DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

For Applicant: Joseph Testan, Esquire

February 13, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On October 18, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On November 2, 2010, 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 January 4, 2011. DOHA issued a notice of hearing on June 22, 2011, and the hearing was set for July 20, 2011. The case was continued and a second notice of hearing was issued on July 14, 2011. I convened the hearing as scheduled on July 21, 2011. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through I, which were also admitted without objection. Three additional witnesses testified on

behalf of Applicant. DOHA received the transcript of the hearing (Tr) on August 10, 2011. 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. through 1.c., under Guideline G, with some explanations in mitigation regarding 1.a. The admitted allegations are incorporated herein as findings of fact.

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 28 years old. He is not married and he has no children. He received a Bachelor of Science degree in Aerospace Engineering in 2005. Applicant has been employed by a defense contractor, his current employer since 2006, 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 three allegations as they are cited in the SOR:

1.a. The SOR alleges that Applicant has "consumed alcohol, at times to excess and to the point of intoxication, from approximately 2001 to at least June 2010." In his RSOR, Applicant admitted that he "consumed alcohol during this time period," but he denied that he "consumed it to excess and to the point of intoxication subsequent to [his] May 2008 arrest."

At the hearing, Applicant testified that he first began consuming alcohol when he was in high school. He described his usage during that period as "pretty minimal. A couple of beers at a party type situation," which did not lead to difficulties of any kind. When he started college in 2001, his frequency of alcohol consumption did not change, but the amount of his consumption increased. (Tr at 85-86.) He conceded that in college he drank to the point of intoxication on different occasions. (Tr at 105.) Applicant described his current alcohol consumption as "very, very minimal to moderate." He drinks once or twice a week, not more than one glass of wine, or two glasses on the weekend. (Tr at 100-101.)

1.b. The SOR alleges that In 2004, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI), and (2) Driving with a .08% of Higher Blood Alcohol Content. Applicant plead guilty to an added charge of Wet Reckless Driving and was fined, placed on 18 months probation, and ordered to attend a DUI class. Counts (1) and (2) were dismissed. As reviewed above, Applicant admitted this allegation in his RSOR.

Applicant testified that this incident occurred in the evening after he had gotten off work. He and a friend went to a local bar, where they shot pool, and he "drank some beer." When they left the bar he drove his friend home, and as he was driving after leaving his friend, his vehicle slid into a curb and was undrivable. Applicant testified that his tires were in poor condition, and that was the cause of his problem with his car. While he was waiting at the side of the road for a tow truck, some police officers arrived at the scene. He was asked if he had been drinking, and when he admitted that he had, he underwent a field sobriety test and a Breathalyzer test. His recollection at the hearing was that he blew a .12% at the scene, and he was thereafter arrested and taken to the local jail. He was released after he had someone take him home. (Tr at 86-88.)

Applicant testified that as a result of his pleading guilty to the Wet Reckless Driving charge, he had to pay a fine that he estimated to be between $600 and $1,000, which he confirmed he had paid. He also attended three months of an alcohol awareness class, going one time a week. Finally, he was on court probation for 18 months, which he completed satisfactorily. Sometime in either 2005 or 2006, Applicant made a motion with the court to recall his guilty plea and have the case dismissed. His motion was granted. (Tr at 88-91.) Applicant testified that he was very concerned after the arrest and conviction in 2004, and did not drive again after consuming alcohol until the incident in 2008, that is the subject of 1.c., below. (Tr at 117.)

1.c. The SOR alleges that in 2008, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI), and (2) Driving with a .08% of Higher Blood Alcohol Content. Applicant plead no contest to an added charge of Wet Reckless Driving and was fined, sentenced to 20 days in jail, placed on three years probation. His drivers license was suspended for one year, and he was ordered to attend a drinking driver program. His probation is scheduled to terminate in October 2011. As reviewed above, Applicant admitted this allegation in his RSOR.

Applicant testified that this incident occurred after he had been working for a year or two, and he had recently purchased a new car. He attended a one day festival, which he described as a "beer festival" with his friends, and he parked his car in a large field with many other vehicles. He stated that he drank many beers on that day, and after the festival was over, even though he knew he was intoxicated, he decided that he should drive his car out of the field so it would not be damaged by all the other intoxicated drivers. He was stopped and arrested almost immediately. He testified that he realizes what a "very, very dumb decision" that he made; worrying about his car, rather than about his livelihood, his friends or hurting someone. (Tr at 92-93, 108.)

Applicant averred that since that event, he has not consumed alcohol to the point of intoxication or to excess on any occasion. Additionally, since this event, one of his strict rules is that he will not drive if he has had even "one sip of alcohol." He cited several reasons for his decision, including that a third arrest for DUI would lead to "major jail time," as well as the real possibility of his losing family and friends. Finally, he stated that if there was a third DUI arrest, he would lose his career, which is extremely important to him. He summed up his feelings by stating, "the risks for me are just tremendous. I know I can't screw up again."

Applicant corrected certain allegations in the SOR, in that he plead guilty to Wet Reckless Driving charge rather than no contest. As a result of the plea of guilty he was placed on a 30 month court probation. He also had to attend a one year alcohol awareness class for second offenders, going to class one time a week, with six months of monthly follow up check-ups. During that one year period, Applicant abstained completely from alcohol consumption. As a result of complying with all of the court requirements, Applicant petitioned the court to terminate his probation early. Exhibit G establishes that the court granted Applicant's petition, and his probation was terminated on November 9, 2010. (Tr at 95-98.)

Applicant underwent an evaluation of his alcohol consumption by a Ph.D. psychologist. Exhibit H is a copy of the report prepared by the therapist after the examination. The psychologist gave Applicant alcohol related urinalysis tests on June 6, 2011, and June 9, 2011. Applicant also completed several psychological tests and the psychologist interviewed Applicant. Based on his findings, the psychologist concluded that Applicant does not have a physical or psychological dependence on alcohol. He further found:

> It appears [Applicant] is an example of someone who has matured out of his drinking problems. In his case a substantial part of the reason for his maturation is his realization that he loves his work and it provides enormous opportunity. Although drinking still remains pleasurable to him, its pleasures are not as significant to him as career advancement.
>
> Consequently, his risk of further alcohol problems does not appear to be any greater than the average risk associated with other personnel who also have security clearances. I recommend that his security clearance not be diminished or eliminated on the basis of his past drinking and driving episodes.

Witnesses testimony

As stated above, three witnesses testified on behalf of Applicant. The first witness has known Applicant since 2006, as both a co-worker and supervisor. He described Applicant's work as outstanding. He stated that they have socialized on company functions and traveled together on business trips, and he has never seen Applicant drink to intoxication or drive after consuming any alcohol. He also indicated that Applicant expressed remorse because of his DUIs, (Tr at 37-51.)

The second witness is an attorney who has been Applicant's roommate since October 2010, and has seen him daily since that time. Since she has known Applicant she has never seen him drink to the point of intoxication or drive after consuming any alcohol. He expressed remorse to her over her DUIs, and he has made it clear he is committed to not getting another DUI in the future. She indicated that she believed he will keep that commitment because he is "very truthful, very honest." (Tr at 53-62.)

The third witness, who is Applicant's girlfriend, has known him since October 2008. She has never seen him drink to the point of intoxication or drive after consuming any alcohol. Applicant expressed remorse to her over her DUIs, and he has made it clear he is committed to not getting another DUI in the future. She described Applicant as honest, very reliable and someone who exercises good judgement. (Tr at 64-77.)

Mitigation

Applicant submitted eight very positive character letters. (Exhibit I.) All of the individuals who wrote the letters hold Applicant in extremely high regard. They believed that he was honest and trustworthy, and that he took his career very seriously. It was also written that Applicant expressed sincere remorse over his previous DUIs.

Issue Raised at Hearing

Applicant's counsel raised the issue that based on Exhibit E, which indicated that the Department of the Air Force granted Applicant a reinstatement of full access eligibility on June 21, 2010, to all Special Access Programs, after they had been suspended on June 10, 2008, that DOHA, because of reciprocity, is bound by that determination and barred from proceeding with a security clearance hearing in this case.

Department Counsel argued that since the SAP program is based on a higher level clearance, there is no reciprocity with DOHA decisions. Also, he argued that the decision by the Air Force of a reinstatement of full access eligibility to all Special Access Programs was based, in part, on DOHA's earlier granting of Applicant's security clearance, so it can not be used for reciprocity to bar DOHA from having a subsequent security clearance hearing.

After reviewing the arguments of both Applicant's Counsel and Department Counsel and the related documents, I find that this issue is moot for the following reasons: Before any decision was reached on this issue, the security clearance hearing was held in this case. After reviewing all of the evidence introduced at the hearing, I have reached a decision to grant Applicant a security clearance under Guideline G, as will be discussed in more detail below. Applicant's Counsel stated at the hearing, "We're willing, I think, to waive that argument [regarding reciprocity] if [Applicant's] granted a clearance on the Guideline." (Tr at 144.) Since a security clearance will be granted under Guideline G concerns, I find Applicant's Counsel's argument for reciprocity waived and not at issue.

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 DUI convictions in 2004 and 2008. 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, as, "so much time has passed or the behavior was so infrequent," because the two DUIs happened four years apart, and the more recent DUI occurred more than three years ago. Also, "it happened under such unusual circumstances that it is unlikely to recur," because, when Applicant received the 2008 DUI, he consumed alcohol to the point of intoxication, which, based on Applicant's testimony, the testimony of the witnesses, the report of the psychologist, and the very positive character letters, Applicant has not done since that 2008 arrest. I also find that ¶ 23(d) is applicable because Applicant did complete a court ordered one year alcohol awareness program, he has greatly reduced his alcohol consumption, and he has received a favorable prognosis by duly qualified medical professional. Considering ¶ 23(a) and 23(d), together with Applicant's very persuasive and credible testimony that he will never again drive after consuming alcohol, I find Guideline G 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 and the strong, laudatory testimony of the witnesses who appeared on behalf of Applicant and the positive character letters, I find that the record evidence leaves me with no significant questions or 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.c.: 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