



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



In the matter of:)	
)	
)	ISCR Case No. 07-01499
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

March 31, 2008

Decision

DAM, Shari, Administrative Judge:

Applicant failed to rebut or mitigate the Government’s security concerns raised under Guideline G, Alcohol Consumption, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. His eligibility for a security clearance is denied.

On September 1, 2000, Applicant submitted his Security Clearance Application (SF 86). On June 13, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines G, E, and J for Applicant. The action was taken pursuant to 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On July 3, 2007, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. On October 23, 2007,

Department Counsel prepared a File of Relevant Material (FORM), containing seven Items, and mailed Applicant a complete copy on October 30, 2007. Applicant received the FORM on November 1, 2007, and had 30 days from its receipt to file objections and submit additional information. Applicant submitted additional evidence on December 7, 2007, that I marked, as Applicant Exhibit (AE) A. Department Counsel had no objection to the documents. DOHA assigned the case to me on March 10, 2008.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel included in its FORM a Motion to Amend the SOR by adding an additional allegation to Paragraph 3: "3.b. As set forth in subparagraphs 1.a. and 1.b., above." Applicant did not file an objection to the motion. Said motion is granted as to 1.b, but not 1.a, which has been appropriately alleged under Guideline G.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a through 1.d, and 2.b. His admissions are incorporated herein as findings of fact. He denied the allegations contained in ¶ 2.a., and explained in his Answer that "I was in my addiction." He did not answer ¶ 3.a or the allegation contained in ¶ 3.b of the Amended SOR.

Applicant is 30 years old and unmarried. From August 1998 until May 2000, he attended college. In August 2000, he began working as a field service engineer for his current employer, a federal contractor. In September 2000, he submitted an SF 86. In January 2001, he received a security clearance. (Item 3).

Applicant started consuming alcohol and using illegal drugs at the age of 18. He admitted that from approximately 1996 to May 2006, he consumed alcohol, at times to excess and to the point of intoxication. He used marijuana for recreational purposes about once a year until October 2005. He purchased and used cocaine about once a month from 2001 until 2005. He was never arrested for his illegal drug use and does not think he was addicted to the drugs. He never received treatment for his usage or a Drug Dependent diagnosis. He admitted the drugs impacted his judgment and reliability. He disclosed the extent and nature of his substance abuse during an interview with a government investigator in December 2006. (Item 4).

After consuming four to six beers in a three-hour period in October 2005, Applicant drove his car and hit a parked car. He failed a breathalyzer test and was admitted to the hospital where his blood alcohol level measured 0.163% and he tested positive for marijuana. After receiving 175 stitches to his head, he was released from the hospital. He was charged with (1) Driving Under the Influence (DUI): High Rate of Alcohol (BAC 0.10-0.16) First Offense; (2) Driving Under the Influence: General Impairment/Incapable of Driving Safely First Offense, and (3) Careless Driving. He

pleaded guilty, and was placed on probation for 12 months. The court ordered him to attend alcohol safety awareness classes, and to perform 25 hours of community service. His driver's license was suspended for 30 days. He reported his arrest to his supervisor. (Items 4 & 6)

On May 16, 2006, Applicant felt stressed about his first DUI and the death of his mother. He stopped at a local bar where he began drinking beer. He left that bar and stopped at another one. Within five hours, he consumed 13-14 beers at several bars. On his way home, the police arrested him and took him to the hospital, where his blood alcohol level was measured at 0.21. He was charged with DUI-Highest Rate of Alcohol (BAC 0.16+) First Offense. He pleaded guilty and was sentenced to two days in jail and 90 days of work release/house arrest with electronic monitoring that he completed on February 11, 2007. He was ordered to complete 50 hours of community service, fined \$3,000, and placed on probation until November 2007. His driver's license was suspended for 30 months and remains suspended. The sentence for this offense ran concurrently with the one imposed in October 2005. (Items 4 & 5).

On May 18, 2006, Applicant contacted his employer's assistance program (EAP). The EAP counselor referred him to an intensive outpatient program. He was diagnosed as Alcohol Dependent.¹ He completed the 16 three-hour sessions satisfactorily in June 2006. The counselor recommended that he participate in additional individual treatment with another counselor. Applicant did not follow that recommendation, but continued attending AA meetings, which was also recommended. He claims he has maintained his sobriety since May 2006. He believes his prognosis is good because he is committed to changing his behavior. His supervisor, colleagues and family are aware of his alcohol problems. He regrets his misconduct. (Item 4).

When Applicant completed his SF 86 in September 2000, he did not disclose his illegal marijuana use from 1996 to 2000. He denied that he falsified the SF 86, and seemingly attributed the omission to his addiction at the time. (Answer).

Applicant submitted Performance Evaluations from his employer for the years 2003, 2004, 2005, and 2006. His supervisor rated him as a "Successful Contributor" for the years 2003 to 2005 and as a "Basic Contributor for 2006. (AE A). Although Applicant's supervisor is aware of his alcohol problems, it is not clear that the supervisor is aware of the illegal drug issues.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used to evaluate an Applicant's eligibility for access to classified information.

¹ The credentials of the evaluator, who made the diagnosis, are not included in the file.

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 to obtain a favorable security decision. 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."

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.

Analysis

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(a)-(g) describe seven Alcohol Consumption Disqualifying Conditions that may be applicable to security concerns raised under this guideline. Based on

Applicant's two DUI convictions and admissions of excessive drinking over ten-years, the Government raised two of them: "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, "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." AG ¶¶ 22 (a) and (c).

After the Government produced substantial evidence of those two disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation. Four Alcohol Consumption Mitigating Conditions are potentially applicable under AG ¶¶ 23 (a)-(d):

(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;

(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);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Only one of the conditions has any application to this case. Insufficient time has passed to apply AG ¶ 23(a). Applicant was convicted of two DUI's within six months of one another, and only recently completed his criminal probationary period in November 2007. His driver's license remains suspended. AG ¶ 23(b) has some application. Applicant admits his alcoholism and has taken steps to address it. However, he did not provide any independent documentation to verify his assertion that he has remained abstinent since May 2006. There is no evidence in the record to support the application of AG ¶ 23(c). Applicant acknowledged that he failed to comply with the treatment plan recommended by the EAP counselor, as required by AG ¶ 23(d).

Guideline E, Personal Conduct

AG ¶ 15 sets forth the Government's personal conduct concern: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."

The Government alleged in SOR ¶ 2(a) that Applicant falsified his SF 86 by failing to disclose his use of marijuana from 1996 to 2000, thereby raising a potential disqualification under AG ¶ 16(a), which reads "the deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Although Applicant denied the allegation, he attributed the omission to his addiction at the time he completed the SF 86. Based on his explanation, I find that he deliberately concealed information from the Government.

The Government alleged in SOR ¶ 2(b) that Applicant used cocaine and marijuana from 2001 to at least 2005, while holding a security clearance that was granted to him in January 2001. Applicant's admissions to those allegations raised a Personal Conduct Disqualifying Condition under AG ¶ 16(c). The security concern is based on "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information." Applicant's decision to use illegal drugs while holding a security clearance was not alleged under any other guideline, but clearly demonstrated his poor judgment and an unwillingness to comply with his employer's rules and regulations under this guideline.

Seven Personal Conduct Mitigating Conditions are set forth in AG ¶ 17. They include the following:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After reviewing all of the conditions, I conclude six of them have no application to the two disqualifications. AG ¶ 17(a) cannot apply because Applicant did not disclose the information about his drug abuse until December 2006. There is no evidence in the record to trigger the application of AG ¶¶ 17(b), (e), (f) and (g). Applicant's drug use while holding a security clearance was not minor or infrequent. He used illegal drugs once a month after obtaining a security clearance in January 2001 and continued to use them up to October 2005, demonstrating his lack of trustworthiness. Accordingly, AG ¶ 17(c) does not apply. Applicant acknowledged his substance abuse problems and received some counseling. However, that evidence is insufficient to assure the Government that similar problems will not recur in the future, given the extent and length of time he abused substances. Hence, AG ¶17 (d) has limited application, and the factors listed therein, will be more fully discussed under the whole-person analysis section.

Guideline J, Criminal Conduct

AG ¶ 30 articulates the Government's concern regarding 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."

Based on the evidence, including Applicant's admissions, the Government established a potential security concern under two Criminal Conduct Disqualifying Conditions: "a single serious crime or multiple lesser offenses," and an "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." AG ¶¶ 31(a) and (c). Applicant was convicted of a DUI and deliberately falsified his SF 86, which is a criminal offense under Federal law.

There are five Criminal Conduct Mitigating Conditions under AG ¶ 32. None of the conditions mitigate the deliberate falsification allegation contained in ¶ 3.a. However, AG ¶ 32 (d) has some application to the allegations set forth in ¶ 3.b of the Amended SOR, as "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." Since his conviction, Applicant has participated in some rehabilitation and has expressed sincere remorse for his mistakes and substance abuse problems. He also provided evidence of a good employment record for the past couple years.

Whole Person Concept

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case is referred to as the "whole person" analysis. In evaluating the conduct of the applicant, the Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include: (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) 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. Applicant is a 30-year-old man, who began voluntarily consuming alcohol and using illegal drugs when he was 18 years old, and continued abusing substances into May 2006. From 2001 to 2005, he frequently used illegal drugs while holding a security clearance and apparently unbeknownst to his employer.

Applicant asserted that he has maintained sobriety since May 2006 when he entered an EAP treatment program and is committed to that sobriety. While those are

positive steps in addressing his substance abuse problems, they are inadequate to mitigate years of serious illegal drug use and alcohol abuse. Absent independent corroboration, such as an evaluation from an appropriately credentialed health care provider or other sources, documenting Applicant's assertions that he is drug and alcohol free, along with proof of a significant period of abstinence, I believe there is a strong likelihood that he will continue to abuse substances in the future.

Overall, the record evidence leaves me with substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his alcohol consumption, personal conduct and criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a to 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	Against Applicant

Conclusion

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

SHARI DAM
Administrative Judge