



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



In the matter of:)
)
) ISCR Case No. 18-01186
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esquire, Department Counsel
For Applicant: *Pro se*

02/11/2019

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the security concerns under Guideline J, criminal conduct and Guideline E, personal conduct. Applicant's eligibility for access to classified information is granted.

Statement of the Case

On May 4, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct and Guideline E, personal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on May 30, 2018, and requested a hearing before an administrative judge. The case was assigned to me on December 11, 2018. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on the same day. I convened the hearing as scheduled on January 18, 2019. The Government offered exhibits (GE) 1 through 4. Applicant testified and offered Applicant Exhibits (AE) A and B. There were no objections to any exhibits, and they all were admitted into evidence. DOHA received the hearing transcript on January 31, 2019.

Findings of Fact

Applicant admitted all of the allegations in the SOR, with explanations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 37 years old. He served in the military from 2002 to 2006 and was honorably discharged in the paygrade E-5. He has never married and has no children. He is working on completing his bachelor's degree.¹

In February 2000, Applicant was arrested and charged with assault causing bodily injury. A person insulted his girlfriend and Applicant hit him. Applicant described himself as "young and dumb."² He pled guilty to the misdemeanor and paid a fine. In October 2000, Applicant was arrested and charged with possession of marijuana. He pled guilty and served 30 days in jail. Applicant admitted that in May 2002, he was charged with failure to stop and give information. He could not recall the incident, but remembered he paid a fine of \$200.³

Applicant testified that he was serving in the military in August 2006 and his friends were giving him a farewell party before he was discharged. Applicant was intoxicated. There was a designated driver, but this person decided to take the vehicle he was driving onto private beach property. Applicant stated he woke up and was being pulled out of the vehicle. He spent the night in jail, and the owner of the property decided not to press charges, so they were dismissed.⁴

Applicant testified that the night of December 31, 2008, he was home and his cousin called him from a bar. Applicant went to the bar and consumed some alcohol. He was driving his cousin home and was stopped by the police. He testified that his breathalyzer result was .09%. He was arrested and charged with driving while intoxicated. After he completed the requirements of a pretrial diversion program, which included a defensive driving course, a 5-day alcohol awareness course, and 100 hours of community service, the charge was dismissed.⁵

¹ Tr. 16-18.

² Tr. 20; GE 4.

³ Tr. 20-23; GE 4.

⁴ Tr. 24-26; GE 4.

⁵ Tr. 26-27, 34-35; GE 4.

In 2017, Applicant was attending a coworker's birthday party. He had taken a ride-share vehicle to the party. He consumed too much alcohol, became intoxicated, and blacked out. He testified he had no recollection of the night. He and his girlfriend had separate rooms, but had permitted each access to the other's. Applicant went into his girlfriend's hotel room to return a gift and then went back to his room. She returned later and was also intoxicated. She could not find an item in her room and began banging on Applicant's hotel room door, which he did not answer because he was passed out. The hotel staff called the police. The police attempted to wake Applicant and gain access to his room. He did not answer due to his intoxication. Once he woke, he was arrested and charged with 2nd degree burglary, theft and criminal damage per domestic violence. Applicant attended court two days later and the charges were dismissed. Applicant's former girlfriend provided a letter corroborating the events and explained the hotel staff misunderstood the situation, and there was no crime committed. She regretted how the event transpired and escalated. Applicant reported the November 2017 incident to his employer immediately after he was released from jail.⁶

Applicant testified that he consumes alcohol about one to three times a month. The last time he was intoxicated was in November 2017 when the incident happened at the hotel. He has not had an alcohol evaluation. He stated that he has only been to a bar once since the 2017 incident and that was for his friend's birthday, and Applicant was the designated driver. Otherwise, he no longer goes to bars and when he drinks it is at home. He does not believe he has a problem with alcohol. He has made a decision that he will not consume alcohol in public places, such as bars and restaurants. He has learned his lesson. He stated he has a huge opportunity to further his career with his employer and does not want to jeopardize it. He promised that in the future, he will not drink alcohol to intoxication.⁷

Applicant is remorseful and embarrassed, and regrets his past mistakes. He accepts responsibility for his past conduct and is committed to acting responsibly in the future.

Applicant provided character letters from coworkers and friends who describe him as a dedicated professional who is always at the work site on time; is focused on attention to details, and consistently adheres to security requirements. He is considered reliable, diligent, honest, generous, intelligent, ethical, friendly, considerate, hardworking, and trustworthy.⁸

⁶ Tr. 29-30, 35-36; GE 3; AE A.

⁷ Tr. 30-33; 37-44.

⁸ AE B.

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(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 not drawn 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, 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 J: Criminal Conduct

The security concern 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was arrested for criminal offenses six times from 2000 to 2017, and has three convictions. The offenses included assault, possession of marijuana, public intoxication and trespassing, driving while intoxicated, burglary, theft and criminal damage. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

- (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.

Applicant was involved in a series of minor criminal offenses from 2000 to 2006. Those offenses alone would not justify denial of a security clearance. However, Applicant was arrested and charged in 2009 for driving while intoxicated. He

successfully completed a pretrial diversion program. It appears he was not involved in any new criminal conduct until 2017, when he was arrested after an incident at a hotel. This charge was dismissed and there is sufficient evidence to conclude it was a misunderstanding. The last three incidents involved alcohol, which is a concern. Applicant immediately reported the 2017 incident to his employer, which shows he recognized the potential security implications. He understands the negative impact his criminal offenses and alcohol have had on his life and career. He credibly testified that he is committed to ensuring alcohol does not have an impact on his life in the future. It appears from character letters from friends and coworkers that Applicant is dedicated to his job. He has not been intoxicated since the event of November 2017 and has only been to a bar once for a birthday party, and he was the designated driver. Applicant expressed sincere remorse for his conduct and I believe he has a new appreciation for the devastating impact a future criminal or alcohol-related incident will have on his life and career. I find that future criminal conduct is unlikely to recur. Based on Applicant's good employment record as expressed through his coworkers and his commitment to the responsible consumption of alcohol, there is sufficient evidence to conclude that there is successful rehabilitation. AG ¶¶ 32(a) and 32(d) apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant was arrested and charged with criminal offenses six times from 2000 to 2017 and has three convictions. The offenses included assault, possession of marijuana, public intoxication and trespassing, driving while intoxicated, and burglary, theft and criminal damage. The above disqualifying condition applies.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(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;

The same conduct that was alleged under the criminal conduct guideline was cross-alleged under the personal conduct guideline. The same rationale and analysis detailed above under the criminal conduct mitigating conditions apply under the personal conduct mitigating conditions. The above mitigating conditions 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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 37 years old. As a young man he made some minor mistakes that resulted in criminal arrests. He was charged with driving while intoxicated in 2009 and

successfully completed a pretrial diversion program. Although there was an incident in 2017, it was dismissed and appeared to be a misunderstanding. I considered Applicant's demeanor, candor, and remorsefulness. Applicant understands and acknowledges that alcohol has had a negative impact on his life. He is committed to it not having an impact on his future. He understands he has a career opportunity and any future negative conduct could deny him that chance. I believe he will comply with his promises. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. Applicant has mitigated the criminal conduct and personal 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 J:	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant
Paragraph 2, Guideline E:	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 grant Applicant a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge