



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



In the matter of:)
)
) ISCR Case No. 07-04793
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

January 29, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s favorable evidence is not sufficient to mitigate the alcohol consumption security concerns. Moreover, he deliberately omitted alcohol-related incidents from his security clearance application and made a false statement to a government investigator. Clearance is denied.

Statement of the Case

On October 16, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ In September 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

¹ Form Item 4.

dated January 2, 1992, as amended, modified and revised.² The SOR alleges security concerns under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be denied or revoked.

On October 7, 2007, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Items 2 and 3). A complete copy of the file of relevant material (FORM), dated November 6, 2008, was provided to him by letter dated November 10, 2008. Applicant signed the receipt for the DOHA transmittal letter on November 18, 2008. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He failed to submit any materials, comments, or objections in response to the FORM. The case was assigned to me on January 21, 2009.

Findings of Fact

Applicant admitted all the allegations in SOR ¶ 1. He failed to admit or deny the allegations in SOR ¶ 2. I considered the two personal conduct allegations denied. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 55-year-old ship fitter working for a defense contractor.³ He married his wife in 1986. He disclosed no children in his e-QIP. He did not serve in the military. He disclosed no felony convictions and no use of illegal drugs in the last seven years. He has worked for the same employer, a government contractor, since September 1972 to the present. Applicant indicated he received access to classified information at the confidential level in May 1986 (Item 4, § 26). Apparently, his access has never been suspended or revoked.

He was convicted four times for driving while impaired (DWI) (Items 5, 1 and 10). February 1984, he has convicted of DWI and sentenced to 12 months jail (suspended), and placed on probation. In September 1989, he has convicted of DWI and sentenced to 18 months jail, most of the sentence was suspended, and he was placed on probation. In September 1991, he has convicted of DWI and sentenced to two years jail (suspended), and placed on two years probation. In June 2004, he has convicted of DWI and sentenced to 18 months jail, most of the sentence was suspended.

² On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

³ Item 4 (2006 e-QIP) is the source for the facts in this paragraph, unless stated otherwise.

As part of his sentence, Applicant was required to attend substance abuse counseling from September 2004 to March 2005 (Item 8). He maintained abstinence through out his treatment period, successfully completed his counseling/treatment, and his prognosis was considered good. Applicant was diagnosed with alcohol dependence. The counselor recommended Applicant attend Alcoholic Anonymous (AA) as part of his treatment/counseling plan.

In his answer to § 23(d) of his 2006 security clearance application (asking whether he had ever been charged with or convicted of any offenses related to alcohol or drugs), Applicant answered "Yes," and disclosed he was convicted of DWI in June 2004. He failed to disclose his 1984, 1989, and 1991 DWI charges and convictions. In response to § 25 (asking whether in the last 7 years his use of alcoholic beverages resulted in any alcohol related treatment or counseling), he answered "Yes," and disclosed he received treatment from June to September 2004 (discrepant with Item 8).

In January 2007, Applicant provided a sworn statement to a government background investigator (Item 9). During the interview, Applicant discussed the circumstances surrounding his 2004 DWI. Applicant told the agent that his 2004 arrest and DWI charge was the only time that he had ever been arrested and/or charged with any alcohol related offenses.

Applicant's background investigation addressed his alcohol related problems and included the review of his state's criminal records history (Item 5), his answers to four sets of DOHA interrogatories (Items 6, 7, 9, and 10), and his counselor's letter concerning his 2005 alcohol-related treatment (Item 8).

In his May 15, 2007, response to DOHA interrogatories, Applicant stated that he was currently consuming alcoholic beverages weekly, and that he intended to continue doing so in the future (Item 6). The last day he consumed alcoholic beverages was two day before he answered the interrogatories. He also stated he was not participating in AA.

In his March 31, 2008 response to DOHA interrogatories, Applicant stated "I [no] longer abuse alcohol in that way anymore" (Item 10). However, Applicant provided no information as to his present consumption of alcoholic beverages or abstinence, whether he continued any alcohol counseling and/or treatment, and whether he has taken any measures to avoid similar alcohol related problems in the future.

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 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 controlling 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁴ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁵

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.

⁴ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁵ "The administrative judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Alcohol Consumption

Under Guideline G 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.

The government established its case under Guideline G by showing that in 1984, 1989, 1991, and 2004 Applicant drove while impaired. He was convicted of DWI on four occasions and sentenced to jail (albeit suspended). Applicant excessive alcohol consumption resulted in his exercising questionable judgment. Additionally, he was diagnosed as alcohol dependent in 2005. Guideline G disqualifying conditions AG ¶ 22(a): *alcohol-related incidents away from work, such as driving while under the influence . . .*, and AG ¶ 22(e): *evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is staff member of a recognized alcohol treatment program*, apply.

There is no evidence that Applicant has been involved in any alcohol-related misconduct since June 2004. However, available evidence shows Applicant continued consuming alcohol and he intends to continue to do so in the future. There is no evidence Applicant has continued his alcohol counseling/treatment, that he has acknowledged his alcohol dependence, or that he has made any lifestyle changes to avoid future alcohol related problems.

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 none of the Guideline G mitigating conditions apply. Applicant's sparse favorable evidence is not sufficient to fully raise the applicability of any of the mitigating conditions, or to show it is unlikely his questionable behavior will not recur. I specifically considered that Applicant's last DWI conviction was in 2004, and there is no evidence of additional alcohol-related misconduct. Notwithstanding, because he has three other DWI convictions, I cannot find that his behavior was infrequent or that it happened under such unusual circumstances that it is unlikely to recur. Applicant's recidivism shows he has not learned from his past mistakes, and casts doubt on his good judgment. AG ¶ 23(a) does not apply.

Guideline E, Personal Conduct

Under Guideline E, the security concern is that 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. AG ¶ 15.

Applicant failed to disclose relevant information in his answers to § 23 (d) of his security clearance application. He also falsified material facts in his statement to a government investigator. Considering the record as a whole, I am convinced Applicant deliberately failed to disclose the information. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's maturity, his employment history, and his answers to the four DOHA interrogatories.

Because of his extensive work experience as a government contractor employee and holding a security clearance, Applicant knew or should have known the importance of accurately completing his security clearance application and telling the truth. Nevertheless, he failed to provide information that was material to making an informed security decision and made false statements. AG ¶ 16(a) "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire," and AG ¶ 16(b) "deliberately providing false or misleading information

concerning relevant facts to an employer, investigator, security official, competent medical authority, or to other official government representative.” apply.

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns. After considering all the mitigating conditions, I find none of the mitigating conditions apply to this case. I specifically considered AG ¶ 17(c), and find it does not apply since his behavior is recent and shows Applicant’s lack of reliability, trustworthiness, and judgment.

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.

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. AG ¶ 2(c).

Applicant’s 36 year record of employment for a government contractor weighs in his favor. He has had access to classified information for 22 years. There is no evidence of any security violation, or that he is not a good, reliable and competent worker. These factors show some responsibility and mitigation.

The evidence against mitigating Applicant’s conduct is more substantial. He has a history of alcohol abuse and was diagnosed alcohol dependent. Applicant’s falsification is directly related to his desire to hide his alcohol related problems. As such, the potential for pressure, coercion, exploitation, or duress exists and it is likely it would continue to exist. Because of his years working for a government contractor and his many years holding a security clearance, Applicant knew or should have known the importance of the trust placed on him by the Government. Notwithstanding, he failed to be candid and honest on his security clearance application and during his interview. His behavior shows he lacks judgment, reliability, and trustworthiness.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to alcohol consumption and personal conduct.

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: Subparagraphs 1.a to 1.f:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraphs 1.a & 1.b:	AGAINST APPLICANT Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge