



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 -----) ISCR Case No. 10-01703
)
)
 Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro Se*

April 25, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On October 19, 2011, 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On December 13, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on February 13, 2012. DOHA issued a notice of hearing on February 17, 2012, and I convened the hearing as scheduled on March 7, 2012. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through K, which were also admitted without objection. The record was left to allow Applicant to offer additional

evidence, and two documents that were submitted have been identified and entered into evidence without objection as Exhibit L. DOHA received the transcript of the hearing (Tr) on March 20, 2012. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.a. and 1.b., under Guideline G; and failed to respond to allegation 2.a., under Guideline J.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 34 years old. He is unmarried and he has no children. He served in the United States Navy from November 1995 to January 2007 and he received an Honorable Discharge. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline G - Alcohol Consumption)

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption. The following are the two allegations as they are cited in the SOR:

1.a. In the SOR is alleged that on or about March 18, 2001, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI). He plead No Contest and was found guilty of DUI. Applicant was fined \$500 plus \$293 for court cost, and his license was suspended for six months. He also received one year of supervised probation and was ordered to serve 50 hours of community service and attend DUI school. As reviewed above, this allegation has been admitted by Applicant in his RSOR.

Applicant testified that this incident occurred when he was serving in the United States Navy. The incident occurred at night after he had been attending a St. Patrick's Day party, and by his estimate, consuming alcohol for several hours. He began driving for approximately one or two miles, when he realized that his driving was impaired, he pulled off of the road, parked his vehicle, and went to sleep. A police officer came to where his car was parked, and after he was administered a field sobriety test and a breathalyser, Applicant was arrested and charged with DUI, even though he had not been driving when he was approached by the officer. (Tr at 33-39.)

Applicant testified that in addition to the punishment listed on the SOR, he was required to have an interlock device put on his vehicle for six months, requiring him to blow into the device before any time he drove his vehicle; the installation charge was approximately \$200 and the monthly charge was \$30. Applicant also averred that in addition, he met all of his other requirements, including never driving his vehicle while

his license was suspended, paying all of his fine, and attending the required classes. (Tr at 41-44.)

1.b. In the SOR is alleged that on or about April 22, 2009, Applicant was arrested and charged with (1) DUI, (2) DUI of 0.08% or more B.A.C., and (3) being an Unlicensed Driver. He plead guilty to charge (1) DUI, and the additional charges were dismissed. Applicant was granted summary probation for five years and fined \$2,077. The requirements for Applicant included: attend four days of Public Service Work Program (PSWP), do not drive with any measurable alcohol in his system, submit to any test at the request of peace officer for detection of alcohol in system, violate no laws while driving a motor vehicle under the influence or in possession of alcohol. Applicant was also required to attend a First Conviction Program for three months, and not to drive without a valid drivers license or valid liability insurance.

It is also alleged in the SOR that on August 28, 2009, Applicant failed to meet his obligation to pay his fine. On September 18, 2009, Applicant failed to comply with the requirement to attend four days of PSWP, and failed to submit proof that he had attended the required classes. As a result a bench warrant was issued with bail set at \$5,000. As reviewed above, this allegation has been admitted by Applicant in his RSOR.

Applicant testified that on the day of this incident, he had been playing softball, and he consumed some alcoholic drinks after the game. He believed he was not intoxicated so he drove his vehicle, but while driving he swerved to avoid another vehicle and he stuck the center divider. He phoned 911 to get medical attention, and when the police arrived he underwent a field sobriety test. Applicant averred that since this incident, he has never driven after consuming even one alcoholic drink, and he makes it a rule to never drive after drinking. If he believes there is any chance that he may consume alcohol, he will either go to an event by taxi, or go with a friend who is a designated driver. He will even make sure not to be a passenger in a vehicle being driven by someone who has consumed any alcohol.

Applicant testified that he has completely paid his fine of \$2,077. He also attended the MADD class. Exhibit C confirms that Applicant did attend the Mothers Against Drunk Driving Victim Impact Panel on February 14, 2012. However, a warrant was issued against Applicant because it appeared that he had failed to follow all of the requirements of the 2009 DUI conviction. Exhibit 6 shows that this warrant was issued on September 29, 2009. Applicant stated that this was a misunderstanding, and that he had not been aware that a warrant was issued. When he learned of the bench warrant, he appeared in court, and resolved the conflict. Exhibit A establishes that the warrant was recalled on November 16, 2011. Applicant explained that the warrant was issued because he had not completed attending all of the required classes. (Tr at 49-60.) Exhibit 5 shows that he had completed three of the six Education Classes and seven of the 12 Group Meetings, when he put in for leave of absence. He is required now to take both classes again from the beginning. Exhibit L shows that Applicant is now scheduled to attend all of the required classes.

(Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts which creates doubt about a person's judgement, reliability, and trustworthiness.

2.a. The SOR alleges that the information as set forth under subparagraphs 1.a., and 1.b., above establishes that Applicant has engaged in criminal acts.

Mitigation

Applicant submitted a very positive character letter from a retired United States Navy Commander and the current Chief Operating Officer (COO) of his employer. (Exhibit E.) He wrote, "I have known [Applicant] for three and a half years and with the exception of the poor judgement he exercised on one occasion while driving under the influence, he is a person of utmost integrity and absolutely trustworthy." he also wrote, "[Applicant] has learned his lesson from his DUI incident and he ceased the practice, and has not consumed in excess or abused alcohol since that occurrence."

Applicant also submitted his three Performance Evaluations from his current employer. In his most recent evaluation, under the job criterion, he received three "Outstanding," one "Exceeds Expectations", and one "Meets Expectations." (Exhibit F, G, and H.) Finally, Applicant introduced his DD Form 214, confirming that he served in the United States Navy from 1995 to 2007, and listing a significant number of Decorations and Medals that he received during his service. (Exhibit I.)

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 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 the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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.

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 G - Alcohol Consumption)

Applicant's alcohol consumption resulted in two convictions for DUI. The Government established that Applicant was involved in “alcohol-related incidents away from work,” and “binge consumption of alcohol to the point of impaired judgement.” Disqualifying conditions AG ¶ 22(a) and (c) apply to this case.

In reviewing the mitigating conditions, I find that ¶ 23(a) is applicable, because “so much time has passed” (11 years since the first DUI, and three years since the second DUI), and the “the behavior was so infrequent” (the two DUIs happened eight years apart). I also considered the fact that the 2001 DUI, “happened under such unusual circumstances that it is unlikely to recur” (Applicant realized he was alcohol impaired, and he pulled off of the road and attempted to sleep it off rather than continuing to drive). Considering these factors together with Applicant's credible and persuasive testimony that he has made it a rule in his life never to drive again after consuming even one alcoholic drink, I find Guideline G for Applicant.

(Guideline J - Criminal Conduct)

The Government has established that Applicant engaged in criminal conduct, by his two convictions for DUI. I find that ¶ 31(a), “a single serious crime or multiple lesser

offenses,” applies in this case. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is also applicable to this case.

However, because three years have past since Applicant’s last DUI “without recurrence of criminal activity,” Applicant has expressed sincere “remorse” for the conduct that led to his convictions, and by the character letter of the COO of his employer, Applicant has demonstrated a “good employment record,” I find “there is evidence of successful rehabilitation,” and mitigating condition ¶ 32(d) is applicable. Guideline J is found for 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 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. Based on all of the reasons cited above as to why the mitigating conditions apply, together with Applicant’s testimony, the laudatory character letter from his employer’s COO, plus his excellent military record, I find that the record evidence leaves me with no significant questions and doubts as to Applicant’s eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns under the whole-person concept.

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.- 1.b.: For Applicant

Paragraph 2, Guideline J:

FOR APPLICANT

Subparagraphs 2.a.:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge