



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



In the matter of:)
)
-----) ISCR Case No. 07-08461
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A Howry, Esquire, Department Counsel

For Applicant: William R Bolton, Esquire

April 24, 2009

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on December 28, 2006 (Government Exhibit 1). On November 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline G concerning the 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), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on November 21, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on December 19, 2008. The case was assigned to another Administrative Judge on December 22, 2008. I received the case assignment on January 8, 2009. DOHA issued a notice of hearing on January 9, 2009, and I convened

the hearing as scheduled on February 6, 2009. The Government offered Government Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf and called three additional witnesses. DOHA received the transcript of the hearing on February 12, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 54 and married. He is employed by a defense contractor and seeks to retain a security clearance previously granted in connection with his employment.

Guideline G - Alcohol Consumption

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he uses intoxicants to excess. The Applicant admitted the factual allegations in subparagraphs 1.b. and 1.c. of the SOR. Those admissions are hereby deemed findings of fact.

The Applicant has had two alcohol related arrests - in 2003 and 2007. The Applicant began drinking when he was a teenager. He would drink to intoxication on an infrequent basis, maybe once or twice a year. The Applicant basically stopped drinking in August 2007, with the exception of part of one beer. It is also worth noting that the Applicant had gastric bypass surgery in 2002 and 2006, reducing his weight from about 300 pounds to 150 pounds. The surgery severely limits the ability of his body to process alcohol. (Transcript at 80-81.) The Applicant worked for his company from 1989 through 1999. He then went to work for a second firm until 2006. At that time he returned to his original employer and has worked for them ever since. Finally, the Applicant works at a remote location away from his home during the work week, with a small cadre of co-workers.

The first alcohol related arrest of the Applicant occurred in June 2003. The Applicant was working out of his home state. He had been having dinner and drinking wine with some work associates. After dinner, he was stopped by police for Driving Under the Influence (DUI). He hired an attorney and, after several trips to this state, plead guilty to the charge of Obstructing the Highway. His sentence included a fine, probation and to attend alcohol courses. The Applicant successfully completed the courses. (Transcript at 71-76; Government Exhibit 4 at 3-4.)

The Applicant's second alcohol related arrest happened in February 2007. This was a difficult year. Both of the Applicant's parents were seriously ill and would pass away later that year, in addition, the Applicant's wife was also suffering from long-term health problems. On the day in question the Applicant had met a former neighbor. He and the neighbor had some alcoholic drinks while they talked at a bar about the Applicant's problems. After he left the restaurant, the Applicant was stopped by police and arrested for Driving Under the Influence. The Applicant eventually plead guilty to

having a blood alcohol level above .08%. His sentence included a fine, three years summary probation, and attend a first offender DUI program. He successfully completed the program. The probation is due to end in October 2010. The Applicant has stated that this was an unusual situation and that he is not an irresponsible person. (Transcript at 76-84; Government Exhibit 3 and Exhibit 4 at 5-6.)

Since the 2007 incident the Applicant has virtually stopped drinking alcohol. He had a few sips of beer on one occasion. He does not intend to drink in the future, finding no interest in it. He attends AA meetings occasionally, but does not believe he has an alcohol problem. (Transcript at 84-89, 96-99.)

Mitigation

Three co-workers of the Applicant testified. The Facility Security Officer of the Applicant's company testified. He has worked for the company since 1989, and has known the Applicant for most of that time. The witness testified that the Applicant is an outstanding employee and should retain his security clearance. He further stated, "If I thought [the Applicant] had an ongoing issue with alcohol, I wouldn't be here." (Transcript at 18-30.)

A co-worker who is a personal friend of the Applicant's also testified. He has also known the Applicant since 1989. He stated that the Applicant is an excellent employee, very trustworthy, and recommended that the Applicant retain his security clearance. (Transcript at 33-45.)

The Applicant's immediate supervisor also testified on his behalf. This person has known the Applicant since 2006. The supervisor testified that the Applicant is a valuable employee, above average very trustworthy and honorable. The witness has considerable personal experience with people with alcohol problems, and sees no evidence of that with the Applicant. He also recommends that the Applicant retain his security clearance. (Transcript at 47-65.)

Policies

Security clearance decisions are not made in a vacuum. 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 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 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination 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 judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.

The Applicant was involved in two alcohol related incidents in 2003 and 2007. The evidence also shows that the Applicant has used alcohol, occasionally to excess, from about 1970 until February 2007. With one minor exception, he has not drunk since that date.

There are two Disqualifying Conditions that arguably apply to this case. AG ¶ 22(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.” In addition, AG ¶ 22(c) states a concern is, “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.”

Under the particular facts of this case, the following mitigating condition currently applies to the Applicant’s situation. AG ¶ 23(a) states that it can be a mitigating conditions when, “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.”

The record shows that the Applicant had two alcohol related incidents within four years. While certainly nothing to be taken lightly, there is, in my opinion, no evidence of a pattern of abuse here. His last incident occurred two years before the record closed and he has abstained from alcohol use since that time. What is particularly telling is the compelling, credible, testimony of the Applicant’s three witnesses, including his direct supervisor. These people have intimate knowledge of the Applicant and his conduct on and off the job, and all recommend him for a position of trust and see no evidence of an alcohol problem. This mitigating condition applies and, when viewed along with the Whole Person Concept discussion below, supports a finding for the 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) 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. The Applicant is a hard-working,

respected, professional person who has had two alcohol related incidents in his life. There is little to no evidence that these incidents show a pattern, or that he is alcohol dependent or an alcohol abuser. In viewing all the facts of this case, I find that the Applicant has mitigated the security significance of his prior conduct. As set forth at length above, I find that the conduct was not recent (AG ¶ 2(a)(3)); that there have been permanent behavioral changes under AG ¶ 2(a)(6); and that the likelihood of continuation or recurrence is close to nil (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his alcohol related incidents.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusory allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Subparagraph 1.c:	For the 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.

WILFORD H. ROSS
Administrative Judge