



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 11-10178
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)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

June 25, 2013

Decision

MOGUL, Martin H., Administrative Judge:

On December 12, 2012, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline G 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 after September 1, 2006.

On January 10, 2013, 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 March 25, 2013. DOHA issued a notice of hearing on April 2, 2013, and I convened the hearing as scheduled on May 6, 2013. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf and no documentary evidence was submitted. The record was left open to May 20, 2013, to allow Applicant to offer additional evidence. The documents that were submitted have been identified as Exhibits A through E, and they were also admitted without objection. DOHA received the transcript of the hearing (Tr) on May 14,

2013. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted both SOR allegations, 1.a. and 1.b. 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 36 years old. He is unmarried and he has no children. 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 allegations 1.a. and 1.b. as they are cited in the SOR:

1.a. It is alleged that in March 2010, Applicant was arrested and charged with Driving Under the Influence (DUI) in State A. He plead guilty, and he was fined. He also was ordered to complete community service, to attend an 18 month DUI program, including weekly attendance at Alcoholics Anonymous (AA) meetings, had his driver's license suspended (except for driving to work), and was placed on five years probation. Applicant is still on probation. As reviewed above, this allegation was admitted by Applicant in his RSOR.

At the hearing, Applicant testified that this incident occurred after he had been rejected for four or five job interviews. He was upset and went with his friends to a bar to have some drinks. He estimated that he had consumed between eight and ten mixed drinks while at the bar, and he believed at the time of this arrest his blood alcohol was .14% or .15%.

Applicant explained that his car was parked where he could get a \$40 parking ticket or the car could be towed after a period of time. To avoid the ticket or towing, he attempted to drive his car home. Applicant testified that he did not think it was that "big of a deal" if he did get a DUI, since the DUI arrest in 2007 (1.b.) was in another state, so he thought this would be considered a first DUI offense. He testified that he never would have driven his vehicle if he knew it could be considered a second offense. (Tr at 25-38.)

As a result of the conviction, Applicant attended approximately 75 AA meetings. He also paid a fine of \$2,000, and had to pay \$4,000 for the classes he attended. (Tr at 45-46.)

He believed that his probation was only for three years not five, and that his probationary period had ended by the time of the hearing. (Tr at 38-40.) The record was left open to allow him to submit written evidence of his current probationary status. Applicant submitted a post hearing statement in which he wrote that he could not obtain probation documents in the allotted time, but he did learn that he will be on probation for five years from the arrest date of March 4, 2010, and that if he commits any crime with alcohol in his system, he will immediately be incarcerated for 90 days. He also wrote that after half of his probation has been completed, he believed he could file a motion to have his probation terminated, but at the time of his letter the probation had not yet been terminated. (Exhibit A.)

1.b. It is alleged that in April 2007, Applicant was arrested and charged with Driving While Intoxicated (DWI) 1st Offense in State B. He plead guilty and was sentenced to 30 days in jail (suspended) and 12 months probation. He was also fined, ordered to attend alcohol awareness classes, and his license was suspended for 12 months (except for driving to work and alcohol awareness classes). As reviewed above, this allegation was admitted by Applicant in his RSOR.

Applicant testified that this incident occurred shortly after a major school shooting incident in the state in which he attended public school. Many of his friends were in a bar commiserating over the tragic events. He estimated that he had at least five or six drinks or “probably more than that,” and then drove to a fast food restaurant next door to the bar. His car tire drove onto the curb as a result of his drinking, and the police arrested him there. He could not recall his blood alcohol at the time of his arrest, but he estimated it to be well over the .08% limit. Applicant testified that his license was not suspended for a full 12 months as it could be restored once he completed his classes. He estimated that his fine was \$2,500. (Tr at 40-46.)

Applicant testified that at the time of the hearing, he was still consuming alcohol, approximately once a month. He estimated that in the last year he has consumed as much as a six pack of beer two or three times. He also estimated that since his 2010 arrest and conviction he has been “completely drunk” approximately five times and “buzzed” 15 more times. He did state that he has considered abstaining completely from alcohol consumption in the future, and he did indicate that he has no intention to drive after consuming alcohol in the future. (Tr at 35-36, 53-54, 56.) In a post-hearing document, Applicant wrote that he has made a decision to abstain completely from alcohol consumption and that he has been attending AA meetings. (Exhibit E.)

Mitigation

Applicant submitted a character letter, dated October 25, 2011, and written to a hiring manager. The letter described Applicant to be a person of “the highest moral character.” (Exhibit D.) Nothing in the letter made it clear if the writer was aware of Applicant’s two DUI arrests and convictions.

Additionally, Applicant introduced a Notice of Completion Certificate showing that he had completed his 18 month multiple offender Driver Under the Influence program.

(Exhibit C.) Finally, Applicant submitted a Certificate of Appreciation that he had received for network support. (Exhibit B.)

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 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 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)

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgement or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.

Applicant's alcohol consumption resulted in the criminal conduct and convictions listed in subparagraphs 1.a. and 1.b. 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 do not find that ¶ 23(a) is applicable, because not enough time has passed since the DUIs. Considering that Applicant’s two DUI arrests and convictions occurred in 2007 and 2010, that he is still on probation and is scheduled to be until 2015, and that at the time of the hearing Applicant continued to consume alcohol, at times in significant quantities, I do not find that any other mitigating factor under this guideline applies in this case. While Applicant has now made the positive commitment to abstain completely from alcohol consumption, I find it to be too soon to determine that alcohol will not continue to be a potential security problem for Applicant. I find Guideline G against 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 do not apply, I find that the record evidence leaves me with 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 not 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:	AGAINST APPLICANT
Subparagraphs 1.a. and 1.b.:	Against Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge