



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 18-02581
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*

10/10/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. He mitigated the concerns under Guideline J, criminal conduct and Guideline G, alcohol consumption. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On January 9, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J, E, and G. The DOD 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 (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on January 31, 2019, and requested a hearing. The case was assigned to me on May 21, 2019. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on May 21, 2019, and the hearing was held as scheduled on July 23, 2019. The Government offered exhibits (GE) 1 through 22, which were admitted into evidence without objection, except for GE 5, which objection was sustained. The Government's exhibit list was marked as hearing exhibit (HE) 1. Applicant testified and offered exhibits (AE) A-E, which were admitted without objection. DOHA received the hearing transcript (Tr.) on August 5, 2019.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a – 1.h and 2.a – 2.b, with explanations. He denied the remaining allegations. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 42 years old. He has worked for a defense contractor since December 2015. Before his current position he served in the U.S. Air Force, retiring after 20 years of honorable service. He holds a master's degree. He is divorced and has custody of his two children. He was married from 2009 to 2016. All the allegations of domestic violence involved Applicant and his former spouse (FS). (Tr. 6, 7, 29-30, 32-33, 84; AE1, 2)

The SOR alleged Applicant was charged with domestic violence or harassment in March 2001, September 2001, January 2004, May 2004, May 2013, November 2013, and April 2014 (SOR ¶¶ 1.a – 1.g; 2.c). It also alleged that since 2010, police were called to Applicant's home based upon reports of domestic disturbances on at least 25 occasions (SOR ¶ 1.h). The SOR also alleged that in June 2014, Applicant was demoted and received a letter of reprimand from his Air Force command as a result of the November 2013 domestic disturbance incident (SOR ¶ 2.a). It also alleged Applicant locked FS out his house in May 2018. When the police were called, they informed Applicant that she was considered a resident and must be allowed access to the property (SOR ¶ 2.b). The SOR also alleged Applicant falsified his November 2016 security clearance application (SCA) by failing to list the criminal offenses he was charged with in SOR ¶¶ 1.a – 1.h (SOR ¶ 2.d). His use of alcohol was alleged as a factor in the criminal and domestic abuse incidents listed in SOR ¶¶ 1.a – 1.h (SOR ¶ 3.a).

Applicant admitted that his volatile relationship with FS goes back to before they were married. He further admitted that they both were at fault for letting their domestic disagreements foment into larger issues which required law enforcement involvement. He admitted engaging in arguments and breaking FS's cell phone, but he denied ever physically hitting or striking her. (Tr. 43-44; 67-68) Records establish that Applicant was criminally charged on the following occasions:

March 2001—charged with harassment—pleaded guilty—sentenced to deferred sentence—ordered to attend domestic violence counseling. (Tr. 37-39; GE 9-10);

September 2001—charged with harassment—dismissed—charged with violating restraining order—pleaded guilty—sentenced to probation for 24 months and required to attend domestic violence counselling for 36 sessions. (Tr. 39-40; GE 11-12);

January 2004—charged with obstructing telephone service, false imprisonment, harassment—all charges dismissed. (Tr. 41; GE 13-14);

May 2004—charged with harassment—charge dismissed. (Tr. 41-42; GE 15-16);

May 2013—charged with criminal mischief (breaking FS's cell phone)—pleaded guilty—sentenced to supervised probation and domestic violence counseling. (Tr. 43-45; GE 8, 17-18);

November 2013—charged with violation of protective order; child abuse; criminal mischief; resisting arrest; harassment—all charges dismissed. (Tr. 45-50; GE 19-20);

April 2014—charged with assault; harassment; and violation of protective order—all charges dismissed. (Tr. 55, 57-59; GE 21-22).

Between January 2010 and May 2018, approximately 37 phone calls were made to the local police department from Applicant's residence claiming domestic disturbances between Applicant, FS (before and after their divorce), and his daughters. These incidents are reflected in approximately 100 pages worth of transcripts. A May 2018 incident involved Applicant locking FS out of his house even though he gave her permission to stay in the house. Police told Applicant he had to let her into the house or pursue eviction proceedings. Applicant and FS divorced in January 2016. He allowed FS to resume living in his house in September 2017 and she remains residing there. (Tr. 33, 80-81, 84; GE 7)

Applicant admitted that alcohol was involved when he was arrested in November 2013. Applicant claims he was evaluated by the Air Force about any alcohol issues after this incident, but no treatment recommendation was made. The record contains no documentation of any alcohol treatment evaluation or counseling for Applicant. Several of the domestic disturbance phone calls from Applicant's residence to the police referenced Applicant using alcohol. Applicant denied that his alcohol use led to any of the reported incidents. (Tr. 65-67, 87; GE 7)

The demotion action against the Applicant by the Air Force in April-July 2014 was a consequence of Applicant's arrest in November 2013 (# 6 above), not an independent incident. I find in favor of Applicant regarding SOR ¶ 2.a. (AE D, E)

Applicant completed a security clearance application (SCA) in November 2016. In answering **Section 22-Police Record**, Applicant responded in the affirmative when he was asked about arrests by law enforcement within the past seven years. He then listed arrests in November 2013 and April 2014. The SOR incorrectly stated that he answered "no" to the above question. Applicant credibly testified that any omissions while completing his SCA were unintentional. Department Counsel conceded this allegation at the hearing. I find in favor of Applicant regarding SOR ¶ 2.d. (Tr. 35, 89; GE 1)

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(a), the entire process is a careful weighing 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.

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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 relating to the guideline 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested and charged with seven domestic violence offenses between 2001 and 2014. I find that the stated disqualifying condition applies.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(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 has not been arrested for a criminal offense involving FS since 2014. This is a sufficient period to show some amount of rehabilitation concerning criminal activity. Both AG ¶ 32(a) and AG ¶ 32(d) have some application.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern for alcohol consumption:

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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. 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 whether the individual is diagnosed with alcohol use disorder.

There is evidence to support that Applicant was using alcohol during at least one occasion when he was arrested for domestic violence. There are also references to his using alcohol on several occasions when family members called the police lodging domestic disturbance complaints. AG ¶ 22(a) applies.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(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.

Sufficient time has passed without another alcohol-related incident. AG ¶ 23(a) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is 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.

Based upon the general personal security concern in AG ¶ 15 and the specific concern expressed in AG ¶ 16(c), Applicant's seven arrests for domestic violence offenses and his continued domestic entanglement with FS, often requiring police intervention, as recently as May 2018, raise questions about his reliability, trustworthiness, and judgment.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(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.

Appellant's continuous volatile relationship with FS, even after their divorce, often led to police involvement. These incidents have occurred from 2001 to 2018 and are not minor. His actions cast doubt on his reliability, trustworthiness, and judgment. AG ¶17(c) does not apply. Applicant successfully completed Level A domestic violence group treatment in September 2014. However, because he continues to have disputes with FS, who he allows to reside in his home, which require police involvement, future problems and disturbances are likely to recur, AG ¶ 17(d) does not fully 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 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 considered Applicant's military service. However, I also considered that he has a nearly 20-year relationship with FS that routinely requires police involvement and has included multiple arrests for domestic disturbances. Additionally, Applicant's poor decision to allow FS to remain residing in his home will likely result in continued domestic disturbances requiring police involvement. Although the criminal conduct and alcohol consumption concerns are mitigated, Applicant failed to provide sufficient evidence to mitigate the personal conduct security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guideline E.

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.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b – 2.c:	Against Applicant
Subparagraph 2.d:	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 not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge