictions, disclosed on the SF 85. He stated during the hearing:

To my recollection, I believe that we only talked about the two that were on there. He didn’t ask any questions about anything else and I didn’t

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<sup>2</sup> Under the heading “Offense/Action” in Section 16 of the SF 85P, the form lists the term “Law Enforcement Authority/Court” twice, leaving space below each heading for information about the location of the county and court pertinent to the criminal incident. (GE 2.)

<sup>3</sup> On March 24, 2009, Applicant completed an SF 86. He again disclosed the two conviction dates but not the other two arrests. (GE 1.)

realize I needed to tell him at that time or else I would have, I would have told him the four dates like is in the second interview on June 16. I thought he just wanted to know about the two dates that I put on the form. (Tr. 32.)

On June 16, 2009, Applicant spoke to another investigator, who inquired about the two arrests that were not disclosed on the SF 85P. Applicant told this investigator that he did not include the two other arrests because they were dismissed and resolved in the November 2007 conviction. (Tr. 33; GE 3 at 75-77.) He spoke to this investigator for 30 to 35 minutes and gave extensive explanations of the four arrest incidents in response to the investigator's questions. (Tr. 33; GE 3.)

### **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 (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 AG ¶ 2(a), describing 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.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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."

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.

## **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.

The guideline sets forth a condition that could raise a security concern under AG ¶ 22 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.

In 2007, Applicant was arrested and charged four times with DWIs. Based on those incidents, the Government raised a concern under AG ¶ 22(a).

After the Government produced substantial evidence of that disqualifying condition, the burden shifted to Applicant to produce evidence and prove mitigation. Conditions that could mitigate that concern are provided under 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 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 satisfactory 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.

AG ¶ 23(a) provides some mitigation because Applicant's last DWI occurred more than two years ago. Since then, he has not been involved in any other alcohol-related misconduct and has modified his consumption of alcohol. Given his change in behavior since November 2007, his previous pattern of drinking no longer calls into question his current judgment. AG ¶ 23(b) also provides some mitigation. Applicant acknowledged his imprudent consumption of alcohol and no longer associates with the people with whom he previously socialized. There is no evidence in the record to support the application of AG ¶ 23(c) or AG ¶ 23(d), which require participation in formalized treatment programs.

### **Guideline E, Personal Conduct**

The security concerns pertaining to the personal conduct guideline are set out in AG ¶ 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. 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.

The Government alleged in SOR ¶ 2 that Applicant deliberately falsified answers to a question on his February 2009 SF 85P, and failed to disclose information during a May 2009 investigative interview. The Government contended that those falsifications constituted potential disqualifying conditions under AG ¶ 16:

(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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant acknowledged that he did not disclose the information about two arrests, but denied that he intentionally misled the Government. When a falsification allegation is controverted or denied, as in this case, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's 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 state of mind at the time the omission occurred. See 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)).

Applicant's explanation that he did not intentionally disclose two of the four arrests on the February 2009 SF 85P because two of them were resolved in the November 2007 conviction was credible. This was the first security clearance application that he completed, and on its face, Section 16 of the form does appear to limit the inclusion of information to two incidents. Furthermore, he disclosed adverse information about an employment termination, lending credence to his explanation that he did not falsify his security clearance application. SOR ¶ 2.a is found in his favor.

Applicant's explanation that he did not disclose the April and August 2007 arrests to the investigator in May 2009 because the investigator limited his questions to the two convictions listed on the SF 85P is not credible. In listening to Applicant's testimony, he had some concerns about the scope of disclosure when he completed the February 2009 SF 85P. Three months later, he had an opportunity to easily discuss those concerns and explain that the November 2007 conviction resolved the May 2007 arrest and two other arrests. He failed to do so. Instead of erring on the side of full disclosure, he chose non-disclosure. That decision raises concerns about his judgment and is sufficient to establish disqualifying condition AG ¶ 16(b).

AG ¶ 17 includes three conditions that could mitigate security concerns arising under this guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

None of the mitigating conditions set forth above apply. Applicant denies the allegation contained in SOR ¶ 2.b. He did not admit or disclose the other two DWI arrests until confronted with the facts by the second investigator on June 16, 2009. He offered no evidence that the misleading information he provided to the first investigator was based on improper advice, or otherwise justified. His decision not to clarify or explain his answers in May 2009 is the type of behavior that casts doubt on one's reliability and good judgment.

### **Guideline J, 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 describes two 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.

Applicant admitted that he was arrested for DWI four times, resulting in two convictions. The evidence raised said disqualifications.

AG ¶ 32 provides two conditions that could mitigate security concerns arising under this guideline:

- (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; 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.

As described under Guideline G, Applicant's last arrest for any type of criminal conduct occurred in November 2007, more than two years ago. Since then, he has changed his friends and alcohol consumption habits. In December 2009, he began



working for his current employer. He acknowledged that his past misuse of alcohol and criminal conduct. The evidence warrants the application of both of the above mitigating conditions.

### **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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

- (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 include 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 pertinent facts and circumstances surrounding this case, including Applicant's age, and candid testimony. Applicant is an intelligent and motivated 24-year-old man, who possesses potential for success in his career.

Applicant began consuming large quantities of alcohol in college and did not begin to moderate his consumption until he was arrested for the fourth time in November 2007. At this point, Applicant is aware of the potential problems that the misuse of alcohol creates, and is careful not to drink and drive. He expressed a commitment to his job and to change his alcohol-related behavior. These facts represent solid evidence of his decision to mature and pursue a successful career. However, his failure to forthrightly mention the April and August 2007 arrests during the May 2009 interview is troubling. Although he elaborated on the events underlying the May 2007 arrest during that interview, he chose not to disclose the fact that the November 2007 conviction, resolved not only the May 2007 arrest, but also the April and August 2007 arrests. Those were significant facts to leave out of his explanation of the conviction and cannot be construed to be a simple oversight.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guidelines for alcohol consumption and criminal conduct, but not those arising under 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 G:      | FOR APPLICANT     |
| Subparagraphs 1.a through 1.d: | For Applicant     |
| Paragraph 2, Guideline E:      | AGAINST APPLICANT |
| Subparagraph 2.a:              | For Applicant     |
| Subparagraph 2.b:              | Against Applicant |
| Paragraph 3, Guideline J:      | FOR APPLICANT     |
| Subparagraph 3.a:              | For Applicant     |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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SHARI DAM  
Administrative Judge