



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



In the matter of:)	
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)	ISCR Case No. 09-08429
Applicant for Security Clearance)	

Appearances

For Government:
Jeff A. Nagel, Esquire, Department Counsel

For Applicant:
John N. Griffith, Esquire
The Edmunds Law Firm

August 9, 2011

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on June 29, 2009. (Government Exhibit 1.) On December 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline G (Alcohol Consumption) 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 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.

Applicant submitted an Answer to the SOR on January 4, 2011, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 26, 2011. I received the case assignment on February 4, 2011. DOHA

issued a notice of hearing on March 2, 2011. I convened the hearing as scheduled on March 16, 2011. The Government offered Government Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf, and submitted Applicant Exhibits A through W, which were also admitted without objection. Applicant requested that the record remain open for an additional period of time for receipt of additional documents. He submitted Applicant Exhibit X on March 28, 2011, which was admitted without objection. DOHA received the transcript (Tr) of the hearing on March 30, 2011, and the record was closed. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 26 and has a GED. He lives with his fiancée, and has one child and another on the way. He is employed by a defense contractor, and seeks to obtain a security clearance in connection with his employment in the defense industry. Applicant admitted allegations 1.c., 1.d., 2.a., 2.b., 2.c., 2.d., 2.e., 2.f. and 2.g. in the SOR. Those admissions are deemed findings of fact. He denied the remaining allegations either in whole or in part. He also submitted additional information supporting his request for a security clearance.

Paragraph 1 (Guideline G - Alcohol Consumption)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he uses intoxicants to excess.

Applicant admits that he used alcohol between 2001 and December 2009. (Answer.) He admits using alcohol, and having alcohol-related incidents, but denies that he used alcohol to excess during this period.

The records show that Applicant has been involved in three alcohol-related incidents. In March 2004, and again in August 2008, Applicant was arrested for Disorderly Conduct, which was related to his being under the influence of alcohol. (Tr at 37-38, 41-42.) Applicant pleaded guilty and received short jail times and fines for these two incidents.

Applicant was arrested for Driving Under the Influence in August 2005. He plead guilty and was sentenced to one day in jail, a fine, and seven years probation. Applicant Exhibit I shows that he completed the Drinking Driver Program, which was part of his sentence. His probation was terminated in December 2008 based in part on his telling the Court he was going to join the Army. Applicant did not enter the Army. (Tr at 38-41.)

Applicant continued to drink at a reduced rate from August 2008 until February 2011. He does not intend to use alcohol to excess in the future. (Tr at 43-44.) In preparation for his hearing Applicant took and passed two alcohol screening tests. (Applicant Exhibits G and H.) He also received an alcohol assessment from the Drinking Driver Program at his county department of mental health. The conclusion, based on all

of the available information, was that Applicant “is not in need of further treatment.” (Applicant Exhibit M.) Applicant also submitted a signed statement of intent with revocation of clearance for any alcohol abuse in the future. (Applicant Exhibit A.) Finally, Applicant testified that he was deeply affected by the recent death of his mother, who had severe alcohol problems and died of an alcohol-related illness. (Tr at 110.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he made false statements to the Government during the clearance screening process; or engaged in other conduct which shows poor judgment, unreliability or untrustworthiness.

2.a. - 2.g. These subparagraphs concern a series of non-alcohol-related traffic offenses, which were committed by the Applicant between May 2004 and May 2010. Of the seven incidents, two involve Applicant driving while his license was suspended because of his DUI arrest and conviction, discussed above. These two citations were in November 2005 and January 2006. (2.d. and 2.e.) His license was suspended from 2005 to 2008, primarily because it took the Applicant that long to pay his fines. Under extensive questioning by Department Counsel, Applicant admitted driving “numerous” times during the period when he did not have a license. He knew that such conduct was illegal and a violation of his probation. (Tr at 80-88.) Applicant submitted documentation showing that he had completed traffic school following his last traffic offense in 2010. (Applicant Exhibit J.)

2.h. Applicant filled out a Government questionnaire on June 29, 2009. (Government Exhibit 1.) Question 22.e., of that questionnaire asked Applicant, “Have you EVER been charged with any offense(s) related to alcohol or drugs?” In response Applicant stated, “Yes,” and listed his August 2005 DUI offense. The SOR alleges that he deliberately did not list his 2004 and 2008 Disorderly Conduct arrests and convictions.

Applicant has explained his failure to list these arrests in various ways. First, in an affidavit dated March 11, 2010, he states, “Regarding my 03/13/04, disorderly conduct - DUI offense [SOR 1.b.], I did not list this because I was placed only on informal probation and paid the court fees/fines.” (Government Exhibit 2 at 1.) Later in the same statement, “I forgot to list this citation on my original application because it had slipped my mind. I had gathered all my paperwork to annotate my criminal history and I just forgot about it.” (Government Exhibit 2 at 3-4.)

This affidavit does not address the August 2008 Disorderly Conduct arrest at all. The closest the statement comes is when he says, “Regarding a 08/10/08 DUI, I do not know what this is. I have only had one DUI charge and that was in 08/05. I suspect that this 08/10/08 DUI allegation is a result of me failing to pay my court fines from the original 08/05 DUI charge.” (Government Exhibit 2 at 9.)

Applicant testified that his company's human resources representative told him that his answers to the questionnaire could be augmented during a subsequent interview. (Tr at 26-31; 69-70.) During cross-examination, Applicant stated that there were actually two reasons for not putting down the Disorderly Conduct offenses. These reasons were he did not remember the dates, and he felt that if he put down the most severe offense, the DUI, he could supplement the record later. Applicant also stated that he was rushing through the questionnaire. (Tr at 64-71, 111-114.) As stated above, Applicant's affidavit does not contain any information regarding the 2008 offense.

Applicant attempted to obtain a statement from the human resources representative confirming her advice to the Applicant. Based on orders from her company superiors, she refused to provide such a statement. (Applicant Exhibit X.)

2.i. The Government alleges in this subparagraph that the conduct set forth under Paragraph 1, above, also has security significance under this Guideline as well.

Mitigation

Applicant submitted letters of recommendation from coworkers, supervisors, and friends. He is described as someone who has a good reputation with his employer, is an outstanding employee, and has "great work ethics." (Applicant Exhibits B - F.) He has also received letters of appreciation from his employer. (Applicant Exhibits R and S.)

Applicant also submitted evidence showing that he had successfully taken several courses required for his job. (Applicant Exhibits N - Q, T - W.)

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 ¶ 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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.

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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by the President in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination 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

Paragraph 1 (Guideline G - Alcohol Consumption)

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

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.

Applicant admitted that he used alcohol, occasionally to excess, from 2001 until 2011. He has been involved with three alcohol-related criminal incidents, in 2004, 2005 and 2008. Since his last alcohol-related arrest in 2008, his drinking has been severely reduced.

There are two disqualifying conditions that arguably apply to this case. 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.” In addition, AG ¶ 22(c) states a concern is, “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.”

Under the particular facts of this case, the following mitigating conditions apply to the Applicant’s situation. AG ¶ 23(a) states that it can be mitigating when, “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.” In addition, AG ¶ 23(b) states that is mitigating where, “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.”

The evidence shows that Applicant had alcohol problems in his past. However, it appears that, since 2008, he has changed his life in substantial ways in terms of alcohol. His alcohol use now is very moderate and does not appear to be a problem. Under the particular circumstances of this case, Applicant has mitigated the security significance of his past alcohol use. Paragraph 1 is found for the Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

Turning first to the Applicant’s alleged falsification of his questionnaire (2.h.), I have considered the disqualifying conditions under AG ¶ 16 and especially considered the following with regard to allegation 2.h.:

(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.

I have examined the Applicant's stories very thoroughly and find them wanting. Applicant repeatedly stated during his hearing that he had come forward completely about his criminal past during his interview with a Government investigator. The affidavit of that interview, Government Exhibit 2, does not support that testimony whatsoever. While he did discuss the 2004 arrest, there is no mention of the much more recent 2008 arrest. In addition, Applicant never gave a fully coherent or believable explanation about why those arrests were left off the form. Applicant had an obligation to be completely forthcoming with the Government; he failed. Subparagraph 2.h. is found against the Applicant.

With regards to the other subparagraphs of Paragraph 2 of the SOR, the following disqualifying conditions apply under AG ¶ 16:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information: and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations.

Including his alcohol offenses, Applicant has a years-long history of criminal conduct, primarily involving driving offenses. His conduct included speeding, DUI and driving while his license was suspended. What was apparent during his testimony is that the Applicant knew his driving while his license was suspended was wrong, but that he did it because he thought his needs were greater than obeying the law. Even though Paragraph 1 was found for Applicant, his alcohol conduct has security significance under this paragraph separate from Guideline G. These incidents show a pattern that, viewed as a whole, lead to an assessment of questionable judgment, unreliability, and unwillingness to comply with rules and regulations that has lasted for a considerable period of time.

Under the particular circumstances of this case, AG ¶ 17(c) is the only mitigating condition that may apply, “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.” There are indications that Applicant is beginning to understand the impact his conduct has had on his life. However, they are insufficient at this time to support a finding in his favor under these subparagraphs. Paragraph 2 of the SOR is found against the Applicant.

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 relevant circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My findings under Paragraph 1 and 2, above, are also relevant to this discussion. The Applicant is a hard-working, respected professional who has engaged in conduct reflecting poor judgment for many years. In addition, he falsified material information on a Government questionnaire. In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his prior conduct. As set forth above, I find that there have not been permanent behavioral changes under AG ¶ 2(a)(6). In addition, I find that there is still potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that there is likelihood of recurrence (AG ¶2(a)(9)).

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 the Applicant has not mitigated the security concerns arising from his conduct as expressed in Paragraph 2 of the Government's Statement of Reasons. As stated above, Paragraph 1 is found for the Applicant.

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 THE APPLICANT
Subparagraphs 1.a through 1.d.:	For the Applicant
Paragraph 2, Guideline E:	AGAINST THE APPLICANT
Subparagraphs 2.a. through 2.i.:	Against the Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge