



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



In the matter of:)
)
) ISCR Case No. 10-09659
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: Daniel C. Lemley, Esq.

October 31, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant has mitigated the security concerns arising under Guidelines G (Alcohol Consumption), H (Drug Involvement), and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

On May 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G, H, and J. DOHA acted under Executive Order (EO) 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) implemented on September 1, 2006.

On June 7, 2011, Applicant answered the SOR and requested a hearing if his response did not provide a basis for a favorable resolution. Department Counsel submitted the ready-to-proceed notification on July 8, 2011. The case was originally

assigned to another judge and was reassigned to me on August 9, 2011. DOHA issued a notice of hearing on August 24, 2011, and the hearing was convened as scheduled on September 14, 2011. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) 1. Applicant testified, called one witness to testify on his behalf, and offered exhibit (AE) A, which was admitted into evidence without objection. The record was held open until September 21, 2011, for Applicant to submit additional information. Applicant timely submitted AE B, which was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 21, 2011.

Findings of Facts

Applicant is a 21-year-old software intern who works for a defense contractor. He started working for the defense contractor as a summer intern in 2009 and now works there on a part-time basis. He graduated from high school in 2008. He has completed two years of college and is currently taking college courses on a part-time basis. He has never been married and has no children. This is the first time that he has sought a security clearance.¹

The SOR contained three Guideline G allegations. These allegations asserted that Applicant consumed alcohol, at times while underage and to excess, from 2005 to March 2011; that he was arrested for Driving Under the Influence of Alcohol (DUI) and for Possession of Alcohol by a Minor in April 2009; and that he was arrested for DUI in January 2010. The SOR contained two Guideline H allegations that asserted Applicant used marijuana from January 2009 to January 2010 and that he was also arrested for Possession of Marijuana during his DUI arrest in January 2010. The underage possession/consumption of alcohol, two DUIs, and marijuana-related offenses were cross-alleged in one allegation under Guideline J. In his Answer, Applicant admitted all of the SOR allegations. His admissions are incorporated herein as findings of fact.²

Applicant began consuming alcohol while in high school. He lived at his parents' home until he started college in August 2008. The first college he attended was located in a city that was about a three-and-a-half-hour drive from his parents' home. His consumption of alcohol increased after he started college. Until about March or April 2010, he would regularly drink to the point of intoxication on weekends at college and conceded such consumption of alcohol constituted habitual or binge drinking.³

In April 2009, Applicant was arrested and charged with DUI and Possession of Alcohol by a Minor. The police stopped him because of an illegal lane change. At the time of his arrest, his blood alcohol level was .22%. In June 2009, he was found guilty of the DUI offense and was sentenced to a pretrial diversion program that included six to

¹ Tr. 19, 35-36, 48, 59; GE 1; AE A.

² SOR; Applicant's Answer to the SOR.

³ Tr. 18, 29-30, 39-40, 48-49, 55; GE 2.

eight weeks of education classes, four Alcohol Anonymous (AA) meetings, six months of probation, and 90 days suspension of his driver's license. Upon completion of the pretrial diversion program, the charges were dismissed. After completing the required AA meetings, he did not attend any additional meetings. He violated his probation by consuming alcohol while he was in that status.⁴

In January 2010, Applicant was arrested and charged with DUI and Possession of Marijuana. He was sleeping behind the steering wheel of his car when the police approached him. At that hearing, he admitted that he drove before falling asleep in the car. At the time of his arrest, his blood alcohol level was .09%, which exceeded the legal limit. In February 2010, he pled guilty to being a Youthful Offender on the underlying charges of DUI and Possession of Drug Paraphernalia and was ordered to complete a Court Referral Program. His sentence included six months in jail (suspended), fine, and probation for 90 days. His driver's license was also suspended for 90 days. Adjudication as a youthful offender in this state does not constitute conviction of a crime.⁵

Applicant used marijuana once or twice in high school but did not like it. He began using it again in college. He estimated that he used it approximately five times a week from January 2009 to January 2010. When he was arrested in January 2010, he had about half an ounce of marijuana in a plastic bag in his pants and a marijuana bong in his car. He purchased marijuana for his own use and shared it with others. The last time that he possessed or used marijuana was in January 2010. He has never been evaluated by a medical professional as being an alcohol or drug abuser or as being alcohol or drug dependent. He has not used any illegal drugs other than marijuana. In his current job, he passed a pre-employment drug test and is subject to random drug tests.⁶

In May 2010, Applicant moved back to his parents' home. He disenrolled from his first college and enrolled in another college near his parent's home. He no longer associates with his classmates from his first college. Since returning home, his consumption of alcohol has decreased. The last time he became intoxicated was at his cousin's wedding reception in June 2010, and he did not drive on that occasion. He stated he now consumes alcohol occasionally when he goes out to dinner. The last time he consumed alcohol was about one month before the hearing when he drank one beer at dinner. He has joined a fishing club since returning home. He now spends his weekends and free time fishing. The consumption of alcohol while fishing is prohibited. He has been elected vice president of the fishing club.⁷

⁴ Tr. 20, 30-31, 36-47, 50, 73-74; Applicant's Answer to the SOR; GE 1, 2, 3.

⁵ Tr. 20, 30-31, 40-45, 50, 63-68, 73-74; Applicant's Answer to the SOR; GE 1, 2, 3.

⁶ Tr. 30-31, 40, 44-47, 51-54, 60-68; GE 2.

⁷ Tr. 21-27, 31-35, 38, 45-51; GE 1; AE A.

Applicant admitted that he has made mistakes and is ashamed of his misconduct. He has accepted responsibility for his wrongdoing. He attributed his misconduct to being “young and dumb” and peer pressure. He provided records of his court proceedings even though those records were sealed. At the hearing, Applicant testified in an open and forthcoming manner. I found him to be a credible witness.⁸

Applicant is an only child. His mother testified that he advised her of each of his arrests soon after they occurred. She indicated that he has always been honest. She has noticed a definite change in him since he returned home from his first college experience. His life now appears to be redirected. He has slowed down on his consumption of alcohol. He does not drink at home and may have one or two beers when they go out to eat. He attended three months of family counseling. She indicated that he now fishes every weekend.⁹

As his post-hearing submission, Applicant provided a signed letter stating:

I, [Applicant], understand the serious nature of having security information. I understand that drug use and alcohol abuse can jeopardize any secure information I may have. I intend to abstain from any drug use and alcohol abuse. I understand that any drug use or alcohol use would subject my security clearance to automatic revocation.¹⁰

Applicant submitted seven letters of reference. In general, these letters describe him as an honest, reliable, hardworking individual who has respect for authority. A security officer stated that she is confident that Applicant would handle classified information in a completely trustworthy manner. His supervisor stated that his performance reflects great credit upon him, the company, and their U.S. Government customer.¹¹

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions that are to be used 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, administrative judges apply the guidelines in

⁸ Tr. 45-47; GE 2, 3.

⁹ Tr. 17-27, 44-45, 46; GE 1; AE A.

¹⁰ AE B.

¹¹ AE A.

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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. Two are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving 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

(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.

While away at college from August 2008 to April 2010, Applicant would regularly consume alcohol to the point of intoxication on weekends and conceded such consumption constituted habitual or binge drinking. He was found guilty of DUI in June 2009 and in February 2010. His blood alcohol level was .22% for the 2009 DUI and .09% for the 2010 DUI. AG ¶¶ 22(a) and 22(c) apply.

Two alcohol consumption mitigation conditions under AG ¶ 23 are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unique circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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).

Applicant acknowledges that his drinking and driving was irresponsible behavior, and he is ashamed of that conduct. He was under the legal drinking age when he committed both DUIs. Those offenses and his excessive consumption of alcohol occurred while he was away from home attending college. He attributes his irresponsible behavior to being "young and dumb" and peer pressure. Since engaging in that behavior, he has changed his lifestyle considerably. In May 2010, he disenrolled from his first college and moved back home. He no longer associates with the friends he had at his first college. He attended three months of family counseling. At present, he attends college part-time and works part-time. He has proven to be a hard-working, reliable employee. He has joined a fishing club and spends his free time fishing. He has significantly reduced his consumption of alcohol. Since his January 2010 DUI, he consumed alcohol to excess on one occasion. This happened in July 2010 when he attended a cousin's wedding. He did not drive on that occasion and was with his parents and other family members. Since returning home from college, his mother has seen a substantial change in his behavior. He does not consume alcohol at home and occasionally has one or two beers when they go out to dinner. The last time he consumed alcohol was about one month before the hearing when he drank one beer at dinner. In short, he has acknowledged his alcohol-related issues, taken action to resolve them, and established a pattern of responsible use. His misuse of alcohol is unlikely to recur. I find that AG ¶¶ 23(a) and 23(b) apply.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. Two are potentially applicable in this case:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana once or twice in high school. While at college in 2009 and 2010, he used marijuana as much as five times a week. In February 2010, he was found guilty as a Youthful Offender of Possession of Drug Paraphernalia. When he was arrested, he had about half an ounce of marijuana and a marijuana bong in his possession. The evidence is sufficient to raise the above disqualifying conditions.

Two drug involvement mitigating conditions under AG ¶ 26 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate

period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has been open and forthcoming about his marijuana use. He last used that substance about 20 months ago when he was 19 years old. He denied ever using any other illegal drugs.

Except for using marijuana once or twice in high school, Applicant's drug use occurred while he was attending his first college, which is located about a three-and-a-half-hour drive from his parents' home. As discussed above under Guideline G, Applicant has significantly changed his lifestyle since his last use of marijuana. These changes have included moving back home, disassociating with drug users, obtaining part-time employment, and becoming involved actively with a hobby. He signed a statement that he will abstain from any illegal drug use and acknowledged that failure to do so would result in revocation of his security clearance.

Applicant's use of marijuana was a youthful indiscretion. He is now well aware of its negative consequences. He has made changes that have taken him away from the college drug scene. A significant period of abstinence has elapsed that demonstrates he put the illegal use of marijuana behind him. I find that AG ¶ 26(a) and 26(b) apply.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

Several conditions that could raise security concerns under AG ¶ 31 are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (e) violation of parole or probation, or failure to complete court-mandated rehabilitation program.

As addressed above, Applicant has been found guilty twice of DUI and once of Possession of Drug Paraphernalia. He has consumed alcohol as a minor and has possessed and used marijuana. In about 2009, he violated his probation by consuming alcohol while he was in that status. The evidence is sufficient to raise the above disqualifying conditions.

Two criminal conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal conduct has already been addressed under Guidelines G and H. During the security clearance adjudication process, he has been forthcoming about his illegal marijuana use and alcohol consumption. He has acknowledged that he has made mistakes and is remorseful for his wrongdoing. He has disassociated himself from drug users and has not used marijuana for the past 20 months. He now works part-time and attends school part-time. As discussed above, he has made changes to his lifestyle that removes peer pressure. In short, he has matured, stopped using marijuana, and established a pattern of responsible alcohol use. His criminal conduct is unlikely to recur. I find that AG 32(a) and 32(d) apply.

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 relevant 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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G, H, and J in my whole-person analysis. Some of the

factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's age and that his use of marijuana was a youthful indiscretion. At the hearing, Applicant was open and forthcoming about his marijuana use and alcohol consumption. His last use of marijuana occurred about 20 months ago. Since engaging in his misconduct, he has made significant lifestyle changes. He is subject to random urinalysis tests in his job. He has matured and realizes the consequences of future use of illegal drugs or alcohol-related misconduct. He has put his irresponsible behavior behind him. I find that he has provided sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with no questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Alcohol Consumption, Drug Involvement, and Criminal Conduct security concerns.

Formal Findings

Formal findings 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
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

James F. Duffy
Administrative Judge