



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



In the matter of:)
)
) ISCR Case No. 18-01634
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: William F. Savarino, Esq.

04/19/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated 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 granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 3, 2016. On August 24, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct, Guideline G, alcohol consumption, and Guideline E, personal conduct. The DOD CAF acted 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 (AGs) implemented by DOD on June 8, 2017.

Applicant timely answered the SOR with a detailed three-page answer, admitting all of the SOR allegations except SOR ¶ 1.b. He provided explanations for each of the incidents that he admitted. The case was assigned to me on January 25, 2019. The

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 28, 2019. I convened the hearing as scheduled.

The Government's Exhibits (GE) 1 through 7 were admitted into evidence without objection. At the hearing, Applicant testified and submitted Applicant's Exhibits (AE) A through J, which were admitted without objection. The transcript (Tr.) was received at DOHA on March 11, 2019. I left the record open until March 8, 2019, and Applicant provided an additional character reference letter from a life-long friend, attesting to Applicant's honesty. (AE K)

Findings of Fact¹

Applicant is 58 years old. He graduated from high school in 1978 and obtained his associate's degree in aeronautics in 1983. Applicant has been employed in the aviation field in some capacity since age 12. (Tr. 42) He reports no military service. He married in 1990 and divorced in 1998 with no children. Applicant taught himself computer coding and he started software companies in the 1980s. (Tr. 45) His company employed 85 people and had \$45 million in annual sales when Applicant was age 29. (Tr. 48) Applicant moved south to a different state in 2016 to get away from a gritty and deleterious lifestyle and start a job with a major federal contractor. (Tr. 91)

Applicant admits he was arrested in February 2008 and charged with possession of a controlled substance, and driving while impaired. (Answer) Applicant testified that he sustained a devastating leg injury in 2003 and he was unable to work through 2008. (Tr. 51, 53, 56, AE E, H) He had invested his life savings in his small business. Since he had no insurance, he lost everything. (Answer) He was attempting to rebuild his business and facilitate investors, when he went out with an associate who used drugs. (Tr. 57-58) They had a beer together and then the associate drove them to a house party where the associate and others used cocaine. Applicant testified credibly he did not use cocaine that evening; although he did use it previously following his injury. (Tr. 67) He wanted to leave the party. (Tr. 58) His associate said "take my keys" and Applicant drove away. He was stopped by police and admitted to having a beer. The vehicle owner's girlfriend left her coat in the back seat. When Applicant authorized a search of the vehicle, police found cocaine and drug paraphernalia in the coat. He was arrested. He no longer associates with the vehicle owner or the coat owner.

Although the driving while impaired charge was dismissed, Applicant was convicted of possession of a controlled substance (found in the female's coat) and sentenced to three years' probation, court costs, and a fine. (Tr. 64-66) In section 22 (Police Record) of his Questionnaire for National Security Positions (SF-86) or security clearance application (SCA), Applicant disclosed that he served four months in jail in July 2011 for a probation violation. He testified credibly that he was at the end of his court-ordered probation for the July 2008 conviction above, when he informed his

¹ Unless stated otherwise, the source of the information in this section is Applicant's May 3, 2016 Security Clearance Application (SCA) (Item 1), or his personal subject interview (PSI) on October 4, 2017. (Item 2)

probation officer that he needed to travel to an upstate location. (Tr. 69) She responded that he should just check in with her when he returned. (Tr. 71) When Applicant spent more time upstate than he intended, he realized he was going to be late returning. (Tr. 72) He called to advise the probation officer of this delay. She nonetheless reported the tardiness violation by Applicant, causing him to have to serve out his sentence in jail. (Tr. 73-74) His mother died while he was in jail. (Tr. 77)

Applicant admits that he was stopped by police in July 2008 and charged with unlicensed operation of a vehicle, running a red light, and driving an unregistered vehicle. SOR ¶ 1.b was amended at the outset of the hearing to reflect that he was “stopped” by police and not “arrested.” (Tr. 11-12) Applicant admits to the allegation as amended. He received a citation and failed to appear in court. He has paid all fees and fines associated with that traffic stop, and the warrant that issued (for failure to appear) has been rescinded in September 2018. (Tr. 85, AE A, F) Applicant states that 2008 was a bad year and he struggled with depression as a result of his crippling injury and loss of his business. (Tr. 15, 67) He later treated with a clinical master social worker in 2016. (Tr. 91-92)

The SOR alleges that Applicant was also arrested for driving while impaired (DWI) in March 1999. (SOR ¶ 1.d) He admits to this offense twenty years ago, and he pled guilty and paid all fines and court costs associated with it. (Tr. 53-55) He also admits that he was arrested in April 2017 for DWI as alleged in SOR ¶ 1.a. Applicant testified that he was very ill and suffering from bronchitis and allergies at the time. (Tr. 98) He was prescribed medication by his physician, and he took a steroid, antibiotic, and cough medicine, prior to the arrest. (Tr. 103, 124) He was pulled over by police who said Applicant had swerved erratically while driving to a convenience mart at 2:00 a.m. to get throat lozenges. (Tr. 102) Applicant testified he was having a coughing fit. When he was pulled over, he was unsteady on his feet due to the devastating injury. (Tr. 102) He took a breathalyzer that registered zero blood-alcohol content. (Tr. 104) He was found guilty of failure to use due care while driving since he was operating under the influence of cough medicine. (Tr. 105, GE 4, AE D) Applicant paid a \$1,500 dollar fine. (Tr. 107)

Applicant last used illegal drugs in 2008. (Tr. 114) He drinks only on rare occasions. (Tr. 116) Applicant presented testimony from his supervisor of the fleet ballistic missile section of a federal contractor. (Tr. 30) He spoke to Applicant’s superb work ethic and character, and testified that Applicant is honest, trustworthy, and reliable. (Tr. 34-36) The witness wrote Applicant’s excellent performance evaluation. (AE J) Applicant also provided a favorable character reference letter and a letter from his previous attorney attesting to the fact that he resolved all outstanding traffic violations in state A and all fines were paid in 2015. (AE C, G) Applicant admitted the cross-alleged violations under Guidelines E and G, at SOR ¶¶ 2 and 3, and provides the same explanations as above.

Policies

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."

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;

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; and

31(d) violation or revocation of parole or probation, or failure to complete a court-ordered rehabilitation program.

Applicant has admitted to his arrests for DWI in 1999 (convicted); possession of a controlled substance found in a female's coat in 2008 (convicted); failure to exercise due care (reduced from DWI) in 2017 (for driving while coughing); a tardiness probation violation, and a failure to appear in court as a result of his 2008 arrest. He also had a series of traffic violations when he was down on his luck around 2008. His admissions are corroborated by the record evidence including the FBI criminal history and court documents introduced by Department Counsel. AG ¶¶ 31(a), (b), and (d) have been established by the Government's evidence. 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 has only one conviction for DWI that occurred over twenty years ago. His last arrest for failure to exercise due care (driving while coughing and taking cough medicine) was not an alcohol-related event. He paid a \$1,500 fine for this conviction. The 2008 arrest for possession, and attendant traffic offenses, all occurred when Applicant was suffering from depression as the result of loss of his life savings in his small business, and loss of his health. Applicant was forthright and candid that his choice of prospective business associates at that time showed a lack of judgment. However, I accept his testimony that the cocaine and paraphernalia found in the female's coat were not his. These offenses occurred 11 years ago, and he has since

treated with a master clinical social worker and turned his life around. While it is inexplicable why he failed to appear in court after the July 2008 traffic stop, it is clear that he has since paid all associated costs, fines and fees to state A. Although his conduct in 2008 reflects a careless disregard for laws and rules of the road, Applicant convinced me that it was a fleeting and uncharacteristic period in his life. He has overcome a catastrophic injury, loss of his mother while in jail, and loss of a lucrative business. It is not likely that his misconduct will recur and I am confident he will follow rules and regulations with respect to handling classified information. AG ¶¶ 32(a) and (d) apply.

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 is 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.

Applicant had only one alcohol-related incident, the DWI arrest in 1999. SOR AG ¶¶ 22(a) is applicable, even though the incident is very dated.

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.

My analyses above under Guideline J is the same under this administrative Guideline G, and are herein incorporated by reference. Applicant has never been

diagnosed with an alcohol use disorder. There is no evidence that he is alcohol dependent or abuses alcohol. He completed court-ordered probation and all conditions ordered in 2008, although he had one hiccup when he violated his conditions by his tardiness in checking in with his probation officer in 2011. He voluntarily attended counseling with a master clinical social worker in 2016. He only drinks on rare occasions, and never to excess. Applicant provided assurance that he has modified his drinking and that he uses alcohol moderately. AG ¶¶ 32 (a) and (b) apply 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 traffic offenses that may indicate an inability or unwillingness to modify his behavior and comply with laws and rules of the road for safe driving. AG ¶¶ 16(c) is 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.

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 counseling, moved away from his external stressors, and modified his lifestyle. AG ¶¶ 17(c) and (d) apply. They are enough to overcome Applicant's established pattern of violating the law and rules. Most of his illegal conduct and driving offenses occurred during a period of enormous stress in Applicant's life and may be considered minor under the circumstances. They do not present a pattern of bad judgment. Applicant has produced documentation, witness testimony, and his own testimony, showing that he has overcome any putative drinking problem and modified his consumption. He has not used drugs since 2008 and he has an engaging and rewarding career opportunity.

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 addressed the specific allegations in the SOR. He has overcome adversity and desires to serve the defense industry as a contractor. He has offered sufficient evidence to assure the Government that there will be no recurrence. He has 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:	FOR APPLICANT
Subparagraphs 1.a – 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

Robert J. Kilmartin
Administrative Judge