



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



In the matter of:)
)
) ISCR Case No. 14-00179
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: Kent Morgan, Esquire

11/21/2014

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on June 20, 2013. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on April 2, 2014, detailing security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. The action was taken under Executive Order 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 For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on April 10, 2014, and he answered it on May 14, 2014. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on July 16, 2014. DOHA assigned this case to another administrative judge on July 17, 2014. For workload considerations, DOHA reassigned the case to me on August 19, 2014. DOHA issued a Notice of Hearing on September 5, 2014, and I convened the hearing as scheduled on September 29, 2014. The Government offered five exhibits (GE) marked as GE 1 through GE 5, which were received and admitted into evidence without objection. Applicant and four witnesses testified. He did not submit any exhibits at the hearing. I held the record open until October 10, 2014, for Applicant to submit additional matters. Applicant timely submitted one exhibit, which is marked as AE A and has been received and admitted without objection. The record closed on October 10, 2014. DOHA received the hearing transcript (Tr.) on October 15, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.e of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶ 2.a of the SOR.¹ He also provided additional information to support his request for eligibility to retain a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 57 years old, works as an electronic test engineer for a DOD contractor. Applicant has worked for his employer since July 2003. There is no evidence that he mishandled classified information or that his employer has disciplined him. He has held a security clearance since September 2005.²

Applicant's team leader for three years, his technical liaison, who has known him for 15 years, and the manager for test operations testified. Each describe him as trustworthy, dependable, and a hard worker. They verified that he had not had any security infractions. They were aware of some of the SOR allegations, but not all of the allegations. All recommended him for a security clearance³

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 22-24, 56.

³Tr. 100-127.

Applicant graduated from college with an associate's degree in 1986 and a bachelor's degree in 1989. Applicant and his wife married in August 1983 and divorced in November 2006. They remarried in April 2013. They have five children, ages 30, 29, 27, 24, and 21.⁴

Criminal Conduct - Driving While Impaired⁵

In 2008, Applicant worked the late or second shift at work. He returned home at the end of his work shift, but found it difficult to sleep during the day. His physician prescribed Ambien, a sleeping medication. Applicant understood that he should not drive for six to eight hours after taking this medication. On August 14, 2008, after he woke up, Applicant drove to the grocery store. He believed he had complied with the recommended restriction on driving. On his way to the store, he rear-ended a car. No one was injured in this accident. The police investigated and charged him with driving under the influence of alcohol (DUI). Applicant failed the field sobriety test, which he believes was due to his back and knee surgeries. The breathalyzer test results were negative for alcohol. Applicant appeared in court in February 2009 and pled guilty to a reduced charge of driving while impaired (DWI), a class B misdemeanor. The court sentenced him to community service, fined him \$1,000, and placed him on probation. He complied with the terms of his sentence and completed probation.⁶

In April 2011, while still working the second shift, Applicant continued to use Ambien. On April 25, 2011, Applicant drove to work. He hit gravel in the center median of a road. A police officer observed this incident and stopped him. He again failed the field sobriety test, and the police officer charged him with a class B misdemeanor DWI not related to alcohol. Applicant pled guilty to DWI on September 12, 2011. The court sentenced him to 180 days in jail, which was suspended; the court fined him \$1,000; and the court placed him on probation for 12 months. He complied with the terms of his sentence and completed probation. Applicant advised that he no longer works the second shift and that he has moved closer to work.⁷

Criminal Conduct - Retail Theft

Applicant shopped at a local retail store on November 19, 2010. Store security personnel observed him opening packages with knives and removing the knives, then placing the packaging and knives in different parts of the store. Store security did not file a report of this incident nor did they detain Applicant as he left the store. On November

⁴GE 1; GE 2; Tr. 56-58, 130-131.

⁵Between December 1975 and March 1981, Applicant was arrested and charged with a number of misdemeanor offenses related to alcohol, marijuana, and reckless driving. None of these arrests are listed in the SOR as a security concern. GE 5.

⁶GE 1; GE 2; GE 5; Tr. 26-27, 46-49, 51-52, 65-69, 84.

⁷GE 5; Tr. 46-52, 65-68, 94-96.

30, 2010, Applicant returned to the same retail store. Store security again observed Applicant select two knives, open the packaging, and conceal the packaging on a shelf before exiting the store. He returned a short time later in slightly different clothing. Store security saw Applicant return to the location where the open knife packaging had been placed, put something in his hand, and conceal it on his person. Store security called the local police department. Police officers arrived shortly thereafter. The retail store wanted to pursue theft and damaging property charges against Applicant. After receiving the Miranda warning, Applicant talked with the police officer and told the officer that he had taken two knives the prior week. At the hearing, Applicant denied an intent to shoplift, but agreed that he damaged property. He stated that he opened the packages to check for defects because he had previously purchased defective knives and other items at the store.⁸

As a result of the above incidents, the police filed two class B misdemeanor retail theft charges against Applicant, which received two court case numbers. Applicant failed to appear for his review hearing on December 22, 2010, and the court issued a warrant for failure to appear. Applicant contacted the court on January 4, 2011 to schedule a court date. The docket sheet reflects that Applicant was booked on the warrant on January 11, 2011, which resulted in the warrant being recalled on January 12, 2011, and Applicant being released from the lockup. At the March 2011 pretrial conference, the court dismissed the retail theft charge in one case, and Applicant pled guilty to the retail theft charge in the second case on April 5, 2011. The court fined him. The rest of his sentence is unknown. There is no evidence that he violated probation.⁹

In January 2011, Applicant again entered a retail store and opened packages. He did not purchase these items. The police arrested and charged him with criminal mischief. He pled guilty to damaging property, a class C misdemeanor on February 9, 2011. The court fined him \$200; sentenced him to 90 days in jail, which was suspended; and placed him on probation for 12 months. He complied with the terms of his sentence and completed probation.¹⁰

At another retail store on June 7, 2012, Applicant took a package of fishing line and placed it in his pocket even though he had the ability to pay for it. He was stopped by store security after he left the store. The police charged him with two counts of retail theft (shoplifting). Applicant pled not guilty to the charges. At trial on August 29, 2012, the court found Applicant guilty of both class B misdemeanor charges and scheduled sentencing for September 19, 2012. The court sentenced him to 180 days in jail for each count to be served consecutively and placed him on 18 months of supervised probation. Following a review hearing on September 26, 2012, the court ordered Applicant released from jail, placed him in the work diversion program, and placed him

⁸GE 4; GE 5; Tr. 30-31, 71-72.

⁹GE 2; GE 5; Tr. 34-39.

¹⁰GE 5; Tr. 36-39.

on GPS monitoring for six months. The court allowed Applicant to return to work during the week and placed him on weekend home detention. The court released Applicant from custody on January 9, 2013, and his probation ended on March 25, 2014. Applicant's 2012 arrest occurred more than 12 months after his February 2011 sentencing.¹¹

When Applicant completed his e-QIP, he did not list his retail theft arrests in 2010 and 2011 and his 2011 arrest for DWI. He did list an arrest for speeding and misuse of a prescription drug in 1998, for DWI in 2008, and for retail theft in 2012. By listing these arrests, Applicant placed the Government on notice of an issue with criminal conduct.

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(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 access to classified information will be resolved in favor of 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. . . ." An applicant has the ultimate burden of persuasion for obtaining 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

¹¹GE 2; GE 5; AE A; Tr. 42-45, 84-85.

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 an 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 information.

Section 7 of Executive Order 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

AG ¶ 30 expresses the security concern 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 conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Between August 2008 and June 2012, Applicant was arrested five times, twice for DWI and three times for retail theft or damaging store property. He completed probation for his last arrest in March 2014. A security concern has been established under AG ¶¶ 31(a) and 31(c).

AG ¶ 32 provides conditions that could mitigate security concerns. I have considered all the mitigating conditions, and especially the following:

- (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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's DWI convictions are not alcohol-related, but rather occurred because he took sleep medication to help him sleep during the day following working the late shift. He understood that he should not drive for six to eight hours after he took the medicine. Although he believed he had waited the required time before he drove, the medicine had a longer impact on him. He no longer works the late shift, which allows him to sleep on a normal schedule. He lives much closer to work. His change in his work schedule, his sleeping habits, and his commuting patterns makes it unlikely that he will be arrested for DWI related to sleep medication. His trustworthiness, reliability, and judgment are not in doubt as a result of the DWIs, the last of which occurred more than three and one-half years ago. SOR allegations 1.a and 1.d are mitigated under AG ¶¶ 32(a) and 32(d).

As for the arrests for retail theft (shoplifting) and damaging store property, Applicant showed poor judgment when he opened sealed packages of store items then placed the open packages and goods in other sections of the store. Despite being arrested for this conduct in November 2010, he continued to open store packages and take items he had not purchased and was arrested twice more for his conduct. He continued to show a lack of good judgment over several years. There are no mitigating conditions applicable to SOR allegations 1.b, 1.c, and 1.e.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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:

(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 person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another

country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 16(c) does not apply. As indicated in the criminal conduct section, there is sufficient information for an adverse security clearance determination without resort to the catch-all provisions of AG ¶ 16(c). SOR ¶ 2.a simply repeats the misconduct discussed in the previous section under the criminal conduct guideline.

AG ¶ 16(e) and the general judgment and unwillingness to comply with rules have some application. When Applicant engaged in the criminal conduct alleged under the disqualifying conditions in AG ¶ 31, he engaged in conduct which showed poor judgment and adversely affected his personal, professional, and community standing. See ISCR Case No. 11-12202 at 4-5 (App. Bd. June 23, 2014)(noting a personal conduct judgment and trustworthiness concern even through conduct alleged was already covered under another guideline, and citing the collateral consequence of that conduct as being relevant, but not dispositive).

AG ¶ 17 provides conditions that could mitigate security concerns:

(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 caused 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's last DWI offense happened more than three and one-half years ago and occurred because he suffered residual effects from a sleeping medication. He now works a regular schedule, which allows him to return to normal sleeping patterns. There is little likelihood that he will be arrested for a DWI because of sleeping medication. AG ¶ 17(c) applies to his DWI arrests.

Applicant has acknowledged his arrests and convictions for retail theft (shoplifting) and damaging store property. He complied with the terms of his probation, which concluded recently. The scope of this security-related conduct is thoroughly addressed under Guideline J. He disclosed three arrests on his e-QIP. He addressed his conduct in his response to the SOR and at the hearing. I do not believe Applicant can be coerced or pressured into releasing classified information by threats of public

disclosure of the negative information detailed under Guideline J, *supra*, and known by many. SOR ¶ 2.a is found for 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 an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was more than 50 years old when he decided to open packages in retail stores to check the contents of the packages for defects. At the time he did this, he held a security clearance, a privilege which requires Applicant to act with the utmost integrity and honesty. His conduct at the retail stores shows a lack of integrity and honesty which concerns the Government. Applicant violated the trust given to him by the Government. While his DWI arrests occurred because the effects of a sleeping medicine had not completely worn off, his conduct in the retail stores was a conscious decision by him. He completed the probation for his last arrest only eight months ago. He has not had sufficient time to show that he can make good decisions and can be trusted to act in the Government's best interest.

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 has mitigated the security concerns arising from his personal

conduct under Guideline E, but he has not mitigated the security concerns arising from his criminal conduct under Guideline J.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.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. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge