



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



In the matter of:)
)
) ISCR Case No. 14-00596
)
Applicant for Security Clearance)

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: *Pro se*

09/07/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On April 3, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. This 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) implemented on September 1, 2006.

The SOR set forth reasons why DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. On April 30, 2014, Applicant answered the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. On May 20, 2014, Department Counsel requested a hearing

in this matter. This case was assigned to me on July 15, 2014. On July 24, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for August 12, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, while Applicant testified and offered Applicant Exhibits (AE) A through C. The record of the proceeding was left open until August 19, 2014, to provide Applicant an opportunity to submit additional matters, but he did not present anything further. All proffered exhibits were admitted into evidence without objection. The prehearing guidance letter sent to Applicant was marked as Hearing Exhibit (HE 1), Department Counsel's list of exhibits was marked as HE 2, and Department Counsel's post-hearing email was marked as HE 3. The transcript (Tr.) of the hearing was received on August 21, 2014.

Findings of Fact

Applicant is a 43-year-old site supervisor/mechanic who is sponsored for a security clearance by a defense contractor. He began working for that defense contractor in April 2013 and was released from employment in October 2013 pending the results of this security clearance determination. He graduated from high school in 1989. He served in the U.S. Navy from 1989 to 1994, attained the grade of petty officer third class (E-4), and received an honorable discharge. He has been married three times. His current wife was also his second wife. He has no children. Applicant held a security clearance in the past without incident.¹

The SOR contained 12 Guideline E allegations. These allegations consisted of ten instances in which Applicant was charged with criminal or traffic violations and two instances in which his employment was terminated. In his Answer to the SOR, Applicant admitted each allegation, some with comments. His admissions are incorporated as findings of fact.²

In about April 1998, Applicant was charged with urinating in public or on private property. At that time, he was about 27 years old. This was an alcohol-related offense. In August 2000, he was convicted of that offense, underwent an alcohol screening, and was required to pay \$88.³

SOR ¶ 1.b alleged that Applicant was charged with driving under the influence (DUI) in March 1999 and, as a result of that offense, was placed on probation for one year. In his Electronic Questionnaire for Investigations Processing (e-QIP), he listed a DUI arrest and conviction in August 1998, but none in 1999. In an Office of Personnel Management (OPM) interview, he was asked about a 1999 DUI charge and indicated

¹ Tr. 5-6, 23-25, 48-49; GE 1, 2.

² Applicant's Answer to the SOR.

³ Tr. 34-36; GE 4; Applicant's Answer to the SOR.

that it was the same charge that he listed in his e-QIP as occurring in August 1998. Even though Applicant admitted the allegation in SOR ¶ 1.b, no police record admitted into evidence reflected that Applicant was arrested, charged, or convicted of DUI in either 1998 or 1999. It is unknown where the OPM investigator obtained the information about a 1999 DUI charge. At the hearing, Applicant responded “Yes” to a question that asked if he was convicted of DUI in March 1999 and placed on probation. He also indicated that he received an alcohol screening and voluntarily participated in a treatment program.⁴

In about April 2000, Applicant was charged with aggravated battery. He was convicted of assault and placed on supervised probation for one year. He indicated this assault was an alcohol-related offense. In his Answer to the SOR, Applicant indicated that he hit an individual during this incident and broke his nose. He also stated, “I did NOT beat this guy senseless as this charge would imply.” In his e-QIP, he indicated he broke the individual’s nose in three places. In January 2001 and September 2001, he was charged with two probation violations and confined for about six months.⁵

In about November 2000, Applicant was charged with disorderly intoxication in a public place causing a disturbance. At the hearing, he stated that he and his brother went out one night to celebrate the birth of his brother’s first child. His brother was driving the vehicle. They were pulled over by the police, and both of them were arrested. They spend the night in jail and a judge dismissed the charges against both of them the next day. The police record did not reflect a disposition of that charge.⁶

In about December 2000, Applicant was charged with DUI (liquor), driving with no driver’s license, careless driving, and transporting an open container. In September 2001, he was convicted of the DUI offense and placed on probation. The other charges were dismissed. At the hearing, he indicated that he received an alcohol screening and voluntarily participated in a treatment program.⁷

In about August 2001, Applicant was charged with DUI (alcohol or drugs) and driving on a suspended/revoked/fraudulent driver’s license. In February 2002, he was convicted of DUI and placed on probation for one year. The other charge was dismissed.⁸

⁴ Tr. 35; GE 2; Applicant’s Answer to the SOR.

⁵ Tr. 35-37; GE 1, 2, 3; Applicant’s Answer to the SOR.

⁶ Tr. 37-39; GE 2, 3, 4, 5; Applicant’s Answer to the SOR.

⁷ Tr. 39-40; GE 2, 4; Applicant’s Answer to the SOR.

⁸ Tr. 40; GE 2, 4; Applicant’s Answer to the SOR.

In about September 2001, Applicant was charged with driving with no driver's license and no proof of insurance. He was convicted of the no proof of insurance and the other charge was dismissed.⁹

In about December 2005, Applicant was charged with sexual battery – unlawful touching. In October 2006, he was convicted of disorderly conduct – brawling/fighting. He was sentenced to probation for six months and a fine.¹⁰

In about January 2007, Applicant was charged with willful criminal damage to property and battery – physical contact/rude – domestic violence. These charges were dismissed.¹¹

From about May 2007 to July 2008, Applicant worked as the director of maintenance at an aviation company. He stated that he has a tumultuous relationship with the president of the company. He indicated that he gave the president two weeks' notice that he was quitting and the next day he was terminated. He contends that he is not aware of why he was terminated from that job.¹²

In about December 2008, Applicant was charged with DUI (alcohol). This occurred after he attended a coworker's party on New Year's Eve. In May 2009, he was convicted of that offense and sentenced to 72 hours of confinement with credit for time served, 40 hours of community service, and 12 months of probation. He also attended a three- or four-day alcohol course. At the hearing, he indicated that his driver's license was still in a restricted status due to this conviction, and he currently had an interlock system on his car. He expects these restrictions to be removed in December 2014.¹³

In about June 2011, Applicant was working for a subcontractor in Afghanistan. He assisted a military aircrew in obtaining parts for an aircraft that enabled them to fly a mission. As an expression of appreciation, the aircrew gave Applicant two shell casings for rounds fired during the mission. Applicant placed the shell casings in a box addressed to his home in the United States and put the box on an aircraft returning to the United States. He intended to keep the shell casings as souvenirs. He knew that it was against regulations to ship the shell casings back to the United States. The shell casings were discovered on the aircraft when it arrived in the United States and were confiscated. When the prime contractor learned that Applicant shipped the shell casings, it demanded that he be fired. He was terminated from that job for deliberately violating company rules and regulations. In his Answer to the SOR, he stated, "I didn't see the harm in mailing home the shells and paid for that decision with my job." At the

⁹ GE 4; Applicant's Answer to the SOR.

¹⁰ GE 2, 4; Applicant's Answer to the SOR.

¹¹ GE 2, 3, 4; Applicant's Answer to the SOR.

¹² Tr. 32-34; GE 2; Applicant's Answer to the SOR.

¹³ Tr. 40-48; GE 2, 3; Applicant's Answer to the SOR.

hearing, he indicated that he purchased similar shell casings in the United States at an Army-Navy store for \$11 apiece. He also indicated that spent shell casings were routinely crushed and given to Afghans as scrape metal.¹⁴

Applicant admitted that he has made poor decisions in the past and stated that he paid for those poor decisions. He also stated that he has shown sound judgment and reason for the past several years. At the hearing, he indicated that he attended an eight-week inpatient alcohol treatment program in about 2002 or 2003 and believed that he was diagnosed as an alcohol abuser. He further testified that “alcohol is not a part of my life anymore”, but also stated that he occasionally has a beer at dinner with his wife. He indicated that the last time he was intoxicated was on the day of the Super Bowl in February 2014, but noted that he did not drive on that occasion.¹⁵

Applicant worked for defense contractors in Afghanistan from November 2009 to June 2011 and from April to October 2013. A Marine Corps lieutenant colonel that Applicant supported as a lead mechanic in Afghanistan in 2013 gave Applicant his highest recommendation for a security clearance and stated that he would trust him with his life and trust him to make sound judgments on behalf of his program and the U.S. Government. Applicant’s former employer indicated that he trusted Applicant because he proved that he was reliable and efficient in all types of projects. A former coworker praised his performance and indicated he was his “go to guy.”¹⁶

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs 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 access to

¹⁴ Tr.25-32, 51-53; GE 2; Applicant’s Answer to the SOR.

¹⁵ Tr. 43-48; Applicant’s Answer to the SOR.

¹⁶ Tr. 25-26; GE 2; AE A-C.

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, 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:

(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 including that the person may not properly safeguard protected information.

Applicant was found guilty of at least six alcohol-related offenses, including four DUIs, between 1998 and 2008. He committed two probation violations in 2001. He was found guilty of assault in 2000 and disorderly conduct (brawling/fighting) in 2006. He was terminated from jobs in 2008 and 2011. AG ¶ 16(c) applies.

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

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant has a history of engaging in misconduct that spans from 1998 to 2011. Some of his offenses appear to be minor, while others are serious. Many of his offenses were alcohol-related. None of his misconduct appeared to have occurred under unique circumstances that are unlikely to recur. His pattern of misconduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) and 17(f) do not apply.

Applicant indicated that he attended an eight-week inpatient alcohol treatment program in about 2002 or 2003 and believed that he was diagnosed as an alcohol abuser. He was later convicted of DUI in 2009. Following his latest DUI conviction, he attended a three- or four-day alcohol course. His driver's license still has restrictions (use of an interlock system) on it due to his 2009 DUI conviction. He continues to consume alcohol on an occasional basis and indicated that he was last intoxicated in February 2014, but did not drive on that occasion. AG ¶ 17(d) and 17(e) do not apply.

Applicant's latest alleged misconduct occurred in June 2011, over three years ago. During that incident, he knowingly shipped spent shell casings to the United States from Afghanistan in violation of existing regulations. In his Answer to the SOR, he indicated that he did not see the harm in shipping home the shell casings, which raises questions about his judgment and willingness to comply with rules and regulations.

From the evidence presented, I find that insufficient time has passed to conclude that Applicant has reformed and rehabilitated himself and that he will not engage in misconduct in the future.

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(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.

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 Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant served in the Navy for about five years and received an honorable discharge. He has worked as a mechanic for various defense contractors, including overseas in dangerous environments. He is a valued employee and well liked by former supervisors and coworkers. Nevertheless, he has engaged in a pattern of misconduct that continues to cast doubt on his current reliability, trustworthiness, and good judgment. Despite the presence of some mitigation, questions remain about his willingness to comply with rules and regulations.

Overall, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the personal conduct security concerns.

Formal Findings

Formal findings 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 E: AGAINST APPLICANT

Subparagraphs 1.a-1.l: Against 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.

James F. Duffy
Administrative Judge