



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



In the matter of:)
)
) ISCR Case No. 18-01616
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel

For Applicant: *Pro se*

02/06/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline J, criminal conduct, Guideline G, alcohol consumption, and Guideline E, personal conduct. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

On June 20, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, G, and E. Applicant timely answered the SOR and elected to have his case decided on the written record in lieu of hearing.

Department Counsel submitted the Government’s file of relevant material (FORM) on August 28, 2018. Applicant received the FORM on September 5, 2018, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided no response to the FORM. The Government’s evidence, identified as Items 1 through 7, is admitted into evidence without objection. The case was assigned to me on January 17, 2019.

Findings of Fact¹

Applicant is 34 years old. He obtained his general equivalency diploma (GED) in 2002 and his master welder's license in 2007. Applicant has been employed as a master welder by a federal contractor since 2017. He reports no military service and he married in May 2016. Applicant has two daughters, age 3 months, and 10 years old. In section 22 (Police Record) of his Questionnaire for National Security Positions (SF-86) or security clearance application (SCA), he disclosed an arrest for driving under the influence (DUI) in July 2012. He pled guilty to a reduced charge of reckless driving in April 2013. He completed probation and community service; paid fines and costs; and attended mandatory, court-ordered DUI-counseling sessions one day each week from April to October 2013. He disclosed another arrest for DUI in November 2016.

The SOR alleges that Applicant was also arrested for DUI and criminal mischief in July 2005 (SOR ¶ 1.a). Applicant pled no contest to reduced charges of reckless driving and criminal mischief in October 2005, and he was sentenced to one year probation and ordered to complete a DUI level one program. Applicant admitted all of the allegations in the SOR in his answer to the SOR in July 2018. (Item 3) He also admitted to five other driving offenses including: driving while license suspended in 2006, 2008, and 2017 (SOR ¶¶ 1.b, 1.e, and 1.i) and driving in violation of court-ordered license restrictions in 2007 and 2013 (SOR ¶¶ 1.d and 1.g). Additionally, Applicant admitted being charged with possession of drug paraphernalia in January 2007. (SOR ¶ 1.c) State court records provided by Department Counsel corroborate Applicant's admissions and confirm his multiple criminal offenses. (Items 6 – 7)

In his personal subject interview (PSI), Applicant stated that his latest November 2016 DUI occurred after he had dinner and three beers with friends and he was pulled over by police. Applicant's blood alcohol content (BAC) was .09 and the state law threshold for DUI is .08 BAC. Again, he paid fines and \$2,000 in court costs plus 25 hours of community service, and one year probation. He completed mandatory alcohol abuse counseling in January 2018, and his license was revoked for one year. Nonetheless, Applicant continued to drive since he needed to get to work and felt he had no other choice. In 2007, when he was charged with possession of marijuana, it was provided to him at a party. He never purchased or sold marijuana, and claims to have used it only this one time. (Item 5, pp. 20-21)

Applicant denied the cross-alleged violations under Guidelines G and E, at SOR ¶¶ 2 and 3. He ascribes his afore-mentioned mistakes to youthful immaturity in his answer to the SOR. He professes his intent to not re-offend. Applicant provided no response to the FORM or character references or performance evaluations. He provided no documentary evidence that he attends treatment or Alcoholics Anonymous (AA) or other support groups, or that he has acknowledged his longstanding pattern of

¹ Unless stated otherwise, the source of the information in this section is Applicant's June 30, 2017 Security Clearance Application (SCA) (Item 4), or his personal subject interview (PSI) on February 26, 2018. (Item 5)

maladaptive alcohol use. He provided no evidence of modified consumption or abstinence from alcohol.

Policies

This 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 Administrative Guidelines (AGs) promulgated in Security Executive Agent Directive 4 (SEAD 4), effective within the DOD on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, 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 adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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. 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, 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 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. 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 as to 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 J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30 as follows:

Criminal activity creates doubt about an Applicant’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 conditions that could raise security concerns under AG ¶ 31. The disqualifying conditions potentially applicable in this case include:

31(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 and trustworthiness; and

31(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 has admitted to three arrests for DUI and possession of drug paraphernalia. His admissions are corroborated by the record evidence including court records provided by Department Counsel, which provide details. AG ¶¶ 31(a) and (b) have been established by the Government’s evidence. (Items 5 - 7) The above disqualifying conditions are applicable.

AG ¶ 32 provides conditions that could mitigate security concerns. The following are potentially applicable:

32(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

32(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 arrested for DUI in 2005, 2012, and 2017. His last arrest for driving on a suspended license was in June 2017, and he was convicted after he completed his SCA. This was his fifth arrest for either driving on a suspended license or on a restricted license. Applicant is incorrigible. While he completed court-ordered alcohol awareness courses at least twice following his DUI arrests, Applicant has apparently not learned from his earlier mistakes. His conduct, on whole, for over a decade, reflects a flagrant disregard for laws and rules of the road. It is not likely that he will follow rules and regulations with respect to handling classified information. AG ¶ 32 (d) only partially applies, if at all.

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set out in AG ¶ 21:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant had three alcohol-related incidents, the DUI arrests in 2005, 2012, and 2017. SOR. AG ¶¶ 22(a) and (c) are applicable.

AG ¶ 23 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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 judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and,

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

My analyses above under Guideline J is the same under this administrative guideline G, and are herein incorporated by reference. Applicant has completed two court-ordered, mandatory DUI courses. Nonetheless, Applicant provided no evidence or assurance that he has modified his drinking or that he abstains from alcohol. AG ¶¶ 32 (d) partially applies to mitigate the cross-alleged allegations at SOR ¶¶ 2.a.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are 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.

Applicant has demonstrated a pattern of rules violations and his long-term conduct indicates an inability or unwillingness to modify his behavior and comply with laws and rules of the road for safe driving. AG ¶¶ 16(c) and (d)(3) are implicated.

Under AG ¶ 17, conditions that could potentially mitigate security concerns include:

(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;

(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; and

My analyses above under Guidelines J and G are the same under this this Guideline E, and are herein incorporated by reference. Applicant has completed two court-ordered, mandatory DUI courses. While AG ¶¶ 17(c) and (d) may have some applicability, they are not enough to overcome Applicant's well-established pattern of violating the law and ignoring rules, such as when he drove drunk three times, and drove with either a restricted or suspended license on five occasions. While some of his driving offenses may be considered minor, the repetitiveness and frequency of his violations show a pattern of bad judgment. Applicant has produced no documentation showing that he has overcome his drinking problem, modified his consumption, or now practices abstinence with the aid of AA or other support group.

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 have incorporated my comments under Guidelines J, G, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Most importantly, Applicant has not addressed the specific allegations in the SOR. He has longstanding and ongoing criminal, alcohol, and driving offenses going back to 2005. He has offered nothing to assure the Government that there will be no recurrence. He has not met his burden of production.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.i:	Against Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against 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 a security clearance. Eligibility for access to classified information is denied.

Robert J. Kilmartin
Administrative Judge