



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-01377
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2022

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct), G (alcohol consumption), and J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On September 30, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, G, and J. Applicant responded to the SOR and requested a hearing before an administrative judge. The case was assigned to me on January 18, 2022.

The hearing was convened as scheduled on February 2, 2022. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant’s Exhibits (AE) 1 and 2, which were admitted without objection. The record was held open for Applicant to submit additional documentary evidence. Applicant submitted an email with attached documents that could not be opened. He then replied: “These documents are actually irrelevant I believe. My apologies. I have nothing else to show.”

Findings of Fact

Applicant is a 27-year-old employee of a defense contractor. He has worked for his current employer since about June 2020. He has a 10% service-connected disability rating for his honorable service in the U.S. military from April 2014 to December 2014. He served in the National Guard until he was discharged with a general discharge under honorable conditions in 2018. He has a bachelor's degree. He has never married and he has no children. (Transcript (Tr.) at 16, 20-21; GE 1, 2; AE 2)

Applicant has a history of criminal offenses, primarily alcohol related. He was arrested in 2015 and charged with assault. Alcohol was not a factor in this charge. He explained that he had an argument with his roommate and pushed him. His attorney was apparently able to negotiate a plea bargain to a less serious offense. Applicant claims it was littering. (Tr. at 23-26; Applicant's response to SOR; GE 2, 4)

Applicant was arrested in September 2016 and charged with driving while intoxicated (DWI). The police report of the incident shows that Applicant took a breathalyzer test that registered .19% blood alcohol concentration (BAC), more than double the legal limit. He pleaded guilty in December 2016 and was sentenced to probation for two years. (Tr. at 33-36; Applicant's response to SOR; GE 2, 3, 5)

Applicant broke both of his wrists in a motorcycle accident in about 2017 after he had been drinking. He was able to walk away from the accident and was taken to the hospital by a passing truck driver. There was no police involvement, and he was never charged. (Tr. at 17-18, 22-23, 36-39; Applicant's response to SOR; GE 2)

Applicant was drunk in February 2020 and had an argument with a friend at the friend's house. The friend told Applicant to leave. After leaving, Applicant "keyed" the friend's car and the friend's girlfriend's car. Applicant testified that he had about three to four beers over a period of a couple hours and that he felt "buzzed," but not intoxicated. He did not feel that alcohol was a factor in his conduct because he "was super mad, and [he] would have done it even if [he] was sober." His testimony is inconsistent with his statement to a background investigator in August 2020 that he was super drunk during the incident. (Tr. at 38-42; Applicant's response to SOR; GE 2, 3)

An arrest warrant was issued, and Applicant was charged with two felony counts of property damage. Pursuant to a plea bargain, in about February 2022, he pleaded guilty to two misdemeanor counts of property damage. He was required to make restitution of \$1,625 and \$1,490 to the two victims, and he was sentenced to probation for one year. Terms of the probation included no contact with the victims and payment of court costs. (Tr. at 15, 38-41; Applicant's response to SOR; GE 2, 3, 6, 7; AE 1)

Applicant testified that he has not had any alcohol since the incident in February 2020. He admitted that he told a background investigator in August 2020 that he continued to regularly drink until shortly before the interview. He testified that he lied to the investigator when he told the investigator that he had been drinking when actually

he had not. He did not like his team at work, and he thought if he did not receive a clearance he would be transferred to another team. (Tr.at 43-46; GE 2)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in June 2020. He failed to report any of his criminal arrests or charges under any of the pertinent questions. (Tr. at 29-30; GE 1)

Applicant was interviewed for his background investigation in August 2020. When asked if he had been arrested within the last seven years, if he had ever been charged with a felony, and if he had ever been charged with a drug or alcohol-related offense, he answered “no” to each question. He discussed his 2016 DWI after being specifically confronted with it. He stated that he did not report the DWI on the SF 86 and discuss it with the investigator because he did not know if it would show up on a records check. Applicant then also discussed his 2015 and 2020 offenses. He stated that he did not report the 2020 arrest and charges on the SF 86 because he thought if his current employer knew about the charges, he would not have been hired. (Tr. at 30-32; GE 1, 2)

Applicant denied intentionally providing false information on the SF 86. In his response to the SOR, he wrote that he “did not fully understand what charge meant,” and that he thought that since he had a lawyer and the charges were reduced, he was not being charged at the time. When asked at hearing why he did not report that he had been arrested, he testified: “I believe negligence of the law. I thought - - I felt like I was just being like in a hold, and I hadn’t gotten arrested yet, like until my case got to trial.” He testified that he thought the 2016 DWI charge had been reduced to littering. Other than Applicant’s testimony, there is no evidence that the DWI charge had been reduced to littering. Applicant could not explain why he did not report a conviction for littering. (Tr.at 14-15, 27-30, 33-34, 46-47; Applicant’s response to SOR; GE 2)

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 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 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

I have considered all the evidence, including Applicant's age, education and background; his admission to the background investigator that he did not report the 2020 arrest and charges on the SF 86 because he thought if his current employer knew about the charges, he would not have been hired; his testimony that he lied to the background investigator about his drinking so that he would not receive a clearance and be transferred to another team; the relatively straightforward nature of the questions; Applicant's motive to fabricate; and his less than credible testimony.

I conclude that Applicant intentionally provided false information on the 2020 SF 86, and specifically in response to questions that asked if he had ever been charged with any felony offenses and if he had ever been charged with an offense involving alcohol or drugs. AG ¶ 16(a) is applicable.

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

(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 denied that he lied on the SF 86. Having determined that he intentionally omitted information about his criminal conduct 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.¹

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 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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant was arrested in September 2016 with a .19% BAC and charged with DWI. He broke both of his wrists in a motorcycle accident in about 2017 after he had been drinking. He was drunk in February 2020 and "keyed" his friend's car and his friend's girlfriend's car. The above disqualifying conditions are applicable.

¹ 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.

There is no evidence that alcohol was a factor in the 2015 assault charge. SOR ¶ 1.b is concluded for Applicant.

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 provided inconsistent statements about his drinking. He told a background investigator in August 2020 that he had continued to regularly drink until shortly before the interview. He testified that he has not had any alcohol since the incident in February 2020. He then testified he lied to the investigator so that he would not receive a clearance. I have no confidence in any of Applicant's testimony. None of the mitigating conditions are sufficient to overcome concerns about his alcohol use, reliability, trustworthiness, and judgment.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. 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 individual was formally charged, prosecuted, or convicted.

Applicant's alcohol-related conduct is cross-alleged under criminal conduct. He was also arrested for assault, which was not alcohol related. The above disqualifying condition is applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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 several criminal offenses; he is on probation until February 2023; and he cannot be trusted to tell the truth. I am unable to determine that criminal conduct is unlikely to recur. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. I have unmitigated concerns under the same rationale discussed in the alcohol consumption analysis.

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, G and J in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not

mitigate the personal conduct, alcohol consumption, and criminal conduct 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 G:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.d:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	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