



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-00569
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2019

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the financial considerations security concerns, but he did not mitigate the personal conduct and alcohol consumption security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 20, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct), F (financial considerations), and G (alcohol consumption). Applicant responded to the SOR on June 12, 2019, and requested a hearing before an administrative judge. Department Counsel amended the SOR on an indeterminate date. The amendment added an allegation under Guideline F and corrected two allegations under Guideline E. Applicant responded to the amendment on July 28, 2019. The case was assigned to me on August 2, 2019.

The hearing was convened as scheduled on October 29, 2019. Government Exhibits (GE) 1 through 10 were admitted in evidence without objection. Applicant

testified and submitted Applicant's Exhibits (AE) A through E, which were admitted without objection.

Findings of Fact

Applicant is a 58-year-old employee of a defense contractor. He has worked for his current employer since March 2018. He is applying for a security clearance for the first time. He has a bachelor's degree, which was awarded in 1984 and additional credits but no post-graduate degree. He is divorced with one child. (Transcript (Tr.) at 36-37, 50, 55-56; GE 1; AE A)

Applicant went through protracted divorce proceedings from 2011 until the divorce was finalized in 2013. He stated that he "was under tremendous stress during that time and . . . exercise[d] bad judgment." He was arrested in October 2013 and charged with driving under the influence (DUI), with blood alcohol level above .15. He pleaded *nolo contendere* to the charge. He was sentenced to \$1,000 in fines plus additional court costs, 50 hours of community service, and probation for one year. He was required to attend a DUI school and a victim awareness program. He completed all the terms of his probation. (Tr. at 25-26, 34; Applicant's response to SOR; GE 1-4; AE A, C)

Applicant attended outpatient substance abuse counseling from November 2013 through January 2014. He admitted during his intake assessment that he smoked marijuana for relief from his chronic pain associated with fibromyalgia. He stated that he smoked marijuana when he was in college, but then nothing until he turned 50. He stated that from age 50 to 52, he would smoke half a joint for relief from his fibromyalgia. Applicant was 52 years old when he completed the intake assessment. His drug test at admission tested positive for THC, the active ingredient in marijuana. He successfully completed the last of his 12 sessions at the end of January 2014. He was diagnosed at intake and discharge with alcohol abuse and cannabis abuse. (Tr. at 26, 31-32, 37-40; GE 6; AE A, C)

Applicant was arrested in July 2016 and charged with DUI, second offense. He pleaded *nolo contendere* to the lesser charge of reckless driving involving alcohol. He was sentenced to \$919 in fines and court costs, 100 hours of community service, and probation for one year. He completed all the terms of his probation in October 2018. (Tr. at 26-27; GE 1-3, 5; AE A, C)

Applicant denies that he was intoxicated when he was arrested in July 2016. He asserted that he had one drink with dinner five hours before he drove. He attributed his erratic driving to a mechanical problem with his car. He refused to have his breath or blood tested because his previous attorney told him that the tests are inaccurate, and he should refuse to submit to them if he is ever arrested again for DUI. (Tr. at 26-31, 43-44; Applicant's response to SOR; GE 2; AE A, C)

Applicant attended outpatient substance abuse counseling as part of a DUI program from October 2016 through February 2017. He admitted on his intake

assessment that he smoked marijuana about 20 times while he was in college. There is no mention of his more recent use. He remained abstinent during the program. He attended 8 individual sessions and 14 group sessions. He successfully completed the program with a diagnosis of alcohol use disorder, mild, which was later corrected to alcohol use disorder in sustained remission. (Tr. at 35-36, 41-42; GE 2, 7; AE A, C)

Applicant stated that he has not used marijuana since before he started his counseling in November 2013. He asserts that he has learned a costly lesson from his DUIs, and he has benefitted from his counseling. He assured that he only drinks responsibly and that he will never drink and drive again. He signed a statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (Tr. at 31-32, 40-45; Applicant's response to SOR; AE A, C)

The SOR alleges a \$92,288 charged-off mortgage loan; \$11,409 in unpaid federal income taxes for tax year 2015; and 34 delinquent medical debts with balances totaling about \$12,150. Except as addressed below, the allegations are established through credit reports and Applicant's admissions.

Applicant's finances were adversely affected by his divorce, a lay-off from his job in 2014, and a serious medical operation in 2017. As part of his divorce, he was ordered to refinance the mortgage on his home to remove his ex-wife's name from the loan or sell the property, to include a short sale. He was unable to refinance the property, but the creditor agreed to a short sale, which took place in 2016. There is no evidence that the creditor has actively pursued any deficiency on the mortgage loan. (Tr. at 23-24; Applicant's response to SOR; GE 2, 9, 10; Applicant's response to SOR; AE A, C)

Applicant's federal income tax liability for tax year 2015 was \$37,912, but there was only \$1,658 withheld from his paycheck. He made payments totaling \$2,000 in 2016. The IRS withheld \$7,424 from his 2016 refund and \$8,420 from his 2017 refund. He made payments totaling \$400 in 2017. He paid \$5,969 in March 2018 and established a \$500 per month installment agreement. He maintained the payments and the IRS withheld \$5,139 from his 2018 refund. In June 2019, the IRS released the tax lien it had filed against him and indicated that the taxes owed for tax year 2015 had been satisfied. (Tr. at 22; GE 8; AE B, C)

Applicant's surgery in 2017 cost more than \$228,000 in medical bills. He contested the amount of the medical debts because his health insurance placed a \$5,000 limit on his liability. He paid a number of the medical debts and referred other debts to his attorney. He stated that he is willing to pay all the medical debts that are his responsibility. His finances are otherwise in order. (Tr. at 22-25; Applicant's response to SOR; GE 2, 9, 10; AE A, C)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in March 2018. He reported his two DUI arrests; his substance abuse counseling; and a \$9,045 delinquent medical debt. He answered "No" to the question that asked if he illegally used any drugs or controlled substances in the last seven years. He failed to

report his marijuana use between 2011 and November 2013. (GE 1) He denied intentionally providing false information about his marijuana use with the following explanation.

I truly believed at the time that my use was over 7 years earlier. During the intake into counseling, if I were informed that traces of Cannabis were found in my system, I would have been more likely to remember the timeframe. All I recalled, when answering the statement, was that sometime during my divorce which started 2010 and filed in 2011 (7 years earlier), I did on a few occasions exercise poor judgment and use Cannabis. The 2011 date stuck in my mind and hence why my response was such. (Applicant's response to SOR)

Applicant's testimony was consistent in that he asserted he thought his marijuana use was beyond the seven-year window for the question. He stated that he was never informed that he tested positive in November 2013 during his substance abuse counseling, which if he had known might have sparked his memory when answering the question. He stated that "knowing that it was that long ago. I gave myself the benefit of the doubt." (Tr. at 32-35, 45-55)

Applicant responded to Defense Office of Hearings and Appeals (DOHA) interrogatories in March 2019. He answered "No" to the question that asked if he "**EVER**" used any illegal drugs. He denied that the answer was intentionally false. He stated that he misread the question and assumed it was asking about the previous seven years, and he thought his marijuana use occurred more than seven years before his response. (Tr. at 35, 46-47, 51; Applicant's response to SOR)

Applicant submitted documents and letters attesting to his excellent job performance over more than three decades. He stated that he has always been a trustworthy employee and he hopes to be given the chance to prove that he is deserving of a security clearance. (Tr. at 57; Applicant's response to SOR; AE C)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(c), 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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 F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental

health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant has a history of financial problems, including a defaulted mortgage loan, unpaid taxes, and delinquent medical debts. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant's financial problems were primarily related to his protracted divorce and his medical problems. His mortgage loan was resolved with a short sale, with no evidence that the creditor has actively pursued any deficiency on the mortgage loan. He paid his delinquent income taxes and is working to resolve his medical debts. Concerns about Applicant's financial problems are mitigated.

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:

(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a

foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant provided inaccurate information about his marijuana use on his SF 86 and in his response to DOHA interrogatories. He tested positive for THC, the active ingredient in marijuana, during his admission for outpatient substance abuse counseling in November 2013, which was less than four and a half years before he submitted the SF 86 in March 2018. I did not find him credible, and I did not find his explanations that he thought his marijuana use was outside the seven-year reporting window to be worthy of belief. After considering all the evidence, including Applicant's age, education experience, and motive to fabricate, I find by substantial evidence¹ that he intentionally provided false information about his marijuana use on the March 2018 SF 86 and in his March 2019 response to DOHA interrogatories. AG ¶¶ 16(a) and 16(b) are applicable.

Applicant's marijuana use and two alcohol-related arrests reflect questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

SOR ¶ 3.a cross-alleges Applicant's two alcohol-related arrests as well as his financial issues. It is somewhat odd to allege both alcohol and financial concerns under one personal conduct allegation. The alcohol-related arrests are discussed above and also below under Guideline G. The financial issues are discussed above under Guideline F. Applicant's financial issues do not generate any personal conduct concerns. The part of SOR ¶ 3.a that alleges Applicant's financial issues is concluded for Applicant.

SOR ¶ 3.c alleges that Applicant was diagnosed with cannabis abuse during his treatment in November 2013. That information might form the basis of a disqualifying condition if it was alleged under Guideline H (drug involvement and substance misuse), but it does not allege any personal conduct independent of Applicant's marijuana use, which is already alleged in SOR ¶ 3.b. SOR ¶ 3.c is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See, e.g., ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant lied on the SF 86 and in his response to DOHA interrogatories. He has consistently denied that he lied on the SF 86 and in his response to DOHA interrogatories. Having determined that he intentionally omitted information about his marijuana use in an attempt to mislead the government, I have also determined that his explanations that the omissions were unintentional were also false. It would be inconsistent to find his conduct mitigated.² Had he been honest from the beginning, his marijuana use and alcohol-related driving offenses might have been mitigated.

² See ISCR Case 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge's decision to grant Applicant's security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.

However, without complete candor, there are no applicable mitigating conditions and none of the conduct is mitigated.

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 the individual's alcohol use or whether the individual has been 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 two alcohol-related driving offenses. He was diagnosed as part of his outpatient substance abuse counseling in February 2017 with alcohol use disorder, mild, which was later corrected to alcohol use disorder in sustained remission. AG ¶¶ 22(a) and 22(d) are applicable.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. 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.

Applicant completed outpatient substance abuse counseling in January 2014. He had another alcohol-related driving offense in July 2016. He completed his second outpatient substance abuse counseling in February 2017. His diagnosis of alcohol use disorder in sustained remission indicates that he is on the right track. AG ¶¶ 23(b) and 23(d) are applicable. However, concerns about Applicant's reliability, trustworthiness, and judgment raised by his two alcohol-related criminal convictions are not mitigated under the same rationale discussed above under Guideline E. AG ¶ 23(a) is not applicable.

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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines E, F, and G in my whole-person analysis. I also considered Applicant's favorable character evidence. However, that is insufficient to overcome his numerous incidents of questionable judgment and dishonesty.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the financial considerations security concerns, but he did not mitigate the personal conduct and alcohol consumption security concerns.

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 F:	For Applicant
Subparagraphs 1.a-1.jj:	For Applicant

Paragraph 2, Guideline G:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant (except for the part of the allegation that addresses Applicant's finances, which is found For Applicant)
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	For Applicant
Subparagraphs 3.d-3.e:	Against Applicant

Conclusion

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.

Edward W. Loughran
Administrative Judge