



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



In the matter of:)	
)	
)	ISCR Case No. 14-02083
)	
Applicant for Security Clearance)	

Appearances

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

12/17/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On July 30, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order 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 DOD on September 1, 2006.

On August 20, 2014, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 27, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 31, 2014. I convened the hearing as scheduled on November 19, 2014. The

Government offered exhibits (GE) 1 through 10, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through J, which were admitted into evidence without objection.¹ DOHA received the hearing transcript (Tr.) on November 28, 2014.

Findings of Fact

Applicant admitted all of the allegations in the SOR. I have incorporated his admissions into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 59 years old. He served in the military for 20 years and retired in 1997 in the paygrade E-8. He worked for a federal contractor from 1998 to 2004. From 2004 to 2010 he worked as a federal employee and then returned to working for a federal contractor from 2010 to 2014. Applicant married in 2000 and has four stepchildren.²

From 1978 to 2008, Applicant was charged with various traffic violations and infractions. These included: expired registration card/tag (four times), failure to wear a seat belt, speeding (three times) and improper equipment.

In 1978, Applicant was arrested and charged with careless and reckless driving and driving under the influence of alcohol (DUI). He pled guilty to having a blood alcohol content of .10% and speeding. He was sentenced to five years in jail. The sentence was suspended.

In 1990, Applicant was arrested (in a different state) and charged with DUI. In 1993, he pled *nolo contendere*, was fined and placed on probation for one year. In 1994, Applicant was arrested and charged with driving while impaired (DWI). He pled guilty and was sentenced to 60 days in jail, which was suspended, probation for a year, a fine and court costs. His driver's license was also revoked.

In January 2000, Applicant was arrested and charged with DWI. The case was dismissed based on a technicality not related to Applicant's guilt or innocence, and the charges were not adjudicated. Applicant admitted he was drinking and driving at the time.

In December 2003, Applicant was pled guilty to reckless driving to endanger. It is unknown what sentence was given. In November 2004, Applicant was charged with DUI and refusal to take blood/breath test. He paid the costs and his license was suspended for refusal to take the test. The DUI was *nolo prosequi*. At his hearing, he admitted he was driving and driving, but disputed that he refused to submit to a breathalyzer. He

¹ Hearing exhibits I and II are Department Counsel's exhibit list and discovery letter, respectively.

² Tr. 77, 86, 119-123.

stated he was not permitted to take the breathalyzer because he was burping too much.³

In April 2008, Applicant was arrested and charged with reckless driving with alcohol as a factor. In July 2009, he pled *nolo contendere*, was adjudicated guilty, sentenced to 25 hours of community service, fined \$648, placed on probation, and ordered to complete a substance abuse evaluation and alcohol education. He attended a court-ordered outpatient program. He stated it was helpful and made him understand his habits. The death of his father, 24 years before, had a serious impact on him. This was the first time he attended alcohol counseling. He did not believe he had an alcohol problem until after his sixth offense. He stated he was not diagnosed as alcohol dependent. He admitted during his substance abuse treatment that he did not disclose to the counselor all of his past alcohol-related incidents because he was never questioned about them. He was offered aftercare, but chose not to participate because he believed he had altered his lifestyle.⁴

Applicant acknowledges he has had six serious alcohol-related incidents. He did not seek help because he did not think he had a problem with alcohol at the time. He believes he has made changes in his life. The changes he described were his marriage in 2000 and that he is no longer in the military. He attributes the traffic infractions and violations to being young and immature, and he liked to drive fast cars. He stated he is now trying to improve his life. He continues to consume alcohol, but only about once a month. His wife consumes alcohol, and they occasionally share a drink. When asked if he ever thought after he had five alcohol-related incidents that he needed to stop drinking and driving. He stated "no." He commented that he never got in an accident. He admitted he likely drove after consuming alcohol without being caught about 10 to 12 times.⁵

On January 21, 2010, while employed as a DOD civilian employee, Applicant disclosed a military capabilities document for a weapon to a representative of a private company. On January 27, 2010, when he was interviewed by a military investigator assigned to inquire about the possible unauthorized release of the document, Applicant intentionally lied to the investigator by denying he had given the document to the representative of the private company.⁶

Following the interview by the military investigator, on the same day, Applicant traveled to another state where he met with a representative of the private company and solicited him to provide the military investigator with a false cover story on how his firm obtained the document. On January 28, 2010, Applicant was re-interviewed by the

³ Tr. 28-29.

⁴ Tr. 32-36, 79-83.

⁵ Tr. 28-29, 36-41, 79-86.

⁶ Tr. 48-60, 91-94.

military investigator. Applicant intentionally lied to him by denying he had contacted any representative of the private company since he was interviewed the previous day. He failed to disclose his trip to the private company's offices where he met with a representative.⁷

Applicant admitted he gave the representative of the private company a copy of the document. He admitted he was not authorized to release it to the private company representative and that it belonged to the military. He explained the document was not the final document, but a draft. His motive for releasing the document to the private company was to get them to make changes to the weapon and make it a better weapon for the U.S. service member. He stated it was the representative who asked him for the document and he does not know why he gave it to him. Applicant admitted the document included technical information that showed what the military was looking for in the weapon. He stated he wanted the private company to make the weapon better, not to provide the private company an advantage over other companies.⁸

Applicant stated the representative took a photo of the cover sheet of the document. He admitted he should not have permitted him to do that. The representative reported Applicant's conduct to the military. When Applicant was questioned by the military investigator he stated "then it really hit me what I did."⁹ He lied to the investigator when he denied he gave the document to the representative. He does not know why he lied. Applicant stated the reason he drove to the private company's offices was because he wanted to know why the representative had turned him in. Applicant stated he talked to two people, and they agreed the representative would lie to the investigator and state that the company already had the document. Applicant stated it was the representative that came up with this story, and he went along with it.¹⁰

Applicant was re-interviewed by the military investigator the day after his trip. He lied to the investigator when he denied traveling to visit the representative and conspiring to create a false cover story on how the company obtained the document. The military investigator indicated that Applicant only told the truth after he was shown evidence that there was a meeting.¹¹ Applicant continued to lie to the military investigator when on February 11, 2010, he again denied giving the private company's representative the document and indicated that he did not know why three of their representatives would say that he did. Applicant's testimony was not credible.¹²

⁷ Tr. 61-68, 71.

⁸ Tr. 43-60, 91-94.

⁹ Tr. 56.

¹⁰ Tr. 48-68, 70-71, 94-104.

¹¹ GE 4 at 4G-11.

¹² Tr. 72-76, 97-104.

Applicant resigned in 2010 from federal employment before he was fired. Applicant acknowledged he made a mistake and should have told the truth. He provided copies of his military awards, recognitions, achievements, work evaluations and community service activities. He also provided numerous character letters. He was questioned about whether those providing character letters were aware he had lied to a military investigator. Some were aware that he had lied, but were not aware that he had lied more than once or of his role in the conspiracy to provide false information to the military investigator. Some did not know of any of his misconduct.¹³

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 and 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

¹³ Tr. 69-70, 87, 105; AE A, B, C, D, E.

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 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 E, Personal Conduct

AG ¶ 15 expresses the security concern for 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. I find the following potentially applicable:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; . . . (3) a pattern of dishonesty or rules violations; and

(e) personal conduct, 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.

Applicant repeatedly lied to a military investigator, telling him he did not provide the representative of a private company with the document. He solicited a representative of a private company to provide the military investigator false information. He knowingly disclosed a military document for a carbine weapon to a private company without authorization. He lied to the military investigator when he denied he met with the representative after he was interviewed and solicited the representative to provide a false cover story. Applicant has a long history of alcohol-related offenses, including being arrested six times from 1978 through 2008 for DUI or DWI. He was convicted or pled *nolo contendere* on four occasions and the remaining two were *nolo prosequi*. Applicant had numerous traffic violations and infractions from 1978 to 2003. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

- (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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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 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 acknowledged he made mistakes. He has a long history of driving under the influence of alcohol, but has not had any alcohol-related offenses since 2008. He continues to consume alcohol. He attended court-ordered alcohol counseling. Applicant repeatedly lied to a military investigator and attempted to cover his lies.

Without authority he knowingly provided a private company's representative with a document on a weapon. He justified his decision because he stated he wanted the company to make a better weapon. His conduct was not minor, but serious. Applicant has a history of violating the law dating back to 1978. Some of his violations are minor traffic infractions, but some constitute serious criminal offenses, such as DUI and DWI. His behavior in repeatedly lying to a military investigator and conspiring with others to lie constitutes grave misconduct and continues to cast doubt on his reliability, trustworthiness, and good judgment. Applicant did not promptly correct his falsifications. He has acknowledged his behavior, but there is insufficient evidence to conclude his behavior is unlikely to recur or he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress as is evidenced by his failure to disclose his misconduct to those writing character letters for him. None of the above disqualifying conditions apply.

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 the 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 is 59 years old. He has a long history of failing to abide by the law. He was arrested six times for DUI or DWI. Without authorization he disclosed a military document to a private company's representative. He repeatedly lied to a military investigator and conspired to provide false information to the investigator. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude

Applicant failed to mitigate the security concerns arising under the personal conduct guideline.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1.q:	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 a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge