



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-05995
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

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

October 27, 2010

**Decision**

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LYNCH, Noreen A., Administrative Judge:

On February 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and G for 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 revised adjudicative guidelines (AG).

Applicant timely requested a hearing before an Administrative Judge. I received the case assignment on June 4, 2010. DOHA issued a notice of hearing on September 5, 2010, and I convened the hearing on September 15, 2010. The Government offered Exhibits (GE 1-3), which were received into the record without objection. Applicant testified and presented the testimony of one witness. He submitted Exhibits (AE A-C) at the hearing which were admitted into the record without objection. I held the record open until September 22, 2010, so that Applicant could submit additional documents. The submission was timely received, marked as (AE D) and entered into the record.

Department Counsel did not object to the documents. DOHA received the transcript on September 23, 2010. Based upon a review of the record, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, dated April 20, 2010, Applicant admitted the factual allegations in ¶¶ 1.a., 1.b., and 1.c. He denied the allegation in ¶ 2.a. with explanations. He provided additional information to support his request for eligibility for a security clearance.

Applicant drank beer on weekends when he was 17 years old. He believed he averaged about six to seven beers at a sitting. (GE 2) He believes that he was intoxicated five to six times a month. He would drink at his parents' beach house on a social basis. He acknowledged that it was "cool" to be drunk in high school. (Tr. 59) He states that he stopped drinking in 2007. He has never been diagnosed with an alcohol problem. (GE 2)

Applicant is a 24-year-old employee of a defense contractor. He graduated from high school in 2004 and attends college classes. Applicant is engaged to be married. He has no children. Applicant worked for the local probation department from 2005 until 2007, but resigned based on an incident in 2007. (GE 1) Applicant has been with his current employer since March 2009. (GE 1)

In July 2005, Applicant was with some friends at a party on a river. He consumed approximately six to seven beers. He was 18 years old. The police arrived and charged him with under-age alcohol consumption. He pleaded "no contest" and paid a fine. (GE 2).

In August 2007, Applicant was at a bar with friends. He states that he had not been drinking alcohol that evening. When he exited the bar, a group of fellows were standing by his truck. (Tr. 25) Applicant felt threatened. Applicant hit one person over the head with a glass bottle. The person fell to the ground and Applicant hit him a "couple more times." (Tr. 30) Applicant did not call the police. He went to a friend's house after the incident. The police called Applicant on his cell phone. When they came to his house, Applicant was charged with aggravated assault with a deadly weapon (felony). The police report notes that Applicant had a strong odor of alcohol about him but Applicant denies that he had been drinking any alcohol. (Tr. 28)

The person that Applicant hit was hospitalized with injuries to the back of the head and his ear. (GE 2) Applicant described him as a "big, strong guy who lifts weights." Applicant pled guilty to the assault charge one year later in June 2008. The court on that date, required 20 session of anger management classes and completion of community service. He was also placed on 36 months probation. As part of the probation, Applicant was required to pay restitution and not consume or drink any substance containing alcohol.

In March 2009, Applicant was charged with three counts of disorderly conduct and one count of assault. At the time of the incident, Applicant was still on probation for the 2007 incident. Applicant reports that after a wedding, he went to a bar to visit his cousin. He was with his girlfriend. Again, Applicant claims that he was not drinking any alcohol. (Tr. 44) He was involved in a fight. (GE 3) The details are not clear. Applicant states that he did not touch anyone and that the people have something against his family. Applicant pled not guilty because he believes it is "an outrageous case." He believes that there are witnesses to prove that he was a bystander. (Tr. 80) He has not provided them to his attorney. The case is still pending because a court date has not been set.

After the March 2009 incident, his probation was modified to include a requirement that Applicant not step inside any bar or place which has the primary purpose of selling alcohol. He agreed to the terms in April 2009.

Applicant argued at the hearing that he is from a good family. He lives with his mother and stepfather. His father is a retired police officer. His uncle was a judge. He is a more responsible person because he is employed and has purchased a house. He is engaged to be married. He goes to church on a regular basis. (Tr. 65) Applicant loves his job. He completed the probation from the 2007 offense on August 21, 2010. (AE C)

Applicant submitted his Certificate of Completion for the anger management classes, dated April 2009. He is compliant with his probation, and has completed 310 hours of community service. (AE A)

A colleague, who is also father of one of Applicant's friends, testified at the hearing that Applicant is an honorable fellow. The witness is retired military, and he believes that Applicant is trustworthy. (Tr. 68) Applicant works hard and can always be counted on to work an extra shift. He is reliable. (Tr. 73) The witness has never seen Applicant drink alcohol. (Tr. 71)

Applicant submitted eleven letters of reference from other colleagues and friends. He is described as an extremely hard worker. He is dedicated to his family. Applicant completes his work in a professional manner. He is religious. He is polite and a pleasure to work with. (AE C)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required 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 overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2, 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.

Under 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 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 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 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 the allegations under criminal conduct in the SOR. Applicant was charged with underage alcohol consumption in 2005. In 2007, he was convicted of a felony charge, after pleading guilty. In 2009, Applicant was arrested and charged with disorderly conduct and assault. The case is still pending. AG ¶ 31(a) and (c) apply in this case.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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.

Applicant had incidents involving assault and disorderly conduct. He was convicted in 2007 of a felony. He completed the probation in August 2010. Applicant's last incident of criminal conduct was in 2009. Although the case is still pending, he was in a bar and still on probation. He completed court-ordered anger management classes. He is employed and has good references. He completed community service hours. However, insufficient time without offenses has passed to mitigate the government's case. He has shown that he is on the right track, but it is too soon to find that he is successfully rehabilitated. Thus, AG ¶ 32(a) and (d) do not fully apply in this case. He has not mitigated the security concerns under this guideline.

### **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.”

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying, “(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 “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.”

In this case, Applicant admitted he was arrested in 2005 for underage drinking. He has been convicted of felony assault but denies drinking that evening. The police report is in conflict with that assertion. Although he argues that he stopped drinking in 2007, he went to a bar which led to various disorderly conduct charges as recent as 2009. AG ¶¶ 22 (a) and (c) apply.

AG ¶ 23 provides conditions that could mitigate security concerns:

(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.

Applicant has not been diagnosed with an alcohol problem. He has not had any alcohol counseling, but he completed anger management classes. In those classes, the counselor did not believe that Applicant had a problem with alcohol. Applicant states that he stopped drinking in 2007. He had one underage alcohol offense in 2005. Applicant has taken full responsibility for his past excessive alcohol consumption. Applicant has mitigated the alcohol consumption concerns under AG ¶¶ 23(a), (b), and (d).

### **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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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.”

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for 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. Applicant is a 24-year-old employee of a contractor. He is a respected employee. He has submitted eleven letters of recommendation. He lives at home and is engaged to be married. He attends church. He is motivated to succeed.

Applicant's most recent criminal charge is still pending. He just completed his probation in August 2010 for the 2007 incident. He has taken steps in the right direction, but at this time, Applicant has not met his burden of proof to overcome the government's case.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Paragraph 2, Guideline G:

FOR APPLICANT

Subparagraph 2.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 security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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NOREEN A. LYNCH  
Administrative Judge