



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



In the matter of:)
)
) ISCR Case No. 10-05039
)
)
Applicant for Security Clearance)

Appearances

For Government: William T. O'Neal, Esquire, Department Counsel
For Applicant: Ronald C. Sykstus, Esquire

July 28, 2011

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On April 1, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his position with a defense contractor. After reviewing the results of an ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant two interrogatories to clarify or augment potentially disqualifying information. After reviewing the results of the background investigations and Applicant's responses to the Interrogatories, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On December 7, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) detailing security concerns for criminal conduct under Guideline J, sexual behavior under Guideline D, and alcohol consumption under Guideline G. 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 in the Department of Defense on September 1, 2006. Applicant received the SOR on December 16, 2010.

Applicant answered the SOR on December 28, 2010. He admitted the allegations under Guidelines D, J, and G with explanation. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 24, 2011. The case was assigned to me on February 23, 2011. DOHA issued a Notice of Hearing on March 18, 2011, for a hearing on April 6, 2011. I convened the hearing as scheduled. The Government offered six exhibits, which I marked and admitted into the record without objections as Government exhibits (Gov. Ex.) 1 through 6. Applicant and three witnesses testified on his behalf. Applicant offered 12 exhibits which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through L. DOHA received the transcript of the hearing (Tr.) on April 27, 2011.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted the allegations under criminal conduct, alcohol consumption, and sexual behavior with explanation. His admissions are included in my findings of fact.

Applicant is a single 31-year-old electrical and optical engineer. He graduated from high school in 1998, and immediately started college. He received a bachelor's degree in electrical engineering in 2002, and became a teaching assistant while continuing his studies for a dual master's degree in electrical engineering and optical sciences, which he received in 2006. While in undergraduate and graduate school, Applicant lived in campus housing in a fraternity-style setting. He usually drank five to ten vodka drinks one night per week, and was intoxicated about once a week. He did not typically drink during the week but on week-ends since he wanted to concentrate on his studies. He continued working at the engineering department of the university while in graduate school from 2004 until 2006. He moved into his own apartment off campus with his brother and a roommate in 2005. From 2005 to 2006, he lived in an apartment with his brother and a friend. In 2006, he purchased a house. He now lives in that house with his brother and four other friends who rent rooms from him. (Tr. 16-27, 56-62; Gov. Ex. 1, e-QIP, dated April 1, 2010; Gov. Ex. 2, Answers to Interrogatories, Interview Summary, dated May 18, 2010; App. Ex. A, Bachelor's Degree Diploma, dated December 2002; App. Ex. B, Master's of Science in Engineering Diploma, dated December 2004 App. Ex. D, Transcripts, dated January 17, 2011)

Applicant started to work for his defense contractor employer in June 2006, and received a security clearance in April 2007. He was terminated from his employment with the defense contractor in July 2009 because his access to classified information was challenged based on a June 2009 incident. While working for the defense

contractor, and after his employment was terminated, Applicant continued his studies and received a Masters of Business Administration degree in 2010. Applicant is now employed as a business development specialist for a local university which requires him to have access to classified information. He also works as a general manager of a local restaurant. He has never, except for the incident in question, had any alcohol-related incidents. Up until June 2009, his record was clean. (Tr. 27-30, 62-66; App. Ex. C, Master's Degree in Business Administration Diploma, dated May 2010)

In June 2009, Applicant and some coworkers were away on temporary duty for approximately ten days for his defense contractor employer. The group was staying in separate apartments in a condominium complex close to a vacation beach. Applicant's condominium was on the first floor with the front accessing the parking lot and the back accessing a walkway to the beach. The other members of the group were staying in different parts of the complex. Their tasks were completed early on a Thursday and the group was preparing to leave to return home the next day. Applicant does not remember if he ate lunch that day. He started drinking alcohol by himself about 3 or 4 p.m. that afternoon. He had six or seven beers and five or six vodkas and amaretto drinks within a two to three hour period, and admits he was intoxicated that afternoon and early evening. He testified that he went out to the beach for awhile and then returned to his condominium. He sat on the deck since it was early. He got up, straightened his swim trunks and went inside. There were other vacationers walking around the condominium complex. He does not know what his blood alcohol level was after consuming the alcohol, but he was intoxicated. He has never had blackouts from drinking, or failed to remember evening events in the morning. He does not remember everything perfectly from that night. From his perspective, nothing happened. (Tr. 30-32, 64-71)

A family consisting of a husband, wife, and five-year-old daughter were staying in the condominium next to Applicant's. The family was outside their condominium at approximately 7:30 p.m. when the daughter told her parents she saw the "privates" of the man next door. She told them that the man had placed his hands on his swim trunks and pulled them down. She saw a "stick." The mother looked over at the man and noted he had an erection in his swim trunks. The father saw the same condition and sent his family inside their apartment. The family then saw the man walk by and look into their window. The husband immediately called the police. When the police arrived at approximately 7:45 p.m., the family described what they had seen and that the man was living in the next condominium. The daughter confirmed to the police officers the account given by her parents and what she had seen. Applicant does not remember any interaction with the family. He does not feel that their statements to police were accurate.

The police went to Applicant's condominium and woke Applicant who was sleeping. Applicant was intoxicated. The police informed him of the family's allegations. They also advised him of his rights. Applicant had no memory of seeing the family or exposing himself to the girl. He denied pulling down his swim trunks and exposing himself. Applicant had never met the family before and they had not talked to him or

previously complained about his conduct. He has read their account of the evening. He admits he had an erection that evening and admitted he masturbated in his room that night. He did not challenge the accuracy of their report at that time. He was arrested and charged with lewd and lascivious exhibition by intentionally exposing his genitals in the presence of a victim under 16. The charge was reduced to the misdemeanor charge of indecent exposure. He pled nolo contendere on the advice of his attorney, who advised him that his plea did not admit guilt to any offense. He decided not to fight the charges because such an action was very expensive. His plea to a misdemeanor did concern him, but he was employed and did not believe his pleas would affect his employment. He was sentenced to probation, and ordered to undergo drug, alcohol, and psychological evaluation and treatment if necessary. He does not have to register as a sex offender. (Tr. 28, 33-47, 71-82, 86-90; Gov. Ex. 4, Police Report and Statements, dated September 3, 2010; Gov. Ex. 5 and 6, Docket, dated September 3, 2010)

Applicant was evaluated for alcohol problems and was told that he did not have an alcohol-related problem. As a routine recommendation, he was advised to take an alcohol-awareness class, which he completed. He received a psychological evaluation after tests by a psychologist. There was no recommendation for further treatment. However, the psychologist's report read: "[Applicant] would consistently rank in the mild risk category, particularly if he is alcohol free or at least mindful of his use of an intoxicant for any reason." (Gov. Ex. 3, Answers to Interrogatories, dated September 27, 2010, Psychological Evaluation and Risk Assessment, dated September 22, 2010, at 16-19; App. Ex. L, Certificate of Completion Alcohol and Drug Awareness Program, dated July 7, 2010)

In June 2010, a friend of more than 20 years requested that Applicant assist him in a restaurant he was about to open. Applicant became the general manager of the restaurant when it opened in October 2010, and his friend continued as the chef. Applicant is responsible for the day-to-day operations of the restaurant, and it is his primary employment. His employment with the defense contractor was terminated in June 2009 shortly after this incident. However, he continues in his position as a business development specialist for the university. (Tr. 47-51, 82-87)

Applicant's consumption of alcohol has eased since the incident. He works six days a week and cannot be incapacitated for work. He admits still taking a drink occasionally after work, but it is no longer fun to spend time recovering from alcohol consumption. His consumption now is five to eight drinks a month of beer or hard liquor, usually averaging one or two drinks a night one or two nights a week. He may also have a glass of wine when they have meetings at the restaurant. He last drank to the point of intoxication about April 2010. He admits he continued to drink heavily from June 2009 until April 2010. He admits a change of lifestyle in April 2010 since he no longer considered drinking fun. He would rather be home reading a book. The alcohol awareness classes had little effect on his change of drinking habits. He did become more aware of the consequences of drinking too much. Applicant notes that the June 2009 incident was not his usual or typical conduct. He denied exposing himself to the

girl. If he had to do it again, he would fight the charges rather than plead nolo contendere. (Tr. 51-55, 87-96)

A fellow employee, who was with Applicant on temporary duty in June 2009, testified that he knew Applicant for over eight years prior to the trip. He has never known Applicant to have an alcohol-related problem even though he has seen Applicant intoxicated on two or three occasions. He confirmed that the team finished their project early and were packing to return home. They had an afternoon free. His family accompanied him on the trip, so he was with them and not any team members that afternoon. He learned that the family involved in the incident left the facility for fear of retaliation about their complaint. The next morning he received a call from Applicant's father informing him that Applicant had been arrested the previous evening and to get Applicant's belonging from his room and bring them back home. He found the allegations about Applicant to be unbelievable and out of character. He would not hesitate to hire and work with Applicant again. (Tr. 97-111)

An investor in the restaurant that Applicant manages testified that he has known Applicant for about a year. His business partner, Applicant's long-term friend, recommended Applicant for the manager's position. He was concerned about his business's liability when he first heard the allegations against Applicant. He studied the reports and transcripts and talked to Applicant about the incident. They all agreed on a set of rules for Applicant to follow. Applicant has followed the agreed rules. He would like Applicant to continue to work for him. (Tr. 112-124)

Applicant's friend, the other partner in the restaurant, testified that he has known Applicant for over 20 years. They met in middle school and were roommates in college. About 25% of the restaurant staff is female and Applicant works well with them without issue. He has seen female staff members willing to go to Applicant with problems. Even though they were roommates and friends, he has never seen Applicant be a danger to himself or others because of drinking or any inappropriate conduct. He sees Applicant on a daily basis and has never seen him drink at work, except after hours, when they are discussing business issues. He has no concerns about Applicant's trustworthiness or judgment. (Tr. 124-134)

Applicant presented evidence to show his excellent work performance. He presented certificates of commendation and letters of appreciation from his company, supervisor, and Government clients to establish his superior work performance. (App. Ex. E through K, Letters and Certificates, various dates)

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 must be considered 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(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 for 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Sexual Behavior, Guideline D
Alcohol Consumption, Guideline G
Criminal Conduct, Guideline J

The security concerns raised against Applicant are from the same incident. The gravamen of Applicant's conduct was the excessive consumption of alcohol, which led to inappropriate sexual criminal behavior. Security concerns for sexual behavior, alcohol consumption, and criminal conduct are the same. The concerns involve questions of Applicant's reliability, judgment, and trustworthiness. 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 ¶ 21)

Sexual behavior that involves a criminal offense indicates a personality or emotional disorder, reflecting lack of judgment or discretion which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 12) 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 regulation. (AG ¶ 30) Since the security concerns come from the same incident and are similar, the concerns will be discussed together.

Applicant admits that he was arrested for lewd and lascivious exhibition by intentionally exposing his genitals in the presence of a victim less than 16 years of age. He was convicted of indecent exposure after pleading nolo contendere on the advice of his attorney. He admits he consumed alcohol that day and was intoxicated, but does not remember exposing his genitals in the presence of a victim less than 16 years of age. He completed an alcohol evaluation and there were no problems raised and no treatment was ordered. The Government's evidence concurs with the criminal proceedings allegation. The Government's evidence by witness statements establishes the inappropriate sexual behavior. The sexual behavior resulting in a misdemeanor conviction raises Sexual Behavior Disqualifying Condition AG ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted); and Criminal Conduct Disqualifying Condition ¶ 31(a) (a single serious crime or multiple lesser offenses). Applicant's admission that he drank alcohol heavily before the incident raises Alcohol Consumption Disqualifying Conditions 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); and AG ¶ 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).

The Government produced substantial evidence by way of police reports, witness statements, court documents, security clearance investigative reports, and Applicant's admission and statements to establish the disqualifying condition in AG ¶¶ 13(a), 22(a and (c), and 31(a). Applicant admits he was drinking heavily on the day of the incident. The witness statement from the young girl's mother and father are detailed and explicit in reporting what occurred. They had no reason to fabricate the incident. Because of his heavy consumption of alcohol, Applicant's memory of the event is not clear. Based on the witness statements and police reports, I find that Applicant did pull down his swim trunks in the presence of a five-year-old girl exposing his genitals.

The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under sexual behavior, alcohol consumption, and criminal conduct. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. The alleged security concerns have similar mitigating conditions. These mitigating conditions involve the passage of time, the unusual nature of the action causing security concerns, the likelihood of recurrence, and whether the actions cast doubt on the individual's reliability, trustworthiness, and judgment. In addition, the

alcohol consumption mitigating conditions also include the individual's action to overcome any alcohol-related issues and establish patterns of responsible use of alcohol.

As noted above, the gravamen of Applicant's conduct causing the security concerns is the excess consumption of alcohol. In this regard, Applicant raised Alcohol Consumption Mitigating Conditions AG ¶ 23(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); and AG ¶ 23(b) (the individual acknowledges his or her alcoholism or issue 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)). These mitigating conditions do not apply. While the incident happened two years ago, Applicant was by himself when he willingly drank alcohol to excess. There were no unusual circumstances that would lead him to the excess consumption of alcohol. He was not facing any personal problems or celebratory circumstances that would lead to a need for excessive consumption of alcohol. He had just finished a project with coworkers and was on his way home. The coworkers went their own way. Applicant was alone and he drank to excess. Applicant's alcohol consumption was binge drinking since he had six or seven beers and five or six hard liquor drinks in about three hours.

Even though there are no reports of other incidents of excessive alcohol consumption, the circumstances could readily recur where Applicant again excessively consumed alcohol. Applicant states he does not have an alcohol-related problem. He presented evidence that he successfully completed an alcohol-awareness program. The psychological report does provide a caution in that Applicant may be at a mild risk category for sexual or criminal conduct if he is alcohol free or mindful of his use of intoxicants. Applicant has not established that he is mindful of his alcohol consumption and he is certainly not alcohol free. He did not establish that he took any actions to understand the nature of and control his alcohol consumption. He still consumes alcohol, sometimes to excess. While Applicant states his consumption of alcohol has moderated because drinking alcohol is no longer fun, there is nothing in the record to establish a pattern of responsible use of alcohol. His conduct of binge drinking and heavy alcohol consumption could readily recur because Applicant still consumes alcohol.

Applicant raised Sexual Behavior Mitigating Condition AG ¶ 14(b) (the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and Criminal Conduct Mitigating Condition AG ¶ 32(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). As noted above, the sexual behavior leading to a criminal conviction happened only two years ago. The circumstances were not unusual since they resulted from voluntary excess consumption

of alcohol. The circumstances of inappropriate sexual behavior could recur, especially if Applicant consumes alcohol to excess. Applicant has not mitigated the security concern for alcohol consumption, sexual behavior, and criminal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 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. I considered the testimony of his supervisors, friends, and fellow workers concerning his reputation for honest, condor, reliability, judgment, and trustworthiness. I considered his reputation as an excellent employee and his record of accomplishments. Applicant drank to excess and exposed his genitals in the presence of a five year old girl resulting in a criminal conviction for indecent exposure. His consumption of alcohol was reckless and irresponsible and showed poor judgment and a failure to control impulses. The failure to control impulses led to the inappropriate sexual behavior and criminal conviction. His continued consumption of alcohol could again lead to a failure to control his impulses. This raises questions concerning his judgment, reliability, and trustworthiness. Failure to control impulses indicates he may not be able to properly safeguard classified information. The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the alcohol consumption, sexual behavior, and criminal conduct security concerns.

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
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge