



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



In the matter of:)
)
) ISCR Case No. 23-01559
)
)
Applicant for Security Clearance)

Appearances

For Government: Adriene Driskill, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2024

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On September 12, 2022, Applicant submitted a security clearance application (SCA). On October 19, 2023, the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines J (Criminal Conduct), and E (personal Conduct). The action was taken under Executive Order (EO) 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 (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on November 11, 2023, and requested a hearing before an administrative judge. The case was assigned to me on February 6, 2024. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on February 9, 2024. I convened the hearing as scheduled on March 13, 2024. At the hearing, I granted Department Counsel’s request to amend the SOR by

adding “Paragraph 3, Guideline G, Excessive Alcohol Consumption often leads to exercise of questionable judgment or the failure to control impulses and can raise questions about an individual’s reliability and trustworthiness. Available information raising this concern shows that: Subparagraphs 1.a.~1.e., above.” Applicant had no objection to this amendment. (Transcript of the hearing (TR) at page 38 lines 1~11.) The Government offered Government Exhibits (GXs) 1 through 8, which were admitted without objection. Applicant testified on his own behalf. DOHA received the TR on March 22, 2024. The record was left open until April 19, 2024, for the receipt of additional evidence. Applicant offered nothing further. The record closed at that time.

Findings of Fact

Applicant admitted to all the allegations in the SOR, as amended. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 43-year-old employee of a defense contractor. He has been employed with the defense contractor since about March of 2015. He has held a security clearance since about 2010. He is divorced and has two minor children. (TR at page 14 line 10 to page 16 line 17, and GX 1 at pages 5, 10, 16, 18 and 29~30.)

Guideline J: Criminal Conduct & Guideline G: Alcohol Consumption

These allegations will be discussed in chronological order:

1.e. and 3.e. In January of 2006, Applicant was arrested for and pled guilty to Driving Under the Influence (DUI) of alcohol. His blood alcohol content was .13. (TR at page 34 line 16 to page 35 line 12, and GX 8.) Applicant was fined and sentenced to eight days of confinement, which was suspended for five years. (GX 8 at page 6.)

1.d. and 3.d. In July of 2006, about six months later, Applicant was arrested for and pled guilty to a Hit and Run with injury, and making a False Report of Crime to the police. He had been drinking alcohol, and “did a wheely” on his motorcycle causing a female passenger to fall off and be slightly injured. Applicant left his motorcycle at the scene of the alcohol related incident, and falsely reported that his motorcycle had been stolen. (TR at page 31 line 14 to page 34 line 15, and GX 7.) He was fined and placed on summary probation for 3 years. (GX 7 at page 3.)

1.c. and 3.c. In December of 2013, Applicant was arrested for and charged with Possession of a Controlled Substance, and with Public Intoxication. An empty bag that had held cocaine was found on his person. Prosecution was deferred and Applicant was placed on probation with the proviso that he return to court in May of 2015, to determine if the conditions of probation had been fulfilled. Appellant failed to return to court; and as a result, a still-outstanding warrant was issued for his arrest. (TR at page 26 line 14 to page 31 line 13, and GX 6 at page 10.)

1.b. and 3.b. In April of 2015, Applicant was arrested for and found guilty of Evading an Officer and Reckless Driving. He had been drinking alcohol, and riding his motorcycle. He evaded initial arrest by the police by driving his motorcycle “at speeds of over 140 miles per hour.” Applicant served 90 days in jail, and was fined \$5,000. (TR at page 20 line 20 to page 26 line 13, and GX 5.)

1.a. and 3.a. Most recently, in May of 2019, Applicant was arrested for and found guilty of DUI, a Misdemeanor. At the time of his hearing, Applicant was still on probation as a result of this conviction. (TR at page 17 line 9 to page 20 line 19, and GX 4.)

Applicant testified that he last consumed alcohol at a wedding in 2020, and does not intend to consume alcohol in the future. (TR at page 39 line 20 to page 45 line 18.)

Guideline E: Personal Conduct

2.a. In answer to “Section 22 – Police Record (EVER),” Applicant failed to disclose any of his above-mentioned five alcohol related criminal charges and convictions. (TR at page 35 line 13 to page 36 line 13, and GX 1 at page 27.) I find this to be a willful falsification.

Policies

When evaluating an applicant’s suitability for national security eligibility, 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 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. 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, an “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 applying for national security eligibility seeks to enter 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, “[a]ny 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

Guideline J: Criminal Conduct

AG ¶ 30 sets forth the security concerns pertaining to criminal conduct:

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 three conditions that could raise a security concern and may be disqualifying in this case:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (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; and
- (c) individual is currently on parole or probation.

Applicant has five arrests and four convictions spanning the period from January 2006 to May 2019. At the time of his hearing, he was still on probation following his last conviction, and the warrant that was issued as the result of his December 2013, deferred prosecution is still outstanding. The evidence establishes the above three disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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.

Neither of these apply. As noted above he may still be on probation, and has an outstanding warrant issued for his arrest. The evidence does not establish mitigation under either of the above conditions. Criminal Conduct is found against Applicant.

Guideline E: Personal Conduct

The security concern relating to the guideline for Personal Conduct 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 guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(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 falsified his September 2022 SCA. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

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

(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.

None of these apply. Applicant willfully falsified his SCA when he failed to divulge any of his five arrests and four convictions. Personal Conduct is found against Applicant.

Guideline G: Alcohol Consumption

The security concern relating to the guideline 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 at AG ¶ 22 contains seven conditions that could raise a security concern and may be disqualifying. Two conditions may apply:

(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 has five alcohol-related incidents between 2006 and 2019. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline at AG ¶ 23 contains four conditions that could mitigate security concerns. Two conditions may apply:

(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; and

(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.

Applicant has ceased the consumption of alcohol. He last consumed alcohol at a wedding in 2020 at a wedding, about four years ago. Alcohol Consumption is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guideline J, E, and G in my whole-person analysis. Applicant failed to establish rehabilitation, or that his pattern of serious misconduct was unlikely to continue. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility

and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Criminal Conduct and Personal Conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a.-1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraph 3.a:	For 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 Applicant eligibility for a security clearance. National security eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge