



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



In the matter of:)	
)	
-----)	ISCR Case No. 11-12202
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

February 21, 2014

Decision

MOGUL, Martin H., Administrative Judge:

On May 29, 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E, G, D, 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 June 22, 2013, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing in this case. The case was assigned to this Administrative Judge on December 19, 2013. DOHA issued a notice of hearing on January 30, 2014, and I convened the hearing as scheduled on January 30, 2014. The Government offered Exhibits 1 through 10, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through I, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on February 10, 2014. The record was left open until February 13, 2014 to allow Applicant to submit additional evidence into the record. Applicant submitted an additional document, which was

identified as Exhibit J, and also admitted without objection. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record discussed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 46 years old. He is married, and he has four daughters. He attended two years of college. He served in the United States Army National Guard from 1986 to 2008, when he received an Other than Honorable Discharge. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

1.a. It is alleged in the SOR that Applicant was tried by a General Court-Marital and was charged with Article 120 - Rape. For this charge Applicant was found Not Guilty. Applicant was also charged with Article 134 - Fraternizing with Enlisted Persons, Wrongful Sex with Person Not Your Spouse, and Wrongful Indecent Act. For these charges Applicant was found Guilty. Applicant was charged with Article 92 - Violate a Lawful General Order, by consuming alcohol. For this charge Applicant was found Guilty. Applicant was charged with Article 133 - While in a Hostile Fire Zone, mixed alcohol drinks at a party for enlisted soldiers and had sex with a female enlisted soldier. For this charge Applicant was found Guilty. For these Guilty charges, on April 7, 2006, Applicant was sentenced to dismissal from the military, and sentenced to confinement for two years.

In his RSOR, Applicant admitted allegation 1.a. During the hearing, Applicant testified that this incident occurred on April 18, 2005, in Afghanistan, after Applicant had been deployed there approximately nine months. On the day of the incident, an Army lieutenant, who was Applicant's roommate and friend, told Applicant that he planned to put on a birthday party that evening for one of the lieutenant's soldiers. Applicant testified that he had debated with himself throughout the day as to whether he should get involved with the party, but he stated, "Against my better judgement I agreed to, at that time, help put on that party." He explained that his primary concern was because of General Order Number 1, requiring no alcohol consumption in a combat zone. He testified that he should have talked to the lieutenant and tried to talk him into having a non-alcoholic party, but Applicant conceded that by not doing that, he "failed everyone in that aspect." (Tr at 39-45.)

Applicant got to the party some time after 8 o'clock, and the lieutenant and a few other people were there. They were listening to music, watching television, talking to each other, and alcohol was being consumed by some of the people there. He estimated a total of six or seven people were at the party. Applicant consumed six or seven vodka and Red Bull drinks through the night. (Tr at 45-48.)

At the party he and a woman spent a good part of the evening speaking to each other, while they were both consuming alcohol. Some time after midnight some of the people began leaving the party. Applicant went into the restroom, and when he came out, the lieutenant and all of the other people, with the exception of the woman to whom he was speaking, were leaving the party. The lieutenant gave him some indication that the woman was interested in him. Applicant testified that he and the woman started "making out" and then they attempted to have intercourse, although Applicant stated that he was quite intoxicated, so he did not know if any sexual activity actually occurred. Applicant averred that he had no question that the woman was a willing participant with him. Applicant and the woman were just laying together on the bed, and then he fell asleep and passed out. When he awoke, the woman was no longer in the bed with him, and he went back to his barracks. (Tr at 48-53.)

At around 4 a.m., Applicant was awakened by the post Military Police, who indicated that they had some questions for him. After waiting most of the day, Applicant was questioned and he gave a written statement to an investigator. He was then moved to another camp and his weapon and phone were confiscated. He stayed there and continued working until he was redeployed back to the United States in August 2005. A few weeks later he was ordered to appear at another fort, and then he was officially charged with all of the charges reviewed in SOR allegation 1.a. (Tr at 53-58.)

Applicant testified that he plead Guilty to all of the charges, except the charge of Rape. He claimed that the woman involved in the incident had a history of drug and alcohol blackouts, and she had blacked out on the date of this incident. When she woke up next to Applicant she did not remember anything that had occurred. She told her Non Commissioned Officer (NCO) that she was at a party, but she did not know how she woke up next to Applicant, and the charge of rape was added to the other allegations. Applicant was ultimately found not guilty of the Rape charge. He was found guilty of all the other charges listed on 1.a. of the SOR, and he was sentenced to confinement for two years. Applicant was released after serving 10 months of confinement. The early release was as a result of a clemency letter he had received from his supervisor, as well as meeting all of the other guidelines including having possible employment available when he was let out, and attending all of the alcohol and sexual behavior courses while he was incarcerated. (Tr at 58-62.)

1.b. It is alleged in the SOR that in 1990, Applicant was arrested and charged with Driving While Intoxicated (DWI). Applicant was fined, received alcohol counseling, license restriction, and was ordered to serve one year probation.

In his RSOR, Applicant admitted this allegation. During his testimony, Applicant stated that this incident occurred when he was around 22. He was at a friend's house

and had consumed some alcohol. He believed he was alright to drive, but when he drove home, he was stopped by the police for speeding, and was found to have alcohol in an amount above the legal limit in his system. (Tr at 65-67.)

1.c. It is alleged in the SOR that on April 8, 1989, Applicant was charged with Public Intoxication. In his RSOR, Applicant admitted this allegation. Applicant testified that this occurred while he was a college student. He was at a friend's house and he was holding a stick that had been in the window of his friend's apartment to hold the window open. Somebody had been breaking windows of cars in the neighborhood, and when the police saw a stick in his hand, they thought he might be the perpetrator. He was arrested for Public Intoxication. Applicant testified that he had only consumed one mixed drink on that day, and the charges were ultimately dismissed. He denied being involved in the breaking of windows. (Tr at 67-69.)

1.d. It is alleged in the SOR that on November 18, 1988, Applicant was arrested for Furnishing Alcohol to Minors.

In his RSOR, Applicant admitted this allegation. Applicant testified that this incident also occurred while he was a college student. He and his apartment roommates threw a party for some other friends from a different college. Applicant stated that the party "got a little out of hand." The campus police arrived at the party and after determining it was Applicant's apartment, they confiscated all of the beer and left the scene. Prior to this incident, Applicant had been a cadet on the campus police force. The day after the party, Applicant was told he was going to be terminated from the police, and he was going to be charged with furnishing alcohol to minors. When he went to court, he was told that since this was his first offense, he could be subject to a deferred prosecution, and if he had no more arrests in the next six months, the case would be dismissed. He had no further arrests during the six month period, and the charge was dismissed. (Tr at 69-70.)

Applicant testified that he has had no arrests other than those listed on SOR Paragraph 1. (Tr at 71.)

Paragraph 2 (Guideline G - Alcohol Consumption)

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption, which leads to the exercise of questionable judgement or the failure to control impulses. The following allegation is cited in the SOR as tending to show that:

2.a. It is alleged in the SOR that Applicant was evaluated on or about August 24, 1993, by a Ph.D. of the United States Army Soldier Support Center for a condition diagnosed in part as alcohol Abuse.

Applicant admitted this allegation in his RSOR. He testified that this was in regard to his application for a security clearance. It occurred in close proximity to the time of his three alcohol incidents of 1988, 1989, and 1990, so his alcohol consumption

was a concern. Despite the examination, he did receive his security clearance in 1993. (Tr at 71-73.)

2.b. It is alleged in the SOR that Applicant's conduct, reviewed in sub-paragraphs 1.a., through 1.d., above, constitutes excessive alcohol consumption. Applicant admitted this allegation in his RSOR.

Applicant conceded that alcohol was involved in all four allegations listed under paragraph 1, but he believed that these were isolated incidents, since there have been no more alcohol related incidents after 1.a. in 2005, and the other alcohol related events, listed in 1.b. through 1.d., happened 15 years or more before 1.a. (Tr at 62-63.)

Finally, and most significantly, Applicant testified very credibly that he has not consumed any alcohol since April 18, 2005, almost nine years ago, and he intends to never consume alcohol again. While he has been at locations where alcohol has been consumed, it has not affected him because he is determined that he will never again allow alcohol to negatively affect his life. (Tr at 63-65.)

Paragraph 3 (Guideline D - Sexual Conduct)

3.a. The SOR alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is either criminal, indicates a personality or emotional disorder, reflects lack of judgement or discretion, or which may subject an individual to undue influence or coercion. Applicant admitted this allegation in his RSOR.

Paragraph 4 (Guideline J - Criminal Conduct)

4.a. The SOR alleges that Applicant has engaged in criminal acts, which create doubt about a person's judgement, reliability, and trustworthiness. As reviewed above, Applicant admitted all of these allegations in his RSOR and during his testimony at the hearing. Applicant admitted this allegation in his RSOR.

Mitigation

Applicant submitted a number of documents in mitigation. These included a letter, dated January 29, 2014, from an individual, who has been identified as a Licensed Clinical Social Worker and a Licensed Clinical Addictions Counselor. (Exhibit G.) He wrote to confirm that Applicant had attended counseling from February 15, 2007, through December 15, 2007, after being referred by Federal Probation. He wrote that Applicant "responded well to the individual counseling and attending AA once a week. The positive response was demonstrated by [his] maintaining abstinence and commitment to stay sober."

Exhibit B included 23 extremely positive character letters submitted by an impressive group of individuals. All of these letters spoke in very laudatory terms as they described Applicant. Exhibit C included a letter, dated April 25, 2011, from the president of Applicant's former employer, a retired United States Army General. He

wrote to thank Applicant for his “dedicated, professional and selfless service to [Applicant’s former employer] and, more significantly, to our nation.” He also wrote, “In all your duties, you brought to bear all of the hallmarks of a true professional: competence, responsibility and commitment. Of even greater importance, you sustained and burnished [the company’s] reputation for maintaining unsullied ethics and uncompromising quality in everything we do.” Exhibit F included 21 Medals, Ribbons, and Awards that Applicant has earned. Exhibit H had 10 certificates and other awards Applicant has received. Finally, Exhibit G includes a letter from the Parole Assistant of the Department of the Army, showing Applicant was released from parole on January 30, 2008.

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

Paragraph 1 (Guideline E - Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant engaged in conduct, which considered as a whole, exhibits questionable judgement, unreliability, unwillingness to comply with rules and regulations and a lack of candor. In reviewing the disqualifying conditions, I find that disqualifying condition AG ¶ 16(d) applies, “credible adverse information . . . which when considered as a whole, supports a whole-person assessment of questionable judgement, untrustworthiness, unreliability, . . . or other characteristics indicating that the person may not properly safeguard protected information.”

Because so much time has passed since Applicant’s conduct, almost nine years since his most recent transgression, and over 14 years for the other three alcohol related incidents, I find mitigating condition ¶ 17(c) is applicable. I also find ¶ 17(d) is applicable since Applicant has “acknowledged the behavior and obtained counseling to change the behavior.” Applicant has also “taken other positive steps . . . to insure that the behavior is unlikely to recur.” I, therefore, resolve Paragraph 1 Guideline E for Applicant.

Paragraph 2 (Guideline G - Alcohol Consumption)

Applicant's alcohol consumption was involved in the alcohol-related incidents listed under paragraph 1, subparagraphs a. through d. 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. Also, ¶ 22(d) “diagnosis by a duly qualified medical professional of alcohol abuse or alcohol dependence” is applicable.

In reviewing the mitigating conditions, I find that ¶ 23(a) and 23(b) are applicable because Applicant’s last alcohol related incident occurred in 2005, and before that the second most recent alcohol related event happened in 1990. Additionally they apply because Applicant has completely abstained from alcohol consumption since April 2005. I also find that mitigating condition ¶ 23(d) applies in this case because of Applicant’s long abstinence and successful completion of outpatient counseling. Therefore, I find Paragraph 2 Guideline G for Applicant.

Paragraph 3 (Guideline D - Sexual Conduct)

The Government has established that Applicant engaged in the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement.

In reviewing the disqualifying conditions, I find AG ¶ 13 (a) “sexual behavior that is of criminal nature, [under military law], whether or not the individual has been prosecuted” applies to the facts of this case. AG ¶ 13(d) also applies because Applicant “engaged in sexual behavior that reflects lack of discretion or judgement.”

Because Applicant’s sexual conduct occurred on only one occasion, almost nine years ago in 2005, while Applicant was under the influence of alcohol, and Applicant no longer consumes alcohol, I find that mitigating condition AG ¶ 14(b) can be found to apply here because “the sexual behavior happened so long ago, so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgement.” Paragraph 3 Guideline D is found for Applicant.

Paragraph 4 (Guideline J - Criminal Conduct)

The Government has established that Applicant engaged in criminal conduct that occurred most recently in 2005. Among the disqualifying conditions, 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.

Because of the significant amount of time that has elapsed since the criminal conduct and the “evidence of successful rehabilitation,” based on “passage of time without recurrence of criminal activity,” sincere showing of remorse and the positive employment record, I find “there is evidence of successful rehabilitation.” Therefore, mitigating conditions ¶ 32(a) and (d) are applicable. I find Paragraph 4 Guideline J 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 under all of the guidelines alleged, plus all of the evidence submitted by Applicant in mitigation, I find that the record evidence leaves me with no significant questions or 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 E:	FOR APPLICANT
Subparagraphs 1.a. - 1.d.:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraphs 2.a. - 2.b.:	For Applicant
Paragraph 3, Guideline D:	FOR APPLICANT
Subparagraph 3.a.:	For Applicant
Paragraph 4, Guideline J:	FOR APPLICANT
Subparagraph 4.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.

Martin H. Mogul
Administrative Judge