



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 19-02685
)
)
Applicant for Security Clearance)

Appearances

For Government:
David F. Hayes, Esquire, Department Counsel

For Applicant:
Pro se

May 28, 2020

Decision

ROSS, Wilford H., Administrative Judge:

Applicant had an alcohol-related arrest in 2018. After his conviction a bench warrant was issued for failure to appear at a subsequent hearing. Applicant also falsified a Government questionnaire on the same topic. Based on a review of the pleadings, and exhibits, national security eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on December 13, 2018. (Government Exhibit 2.) On November 5, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). (Item 1.) The action was taken under

Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing on December 2, 2019 (Answer One); and February 5, 2020 (Answer Two). He requested his case be decided on the written record in lieu of a hearing. (Item 1.) On March 2, 2020, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 to 7, was provided to Applicant, who received the file on March 18, 2020.

Department Counsel submitted seven Items in support of the SOR allegations. Item 3 is inadmissible. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on February 20, 2019. Applicant did not adopt the summary as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation (ROI) summary is inadmissible in the Government's case in chief in the absence of an authenticating witness. (See Executive Order 10865 § 5.) In light of Applicant's admissions, Item 3 is also cumulative. Applicant is not legally trained and might not have understood Department Counsel's FORM commentary, which described the potential admissibility of Item 3. I therefor reviewed it for any potentially mitigating information that Applicant might have thought would be considered. Any such mitigating information will be discussed later in this decision.

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any additional information, or object to the admissibility of any contents of the FORM. The case was assigned to me on May 12, 2020. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 51 and is separated from his wife. He has a bachelor's degree and has worked for his current employer since 2018. Applicant is seeking to obtain a security clearance in connection with his work with the DoD. (Item 2 at Sections 12, 13A, and 17.)

Paragraph 1 (Guideline J: Criminal Conduct)

The Government alleged in this paragraph that Applicant is ineligible for national security eligibility because he has engaged in conduct of a criminal nature. Applicant admitted both allegations in the SOR, with explanations.

Applicant was arrested on September 9, 2018, and was charged with Driving Under the Influence of Alcohol, Driving with Blood Alcohol more than .08%, and Transportation of Liquor. Applicant stated in both of his Answers that he had started blood pressure medication and it had reacted badly with alcohol he had been drinking. He pulled over into a gas station, where he passed out and was later awakened by a police officer.

Police records state that Applicant showed obvious signs of intoxication when he was approached by the police, and had an open can of beer in his car. At the police station Applicant was given a breathalyzer test that showed a blood alcohol level of .146%, far above the .08% legal limit. He was cited for the three offenses mentioned in the SOR. (Item 5.)

Applicant stated in his Answers, "My case was an ongoing situation at the time of the DOD interview [February 20, 2019] that constituted a 'no' answer from me at that time." This statement is incorrect. Court records show that Applicant personally appeared in court on November 29, 2018. He pleaded guilty to Driving with Blood Alcohol more than .08%. The other two charges were *Nolle Prossed*. He was sentenced to 24 months court supervision, to pay a fine, attend ten hours of DUI risk education, and 20 hours of substance abuse education. His court supervision is due to end on November 30, 2020. The court record does not show that Applicant completed any part of his sentence and a bench warrant was issued on March 16, 2019, for failure to appear. (Item 6.)

Applicant stated in his Answers that he moved and that his attorney told him that he would not have to appear further. The record shows the court received a change of address from the Applicant on November 30, 2018. Applicant indicated in Answer One, and again two months later in Answer Two, that he would be following up with his attorney to resolve the matter. There is no evidence that he did so. (Item 6.)

Paragraph 2 (Guideline E: Personal Conduct)

The Government alleged in this paragraph that Appellant is ineligible for clearance because he falsified material facts during the clearance screening process.

Applicant filled out his e-QIP on December 13, 2018. Section 22 of the e-QIP asked, "Have you **EVER** been charged with an offense related to alcohol or drugs?" (Emphasis in original.) Applicant responded, "No." This was a false answer to a relevant question about Applicant's criminal history. (Item 2.)

In Answer Two Applicant basically stated that he could not admit or deny this allegation because it had not been "verified." He went on to say that his case was an ongoing situation and he could not answer yes or no.

This explanation is rejected for two reasons. First, Applicant's explanation is not reasonable. The question is not subject to misinterpretation. He was arrested, charged,

and convicted of Driving with Blood Alcohol more than .08% two weeks before filling out the e-QIP.

Second, Applicant also falsified the e-QIP when he answered, “No,” to two other questions under Section 22. Specifically, Applicant was asked whether he had been arrested within the past seven years. He was also asked whether he had been charged, convicted or sentenced of a crime in any court in the past seven years. While these falsifications cannot be used as disqualifying matters in the case in chief because they were not alleged in the SOR, I find that his conduct evidences an intent to deceive with respect to the alleged falsification, and greatly weakens the credibility of his explanation.

Applicant did not submit any evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant’s national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (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.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. Three conditions apply:

- (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
- (c) individual is currently on parole or probation.

Applicant had an alcohol-related criminal incident in September 2018. He is currently under court supervision until at least November 2020 for this conviction. He submitted no evidence showing that he had completed any of the terms of his sentence. In addition, there is a bench warrant for his arrest for failure to attend a required post-conviction court appearance. No evidence was submitted that the warrant has been cleared.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns:

- (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;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; 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 was seriously intoxicated when he was arrested. He has not submitted evidence showing that he has completed any of his sentence. Of particular concern is the fact that he is still under court supervision and there is an outstanding bench warrant. There is insufficient evidence to make a positive decision in Applicant's favor. Guideline J is found against Applicant.

Paragraph 2 (Guideline E: Personal Conduct)

The concern under this guideline 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying condition is applicable under AG ¶ 16:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant knowingly falsified his e-QIP personnel security questionnaire concerning his criminal conduct. He did this, moreover, only two weeks after pleading guilty to the relevant charge in court.

The following conditions are not mitigating under AG ¶ 17:

(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; and

(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.

Applicant did not provide a coherent, believable excuse for his denial of and failure to disclose his DUI arrest and conviction as required. The evidence establishes that Applicant deliberately falsified, omitted and concealed this relevant information. Guideline E 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(d), the ultimate determination of whether to grant national security 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 pertinent facts and circumstances surrounding this case. Applicant has not mitigated the security significance of his criminal conduct and related falsification of a government questionnaire on the same topic. Overall, the record evidence creates substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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 national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge