



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



In the matter of:)
)
) ISCR Case No. 18-00989
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

01/16/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On June 7, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E and Guideline J. DOD CAF acted under Executive Order (EO) 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 adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on September 11, 2018, and requested a hearing. The case was assigned to me on October 11, 2018. The Defense Office of Hearings

and Appeals (DOHA) issued a notice of hearing on October 18, 2018, and the hearing was convened as scheduled on November 28, 2018. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence. The Government's exhibit list was marked as a hearing exhibit (HE I). Applicant testified, called two witnesses, but did not offer documentary evidence. DOHA received the hearing transcript (Tr.) on December 7, 2018.

Findings of Fact

In Applicant's answer (Answer), he denied the allegations in the SOR. After a thorough and careful review of all the pleadings and evidence, I make the following findings of fact.

Applicant is 59 years old. He is married, but has been separated from his wife for five years. He has three children. He has worked for his current federal contractor since 2013. He has worked for other federal contractors since 1998. He served in the Air Force from 1982 to 1987. He received an honorable discharge. He has two associate's degrees.¹

The personal conduct allegations raised in the SOR include: (1) In December 2016, being charged with Assault-Unlawful Force, which was later reduced to Attempted Assault (See SOR ¶ 1.a); (2) In November 2012, being charged with Hit and Run, Duty of Driver to Stop, which was later reduced to Reckless Driving (See SOR ¶ 1.b). The same allegations were also cross-alleged as criminal conduct concerns (See SOR ¶ 2.a).

In December 2016, Applicant had a dispute with his then-girlfriend with whom he was living at the time. The dispute started because Applicant received a phone call from an ex-girlfriend. Applicant's girlfriend demanded that he leave the home. As Applicant was attempting to gather his possessions, he and his girlfriend had a physical altercation. She called the police, who arrived shortly thereafter. She claimed that Applicant grabbed her by the throat and threatened her. The police noted in their report that the girlfriend was belligerent towards them and Applicant, and that Applicant remained calm and cooperative during their presence. Applicant claimed that his girlfriend blocked his way when he attempted to gather his possessions and he pushed her resulting in her falling down. There were two witnesses to the altercation. Both verified that Applicant pushed his girlfriend to the ground to get past her. One heard a threat by Applicant, but the other did not.²

Applicant was arrested and charged with Assault-Unlawful Force or Violence. In April 2017, he appeared in court and pleaded guilty to the lesser offense of attempted assault. He was sentenced to 90 days of jail (suspended), a fine, and 12 months'

¹ Tr. 5-6, 25, 27, 32; GE 1.

² Answer; GE 5.

probation. He was also ordered to complete a domestic violence class. Applicant successfully completed his probation and also completed a 16-week domestic violence program. He has had no further contact with his ex-girlfriend. Aside from being questioned by a detective on an unrelated matter, Applicant has had no further law enforcement involvement since this arrest in December 2016. He reported both the arrest and the conviction to his security officer.³

In November 2012, Applicant was involved in an incident with another driver. Applicant hit another vehicle while attempting to pass. He did not immediately stop after the incident but drove down the road for some distance. The police arrived and Applicant was arrested for Hit and Run and Duty of Driver to Stop offenses. Later in 2013, the prosecutor dropped those two charges and Applicant pleaded nolo contendere to Reckless Driving. He paid a fine and reported the incident to his security officer.⁴

Applicant presented the testimony of two witnesses. One witness has worked with Applicant for a number of years. He testified that Applicant is a valued employee who handles his job with great care and diligence. He has never seen Applicant become violent or aggressive in the workplace and he was in a position to observe such things if they had happened. He recommended that Applicant retain his clearance.⁵

The second witness is a friend who knows Applicant on a personal basis and has lived with him for the past several months. She also never observed Applicant showing a temper.⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable

³ Tr. 28-31, 33-35; Answer; GE 3.

⁴ Tr. 23; Answer; GE 3.

⁵ Tr. 46-48.

⁶ Tr. 52, 54.

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 national security eligibility will be resolved in favor of the 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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 E, Personal Conduct

AG ¶ 15 expresses the personal conduct security 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(c) 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 individual may not properly safeguard classified or sensitive information

Appellant had two criminal incidents against him in 2013 and 2017. While they may or may not arise to the level of criminal activity sufficient to cause concern under the criminal conduct guideline, they do raise the issue of Applicant's judgment. AG ¶¶ 16(c) applies.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(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; and

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Appellant satisfied his probation obligations from the 2016 arrest and also completed a domestic violence class, which are positive steps to alleviate future incidents. He no longer has contact with the victim of that incident and is arrest free since that time. It is unlikely this behavior will recur and Appellant's reliability and trustworthiness have not been impacted. AG ¶¶ 17(c) and 17(d) apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Appellant was convicted of reckless driving in 2013 and attempted assault in 2017. AG ¶ 31(b) applies.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The most recent criminal charges against Appellant occurred in 2016 (date of incident) and involved a dispute with an ex-girlfriend. Police reports describe possible culpability by both parties. Applicant pleaded guilty to attempted assault. He successfully completed his probation and participated in 16 domestic violence classes. No repeat incidents have occurred since that time. He has had no further involvement with his ex-girlfriend since his 2016 arrest. He has had no additional driving offenses since the reckless driving charge in 2012. AG ¶¶ 32(a) and 32(d) apply.

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(d):

(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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's military service, the recommendation from his coworker, and the testimony of his friend.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant mitigated the security concerns arising under the Guidelines.

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 E:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge