



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



In the matter of:)
)
) ISCR Case No. 11-04756
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

03/29/2012

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On October 19, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption. DOHA acted 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 (Answer) the SOR on November 14, 2011, and requested a hearing before an administrative judge. The case was assigned to me on January 10, 2012. DOHA issued a notice of hearing on February 8, 2012, and the hearing was convened as scheduled on March 6, 2012. The Government offered exhibits (GE) 1 through 4, which were admitted into the record without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified at the hearing, but did not offer any exhibits. DOHA received the hearing transcript (Tr.) on March 15, 2012.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations under both guidelines. The admissions are incorporated as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 29 years old. He has worked for a defense contractor for over five years. He is single and has no children. He graduated from high school and earned some college credits. He has no military experience and currently holds a security clearance.¹

Applicant's admitted conduct raised in the SOR includes: (1) being arrested and charged with felony counts of resisting arrest and aggravated assault in October 2010 (subsequently, all charges were dismissed without prejudice because law enforcement failed to produce required evidence for the defense); (2) consuming alcohol to the point of intoxication which led to the criminal charges in October 2010.

On October 21, 2010, Applicant and two friends went to a local bar for some drinks after work. Applicant proceeded to drink approximately 10 mixed drinks over the course of six hours that evening and became intoxicated. Because of his state of intoxication, he does not remember much about what transpired the rest of the evening. He remembered being outside the bar with his friends waiting for a taxi to take them home. The next thing he remembered was waking up in the local hospital after being Tasered by Sheriff's deputies. He was told (not clear from the record who told him) that he struck at one of the deputies with his fist and was Tasered in an effort to control him.²

The Sheriff's report, prepared by one of the deputies involved in the incident that night, described Applicant as "very intoxicated" and stumbling toward one of the deputies. This stumble was not viewed by either deputy as an act of aggression, but rather just a person who was very intoxicated. Then the report stated Applicant began to walk away from one deputy and that deputy grabbed his arm. At that point, the report

¹ Tr. at 4-5, 53-54; GE 1.

² Tr. at 22, 26-27; GE 2.

states that Applicant “turned around and struck Deputy H in the face with a closed fist.” It also states that Applicant continued to hit the deputy. The deputy pushed him to the ground and he was Tasered by the other deputy. He was Tasered a second time because the report stated he continued to resist. He was then handcuffed. Applicant scraped his face on the pavement when he was on the ground and requested medical attention. The Sheriff’s report concluded by stating that neither deputy was injured and that both a digital recording and digital pictures were taken and would be used to supplement the report at a later date. Neither deputy testified during this hearing.³

The two friends who were with Applicant the evening in question told him a different version of what happened concerning his interaction with the deputies. They said while all three were outside the bar waiting for a taxi, Applicant stumbled into the direction of the approaching deputies. They believe the deputies interpreted this as a hostile act. The deputies then Tasered Applicant and hit him with unknown objects causing multiple injuries.⁴

In December 2010, the county attorney requested that the Sheriff’s office supply the supplemental evidence to its office (the digital recording and photos taken the evening of the arrest); however, the Sheriff’s office refused to honor the request. In January 2011, a second request was made and it was also ignored. Consequently, the county attorney’s office moved to dismiss the charges because the Sheriff’s office refused to supply evidence that was required to be disclosed to the defense. On January 26, 2011, the judge granted the motion and the charges were dismissed without prejudice. No subsequent charges were ever brought against Applicant. Applicant was never involved with law enforcement before this incident and has not been involved with them since this incident.⁵

Applicant started drinking alcohol when he was about 17 years old. His drinking frequency at that time was about once a month. He drank at local parties, but does not recall the amount of consumption. He stopped drinking completely when he was 18 years old and remained abstinent until he was about 23 years old. He would drink about once every week or two. He drank socially at bars and would consume about six or seven mixed drinks. This amount of alcohol would typically lead to intoxication. His drinking pattern was to meet friends at local bars and drink with them. He did not drive after nights of drinking. He believes he drank more during the night of his arrest than he normally drinks.⁶

³ GE 3.

⁴ Tr. at 27; GE 2.

⁵ Tr. at 25, 28; GE 3.

⁶ Tr. at 37-39; GE 2.

Applicant has never been through any alcohol treatment or counseling program. He has not been diagnosed as an alcohol abuser or as alcohol dependent. He has not participated in Alcoholics Anonymous (AA). After the arrest in October 2010, Applicant began a self-evaluation of his drinking habits. He read a book titled *Under the Influence* and concluded that he was an alcoholic. He made the decision to limit the amount of alcohol he consumed to one or two drinks when he went out about once every two weeks. This reduction took place in December 2010. In October 2011, he stopped drinking any amount of alcohol. He testified that he has remained abstinent since then. He claims he made the decision to stop drinking entirely before he received the SOR in his case. Although he does not participate in AA or any other alcohol support group, he feels he has the support of certain friends and family. This support helps him with his sobriety. He has not ruled out the possibility that he might participate in AA or undergo alcohol treatment in the future, if he feels the need to do so. He does not intend to drink in the future. He still occasionally goes out to bars with friends who drink alcohol.⁷

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.

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."

⁷ Tr. at 29-33, 35, 47-48; GE 2.

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 that an applicant may deliberately or inadvertently fail to 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 J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged with resisting arrest and aggravated assault upon a law enforcement officer. The charges were dismissed because law enforcement failed to supply necessary evidence. I find that the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and considered the following relevant:

- (c) evidence that the person did not commit the offense.

Although Applicant admits that he was so intoxicated he does not recall what happened, it is apparent that the alleged assault and resisting arrest allegations are not supported by the evidence. The police report is contradicted by witness testimony and is

of questionable reliability because the Sheriff's office failed to produce evidence referred to in the report that could totally corroborate the narrative write up. Even when the prosecuting attorney specifically requested this evidence on two different occasions, the Sheriff's office refused to produce it, resulting in the prosecution's motion for dismissal. Because the Sheriff's report is uncorroborated and in variance with other evidence, there is insufficient evidence to conclude Applicant committed the crimes. AG ¶ 32(c) applies.

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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(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

(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;

Applicant's admitted intoxicated state on the night of October 21, 2010, put him in a position that led to the encounter with law enforcement. Even though he did not commit a crime, he exercised poor judgment in drinking to excess. The evidence supports the application of both disqualifying conditions.

I have also considered all of the mitigating conditions for Alcohol Consumption under AG ¶ 23 and considered the following relevant:

(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

(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 has been involved in only one alcohol-related incident. He acknowledged his culpability for that incident when he drank to excess. He has modified his actions in light of his recognition that he believes he is an alcoholic. First, he reduced his alcohol consumption, and then he stopped completely. I found his testimony credible concerning his desire to stop drinking and his willingness to follow through with actions to carry out his intent. He has evaluated himself and chosen a path of abstinence even though he has not been classified as either an alcohol abuser or as alcohol dependent. A recurrence of similar behavior is unlikely and there is no other evidence to question his reliability, trustworthiness, or good judgment. Both AG ¶¶ 23 (a) and (b) 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 considered Applicant's current position, and the circumstances that caused his arrest by law enforcement. I also considered that Applicant made a conscience decision to alter his lifestyle and remain abstinent so that no future alcohol-related incidents might occur. He has made positive strides to change his behavior and, although his abstinence is less than one year, his sincerity of effort is reflected in his actions. Applicant provided sufficient evidence to mitigate the security concerns.

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 mitigated the security concerns arising under Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption.

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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.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.

Robert E. Coacher
Administrative Judge