



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



In the matter of:)
)
 REDACTED) ISCR Case No. 12-12280
)
 Applicant for Security Clearance)

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

01/10/2014

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the criminal conduct, personal conduct, and financial considerations concerns. He has a lengthy criminal record and history of financial problems that continue to cast doubt on his current reliability, judgment, and trustworthiness. Clearance is denied.

Statement of the Case

On August 12, 2013, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). Applicant answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

On October 29, 2013, I was assigned Applicant's case. After coordinating with the parties, I scheduled the hearing for November 13, 2013.¹ On November 7, 2013, Department Counsel moved to amend the SOR to correct a minor error in allegation 2.c. Applicant did not object and I granted the motion. The Government's motion to amend the SOR was marked Hearing Exhibit (Hx.) I and made a part of the record.²

The hearing was held as scheduled. Department Counsel offered Government Exhibits (Gx.) 1 – 11, which were admitted into evidence without objection.³ Applicant testified and requested time after the hearing to submit matters in support of his case.⁴ I granted his request. On November 26, 2013, the original deadline for submission of post-hearing matters, Applicant requested additional time. I granted this subsequent request for an extension of time and set a new deadline of December 10, 2013. Notwithstanding the additional time granted, Applicant did not submit any matters. The hearing transcript (Tr.) was received on November 21, 2013, and the record closed on December 10, 2013.

Findings of Fact

Applicant, 31, has been working for the U.S. military as a federal contractor since graduating from high school in 2001. He is not married, but has four children that he supports. (Tr. at 33-34, 75-80; Gx. 1, Gx. 3)

Applicant was arrested three times before graduating high school and beginning his job as a federal contractor. In 1996, he was arrested for assault and battery after a fight with another boy. He was required to attend a "scared straight" program. In 1999, he was charged with underage possession of alcohol after he was pulled over for a traffic violation and police found a bottle of champagne in his car. He was required to complete 50 hours of community service. In 2000, he was arrested, charged, and later convicted of reckless driving after being caught driving 110 miles per hour (mph) in a 55 mph zone. He was sentenced to 60 days in jail and fined. Applicant disclosed and discussed his underage criminal history during the course of his initial security clearance background investigation. (Tr. at 34, 48-49; Gx. 2 – 4)

Applicant's criminal conduct did not end after graduating high school, starting his current job, and submitting his initial security clearance application. In 2003, he was arrested and convicted of assaulting his cousin. He was arguing with his cousin regarding an unpaid cell phone bill. He put his arms around his cousin's throat, lifted her off the ground, and choked her until she passed out. At the time, Applicant was 6'0" tall

¹ In a October 30, 2013 e-mail Applicant stated that "[t]he date and time for my hearing is fine." At hearing, he waived any potential notice issues and indicated he was prepared to proceed. (Tr. at 7-9)

² Tr. at 15-22.

³ Tr. at 28-30.

⁴ Tr. at 80-84, 89-93.

and weighed about 225 pounds, while his cousin was about 5'9" and weighed 130 pounds. (Gx. 4, Gx. 7; Tr. at 51) At hearing, Applicant denied he choked his cousin, claiming that he pushed his cousin while trying to defend himself and she happened to fall from the force of the push. (Tr. at 49-51) His hearing testimony is inconsistent with the police report and his prior sworn statement during his initial background investigation, where he admitted to lifting his cousin off the ground while choking her. (Gx. 4, Gx. 7)

In 2004, Applicant was arrested and charged with obstruction of justice after getting into a verbal confrontation with a police officer. He failed to appear for his initial appearance on the charge and a warrant for his arrest was issued. He eventually appeared in court and was convicted on the obstruction charge. (Gx. 3, Tr. at 41-43)

In 2006, Applicant was arrested and charged with attempted murder and other serious offenses. Applicant claims his sister asked for help because her husband was purportedly abusing her. Applicant gathered a few friends and confronted the sister's husband, who attempted to flee but was chased down by Applicant and his friends. According to the police report, Applicant pushed his sister's husband into a window (breaking the window), produced a gun, and fired it twice at the victim. (Gx. 8) Applicant denies he fired his gun, stating that "if I would have fired at him, I wouldn't have missed." (Tr. at 75) Applicant previously admitted that his friends blocked the victim's escape with their car. He also admitted that he shoved the victim against a garage door and during the ensuing struggle his gun fell to the ground, which allowed the victim to escape. (Gx. 3 at 6) The authorities ultimately decided not to pursue the charges because Applicant's sister and her husband refused to cooperate. (Gx. 3 at 7)

In 2007, Applicant was stopped for a traffic violation and cited for carrying a concealed weapon in his car. He was convicted of the charge and was forced to surrender his weapon. (Gx. 3; Tr. at 44-48)

In 2010, Applicant was suspended from his job for five days because he failed to supervise the work of a subordinate. At hearing, he blamed the subordinate for his suspension. He did not reveal the five-day suspension on his security clearance application, because he was under the mistaken belief that the question was only seeking adverse employment information regarding security violations. (Tr. at 55-60) The question at issue asks, in pertinent part: "in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?" (Gx. 1 at 11-12)

In 2012, Applicant was arrested and charged with domestic assault. Applicant claims that he simply intervened to break up a fight between his uncle and his brother. The charge was later dismissed. (Gx. 3) Applicant revealed his criminal record, including the 2006 charges that were *not proessed*, on his current security clearance application. (Gx. 1) He discussed his entire criminal record during his current background investigation. (Gx. 3, Tr. at 53-55, 60-64)

Applicant also disclosed on his SCA and discussed during his background interview his financial problems. In 2007, his debts were discharged through Chapter 7 bankruptcy. Applicant had over \$250,000 in debts, including a \$100,000 judgment from a car accident. (Gx. 3, Gx. 11) At hearing, Applicant testified that his bankruptcy was, in part, a result of overspending. (Tr. at 64-65) He also admitted that he was at least a month in arrears on several of his monthly bills because of overspending during the holidays. (Tr. at 68) He is over \$3,000 in arrears on his child support obligation for his youngest child and several of his accounts are in collection status. (Tr. at 38-39, 68-71; Gx. 3, Gx. 9, Gx. 10)

Applicant also revealed during his recent background interview that he consumes alcohol to excess. He regularly consumes four beers and a couple of mixed drinks. He told the investigator that in order to “become intoxicated, he has to drink eight or nine beers or a pint and half of alcohol . . . and he has been drinking to intoxication about once a week.” (Gx. 3 at 8)⁵

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b).

⁵ Applicant’s excessive alcohol use was not alleged in the SOR, and is only being considered in assessing his mitigation case and whole-person concept.

Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.⁶

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. 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 an 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.⁷

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline J, Criminal Conduct

Applicant’s long, extensive, and violent criminal past raises the criminal conduct concern, which is addressed at 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.

Applicant’s criminal history also establishes the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

⁶ See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)).

⁷ See ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance determinations require administrative judges to make predictive judgments). See also, *Kaplan v. Conyers, et al.*, 2013 U.S. App. LEXIS 17278 at ** 23-24, 40-51 (Fed. Cir. Aug. 20, 2013) (federal courts will generally defer to such predictive judgments).

The guideline also lists a number of conditions that could mitigate the concern.⁸ I considered all the mitigating conditions and none apply. Applicant's criminal conduct dates back to 1996. He has been provided the opportunity to reform his behavior from his earliest interaction with the law to no avail. He continued his criminal conduct even after being hired as a federal contractor, submitting a security clearance application, and undergoing a background investigation. Instead of realizing that his past conduct was not acceptable for someone working for the federal government and seeking a security clearance, he continued his criminal behavior. Although the 2006 incident did not result in a conviction, the record evidence established that he committed a serious violent offense. His hearing testimony regarding the 2004 incident, where he denied that he choked his cousin and claimed that he merely pushed her in an attempt to defend himself, was patently false and is contradicted by his own previously sworn statement. Notwithstanding the fact that his last criminal conviction was in 2007, Applicant's extensive criminal history and less than candid hearing testimony leave me to question whether he will engage in similar conduct in the future. Accordingly, Appellant's criminal history continues to raise questions about his current reliability, judgment, and trustworthiness.

Guideline E, Personal Conduct

The personal conduct security concern is set forth at 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 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.

Under this guideline, the Government alleges that Applicant falsified his current security clearance application (SCA) by failing to disclose his criminal past and the five days he was suspended from his job. However, Applicant disclosed his criminal past, including serious charges that were ultimately dismissed or *nol prosequi*, on his SCAs. He also fully discussed his criminal record through the course of two security clearance background interviews. His explanation for not listing the five days he was suspended from work was plausible and, in light of the other significant adverse information he revealed, credible. Therefore, SOR ¶¶ 2.c and 2.d are decided for Applicant.

The Government also alleges that Applicant's criminal past and the five-day suspension from work raise the security concern under the personal conduct guideline. Applicant's criminal record and failure to take responsibility for his own conduct that led to his suspension raise the concern. This evidence also triggers application of the disqualifying condition at AG ¶ 16(c), "credible adverse information . . . 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

⁸ See generally, AG ¶ 32.

regulations, or other characteristics indicating that the person may not safeguard protected information.”

The personal conduct guideline also lists a number of conditions that could mitigate the concern. After taking into account all the mitigating conditions and for similar reasons cited under the criminal conduct guideline, I find that none apply.

Guideline F, Financial Considerations

The potential security concern regarding an applicant with financial problems is explained at AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant’s 2007 bankruptcy, in which over \$250,000 in debt was discharged, and his recent accumulation of delinquent debt raise this concern. This evidence also establishes the disqualifying conditions at AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations.”

As with the other guidelines, the financial considerations guideline lists a number of conditions that could mitigate the concern. The amount of delinquent debt alleged in the SOR is not substantial; however, Applicant continues to spend beyond his means, while failing to pay his financial obligations – notably his court-mandated child support. This evidence of financial carelessness strongly suggests that Applicant has not learned from his past and appears to be heading down the same path that led him to file for bankruptcy. Under such circumstances, none of the mitigating conditions apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁹ I specifically considered Applicant’s age when he committed some of his crimes and the maturity he has shown in caring for his four

⁹ The non-exhaustive list of adjudicative factors are: (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.

children. However, this favorable evidence is insufficient to mitigate the security concerns at issue. In addition, his excessive alcohol use, coupled with his criminal record and history of financial irresponsibility, raises concerns about his reliability. His hearing testimony regarding the 2004 and 2006 criminal incidents was not credible. Overall, the record evidence raises significant doubts about his eligibility for a security clearance.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a – 1.j:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Subparagraphs 2.c – 2.d:	For Applicant
Paragraph 3, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 3.a – 3.h:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge