



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



In the matter of:)	
)	
)	ISCR Case No. 11-02552
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip Katauskas, Esq., Department Counsel
For Applicant: David Price, Esq.

December 15, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline J, Criminal Conduct. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On August 31, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. 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 within the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 29, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 24, 2011. DOHA issued a Notice of Hearing on November 3, 2011. I convened the hearing as scheduled on November 30, 2011. The Government offered exhibits (GE) 1 and 2.

Applicant did not object and they were admitted into evidence. Applicant and three witnesses testified. He offered exhibits (AE) A through C, which were admitted into evidence without objections. DOHA received the hearing transcript (Tr.) on December 7, 2011.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 31 years old. He has worked for a federal contractor since 2004. He has held a Top Secret clearance since 2005. He married in 2006, and he and his wife are expecting their first child. Applicant graduated from college in 2002.¹

In October 27, 2009, Applicant and a friend attended a Monday night professional football game. He met his friend at his friend's house, and they had a designated driver take them to the game. Applicant's plan was that after the game he would return to his friend's house, and if he felt he was incapable of driving home he would spend the night. He and his friend began tailgating around 5:30 p.m. Applicant estimated that he continued to consume alcohol, approximately six to eight beers, until about 10:00 p.m. The game ended around midnight and the designated driver drove them back to the house. It was around 12:30 a.m. when they arrived. Applicant decided he felt okay to drive home and proceeded to leave at 1:00 a.m. It was about a 20-minute drive.²

The weather was drizzling and there were construction lanes on the road. Applicant indicated that the roads were more treacherous than usual because the lanes shifted from four lanes, down to three lanes, then to two lanes. Applicant was behind an 18-wheeler truck and was trying to go around it when he was stopped by the police. Apparently, the passing lane he was trying to use was a designated construction lane. Applicant was asked by the police officer if he had consumed alcohol, and he admitted he had. He was given a field sobriety test and a field breathalyzer which read .115%. At the police station, he was given a second breathalyzer and the reading was .12%. Applicant was charged with driving under the influence (DUI) of alcohol. He admitted he made a terrible decision that night. He contacted his wife and was worried, embarrassed and scared. Applicant reported the incident to his employer.³

In January 2010, Applicant's DUI charged was reduced to reckless driving. He was sentenced to a six-month suspension of his driver's license. He was also given a \$300 fine that was suspended. He was permitted to drive to and from work and to and from medical appointments. He was also required to completed the state's 10-week

¹ Tr. 66-69.

² Tr. 79-83.

³ Tr. 83-87.

substance abuse awareness program and attend six Alcoholics Anonymous meetings. Applicant was also ordered to abstain from alcohol consumption for one year during his unsupervised probation.⁴

Applicant stated he took the charge seriously and respected the abstention order for the first few months. He and his wife discussed his drinking and did not believe it was a problem. They decided it would be okay if he had a drink at home as long as he did not drive. He also would have a drink if they were out for dinner. He admitted that his consumption of alcohol was greatly reduced, but concurs that he was not complying with the court's abstention order. He estimated he likely consumed alcohol 10 to 12 times. He believed because he was in a controlled setting and not driving that it would be okay. He now understands and fully admits that his analysis was flawed.⁵

In July 2010 Applicant and two of his friends went to their college town (in a different state) for a bachelor party. They went to a restaurant for dinner. Applicant consumed some alcohol. Feeling nostalgic about being back in their college town they decided to go look at the house where they had lived as roommates during college. When they lived there, on a couple of occasions, people who had previously lived there would stop by to see how the house had changed or to find old markings they left. When Applicant and his friends arrived at the house they noticed the lights were on. They knocked on the door. When no one answered, they checked and found the door was unlocked. They entered the house and called out to see if anyone was home. No one answered. They entered the house and each went to see what their old rooms looked like. They were in the house about five to ten minutes. As they were leaving the tenants of the house returned. Applicant tried to explain they were just looking at their old house. The police were called. Applicant's friends had walked away from the house. Applicant was fully cooperative with the police. All three were arrested for felony criminal trespass. Applicant admitted he had consumed alcohol prior to the incident.⁶

Applicant reported the incident to his supervisor as soon as practicable and to his security officer. Applicant also reported the offense to the state where he was on probation. At the preliminary appearance, the judge permitted Applicant and his friends to talk to the tenants. They profusely apologized and explained they understood how they must have felt. In September 2010 the judge agreed to dispose of the case through an accelerated disposition. Applicant was put on probation for one year and was to perform a day of community service. There was no restriction on alcohol consumption. Applicant commented that he had an opportunity to reflect on the seriousness of his conduct. He completed the terms of his probation in September 2011. Pursuant to the accelerated disposition program he has requested his record be expunged.⁷

⁴ Tr. 87-88.

⁵ Tr. 89-90, 116-118.

⁶ Tr. 71-75, 91-102.

⁷ Tr. 100-110 AE B-2, B-3.

Regarding the probation for his reckless driving sentence, Applicant met with the state substance abuse counselor who determined he did not have an alcohol problem.⁸ The judge revoked the suspended fine. He paid the fine. Applicant was required to successfully complete his probation, which he did. His probation expired in January 2011. Applicant credibly testified that he never drove on his suspended license, except as permitted. Both state's requirements have been completed.⁹

Applicant and his wife have had serious conversations about his actions and the alcohol incidents. He was evaluated by an alcohol counselor and it was determined he does not have an alcohol problem, but he readily admitted that he used poor judgment.¹⁰

Applicant has curbed his alcohol consumption. He never drinks and drives. He does not consume alcohol during the week. His consumption is limited to two drinks, and it is usually while watching a football game.¹¹

Applicant is remorseful for his conduct. He understands the magnitude of his repeated violation of the abstention order. He has changed his attitude. He understands alcohol may impair one's judgment. He fully accepted responsibility for his actions.¹²

Applicant's wife testified on his behalf. She does not believe Applicant has an alcohol problem, but admitted he made poor decisions when he consumed alcohol. She and Applicant have been emotionally shaken by these incidents. She indicated that Applicant was distraught about his actions. She confirmed that he did not consume alcohol for the remainder of his probation period. He is more conservative with his consumption of alcohol. He has been exercising a heightened sense of awareness. These incidents have caused him to reflect on his actions. He was disappointed in himself and knows he has disappointed those he respects. He is dedicated to making better decisions.¹³

Applicant's senior supervisor testified on his behalf. He hired Applicant seven years ago. He supervises about 50 staff members. He has had daily contact with Applicant for the past seven years. He stated Applicant has done a great job and has been given increased responsibility. He recently moved him into a new role, and he has been a key asset. He has no concerns that Applicant has an alcohol issue. Applicant was forthcoming with him and told him about the incidents right away and how sorry he

⁸ AE B-1.

⁹ Tr. 104-110, 115-120; AE B-2, B-3.

¹⁰ Tr. 109-110.

¹¹ Tr. 111-112.

¹² Tr. 110-111.

¹³ Tr. 43-66.

was for his actions. Applicant has a strong work ethic. He believes these incidents have been an awakening to Applicant, and he has an increased sense of seriousness and maturity. He is a solid conscientious employee. He believes Applicant is trustworthy.¹⁴

Applicant's immediate supervisor for the past three years testified on his behalf. He has daily interaction with Applicant. He has had some social contact with him and never noted an alcohol issue. He believes Applicant is honest, trustworthy, and exercises good judgment. He has shown a new sense of maturity since the incidents. He appears to be more focused on his work and has a sense of priority in his life. His supervisor believes Applicant is a responsible person.¹⁵

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, which are 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, 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain 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

¹⁴ Tr. 20-30; AE A-4.

¹⁵ Tr. 31-42; AE A-5.

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 of 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 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offense;
- (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.

Appellant was arrested for DUI in 2009. He was arrested in 2010 for felony criminal trespass. He violated the terms of his probation by drinking alcohol. I find the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 23 and the following 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 admitted he made mistakes in judgment when he drove after drinking. He admitted he violated his probation by consuming alcohol. He also admitted his error in judgment when he entered a house he had formerly lived in when he was in college, without the owners' permission. He has completed all the terms of his sentence and probation. The trespass charge will be expunged from his record. By all accounts, it appears he has matured and is more focused on his work and the fact he is going to be a father. He was crushed having to tell his wife of his actions. It has been 18 months since his last offense. Applicant acted responsibly by immediately disclosing his actions to his employer and security officer. His supervisor has increased his level of responsibility reflecting the confidence he has in Applicant. I observed Applicant and believe he is mortified and remorseful by his actions. He fully understands the gravity of his actions. After reviewing his background from the documents that were provided, I am convinced his actions were an aberration and they will never happen again. He has an excellent work record and is a trusted and valued employee. He recognized he made bad choices and he is remorseful. He is committed to acting appropriately in the future. I find there is an abundance of evidence that Applicant is successfully rehabilitated. I find that a sufficient amount of time has passed and believe this type of conduct will not happen again. Therefore, AG ¶¶ 32(a) and (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 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. I have incorporated my comments

under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but others warrant additional comment.

Applicant has a long and consistent record of achievement. Applicant made mistakes after he consumed alcohol. He does not have a problem with alcohol, but clearly it affected his judgment. He is incredibly remorseful for his conduct. He acknowledges his lapses in judgment. He is focused on his work and his family. I found Applicant's testimony credible. Applicant has met his burden of persuasion. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant successfully mitigated the security concerns arising under the guideline for Criminal Conduct.

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:	FOR APPLICANT
Subparagraphs 1.a-1.d:	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 a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge