



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-05941
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: Matt Fargo, Personal Representative

July 20, 2011

Decision

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

On October 20, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline G (Alcohol Consumption), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct). 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 December 1, 2010, response, Applicant admitted two of seven of the allegations set forth under Guideline G, the single allegation raised under Guideline D, and denied both allegations under Guideline E. He also requested a hearing. DOHA assigned the case to me on May 20, 2011. The parties proposed a hearing date of June 29, 2011. A notice setting that date for the hearing was issued on June 3, 2011. I convened the hearing as scheduled.

Applicant gave testimony and introduced five witnesses, including his personal representative. He also presented eight documents that were accepted into the record without objection as exhibits (Exs.) A-H. Department Counsel offered one hearing

exhibit (Ex. HE-1) and 15 documents, which were admitted as Exs. 1-15 without objection. Upon motion by Department Counsel, SOR allegation ¶ 3.b was struck from the SOR without objection.¹ The parties were given until July 12, 2011, to submit any additional materials. The transcript (Tr.) of the proceeding was received on July 9, 2011. In the absence of supplementary submissions, the record was closed on July 12, 2011. Based on a review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to alcohol consumption. Clearance is denied.

Findings of Fact

Applicant is a 30-year-old systems engineer who has worked for the same defense contractor for approximately three-and-a-half years. He is mathematically gifted and has earned both a high school diploma and a bachelor of science degree. Applicant is single and has no children.

In the autumn of 2000, Applicant was 19 years of age and enrolled as a freshman in a post-secondary military academy. During the final examination period for the fall term, Applicant began an on-line relationship with a female he later discovered was a 14-year-old girl.² When his roommates discovered this fact, they argued with Applicant about the relationship and his poor grades. Their advice was regularly dismissed, and his behavior was often sophomoric. During the winter holiday break, Applicant met the girl several times. He would regale his roommates with tales of his sexual exploits with the girl, much to their disapproval.³ Eventually, he told the roommates that he had stopped seeing her and was currently dating a 17-year-old girl. In fact, however, there was no 17-year-old girl involved; he was still seeing the 14-year-old. The girl faced a pregnancy scare around the time of Applicant's spring break in March 2000. Applicant's roommates learned that he was still involved with the girl. During this time, the girl pursued the relationship, threatening to commit suicide if their affair ended. Although the sexual relationship ended in March 2001, when Applicant was still 19, Applicant, the girl, and her parents remain on cordial terms.⁴

By the end of March 2001, the military had instituted an investigation into the relationship. The details of the incident were reported to the local police, but the state chose not to pursue the issue because neither the girl nor her family wished to cooperate. During the military investigation, Applicant turned 20. He cooperated with investigators and admitted his actions. In September 2001, Applicant was

¹ Tr. 8.

² Tr. 63.

³ See, e.g., Tr. 97. At the time, Applicant did not think of his conduct in terms of it being potentially illegal, but he was aware that the conduct was not the type contemplated by his academy's or service's honor code. Tr. 94-95.

⁴ Indeed, the girl, now in her mid-20s, wrote a letter on Applicant's behalf. She stresses that the relationship was consensual. Ex. A (Letter, dated Jun. 29, 2011). See also Tr. 64-66, 98-99.

administratively discharged under other than honorable circumstances in lieu of a trial by court-martial.⁵

Starting in 2002, the year in which he turned 21, Applicant began consuming alcohol, at times to excess and to the point of intoxication. That year also marked his entry into a civilian university in another part of the country. In about March 2003, while he was an undergraduate student, Applicant was arrested for impaired driving.⁶ He was ultimately found guilty of operating a vehicle while intoxicated (DWI), operating with a blood alcohol level (BAC) of .08% or more, and speeding. He was ordered to complete an alcohol education program, a community service term, pay fines, and serve one year of probation.

In March 2004, the State filed a petition to revoke Applicant's probation after he was arrested following a fraternity party in February 2004 on two counts of theft and public intoxication. That petition was dismissed. However, Applicant agreed to a plea bargain under which he was accepted into a diversion program and ordered not to return to the fraternity house in question.⁷ The following month, in June 2004, Applicant was arrested for public intoxication after a graduation party. He pled guilty to the charge and was ultimately found guilty of public intoxication.⁸

In late September 2007, Applicant and friends went to a bar. One friend felt ill, and Applicant volunteered to drive him home. After crossing the median strip, he was arrested and charged with DUI, driving with a BAC of .08% or more, possession of an open container while driving, and failure to provide evidence of financial responsibility. Applicant was found guilty of the BAC charge and was sentenced to fine and costs, community service, attendance in an alcohol program, and three years of probation.⁹ The judge's order was signed in May 2008.¹⁰ Also at the end of September 2007, on the morning before a big college football game, Applicant was arrested for public intoxication and ultimately placed into a diversion program, sentenced to fines and fees, and ordered to complete an alcohol education program.¹¹ He does not recall ever being

⁵ The SOR incorrectly states that the administrative discharge occurred in 2002. Applicant's Certificate of Release or Discharge (Ex. 14) and security clearance application (Ex. 1), however, reflect a discharge date in September 2001. This discrepancy was noted during the hearing, and the SOR appropriately amended. See Tr. 67-68.

⁶ Tr. 51-52.

⁷ Tr. 52-53.

⁸ Tr. 54.

⁹ See also Ex. 11 (Case file at 30 of 40, indicating the judge's order of May 6, 2008).

¹⁰ *Id.*

¹¹ Tr. 58-60.

given a diagnosis of alcohol dependence or abuse during the subsequent alcohol programs.¹²

A couple of months after his 2007 arrest, Applicant relocated. He took his alcohol rehabilitation program seriously and decided to make changes in his life. He stopped drinking to excess “at the end of 2007.”¹³ He met a girlfriend. He chose to spend time with her instead of going out with the “guys.”¹⁴ He applied himself to working on his career. When he goes out, he paces his alcohol consumption and limits himself to three drinks per evening.¹⁵ He will not drive if he has had alcohol, preferring instead to use a designated driver or public transportation. He has a new set of friends who are supportive of his attempts to comport his alcohol consumption within socially acceptable boundaries. He has actively worked at demonstrating that he is a responsible adult.

Today, Applicant continues to consume alcohol. He does so in moderation. He does not believe he needs to maintain total sobriety to contain his alcohol use or prevent him from binge drinking.¹⁶ None of his witnesses have seen him intoxicated in the past few years.¹⁷ Applicant and his girlfriend do not usually visit bars, though they occasionally meet friends at them. Applicant tries to comport his behavior appropriately and professionally. At work, he is considered a gifted and brilliant employee.¹⁸ Applicant is financially stable. He enjoys travel and nature. He regularly donates to a fund for needy children in Latin America. Now a competitive runner, he watches his diet and is, consequently, particularly mindful of his alcohol consumption.¹⁹

Policies

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the 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, 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-

¹² Tr. 57.

¹³ Tr. 50.

¹⁴ Tr. 45-46.

¹⁵ Tr. 47.

¹⁶ Tr. 57.

¹⁷ Tr. 17, 35, 38-39, 45-49.

¹⁸ See generally Tr. 15-43.

¹⁹ Tr. 70.

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. . . .”²⁰ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²¹

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.”²² Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²³

Based upon consideration of the evidence, Guideline G (Alcohol Consumption), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) are the most pertinent to this case. Conditions pertaining to those AGs that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

²⁰ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²¹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²² *Id.*

²³ *Id.*

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.²⁴ In this case, Applicant admits that he regularly drank alcohol, at times to excess, from 2002 through the end of 2007. He was cited for excessively high blood alcohol levels while driving in 2003 and late 2007. His last such citation in late 2007 led to his being ordered to serve three years of probation. The judge signed the order for that case in May 2008. Applicant was also arrested for public intoxication twice in 2004 and once at the end of September 2007. While there is no evidence of a diagnosis of alcohol abuse or dependence, 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*). With disqualifying conditions raised, the burden shifts to Applicant to raise mitigating conditions.

Applicant was arrested for behavior related to his excessive use of alcohol on multiple occasions between 2002 and late 2007. While he now drinks in moderation and admits the facts related to his past misconduct, Applicant continued drinking alcohol to excess through only the end of 2007, less than four years ago. As a consequence of his last drunk driving incident in September 2007, he was ordered to serve three years of probation. The judge's order in that case appears to have been signed in May 2008. Therefore, his most recent probationary period was not completed until somewhere between September 2010 and May 2011. Given these facts, the behavior is neither infrequent nor remote in time.

Moreover, while Applicant presently drinks alcohol in moderation, insufficient time has passed to demonstrate that alcohol is no longer an issue in his life or that he can maintain his present level of responsible alcohol consumption. This is particularly true given that a similar period of about three-and-a-half years of incident-free moderation preceded his September 2007 incidents. In light of these considerations, neither Alcohol Consumption Mitigating Conditions (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*) nor 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. In addition, under

²⁴ AG ¶ 21.

the facts noted, neither, 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 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.

Guideline D – Sexual Behavior

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.²⁵ Here, Applicant had sexual relations with a 14-year-old girl when he was 19 and attending a post-secondary military academy. Such conduct was criminal in nature and was antithetical to the conduct expected by his institution and military branch of service. During the height of their sexual relationship, Applicant indiscretely shared details of his sex life with his roommates. Such facts are sufficient to raise Sexual Behavior Disqualifying Conditions (SB DC) AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and AG ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*). With disqualifying conditions raised, the burden moves to Applicant to mitigate security concerns.

There is no federal law defining the age range of adolescence, the leading dictionaries avoid setting precise years for the duration of the phase, and the AG provides neither a definition of the term nor guidance. Biological, psycho-social, and anthropological definitions generally set the term's range within parameters loosely around the ages of 13 and 19. Here, Applicant was 19 at the time at issue, setting him at the cusp of adolescence. His overall behavior at the time with regard to other matters, such as his behavior as a military academy student, appears to have been somewhat puerile. However, the incidents at issue occurred over a decade ago, a significant duration in the life of a 30-year-old. No subsequent incidents of sexual contact or behavior are noted. He expressed no provocative interest in or fixation on adolescent partners. He is now in a romantic relationship with a contemporary. Applicant has since taken adult responsibility for both this behavior and his abuse of alcohol, and demonstrated both maturity and improved judgment. He is open about his past sexual behavior. Given these facts and considerations, I conclude that AG ¶ 14(a) (*the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature*), ¶ 14(b) (*the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur*

²⁵ AG ¶ 12.

and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment), and 14(c) (the behavior no longer serves as a basis for coercion, exploitation, or duress) each apply.

However, despite the seemingly consensual nature of the relationship, Applicant's sexual partner was 14 at the time. Without delving into issues regarding that state's laws regarding the age of consent, his braggadocious reportage back to peers on his relationship clearly flaunted his sexual escapades. AG ¶ 14(d) (*the sexual behavior is strictly private, consensual, and discreet*) does not apply.

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because “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.”²⁶ In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.²⁷

Here, Applicant was administratively discharged under other than honorable conditions in lieu of trial by court-martial from a military academy. This occurred in the wake of the revelation that he, at age 19, had recently had a sexual relationship with a 14-year-old girl. Such facts are sufficient to raise Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(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. . . .*).

The incident at issue occurred a decade ago, when Applicant was 19 years old. Since that time, however, Applicant, now 30, has comported his behavior in such a way that no further incidents involving sex have occurred. Moreover, he is no longer in the military. He has been in a stable relationship with an age-appropriate partner since 2007. He is considered a mature and productive employee in his current professional position. His only other issues of personal conduct were previously discussed under Guideline G, where issues regarding alcohol consumption are more appropriately reserved for discussion and analysis. Therefore, in light of these considerations, PC MC AG ¶ 17(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*) applies. None of the other mitigating conditions are applicable.

²⁶ AG ¶ 15.

²⁷ *Id.*

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 upon 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 30-year-old systems engineer who has been steadily employed by the same employer for approximately three-and-a-half years. A college graduate, he is considered a gifted mathematician and a superior employee. He has the full support of his professional superiors and peers. Despite past problems with discipline, restraint, and excessive alcohol consumption, Applicant decided to turn his life around at the end of 2007. He is now in a committed relationship and thriving in a new city, where he responsibly socializes with age-appropriate peers.

At issue in this case are two scenarios raising security concerns. First, at age 19, Applicant had a sexual relationship with a 14-year-old girl. He did so while attending a post-secondary military academy, at which poor judgment was noted in other behavioral areas. As a result, he left the academy following an administrative discharge. In the intervening decade, he completed his college education and matured. He is now in an age-appropriate relationship. He has demonstrated his ability to comport his behavior appropriately in sexual matters. To continue to hold this issue against him at this point would serve little purpose.

Remaining at issue are security concerns raised by Applicant's past alcohol consumption. It is noted that while Applicant continues to consume alcohol, he started making adjustments to his lifestyle in late 2007. Lacking evidence that he was diagnosed as an alcohol dependant or abuser, neither abstinence nor sustained support are required. However, less than four years passed between his June 2004 alcohol-related incidents and the recurrence of related incidents in September 2007. To date, as a matter of comparison, Applicant has developed a current record of demonstrated moderation that exceeds his 2004-2007 incident-free period by only a few months. At this point, less than four years of demonstrated moderation and less than a year of successful post-probation behavior is insufficient to show that he is fully capable of keeping his alcohol consumption within acceptable social and legal boundaries. As noted above, any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. In light of the facts in his case, and the brevity of his current period of moderate alcohol use, alcohol consumption security concerns remain unmitigated. Clearance is denied.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge