



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



In the matter of:)
)
) ISCR Case No. 18-01639
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: Catie E. Young, Esq., Applicant’s Counsel

December 9, 2019

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On December 17, 2018, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines M, Use of Information Technology, and E, Personal Conduct. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

Applicant answered the SOR on January 22, 2019, and requested a hearing before an administrative judge. (Answer.) The case was originally assigned to another judge, but was reassigned to me on July 31, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 24, 2019, scheduling the hearing for August 6, 2019. The hearing was convened as scheduled. The Government offered Exhibits (GX) 1 through 3, which were admitted without objection. Applicant testified on

his own behalf and presented 16 documents, which I marked Applicant's Exhibits (AppXs) A through P, which were also admitted without objection.

On direct examination, Applicant also testified as to his past alcohol consumption. (Transcript (TR) at page 21 line 8 to page 26 line 23.) As a result, Department Counsel amended the SOR adding Guideline G, Alcohol Consumption. (TR at page 58 line 11 to page 59 line 7.) After the record was closed on August 6, 2019, Department Counsel issued the written amendment to the SOR, adding subparagraphs 3.a.-3.f. The record had been left open for 15 days from the date of the receipt of that amendment for Applicant to ask for the record to be reopened, to formally answer the amended SOR, to submit additional documentation, and/or to submit a closing statement. (*Id.*) On August 22, 2019, Applicant answered the amended SOR (Answer2), and submitted a closing statement. DOHA received the transcript of the hearing on August 15, 2019.

Findings of Fact

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

Applicant is a 38-year-old employee of a defense contractor. (GX 1 at page 5.) He has been employed with the defense contractor since November of 2016. (GX 1 at page 15.) As a result of the incident alleged in subparagraph 1.a., Applicant "was denied access to classified information," but it was re-granted in conjunction with his current duty position. (GX 1 at pages 91~92.). He is divorced, and has no children. (TR at page 12 line 21 to page 15 line 14.)

Guideline M - Use of Information Technology & Guideline E - Personal Conduct

1.a. and 2.a Applicant, while a member of the U.S. Air Force, intentionally misused his administrative rights access to a U.S. Government administrative computer account to log into his then wife's personal storage files, on two to three occasions, from about December of 2015 to February of 2016. He suspected that she was engaging in on-line infidelity. (TR at page 36 line 2 to page 42 line 12, and at page 52 line 12 to page 55 line 7, and AppX K.) Applicant self-reported this error in judgment. (*Id.*) This, coupled with an October 2, 2015, Driving Under the Influence of Alcohol (DUI) incident, which will be discussed under Paragraph 3, below, resulted in Applicant being separated from the Air Force. (TR at page 17 line 12 to page 21 line 7.) His former spouse, a member of the U.S. Air Force, supports Applicant's security clearance retention request. (AppX O.)

Guideline G - Alcohol Consumption

3.a. Applicant admits that he was cited in 1999 for possession of alcohol by a minor. (Answer2 at page 1.)

3.b. Applicant admits that in August of 2005, he was charged with a DUI. The charges were later dismissed in accordance with a plea bargain, which included Applicant's agreement to join the U.S. Air Force and graduate from basic training without further incident. (Answer2 at page 1.)

3.c., 3.d., 3.e. and 3.f. As noted above, in October of 2015, Applicant received non-judicial punishment for a second DUI. (TR at page 21 line 8 to page 26 line 20, and GX 3.) As a result, Applicant attended 3~5 mandatory out-patient Alcohol and Drug Abuse Prevention and Treatment (ADAPT) counseling/treatment sessions from October to November of 2015. However, as the result of a relapse in December of 2015, Applicant self-referred himself back to ADAPT, where he was diagnosed as an alcohol abuser. He completed this counseling in July of 2016. Applicant last consumed alcohol to the point of intoxication in June of 2019, about two months prior to his hearing. (TR at page 25 lines 21~25.)

Applicant is well respected in the work place as evidenced by seven character references. (AppX A.)

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 for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, administrative judges apply the guidelines 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. According to AG ¶ 2(a), 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 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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 information.

Section 7 of Executive Order 10865 provides that adverse 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 M - Use of Information Technology

The security concern relating to the guideline for Use of Information Technology is set out in AG ¶ 39:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

The guideline notes several conditions that could raise security concerns under AG ¶ 40. Three are potentially applicable in this case:

- (a) unauthorized entry into any information technology system;

- (c) use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;
and

- (e) unauthorized use of any information technology system.

Applicant misused his access rights on his Government computer to log into his former spouse's personal storage files.

AG ¶ 41 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 41 including:

(a) so much time has elapsed since the 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.

Applicant's misuse of his access occurred under unusual circumstances, more than three years ago. Despite the misuse of his computer administrative rights vis-à-vis his former spouse; he has the support of his former spouse, and the support of those with whom he works. This allegation is found for Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources;

Applicant's misuse of his computer access arguably shows a pattern of rule violations. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

- (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.

Again, Applicant's error in judgement occurred under unusual circumstances, more than three years ago. He has the support of his former spouse, and of those with whom he works. This allegation is also found for Applicant.

Guideline G - Alcohol Consumption

The security concern relating to the guideline 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 at AG ¶ 22 contains seven conditions that could raise a security concern and may be disqualifying. Three conditions may apply:

- (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 the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder; and
- (d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

Applicant had three alcohol-related incidents between 1999 and 2015, to include two DUIs. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline at AG ¶ 23 contains four conditions that could mitigate security concerns. Three conditions may apply:

(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.

I find that none of these apply. Applicant had a relapse in December of 2015, and has been diagnosed as an alcohol abuser. Despite this diagnosis; only two months prior to his hearing, Applicant consumed alcohol to the point of intoxication. This allegation is found against Applicant.

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(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 national security eligibility 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines M, K, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant has a distinguished history of working in the defense industry and is respected by those with whom he works. He performs well at his job.

Overall, however, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Alcohol Consumption security concern.

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 M:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraphs 3.a.-3.f.:	Against Applicant

Conclusion

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

Richard A. Cefola
Administrative Judge