



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



In the matter of:)
)
) ISCR Case No. 19-02046
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Bruce R. Heurlin, Esq.

11/03/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On October 28, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. 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 December 13, 2019, and requested a hearing. The case was assigned to me on March 2, 2021. The scheduling of the case was

delayed because of the COVID-19 pandemic. On June 24, 2021, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for July 28, 2021. I convened the hearing as scheduled using the video capabilities of the Defense Collaboration Services. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through M, which were admitted without objection. Applicant's exhibit lists were marked as HE II and III. DOHA received the hearing transcript (Tr.) on August 5, 2021.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a and 2.b, with explanations. He denied SOR ¶ 2.a. 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 48 years old. He has worked for defense contractors since April 2010. He worked for contractor-one (C1) from 2010 to May 2017; he worked for contractor-two (C2) beginning in June 2017 and lasting until August 2017 (C2 took over the contract C1 previously held); and in August 2017, he started working for contractor-three (C3), for whom he continues to work. He reported in his 2017 security clearance application (SF-86) that he held a security clearance beginning in 2010. He holds a bachelor's degree in electrical engineering and is currently working on a master's degree. He is single, never married, and has one adult child. (Tr. 31, 38-40, 77; AE1, 3)

The SOR alleged, under Guideline J, that in October 2016, Applicant was charged with four felony drug-related offenses and that he ultimately pleaded guilty to one charge of facilitation to possess marijuana for sale, a class 6 felony. (SOR ¶ 1.a) It also alleged, under Guideline E, the same conduct alleged under Guideline J (SOR ¶ 2.b) and that he failed to timely report his October 2016 arrest and his May 2017 conviction to his employer, as required. (SOR ¶ 2.a).

Applicant admitted pleading guilty to the class 6 felony (the lowest degree felony under state law (See A.R.S. § 13-702)) drug facilitation charge on May 12, 2017. A judgment of conviction was entered that day. The arrest that resulted in this conviction occurred on October 21, 2016. He was sentenced to six months' probation, fees and fines. He was represented by a criminal defense attorney on these charges and was advised by counsel not to disclose his arrest to his employer until after a judgment was entered, which turned out to be May 12, 2017. He successfully completed his probation and on December 19, 2017, his conviction was set aside. (Tr. 28, 39-40; GE 4; AE J)

The underlying facts that led to Applicant's plea and conviction are that on the morning of October 21, 2016, while Applicant was asleep in his home, law enforcement personnel raided his home possessing a search warrant. A search of an inoperable vehicle in his garage resulted in finding a large quantity of marijuana and some cocaine. Applicant claimed he had no knowledge of drug activity at his home. He had recently been out of town attending a pro football game and his work location was approximately

70 miles from his home so during the week he stayed at a rented room he had at his work location. Additionally, he had given out three keys to his house to friends because he had been burglarized before when he was away. Despite these facts and upon the advice of his attorney, he entered into a plea agreement where three charges were dismissed and he pleaded to the facilitation charge. Before he agreed to the plea, his attorney advised him that because the law of the state created a legal presumption that home and car owners were presumed to know the contents of their homes and cars, it would be difficult to win at trial with an argument that he had no knowledge of the drug activity. (Tr. 45-57)

The record contains no evidence of any prior drug activity by Applicant and he testified that he has not been involved with any drug or criminal activity since his conviction in May 2017. (Tr. 50, 82)

To understand the sequence of events as they impact the allegation that Applicant failed to report his arrest and conviction, I find the following timeline existed:

April 2010 to May 31, 2017--Applicant was employed by C1. (GE 1);

October 21, 2016--Applicant arrested at his home on drug charges. (GE 5);

After the October 2016 arrest--Applicant's attorney advised him not to disclose the arrest until after judgment was entered on his plea agreement. (Tr. 59);

May 12, 2017--Applicant pleaded guilty to the facilitation charge and a judgment was entered against him. (GE 4);

May 31, 2017--Applicant completes a job application and background check for C2, who has replaced C1 on the government contract Applicant is working on. In the application, Applicant disclosed that he was convicted of facilitation and that he was sentenced to six months' probation and fines. He listed the place of the conviction and offered to provide more information, if needed. (Tr. 59; AE K);

June 1, 2017--Applicant is hired by C2 (Tr. 79; GE 3 (p.7));

August 1, 2017--Applicant is hired by C3, his current employer. No employment application is offered into evidence. Applicant testified that he filled out an application, which did not include a request to supply any criminal history. There was no evidence to the contrary. (Tr. 65-66);

August 2, 2017--C3 is made aware of Applicant's October 2016 arrest when Applicant's common access card (CAC) is stolen and needed

replacing. The information was apparently supplied by C2 to the security office of C3. Applicant was questioned by a C3 employee about why he could not be issued a new CAC. Applicant disclosed the October 2016 criminal incident. (GE 2);

August 3, 2017—A Joint Personnel Adjudication System (JPAS) incident report prepared for the database. (GE 2);

December 21, 2017—Applicant completes his SF 86 as an employee of C3. He details his arrest and conviction in the document. (GE 1)

No evidence was presented nor request for administrative notice made about any employer rule, procedure, or practice; or government regulation or rule that created the duty for Applicant to report his criminal history to his employer.

Applicant presented evidence showing that he has received numerous work awards, been selected for employer-sponsored training, and his interim 2019 work appraisal stated that he had an excellent work ethic. He is a contributor to his local community, to include providing monetary donations to his church and by volunteering to help with disabled veterans' activities. (AE C-F; SOR Answer)

Applicant also presented character letters from a work supervisor, a coworker, two pastors, and two personal friends. They vouch for his professionalism, integrity, and dependability. His work supporters request granting of his clearance. His pastors and friends describe him as a good person whom they trust unconditionally. (AE L)

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 four drug offenses in October 2016, for which he pled guilty to one facilitation charge and was convicted and sentenced to probation in May 2017. 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's criminal charge occurred over five years ago. Since then he has not had any additional criminal allegations against him. He successfully completed his probationary term without incident and his conviction was set aside in 2019. He is pursuing a master's degree program. He is active in his community. These are sufficient activities and this is a sufficient period to show his productive rehabilitative efforts. Both AG ¶ 32(a) and AG ¶ 32(d) apply.

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:

(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;

(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; and

(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.

SOR ¶ 2.a alleged that Applicant failed to timely report his October 2016 arrest and his May 2017 conviction to his employer as required. It is clear from the plain language of AG ¶¶15 and 16 that those provisions apply when a person is undergoing the “national security investigative or adjudicative processes.” Applicant was not going through those processes at the time of his arrest or his conviction. The Government has failed to establish by evidence or administrative notice that there was some other duty established by either an employer or the Government that required Applicant to report this information. Even if there were such a duty, there is also no evidence that Applicant was made aware of that duty. Finally, Applicant **did report** his criminal history in his employment application in May 2017 when he applied for a position with C2. Additionally, he fully reported this information when he completed his SF 86 for C3 in December 2017. The evidence presented shows that these are the first two occasions he had to inform his employer about his criminal history that fell within the “national security investigative or adjudicative processes.” Therefore, AG ¶¶ 15 and 16(a)-16(c) do not apply to SOR ¶ 2.a.

Concerning SOR ¶ 2.b, which is a cross-allegation of his criminal conviction as personal conduct, based upon the general personal security concern in AG ¶ 15 and the specific concern expressed in AG ¶ 16(c), Applicant’s conviction raises 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.

For the same reasons expressed above in the application of the criminal conduct mitigating conditions, Applicant has mitigated the personal conduct concerns under AG ¶ 17(c)

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 the evidence of Applicant's good character, his community involvement, his successful completion of probation, and his clean record since his conviction. The criminal conduct and personal conduct security concerns are mitigated.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated all the 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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - .2.b:	For Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge