



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



In the matter of:)
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-----) ISCR Case No. 10-10849
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)
Applicant for Security Clearance)

Appearances

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

For Applicant: Alan K. Hahn, Esquire

February 13, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On June 15, 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 July 8, 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 October 5, 2011. DOHA issued a notice of hearing on November 4, 2011, and I convened the hearing as scheduled on November 30, 2011. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through C, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on

December 13, 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.d., under Guideline G; and 2.b. through 2.c., under Guideline J with some explanations in mitigation. 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 34 years old. He has been married to his current wife since May 1, 2011, and was previously married to his first wife from 2005 to 2008. The woman, who is the subject of 1.d, below, lived with Applicant from 1997 to 2002, and they had two children together. 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 four allegations as they are cited in the SOR. As reviewed above, 1. a. through 1.d. have been admitted by Applicant in his RSOR :

1.a. Applicant has “consumed alcohol, at times to excess and to the point of intoxication, from approximately high school to at least June 2010.” At the hearing, Applicant testified that currently, he usually does not consume alcohol during the week, and drinks “maybe a few beers on a football Sunday” or at a barbecue on a Saturday. Since the arrest in June 2010, which is the subject of 1.b., below, he has not driven at any time after consuming any alcohol, and he plans to continue this practice for the rest of his life. (Tr at 70-73.)

1.b. In June 2010, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI) (BAC .25%) and (2) Driving Under the Influence of Alcohol with BAC of .08 or Higher Blood Alcohol. Applicant plead guilty to Count (2) and was sentenced to five years probation, ordered to attend an alcohol program and fined. Count (1) was dismissed.

Applicant testified that this incident occurred after he and some friends attended a professional baseball game. He had consumed two beers before he attended the game, and since he supplied the tickets to the game, his friends bought him drinks at the game, which were stronger than the beers he was accustomed to drinking. He consumed more than usual, and then made the bad decision to drive himself home after the game. When driving home, he started weaving and swerving toward the shoulder, and he was stopped, arrested, and ultimately charged with DUI. Since the two DUI

arrests, the one reviewed in this allegation and 1.d, below, were 11 years apart, he was treated under the First Conviction Program. He was ordered to pay a fine of \$1,950, of which he pays \$100 a month, attend DUI classes and Mothers Against Drunk Driving (MADD) classes. He also had to attend 13 days of a work project. Finally, he is held to a standard of zero tolerance that if he drives a vehicle he can have no alcohol in his system. Applicant testified that he has completed all of his obligations except finishing payment of the fine, (he still owed \$400 at the time of the hearing), and he is to continue serving his probation, which does not end until 2015. (Tr at 52-54, 58, 60, 70.)

1.c. In August 1999, Applicant was issued a citation for Open Container. In 1999, Applicant was 22 years of age. He was at the beach with his female companion, who is also the subject of 1.d., below, and his daughter. He was consuming beer on the beach, which at that time was legal, but then he crossed onto the sidewalk. Unbeknownst to Applicant, at that time his leaving the beach with an open container of alcohol was a violation of an Open Container law, and he received a citation for his action. He stated that he paid the fine for the citation, which he believed to be about \$100. (Tr at 39-41.)

1.d, In August 1999, Applicant was arrested and charged with (1) Corporal Injury to Spouse and/or Roommate, (2) Cruelty to Child by Inflicting Injury, (3) Driving Under the Influence of Alcohol and Drugs, and (4) Driving While Having a Measurable Blood Alcohol. Applicant pled guilty to counts (1) and (4) and was sentenced to probation, alcohol education classes, community service, drivers license suspension, and to pay a fine. Counts (2) and (3) were dismissed.

Applicant testified that the action that is the subject of this allegation happened on the same day as 1.c., above. The woman, involved in this allegation, was Applicant's girlfriend. They lived together from 1997 to 2002, and they had two children together. After they returned from the beach on that day in August 1999, they had an argument, which escalated into a physical altercation, as Applicant's girlfriend attempted to leave the premises in her car, and Applicant attempted to close the car door to keep her from leaving. Thereafter Applicant was confronted by some neighbors, and to avoid further confrontation, he drove a short distance away. He sat in the car for some time, and he consumed some beer from the cooler, which was still in the car from their trip to the beach earlier in the day. Applicant conceded that alcohol consumption contributed to the altercation. (Tr at 66-67.)

Applicant testified that approximately an hour and a half after the incident, he walked back to his apartment, and the police arrested him for domestic violence. He ultimately plead guilty to what he described as a misdemeanor battery to a domestic partner and DUI. Applicant stated that he plead guilty to these two allegations at the advice of his counsel, since the felony allegations would be dropped. (Tr at 40-48.)

Applicant attended approximately six months of alcohol awareness education, one year of domestic violence classes, and he had to perform community service for a minimum of one hundred hours. Applicant averred that since this incident he has never been involved in a domestic violence dispute. (Tr at 48-50.) He also indicated that he

moderated and lessened his alcohol consumption, and he has never consumed alcohol at the beach after this day. (Tr at 51-52.)

(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,b,, 1.c., and 1.d., above establishes that Applicant has engaged in criminal acts.

Mitigation

Applicant submitted three very positive character letters. (Exhibit C.) The first is from an individual, who indicated that he has known Applicant professionally since 2005, as his supervisor since 2007, and socially since 2007, as well. He wrote that the alcohol arrest in 2010 is out of character and not representative of Applicant, and Applicant has deep remorse for this event. Despite embarrassment, Applicant did report the incident to his supervisor and to his security officer. The second letter is from a police officer and a friend of Applicant for more than 20 years. He stated of Applicant, "His trustworthiness has been proven time and time again and is a valued member of my family." The third letter is from a friend of Applicant for more than 24 years. He strongly recommended him "for any position or endeavor that he may seek to pursue."

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 convictions for one DUI and one DUI plus Corporal Injury to Spouse and/or Roommate. 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 for two reasons. First, “the behavior was so infrequent,” because the two DUIs happened 11 years apart, and second, “it happened under such unusual circumstances that it is unlikely to recur,” because, when Applicant received the 2010 DUI, he was drinking a stronger alcoholic drink than the one to which he was accustomed, he had never consumed it before, and it was purchased for him by friends. Considering ¶ 23(a) together with Applicant’s very persuasive and credible testimony that he will never again drive after consuming alcohol, I find Guideline G for Applicant.

(Guideline J - Criminal Conduct)

The Government has established that Applicant engaged in criminal conduct, by his convictions for one DUI and one DUI plus Corporal Injury to Spouse and/or Roommate. 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 Applicant has expressed sincere “remorse” for the conduct that led to his convictions, and by the character letter of his supervisor 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 and the strong, laudatory letters of reference, 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.d.:	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