



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-08595
SSN:-----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

April 7, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on December 5, 2006. On November 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G and E 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), 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 replied to the SOR (RSOR) in writing on January 7, 2008, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on January 31, 2008. DOHA issued a notice of hearing on February 7, 2008, and I convened the hearing as scheduled on March 6, 2008, in San Diego, California. The Government offered Exhibits (Ex) 1 through 4, which were received without objection. Applicant testified on his own behalf, and three additional individuals testified on behalf of Applicant. He also submitted Ex A through D. I granted Applicant's request to keep the record open until March 14, 2008, to submit additional

document. On March 13, 2008, he submitted a 23 page post hearing submission, which has been marked as Ex E, and entered into evidence without objection, and the record closed on that date. DOHA received the transcript of the hearing (Tr) on March 14, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR, Applicant admitted the SOR allegations 1.b, under Guideline G, and 2.a. and 2.b., under Guideline E with explanations. He denied 1.a. under Guideline G. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant and the other witnesses, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 46 years old. He is married and he has one stepchild. He served for 20 years in the United States Navy, and he received an Honorable Discharge. He 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 G - Alcohol Consumption)

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption. The following are the allegations as they are cited in the SOR:

1.a. Applicant is alleged to have consumed alcohol, at times to excess and to the point of intoxication, from approximately 1979 to at least May 2007. Applicant testified that he started consuming alcohol as a teenager and when he joined the military December drank at times to excess. For the last 15 years, Applicant consumes alcohol on a moderate level, and while he still drinks alcoholic beverages, the amount has decreased since his 2006 arrest to no more than three beers at one time. He also testified credibly that since the DUI, he has not driven and will never drive again after consuming alcohol.

1.b. On December 3, 2006, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI), and (2) Driving While Having an 0.08% or Higher Blood Alcohol Content. He found guilty on March 2007, and he was sentenced was to five years probation. Applicant was ordered to complete the First Conviction Program, pay a fine, complete community service, attend a MADD Impact panel, and attend three Alcoholics Anonymous meetings. Applicant has completed all of his requirements.

Applicant testified that on the day of this incident, he had consumed approximately 12 beers from noon until he drove at around five in the afternoon. He stated that was more than he usually drank in one day, but on that day he and his wife had an argument. When he was stopped, his blood alcohol measured .16, and he

ended up spending the night in jail. The next day when he got out, he immediately called his supervisor to inform him of his DUI arrest. His supervisor, during his testimony, verified that he was phoned by Applicant on the day of his release to inform him of Applicant's arrest.

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government.

2.a. Applicant completed a signed, sworn Security Clearance Application (SCA) on December 5, 2006 (Ex 1). He answered a series of questions under Section 23, regarding his police record. Question C asks "Are there currently any charges pending against you for any criminal offense?" Applicant answered "No." The Government alleges that Applicant's deliberately failed to list the pending charges from his December 3, 2006 arrest as set forth in 1.b., above.

Applicant testified that he completed the SCA on December 1, 2006, and at that time he had not yet been arrested. He submitted it to another individual within his company, on that date and indicated to him that it was ready to be forwarded. The DUI arrest happened on December 3, 2006. The document was submitted on December 4, 2006, by that individual who testified at the hearing. Applicant signed the document on December 5, 2006, indicating that everything he had included on the document was true and correct.

The evidence is clear that Applicant did not intend to mislead the Government on the SCA. He completed the document and submitted it to be forwarded, before he was arrested, and he believe that it had been forwarded before his arrest. Although it actually was submitted one day after Applicant's arrest, I find nothing in the record to indicate that Applicant in any way was attempting to hide his DUI arrest from the Government or his employer. In fact, as discussed above, Applicant called his supervisor immediately after being released from prison to inform him of his arrest for DUI.

2.b. During a 1987 investigation by Naval Investigative Service, Applicant initially denied drug use after he received a positive drug screening through urinalysis, even though he had consumed amphetamine mixed with alcohol prior to the testing.

At the hearing, Applicant explained that during his first year in the Navy, he used methamphetamine on one occasion after he had broken up with his girlfriend, when it was offered to him at a party. Shortly after that, he showed positive during a random drug test, and he conceded that at first he denied that he had used any drugs. However, when the matter proceeded to a Captain's Mast, Applicant did admit that he had used drugs. He was granted a second opportunity to remain in the Navy, with the understanding that he must never use drugs again. Applicant testified most credibly that he very much appreciated this second chance, and since that event in 1987, he has never used any illegal substance.

Mitigation

Three witnesses, who know Applicant from his present employment, testified on his behalf. They all were extremely positive in describing Applicant as a most honest and conscientious employee. His direct supervisor also verified that Applicant kept him informed of his arrest, immediately upon his release from jail, and continued to inform him as to the status of the case. One of the other witnesses traced the timeline of Applicant's completion and submission of his SCA, and verified that Applicant did not attempt to mislead the Government when he completed the SCA.

Applicant submitted 11 character letters from individuals, who have known him in either professional or personal status or both (Ex D). They all were quite laudatory, describing Applicant as "honest, hard working, and very responsible." The letters from individuals, who have known him outside of the work environment, confirmed that they have never seen him consume alcohol to excess.

In his post hearing documents (Ex E) Applicant submitted his current Performance Development Summary. His Overall Performance Rating was "Exceeds Expectations," which is the second from the highest rating, and he was described as "a productive and highly valuable asset " to his employer. He also included his Naval Evaluation Reports and Counseling Records for years 2003 and 2004. In his most recent evaluation, he was described as a "top notch Petty Officer who demonstrates keen foresight and is an inspiration to all who observe him. His efforts directly contribute to the overall success of this command and its mission."

Finally, in Ex E, Applicant explained that his 2006 DUI conviction cost him approximately \$7,672, as well as a great deal of time and requirements. He stressed that he would never again find himself in a position where he would drive after consuming any alcoholic beverages.

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 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 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

Applicant's alcohol consumption has resulted in one DUI arrest and conviction, occurring in 2006.

The Government established that Applicant was involved in an alcohol-related incident away from work, and binge alcohol consumption to the point of impaired judgement on one occasion. Disqualifying Conditions (DC) 22. (a) and (c) apply to this case.

As stated above, Applicant admitted to currently drinking, but only in moderation, and he never drives after drinking. I find that Mitigating Condition (MC) 23. (a) applies as the behavior was so infrequent, only one DUI in his life, which he sincerely regrets, that it is unlikely to recur and does not cast doubt on the individual's current reliability and trustworthiness. Paragraph 1 is found for Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, when Applicant completed his SCA it was true and correct. While it was forwarded to the Government one day after his arrest for DUI, I find that Applicant did not knowingly or wilfully furnish untruthful information to the Government. His initial denial of using drugs in 1987 was misinformation that was submitted to a Government investigator.

In reviewing the DC under Guideline E, I conclude that DC 16. (b) applies because Applicant deliberately provide false and misleading information to the Government investigator in 1987. However, MC 17. (c) applies because so much time has passed since this offense, and the behavior occurred on only one occasion, that it is unlikely to recur and it does not cast doubt on the individual's reliability, trustworthiness or good judgement. Applicant has mitigated this allegation. I resolve Guideline E 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) 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 factors discussed above, including the positive testimony from his witnesses, the character letters and employment reviews, plus Applicant's credible sincere remorse, I find that Applicant is a decent person, who will continue to control his alcohol consumption, so that in the future, he will not find himself in the position of driving after he has consumed alcohol.

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
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge