



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



In the matter of:)
)
) ADP Case No. 20-01709
)
Applicant for Public Trust Position)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the criminal conduct or alcohol consumption concerns. Disqualification conditions under personal conduct concerns were not established. Eligibility for access to sensitive information is denied.

Statement of the Case

On November 20, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline J, criminal conduct; Guideline G alcohol consumption; and Guideline E, personal conduct. DCSA CAF acted under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on December 10, 2020, and requested a hearing. Processing of the case was delayed because of COVID-19. The case was assigned to me on July 13, 2021. I first notified Applicant of his upcoming hearing by email on July 27, 2021. (See Hearing Exhibit (HE) III) The Defense Office of Hearings and Appeals

(DOHA) issued a notice of hearing on August 9, 2021, and the hearing was held as scheduled on August 19, 2021. This hearing was convened using the Defense Collaboration Services (DCS) video teleconferencing capabilities. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government's exhibit list and discovery letter were marked as hearing exhibits HE I and II. Applicant testified but offered no exhibits (he provided attachments to his SOR answer, which were considered as a part of the answer). DOHA received the hearing transcript (Tr.) on August 27, 2021.

Findings of Fact

Applicant admitted some of the SOR allegations, with explanations (SOR 1.a, 1.c, 1.d, 2.a, and 3.a), and he denied others (SOR 1.b and 3.a-3.c). His admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 49-year-old employee of a federal contractor. He has worked for this employer since November 2017. He is a high school graduate. He married in 1996 and divorced in 2012. He has three children from this marriage, ages 24, 20, and 14. (Tr. at 5, 20, 26-27; GE 1)

The SOR alleged, under Guidelines J and G, that Applicant was involved in four alcohol-related arrests between 2002 and 2019 (SOR ¶¶ 1.a-1.d, 2.a). The SOR also alleged, under Guideline E, that he falsified his August 2019 Electronic Questionnaires for Investigation Processing (e-QIP) when he failed to list his previous arrests as required by the questions (SOR ¶¶ 3.a-3.b). The criminal conduct was also multiplicatively pleaded in SOR ¶ 3.c. The allegations are supported by a September 2019 federal arrest report, statements to a defense investigator during his background investigation in October 2019, admissions he made in his answers to interrogatories in May 2020, and his December 2020 SOR answer. (GE 2-4; SOR Answer)

Applicant described his alcohol history as beginning when he was either 18 or 19 years old. He increased his amount of consumption in approximately 1996 after he married. When he was approximately 26 years old he abstained from alcohol use for religious reasons. This lasted until he was 30 years old. (Tr. at 27-29)

The four alcohol incidents are described below:

2002 Driving Under the Influence (DUI) arrest. Applicant could not recall the details of this arrest. He admitted the conduct in his SOR answer. (Tr. at 33; GE 2-3; SOR answer)

2011 Disorderly Conduct; Intoxication by Alcohol or Drugs; DUI arrest. Applicant could not recall the details of this arrest. He believed he received a ticket for disorderly conduct. He denied the conduct in his SOR answer. A federal arrest report describes the arrest and it appears that only the disorderly conduct and intoxication offenses went to court. (Tr. 40-41; GE 2, 4; SOR answer)

2014 DUI, Driving on Suspended License, Failure to Appear, and other related charges. Applicant described being stopped by law enforcement while having a wine cooler in his car. A federal arrest report describes the arrest. (Tr. 40-41; GE 2, 4; SOR answer)

2019 DUI. Applicant described having several glasses of wine and bourbon whiskey at a friend's house in June 2019. After he left the house, he was stopped by law enforcement for having tinted windows. During his October 2019 interview with a defense investigator, he recalled taking a breathalyzer test, which showed a result of .08 percent blood alcohol. During his hearing testimony, he recalled that he declined the breathalyzer test. He admitted committing this offense in his SOR answer. He was convicted and, among other things, he was sentenced to four years' probation. He remains on probation. (Tr. 37-39; GE 2-4; SOR answer)

Applicant offered a progress report from the court showing he had completed approximately 63 hours of education and counseling sessions as of October 2020. He also provided a compliance form showing he had attended a victim-impact panel in August 2020, as required by his sentence. He has not participated in any alcohol treatment programs and he also does not participate in Alcoholics Anonymous (AA). He claims he has not consumed alcohol since his June 2019 arrest. He claims he uses meditation to control any urge to consume alcohol. (Tr. at 56-47; SOR answer)

Applicant listed his 2019 DUI arrest when he completed his SCA in August 2019. He did not list the earlier alcohol-related offenses (2002, 2011, 2014). He testified that he was under pressure to complete his e-QIP and did not recall the earlier incidents, which is why he failed to list them. (Tr. at 23, 26, 33, 44-45; SOR answer)

Policies

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline J, Criminal Conduct

The trustworthiness 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 trustworthiness 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 alcohol-related offenses between 2002 and 2019. 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 recent arrest for DUI in 2019 takes his series of arrests out of the context of remote. Since he still remains on probation, it is too soon to tell whether rehabilitation efforts have been successful. Neither AG ¶ 32(a) nor AG ¶ 32(d) apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the trustworthiness 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 trustworthiness 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.

Applicant was arrested and charged with four alcohol-related offenses between 2002 and 2019. I find that the stated disqualifying condition 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.

Applicant's recent arrest for DUI in 2019 takes his series of arrests out of the context of remote. Since he still remains on probation, it is too soon to tell whether rehabilitation efforts have been successful. AG ¶ 23(a) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct trustworthiness 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 trustworthiness concern and may be disqualifying in this case. 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 national security eligibility or trustworthiness, or award fiduciary responsibilities; 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.

Applicant's failure to list his 2002, 2011, and 2014 arrests was not done with the intent to deceive. Had that been the case, he would have also failed to list his 2019 arrest. A faulty memory is more likely the cause of the omissions. AG ¶ 16(a) does not apply to SOR ¶¶ 3.a-3.b. Applicant's alcohol-related criminal conduct was alleged under both Guidelines J and G, therefore, also alleging it under guideline E makes such allegations multiplicitous. AG ¶ 16(c) does not apply to SOR ¶ 3.c. Guideline E disqualifications were not established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information 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 access to sensitive information must be an overall commonsense assessment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and G in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's contractor service and his compliance with his probationary requirements to date. However, Applicant has had four alcohol incidents ranging from 2002 to 2019. He remains on probation for the 2019 DUI conviction. At this point, it is too soon to tell whether he will remain abstinent from alcohol in the future. His trustworthiness and reliability have not been established.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for access to sensitive information. For all these reasons, I conclude Applicant has not mitigated the alcohol consumption or criminal conduct trustworthiness concerns. Personal conduct concerns were not established.

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:	AGAINST APPLICANT
Subparagraphs: 1.a – 1.d:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph: 2.a:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph: 3.a – 3.c:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for access to sensitive information. Eligibility for access to sensitive information is denied.

Robert E. Coacher
Administrative Judge