



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



In the matter of:)
)
-----) ISCR Case No. 10-00827
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Darin Groteboer, Attorney At Law

March 25, 2011

Decision on Remand

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on August 1, 2007. (Government Exhibit 1.) On June 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G and J 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 adjudicative guidelines (AG), and effective within the Department of Defense (DoD) for SORs issued after September 1, 2006.

The Applicant responded to the SOR on August 5, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the Administrative Judge on September 16, 2010. A notice of hearing was issued on September 28, 2010, scheduling the hearing for October 19, 2010. At the hearing the Government presented five exhibits, referred to as Government Exhibits 1 to 5, which were admitted without objection. The Government also moved to amend the SOR under allegation paragraph 1(b) to reflect the month of "May 2009," instead of the date of "May 30, 1999," and paragraph 1(d) to reflect the month of "May 2009," instead of the

month of "May 1999." The Applicant had no objection. (Tr. p. 20.) The Applicant presented four exhibits, referred to as Applicant's Exhibits 1 through 4, which were admitted without objection. He also testified on his own behalf. The record remained open until close of business on October 25, 2010 to allow the Applicant to submit additional documentation. The Applicant submitted three Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits A through C. The official transcript (Tr.) was received on November 3, 2010.

On December 8, 2010, the undersigned Administrative Judge issued an unfavorable decision denying the Applicant's access to classified information. On March 3, 2011, the Appeal Board remanded the Administrative Judge's decision that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The Board determined that the Administrative Judge based her decision on an erroneous finding of fact when she found that the Applicant was diagnosed as alcohol dependent in 2007 as alleged in the SOR. The Board determined that the Applicant did not admit the allegation, and that there was no evidence in the record to support this. Accordingly, the decision of the Administrative Judge was remanded for a new decision based upon the evidence in the record. This is the new decision.

FINDINGS OF FACT

The Applicant is 28 years old and unmarried with one child. He is employed by a defense contractor as a Bonding Assembler and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant admitted each of the allegations with some qualifications, except 1(c), set forth under this guideline. (Applicant's Answer to SOR.) He has been working for his current employer for the past nine years.

The Applicant first tried alcohol as a junior high school student. He did not like the taste and did not try it again until he was 21 years old. From 2004 to May 2009, he consumed alcohol, not on a daily basis, but several times a week and at times to excess and to the point of intoxication. He did not drink alone. His drinking was restricted to social situations, such as when he watched sporting events on television with friends. He does not believe that he has ever had a drinking problem, that he is alcohol dependent or that he is an alcoholic. (Tr. pp. 26 and 67.) At the most, he would drink a maximum of eight beers, and sometimes he might have a shot of hard liquor. On most occasions where he would drink with friends and consume five to nine beers, he would not drive a vehicle. (Tr. p. 71.)

In 2007, the Applicant was concerned about his drinking, as he was consuming more alcohol than he wanted to. He admits consuming alcohol more than twice a week

during this period, as he was depressed about the program he was working shutting down, but does not believe he was drinking to excess. (Tr. p. 31.) People on the job were missing work and not being reprimanded for it. Although he was the Union Steward, he decided to miss work too, and was written up for attendance problems. He went on line and found an alcohol treatment program he could attend. (Tr. p. 51.) He states that he entered the treatment program on his own free will and not with the recommendation of his employer. (Tr. p. 32.) At this point, he was consuming alcohol two to three times a week. (Tr. p. 77.)

During the interview with the DoD investigator dated November 24, 2009, the Applicant admitted that he was drinking too much in the evening and was not being able to get up for work. He also stated that the security representative at the company recommended that instead of getting written up for attendance, a good way to save his job would be to attend an alcohol treatment center. (Government Exhibit 2.) At the hearing, the Applicant testified that he never drank excessively nor was he hung over in the morning that prevented him from going to work. He does not know how that information came out in the interview since alcohol was never a problem for him making it to work or not. (Tr. pp. 33-34.)

The Applicant attended an inpatient alcohol treatment program in 2007. There is no evidence of any diagnosis during this treatment program. Accordingly, allegation 1(c) is found for the Applicant. During the Applicant's interview with a DoD investigator dated November 24, 2009, he indicated that the alcohol program was a scam, and so he left the program early, after 28 days instead of the full 30 day program. (Tr. p. 34 and Government Exhibit 2.) He did not want to take the medication that the psychiatrist, who was seeing him weekly, was prescribing. The Applicant was told that if he did not follow the program, he was not wanted there. (Tr. pp. 34-35.) Following this alcohol program, the Applicant did not consume any alcohol for about five or six months. (Tr. p. 56.) He then resumed his drinking once or twice on the weekends. (Tr. p. 57.)

In May 2009, the Applicant was arrested for Driving Under the Influence of Alcohol (DUI). (Government Exhibits 3 and 5.) He explained that he was watching sports with friends and drinking beer. He has consumed eight or nine beers, it was getting late and he did not feel drunk. He decided to drive home. The Applicant explained that he was multi-tasking as he was driving on the freeway. He was talking to his Onstar system and trying to read his credit card number to add minutes to his phone. He drove off the freeway into the dirt and the Onstar system immediately called the police. (Tr. p. 61.) The Applicant failed the breathalyzer test and blew a .15. (Tr. p. 62.) He was found guilty and sentenced to 36 months probation, one day in jail, \$390.00 in fines, \$936.00 in penalties, and completion of a six month alcohol program. His driver's license was suspended for six months. Since the arrest, he has not consumed alcohol. (Tr. p. 26.)

Following his DUI in 2009, in compliance with the court order, the Applicant enrolled in an alcohol beverage control traffic program and Mother's Against Drunk Drivers (MADD) classes. The Applicant successfully completed both of these classes in 2010. (Tr. p. 32.) He also attended Alcoholics Anonymous meetings required as part of

the program. He also stopped consuming alcohol and has been abstaining for more than a year.

An addiction severity index dated April 23, 2010, indicates that the Applicant was at that time, interviewed by a certified medical professional at an alcohol treatment program and diagnosed as "alcohol dependent." His prognosis was "fair." (Government Exhibit 4.) The Applicant does not believe he has a problem with alcohol, that he is an alcoholic, or that he is alcohol dependent. (Tr. p. 67.)

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in criminal conduct.

The Applicant is currently on probation until May 2012, which is three years from the date of his arrest for DUI. (Tr. p 70.)

The Applicant is the father of a two year old and wants to be a good role model for his son. He realizes that he has made some bad decisions in the past and he believes that he has learned from them. He states that he has no plans to ever consume alcohol again. (Tr. p. 37.) He believes his consumption of alcohol to be under control and that he can manage it by himself.

A letter from the Applicant dated after the hearing, indicates that after long and careful thought about the matter, he is planning to go to Alcoholic Anonymous meetings near his home to give himself the extra security to abstain from drinking and to prevent relapse. (Applicant's Post-Hearing Exhibit B.)

Letters of recommendation from the Applicant's past supervisor, a coworker, and a friend, attest to his sense of responsibility toward his job and his personal life. In the past year, one of them has noticed a remarkable change for the better. He is described as patient, trustworthy, responsible, mature, and a good husband and father. (Applicant's Exhibits 1, 2 and 3.)

A letter of recommendation from a professional associate of the Applicant who has known him for ten years considers him trustworthy and loyal. The Applicant is said to have always taken the proper steps to safeguard any and all information while supporting the classified program where he was assigned. (Applicant's Post-Hearing Exhibit C.) A letter of recommendation from a friend who has known the Applicant for six years indicates that the Applicant is trustworthy. He has never seen the Applicant consume alcohol nor has he smelled alcohol on him. (Applicant's Post-Hearing Exhibit A.)

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline G (Alcohol Consumption)

21. *The Concern.* 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.

Conditions that could raise a security concern:

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;

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;

22. (e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Condition that could mitigate security concerns:

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).

Guideline J (Criminal Conduct)

30. *The Concern.* 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.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple lesser offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

31.(d) individual is currently on parole or probation.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in 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."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in alcohol abuse and criminal conduct that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in Alcohol Abuse (Guideline G) and Criminal Conduct (Guideline J). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility. Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines G and J of the SOR.

The evidence shows that the Applicant is an alcoholic in denial who was diagnosed with alcohol dependence as recently as 2010. He voluntarily entered and attended an alcohol inpatient treatment program in 2007, and following this was able to remain sober for five or six months. He then returned to drinking and was arrested for Driving Under the Influence of Alcohol in May 2009. Since his DUI in 2009, the Applicant states that he has completely abstained from drinking and plans to maintain sobriety. He is commended for this, however, based upon his past history of drinking, with only a year of sobriety, there is no guarantee that he will be able to maintain any long term sobriety. Furthermore, based upon his past record of relapse following treatment, there is a strong chance at this point that he may return to his old habits. He has indicated that he will attend Alcoholics Anonymous meetings in the future. Hopefully he will continue to be able to maintain sobriety, and at some point demonstrate the maturity and level of responsibility required to meet the eligibility requirements to access classified information.

Under Guideline G, Disqualifying Conditions 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; 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; 22.(e) evaluation*

of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program apply. Mitigating Condition 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) arguably applies. However, it is not controlling in this case as the Applicant has only recently acknowledged his alcohol problem and expressed an intent to participate in an alcohol after care program to help him maintain sobriety. Accordingly, I find against the Applicant under Guideline G, Alcohol Consumption.

Under Guideline J, Criminal Conduct, Disqualifying Conditions 31.(a) *a single serious crime or multiple lesser offenses*, 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*; and 31.(d) *individual is currently on parole or probation* apply. None of the mitigating conditions are applicable. The Applicant's arrest for DUI occurred just last year and he will remain on probation for the offense until May 2012. The conduct was criminal and recent and has not been mitigated. Accordingly, I find against him under Guideline J, Criminal Conduct.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant is a 28 year old alcoholic who has just started to come to grips with the seriousness of his drinking problem. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of poor judgment, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

This Applicant has demonstrated that he is not sufficiently trustworthy, and he clearly does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

- Paragraph 1: Against the Applicant.
- Subpara. 1.a.: Against the Applicant.
- Subpara. 1.b.: Against the Applicant.

- Subpara. 1.c.: For the Applicant.
- Subpara. 1.d.: Against the Applicant.
- Subpara. 1.e.: Against the Applicant.
- Subpara. 1.f.: Against the Applicant.

Paragraph 2: Against the Applicant.

- Subpara. 2.a.: Against the Applicant.
- Subpara. 2.b.: Against the Applicant.

DECISION

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

Darlene Lokey Anderson
Administrative Judge