



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



In the matter of:)
)
) ISCR Case No. 18-01353
)
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

03/06/2019

Decision

DAM, Shari, Administrative Judge:

Applicant did not mitigate the criminal conduct or personal conduct security concerns. National security eligibility for access to classified information is denied.

History of Case

On August 27, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Applicant answered the SOR in writing on September 16 and October 18, 2018, and requested a hearing before an administrative judge (Answer).

The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 2, 2019. DOHA issued a Notice of Hearing on February 12, 2019, setting the hearing for February 26, 2019. Department Counsel offered Government Exhibits (GE) 1 through 6 into evidence. Applicant testified. After making a minor correction of a telephone number in GE 2 pursuant to Applicant's objection. All of the Government's exhibits were admitted without further objection. DOHA received the hearing transcript (Tr.) on March 6, 2019.

Procedural Ruling

At the commencement of the hearing, Department Counsel moved to amend SOR ¶ 1.a to read as follows:

You committed an act of domestic violence against your children's mother in about July 2017.

Applicant objected to the amendment because he said the date was wrong. I granted the Motion to Amend. In response to my request that he answer the amended allegation, Applicant said he denied it and asserted the date was February 2017. (Tr. 9-11)

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.b through 1.h. He denied the allegations in SOR ¶¶ 1.a, 2.b, and 2.c. His admissions are incorporated into these findings of fact. He did not fully answer the allegations in SOR ¶ 2.a, which re-alleged the allegations in SOR ¶¶ 1.a through 1.h; however, he reiterated his denial to SOR ¶ 1.a.

Applicant is 38 years old and unmarried. He graduated from high school and has taken a couple college courses. He has a 12-year-old child and 10-year old child with a former girlfriend (GF 1). He has a 9-year-old child and a 1-year-old child with his current girlfriend (GF 2). He financially supports all of the children. He shares physical custody of the older two children with GF 1. (Tr. 23-25)

Applicant is unemployed while awaiting the outcome of this proceeding. He had worked about six months for the defense contractor that is sponsoring him for a security clearance. Prior to that position, he had been a manager for retail stores for about 13 years. (Tr. 25-27)

(SOR ¶ 1.h) In October 1998, Applicant was arrested and charged with disorderly conduct and breach of peace. The charge was dismissed. (Answer) He denied that he engaged in unlawful conduct before the arrest. (Tr. 29)

(SOR ¶ 1.g) In November 2004, Applicant was arrested and charged with battery-cause bodily harm, and theft-property, exerts unauthorized control. (Answer) At the time of the arrest, Applicant stated he became involved in a physical fight with his girlfriend's cousin. The cousin then broke into Applicant's car and stole some of Applicant's things. Applicant pleaded guilty to battery-cause bodily harm and was ordered to perform community service. The theft charge was dismissed. (Tr. 31-33)

(SOR ¶ 1.f) In September 2006, Applicant was charged with driving on a suspended driver's license and driving 26-30 miles over the speed limit. (Answer) Applicant's license was suspended at the time because he had numerous unpaid parking

tickets that he could not afford to pay. (Tr. 33-34) The court's disposition is not in this record.

(SOR ¶ 1.e) In February 2008, Applicant was arrested and charged with having an expired driver's license for more than a year, and failure to reduce speed. (Answer) Applicant stated he did not know his license was expired when he was stopped by the police. He was speeding because he was late for work. He said the case was dismissed after he provided the court with evidence that his license was updated. (Tr. 34-36) This allegation is found in his favor.

(SOR ¶ 1.d) In February 2010, Applicant was arrested and charged with domestic battery-bodily harm. (Answer) His neighbors called the police because he and GF 1 were in a heated verbal argument that became physical. He said he does not recall hitting or grabbing GF 1. They were living together at the time. The case was dismissed because GF 1 refused to testify. (Tr. 36-39)

(SOR ¶ 1.c) In December 2012, Applicant was arrested and charged with driving without a license, disregarding a stop sign, operating a car without insurance, and having an unregistered or expired registration. (Answer) He said that this incident occurred while he was driving a friend's car, and he did not have his driver's license with him. All charges were dismissed when Applicant went to court and produced evidence of his license, insurance, and registration. (Tr. 41-42) This allegation is found in his favor.

In February 2014, Applicant was in an automobile accident after he had a seizure while driving. He stopped driving later that year, as a consequence. He has epilepsy and is not allowed to drive. He has seizures once or twice a month. His last seizure was a month ago. He takes medication for the illness. (Tr. 42-44, 59-61)

(SOR ¶ 1.b) In February 2017, Applicant was arrested and charged with domestic battery-bodily harm. (Answer) Applicant was at GF 1's house at the time of the incident and became embroiled in an argument with her. He said GF 1 struck him, and he hit her in the face. He denied that he punched her in the face. He then took her phone, broke it, and smashed her windshield with a garbage can. The case was dismissed because GF 1 refused to testify. (Tr. 44-47)

(SOR ¶ 1.a) In July 2017, GF 1 called the police after she and Applicant got into an argument when he returned their two children to her home. She told the police that he spit at her during the conflict. The police filed an incident report regarding her complaint. (GE 5) GF 1 never signed a complaint, and the matter was dropped. Applicant said that the incident never happened in July 2017. (Tr. 47-49)

Applicant has not participated in treatment for domestic violence or anger management. (Tr. 54) He said after the February 2017 incident, he began talking to his pastor about his anger problems. He has counseled with him about 13 times. Applicant now tries to walk away from situations that upset him. (Tr. 54-58)

In August 2017, Applicant submitted his first security clearance application (SCA). In response to Section 22, inquiring about his police record, he disclosed the February 2014 car accident arrest, which was not alleged in the SOR. He also disclosed the February 2017 incident (SOR ¶ 1.b), stating that he had a “disagreement” with GF 1. (GE 1) He did not disclose that he struck her which he admitted during his testimony. (Tr. 44)

Applicant did not disclose the July 2017 incident in Section 22, alleged in SOR ¶ 1.a, because he denied any incident occurred in July 2017. (Tr. 47) Applicant denied that he intentionally withheld information from the Government regarding the December 2012 arrests for driving violations, alleged in SOR ¶ 1.c. He said he did not disclose that incident because he thought the word charged meant convicted, and he was not convicted. (Tr. 51-53; Answer)

Policies

This national security eligibility 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 *National Security Adjudicative Guidelines Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which became effective within the DOD on June 8, 2017.

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an “applicant is

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant 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 *a/so* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline J: Criminal Conduct

AG ¶ 30 sets out the security concern related to criminal conduct:

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 lists conditions that could raise a security concern and may be disqualifying. Two may be potentially applicable in this case:

(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.

Based on credible evidence, Applicant has been arrested and/or charged with criminal conduct on eight separate occasions between October 1998 and July 2017, demonstrating a pattern of offenses that cast doubt on his judgment, reliability, and trustworthiness. The evidence establishes the above two disqualifying conditions.

AG ¶ 32 describes four conditions that could mitigate security concerns raised under this guideline:

- (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;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; 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.

There is insufficient evidence to establish mitigation under AG ¶¶ 32(a), (b), or (c). Applicant's criminal conduct spans 20 years, the last incident having occurred in July 2017, less than two years ago. None of the criminal incidents occurred under unusual circumstances. He was not pressured or coerced into committing any of the crimes or incidents. The evidence supporting the offenses is credible, including his admissions. There is some evidence of rehabilitation. Applicant has counseled with his pastor about 13 times about his anger management issues. However, that is insufficient evidence from which to conclude that he has adequately addressed his anger problems or is successfully rehabilitated. AG ¶ 32(d) minimally applies.

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to 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 or sensitive information.

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

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications,

award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(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.

Applicant denied withholding information as alleged in SOR ¶¶ 2.b and 2.c. He maintained that he was not involved in an incident in July 2017 alleged in the amended SOR ¶ 1.a. He was not required to disclose the July 2017 incident, regardless of whether he was confused about dates, because he was not arrested or charged with an offense at that time. He did not disclose the December 2012 vehicular offenses because he misunderstood the question. He thought he was required to disclose convictions, not charges. He disclosed sufficient information about the February 2017 incident to inform the government about it. After listening to his testimony and reviewing the record, including all of his admissions and his disclosures of the February 2014 and February 2017 incidents, I find that that he did not deliberately fail to disclose requested information. SOR ¶¶ 2.b and 2.c are found in his favor.

Although the offenses alleged in SOR ¶¶ 1.c and 1.e were dismissed by the court and are found in Applicant's favor under Guideline G, they are, when considered in conjunction with his history of other criminal offenses, demonstrate a lack of good judgment and an inability to comply with rules and regulations. The evidence establishes a disqualify condition under AG ¶ 16(c).

AG ¶ 17 provides conditions that could mitigate security concerns raised under this guideline and alleged in AG ¶ 16(c).

(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.

Applicant's history of misconduct is not minor and did not occur under unusual circumstances, as articulated under AG ¶ 32(a) above. He has not participated in sufficient treatment or counseling to demonstrate that he is unlikely to repeat similar

behaviors. The evidence is insufficient to establish mitigation under the above two conditions.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. Applicant has a history of criminal conduct that spans a long period of time. The most serious incidents involved domestic violence with his former girlfriend, which were not prosecuted because she refused to testify. Applicant displayed some remorse over his anger problem, but has not sufficiently demonstrated that he has control over it and that similar conduct will not occur in the future. Overall, the evidence raises doubt as to Applicant's present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant

Subparagraphs 1.f through 1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b and 2.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM
Administrative Judge