



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



In the matter of:)
)
) ISCR Case No. 07-03313
 SSN:)
)
 Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Kathleen E. Voelker, Esquire

June 24, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the alcohol consumption security concerns raised by his alcohol related incidents. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 3, 2006. On November 7, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct).¹

¹ 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 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.

Applicant answered the SOR on December 19, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on January 17, 2008. The Notice of Hearing was issued on January 23, 2008, convening a hearing on February 26, 2008. The hearing was convened as scheduled. The Government presented eight exhibits, marked GE 1-8, which were admitted without objection. Applicant presented two witnesses, testified on his own behalf, and presented 23 exhibits, marked AE 1-23, which were admitted without objection. DOHA received the transcript (Tr.) on March 5, 2008.

Procedural Issues

The Government moved to amend the first sentence of SOR ¶ 1.b, by deleting the date “August 5, 2006,” and substituting the date “April 30, 2005.” Applicant did not object. I granted the motion (Tr. 10).

The Government elected not to pursue the allegation in SOR ¶ 2.a, conceding that under Applicant’s state law, driving under the influence is considered a civil infraction and not a criminal offense (Tr. 11-12).

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.c, and 1.d. He denied, however, the validity of the allegations reflected in SOR ¶¶ 1.b, 1.e, and 2.a, and provided explanations. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, including his demeanor, I make the following additional findings of fact.

Applicant is a 40-year-old senior electrical engineer. From 1986 to 1990, he served in the U.S. Army on active duty. His service was characterized as honorable. After his discharge he served in his state National Guard for four years (Tr. 102, 138). He received a Bachelor of Science degree in physics, and then completed a Master in Science and Technology Management in 2006 (Tr. 103).

Applicant has been working for a defense contractor for approximately 10 years during which he has had access to classified information at the secret level (Tr. 103, GE 1). There is no evidence to suggest, and the Government does not allege, that Applicant has ever compromised or caused others to compromise classified information. Nor does the record evidence show that Applicant has ever failed to follow the rules and regulations required to protect classified information.

Applicant has a reputation as a gifted engineer who is extremely dedicated and resourceful. Numerous certificates of appreciation/achievement, monetary awards, and outstanding performance appraisals attest to his excellent work history, character and professionalism (AE 4-21).

Applicant and his wife have known each other for approximately 10 years, and married in June 2004. They have an 18-month-old daughter, and his wife was

scheduled to deliver a boy in April 2008 (Tr. 59). He also has a 15-year-old daughter from a prior relationship.

Applicant has a history of episodic alcohol abuse, marked by his involvement in five alcohol related incidents. In June 1987, Applicant was arrested and found guilty of driving while intoxicated (DWI). He received probation before judgment. While serving in the Army, Applicant consumed alcohol frequently and was counseled informally by his supervisors for what he called his "after working hour's problem" (Tr. 140). Applicant received non-judicial punishment because he was late to work as a result of being hung over from drinking the night before (Tr. 139). He remembers blacking out one time during his period in the Army.

Applicant continued drinking alcohol while in college. He remembered having one or two blackouts/passing out as a result of his alcohol consumption. In January 1996, Applicant was involved in a one car accident. He was driving to the dorm through ice and snow at around 10:00 P.M. His car slid on the ice and hit a sign post, losing his car's tag. After inspecting the car, Applicant continued on his way home where college friends awaited him. He claimed he had not consumed any alcoholic beverages before the accident. Applicant and his friends partied and consumed alcoholic beverages all night long that night. The next morning, police officers investigating the accident noticed Applicant's smell of alcohol and he was arrested and charged with driving while intoxicated (DWI). The charges were dismissed in court (Tr. 163).

In July 1996, Applicant had two or three alcoholic drinks with dinner and drove his car home. He failed to obey an intersection stop sign and was arrested and charged with driving under the influence (DUI) and failure to obey the stop sign (Tr. 110). In November 1997, he was found not guilty of the DUI, but guilty of failing to obey the stop sign. He was given probation before judgment (Tr. 112, 166).

Applicant worked intermittently at a bar as a security person (bouncer) and bar backup (stocking and cleaning) from 1995 to 2007 (Tr. 104, 141). In April 2005, after working at the bar, Applicant consumed alcoholic beverages with his bar co-workers to the point of intoxication. He then drove his car home, lost control of the car and hit a bridge and a truck. He was charged with DWI, found guilty, and given one-year probation before judgment (Tr. 118, 168). As a condition of his probation, Applicant was required to report to his probation officer, and to abstain from drinking alcohol (Tr. 168-169). Applicant stopped drinking for almost one-year; however, he started consuming alcohol before his probation term was over (Tr. 190).

Applicant attempted to control his alcohol consumption by practicing controlled drinking. He did not attend alcohol counseling/therapy, Alcoholic Anonymous (AA), nor did he change his lifestyle. His controlled drinking did not work. Between April 2005 and August 2006, Applicant consumed alcohol approximately 10 times, four of which he consumed alcohol to excess (Tr. 119).

On a Friday in August 2006, Applicant was playing music at a bar and drinking. He drank alcoholic beverages while consuming cold medication. He then drove home, lost control of his car and rear ended another vehicle. He was arrested, charged with, and convicted of DWI. He was sentenced to 60 days jail (suspended), to pay a fine, and placed on probation. He was also required to attend victim impact group meetings, AA counseling, and to abstain from alcohol. In March 2008, he successfully complied with the conditions of his probation (except for payment of \$192) (GE 23 at 4).

The next working day after his DWI arrest, Applicant notified his employer of his DWI arrest and alcohol problem. He was enrolled in the company's "Employee Family Assistance Program" (Tr. 121), and referred to formal therapy/counseling. He also was assigned a company manager (a recovering alcoholic) as a mentor to assist him as an informal AA coordinator (Tr. 123, 150). He met with the company mentor for approximately six months after his 2006 DWI (AE 22).

After his August 2006 DWI arrest, Applicant realized he had an alcohol problem and that he needed help. He immediately began attending AA meetings, and attended 90 AA meetings in 90 days (Tr. 124). He has continued to attend AA meetings, at least four times a week, to the day of the hearing. He finds the meetings helpful and promised to continue attending AA meetings.

From August 2006 to September 2007, Applicant participated in an Intensive Outpatient Counseling Program. He was evaluated and received counseling from a state certified chemical dependence counselor who is also a licensed clinical alcohol and drug counselor. Applicant was diagnosed as being alcohol dependent; however, his prognosis is very favorable (AE 1). The counselor noted that Applicant has gained good insight into his addiction and his need to be in recovery . . . he sees the problems his behavior has created for him and others . . . and understands the potential consequences if the situation is not rectified (AE 1).

In the counselor's opinion, Applicant has been willing to do whatever necessary to maintain his sobriety. This is evidenced by Applicant maintaining contact with the counselor on a regular basis even after the conclusion of the formal treatment, regular attendance at several meetings of AA a week, strong sponsor contact, great family support, stable employment and strong work ethic, participation in the employer's assistance program, and Applicant's attitude (AE 1). Applicant's AA sponsor has known him for approximately one-year as they attend the same AA meetings. Applicant changed AA sponsors about five weeks prior to the hearing because the prior sponsor was unavailable due to his travel schedule. Applicant's current sponsor believes Applicant is doing all he can to maintain sobriety. Applicant has a great attitude; he is committed and dedicated to being sober (Tr. 45-53).

Applicant testified the last time he consumed alcoholic beverages was in August 2006. He credibly testified he has been sober since (Tr. 133). Applicant's testimony is corroborated by his wife's testimony, as well as the testimony of his AA sponsor, and the statement provided by his company's mentor (AE 22). He further testified his

therapy taught him to change his lifestyle to be able to stop drinking (Tr. 134). In April 2007, he stopped working at the bar to stop being around people consuming alcohol.

After his August 2006 arrest, Applicant realized he had a drinking problem and sought help for the first time. His arrest was very close to his daughter's birth and he realized he was at the brink of losing his family (Tr. 64). His wife confirmed Applicant has changed his lifestyle. His behavior is now family oriented, assisting with the care of his daughter, attending church meetings, working on remodeling his rental property, and avoiding friends who may be a bad influence (Tr. 134-135).

Applicant continues to play music with his band, sometimes playing at bars where alcohol is being served. During 2007, he played music in bars six times (Tr. 158-159). His last performance at a bar was in January 2008. Applicant claimed the entire band members know about his alcohol problem and protect him from drinking alcoholic beverages (Tr. 186).

Applicant testified he understands the seriousness of his past behavior and takes full responsibility for his actions. He has made a conscious decision to be sober because of his concern to keep his marriage, his job, and to take care of his family. His past drinking behavior was a contributing factor to the ending of a prior relationship with the mother of his 15 year-old daughter (Tr. 160).

Having observed closely Applicant's demeanor, I find his testimony credible. At his hearing, Applicant promptly answered all the questions asked. He was frank, candid, and forthcoming in his answers and explained his answers without hesitation. He readily admitted his bad behavior and apologized numerous times for his questionable behavior. Applicant expressed sincere remorse for his actions.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.²

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be considered 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 controlling adjudicative goal is a fair, impartial and common sense decision. According to AG ¶

² See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.”³ 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

Under Guideline G (Alcohol Consumption), the government’s concern is that 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 ¶ 21.

³ *Egan, supra*, at 528, 531.

The government established its case under Guideline G by showing that in June 1987, while serving in the Army, in July 1996, in April 2005, and in August 2006 Applicant was involved in questionable behavior related to his alcohol consumption. Applicant drove while under the influence of alcohol in 1987, 1996, 2005, and 2006. He was convicted of DWI in 1987 and 2006. He received probation before judgment in 2005.

Applicant's excessive alcohol consumption resulted in his exercising questionable judgment. Additionally, he was diagnosed as alcohol dependent in 2006. Guideline G disqualifying condition AG ¶ 22(a): "alcohol-related incidents away from work, such as driving while under the influence," AG ¶ 22(c): "habitual or binge consumption of alcohol to the point of impaired judgment," and AG ¶ 22(e): "evaluation of alcohol abuse or alcohol dependence by a license clinical social worker who is staff member of a recognized alcohol treatment program," apply.

There are four Alcohol Consumption Mitigating Conditions under AG ¶ 23 potentially applicable to these disqualifying conditions:

(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.

Considering the totality of the circumstances in this case, I find Guideline G mitigating conditions AG ¶ 23(a) does not apply. Applicant's most recent DUI is recent. AG ¶ 23(b) applies. Applicant has acknowledged his alcohol dependence, presented credible evidence of actions taken to overcome his problem, and established he has been abstinent for 18 months. He is remorseful for his behavior and has initiated

changes in his lifestyle. His performance appraisals, certificates of achievement, monetary awards, and the statements from his company's Employee and Family Assistance Program coordinator show Applicant's work behavior has not been indicative of his having an alcohol problem. He is considered a valuable employee, who is reliable, dependable, and professional. Overall, he has made satisfactory progress in his counseling and treatment program. AG ¶ 23(c) applies. His wife, counselor, and AA sponsor corroborated he has abstained from alcohol since October 2006. Furthermore, Applicant received a favorable prognosis after he completed his intensive outpatient alcohol counseling, and continues his frequent participation in AA. At his hearing, Applicant acknowledged his issues of alcohol abuse, demonstrated remorse, and promised to continue his lifestyle changes and to remain abstinent. AG ¶ 23(d) applies.

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that 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." AG ¶ 30.

The Government conceded Applicant's behavior did not involve criminal conduct under state law, and did not pursue the allegation in SOR ¶ 2. I find this allegation 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 have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines in light of all the facts and circumstances surrounding this case. Applicant is a mature and educated

man. He served honorably in the Army for approximately four years. He has worked for the same defense contractor and has had access to classified information at the secret level for approximately 10 years. Except for the pending allegations, there is no evidence of Applicant's questionable behavior or, more importantly that he has ever compromised or caused others to compromise classified information.

Applicant has been willing to do whatever necessary to maintain his sobriety, including maintaining contact with his counselor on a regular basis even after the conclusion of the formal treatment and attending several AA meetings a week. He has great family support, stable employment and a strong work ethic. His participation in the employer's assistance program, and his company support should ensure his successful rehabilitation. Applicant demonstrated the correct attitude and commitment to being sober. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

Overall, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alcohol consumption and criminal conduct security concerns.

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: | FOR APPLICANT |
| Subparagraphs 1.a - 1.e: | For Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT |
| Subparagraphs 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 continue Applicant's security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge