



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-02178
)
)
Applicant for Security Clearance)

For Government: Caroline Heintzelman, Esquire, Department Counsel
For Applicant: *Pro Se*

04/30/2015

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of criminal incidents and ordinance violations spanning 11 years, beginning while he was in military service and continuing through employment with a defense contractor. He remains on criminal probation for a March 2013 conviction. During this entire period of time he held a security clearance. Based upon a review of the record evidence as a whole, he failed to mitigate the personal and criminal conduct security concerns. Eligibility for access to classified information is denied.

On July 28, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal 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 Department of Defense for SORs issued after September 1, 2006.

On September 8, 2014, Applicant answered the SOR in writing and requested a hearing before an administrative judge. On December 15, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On January 2, 2015, DOHA issued a Notice of Hearing scheduling the hearing for January 22, 2015. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. All were admitted without objection. Applicant testified. The record remained open until February 13, 2015, to give Applicant an opportunity to submit documents. Applicant timely submitted three documents that I marked as Applicant Exhibits (AE) A through C, and admitted into the record without objection from Department Counsel. DOHA received the hearing transcript on February 3, 2015, and I received it on February 23, 2015.

Findings of Fact

In his Answer (AR) to the SOR, Applicant admitted 15 of the 16 allegations in Paragraph 1 of the SOR; he denied the allegation in Paragraph 1.n because it related to the same incident listed in Paragraph 1.o. He neither admitted nor denied the allegation in Paragraph 2, which re-alleged the 16 allegations contained in Paragraph 1. His admissions are incorporated into the findings of fact.

Applicant is 30 years old and unmarried. After graduating from high school in 2003, he enlisted in the Air Force and started training in October 2003. He graduated with honors from basic training. He received an honorable discharge in October 2007 at the rank of E-4. Upon discharge he started a position with his current employer, a defense contractor. He is attending college. He has held a Secret security clearance since October 2003, except for a month in 2005 when it was suspended as a result of a speeding violation. (Tr. 13-19.)

Applicant has a longtime hobby of buying, restoring, and selling automobiles and motorcycles. Currently, he owns six cars. Two of the cars are licensed and registered; four cars are not licensed or registered because they are inoperable. (Tr. 22-23, 44.) He is selling his motorcycle, which he has not ridden for two years. (Tr. 51.)

Applicant has a history of criminal incidents or ordinance violations, beginning in spring 2002 and up to March 2013. They are alleged in SOR ¶ 1 as follows:

1. (a) In September 2002 Applicant was arrested and charged with operating a motor vehicle in a careless and imprudent manner. He pled guilty to the charge and was fined. He was 18 years old and in the Air Force.
2. (b) In 2004 Applicant was charged with speeding on his motorcycle. In February 2005 he pled guilty and was fined. His security clearance was suspended for one month. He was 20 years old and in the Air Force.
3. (c) In November 2004 Applicant was charged with speeding. He pled guilty to an amended charge of failure to equip motor vehicle with a horn/maintain

horn in good working order, and was fined. He was 20 years old and in the Air Force.

4. (d) In August 2005 Applicant was charged with exceeded posted speed limit. He pled guilty and was sentenced to 90 days, suspended. He was ordered to pay costs and a fine, and serve 40 hours of community service. He was placed on unsupervised probation for two years. He was 21 years old and in the Air Force.
5. (e) In August 2007 Applicant was charged with speeding. In October 2007 he pled guilty to an amended charge of operating motor vehicle which emitted excessive and unnecessary noise and was fined. He was 23 years old and in the Air Force.
6. (f) In October 2007 Applicant was arrested and charged with a traffic offense involving his motorcycle. He pled guilty and received a suspended sentence and placed on supervised probation for two years. He was no longer in the Air Force at this time.
7. (g) In October 2008 Applicant was charged with failure to register motor vehicle, specifically his motorcycle. He pled guilty and paid a fine.
8. (h) In August 2009 Applicant was charged with failure to register motor vehicle, specifically his motorcycle. He pled guilty and paid a fine.
9. (i) In September 2009 Applicant was arrested, taken to jail, and charged with (1) felony resisting arrest/detention/stop-risk death/injury; (2) failure to display plates on vehicle; (3) speeding 149/65; 4) pass on right side of highway; (5) failure to signal; (6) disobey steady red signal; and (7) speeding 95/55. He was riding his motorcycle. He was convicted of misdemeanor resist/interfere arrest and given a suspended sentence. He was placed on probation for two years.
10. (j) In June 2010 Applicant was charged with failure to appear. He was fined.
11. (k) In January 2012 Applicant was charged with failure to maintain financial responsibility for his automobile.
12. (l) In July 2012 Applicant was charged with resisting arrest. He was riding his motorcycle. He was fined.
13. (m) In October 2012 Applicant was charged with speeding 84/60 and failure to register motor vehicle. He pled guilty to failure to equip vehicle with muffler/adequate muffler/properly attached muffler, and failure to register motor vehicle. He was fined.

14. (n) On March 30, 2013, Applicant was arrested and charged with willfully resists or opposes a member of the patrol in the proper discharge of their duties. He was riding his motorcycle. In July 2014 he was placed on probation for one year. He remains on probation until July 2015. (Tr. 42.)
15. (o) On the above date, Applicant was also charged with failure to register motor vehicle and failure to display plates on vehicle. He pled guilty to failure to register and was fined. (GE 4 at 31.)
16. (p) In June 2013 Applicant was charged with failing to register a motor vehicle, specifically his motorcycle. He pled guilty and was fined.

Applicant stated that in January 2015 he purchased a car and within a week he received a ticket for failing to register it. (Tr. 29.) He said he understood that he had 30 days in which to register it, and could not register it immediately because it would not have passed a safety inspection. He is getting the car repaired and will contest the ticket.¹ (Tr. 44, 49-50.)

Applicant testified credibly and candidly. He admitted that his conduct has been “stupid” and that he was associating “with a wrong crowd of people.” (Tr. 37.) For the past year and a half, he has not associated with those people. (Tr. 51.) He admitted that his behavior over the years demonstrated a lack of maturity. (Tr. 52.) He is trying to “get things straightened out in [his] life.” (Tr. 54.) He has new friends and finds appropriate guidance through his church. (Tr. 55.) He has safely maintained Government secrets for 11 years. He wants to live responsibly. (Tr. 56.) He expressed visible remorse over his past behaviors.

Applicant’s supervisor for five years wrote a letter of recommendation. He stated that Applicant is honest and hardworking, and has never created a problem at work. He strongly recommends Applicant for a security clearance. (AE C.) Other friends and colleagues are aware of Applicant’s motorcycle violations. They do not think he poses a security risk. (AE A, AE B.) While testifying about the allegations, Applicant acknowledged that he did not report any of the incidents to his security officer and was unaware that he was required to do so. (Tr. 35.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised Adjudicative Guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list

1. This incident was not alleged in the SOR as a security concern. That fact will not be analyzed as a potential disqualifying condition, but will be considered under the analysis of mitigating conditions and whole-person concept.

potentially disqualifying conditions and mitigating conditions, which are useful 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 avoided drawing inferences grounded on mere speculation or conjecture.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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."

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 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.

Analysis

Guideline E, Personal Conduct

The security concerns pertaining to the personal conduct guideline are 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 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 a condition that could raise a security concern and may be disqualifying in this case:

(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:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant has a long pattern of engaging in misconduct on numerous occasions involving questionable judgment and an unwillingness to comply with rules or regulations while holding a security clearance. This credible information is not explicitly covered by any other guideline, but when combined with all record facts, raises security concerns under AG ¶ 16(d)(3).

The guideline includes six conditions in AG ¶ 17 that could mitigate security concerns arising from personal conduct, four of which may be 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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

The evidence does not support the application of AG ¶ 17(c). Applicant's history of exercising poor judgment and unwillingness to comply with rules and regulations spans 11 years, from 2002 to 2013. The record contains 16 instances in which he was charged with numerous legal infractions. His conduct cannot be considered minor or infrequent. In addition, during those years he was in the Air Force and subsequently working for a defense contractor while holding a security clearance.

Applicant candidly admitted his misbehavior. Within the last year and a half he has taken steps to change his pattern of inappropriate behavior. He is maturing and acknowledging responsibility for his conduct. However, at this time there is insufficient evidence to determine that similar behavior is unlikely to recur, based on the fact that in January 2015 he received another citation for failing to register a newly purchased car. Hence, AG ¶ 17(d) has minimal application.

Applicant's supervisor is aware of some of his misconduct as are his friends and colleagues. That fact reduces vulnerability to exploitation or duress. AG ¶ 17(d) has limited application because it is unknown whether his supervisor or friends are aware of the extent of Applicant's history of arrests and convictions, involving automobiles in addition to motorcycles. Applicant said that he has changed his friends and no longer associates with a "bad crowd" of people. AG ¶ 17(g) has some mitigating application.

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.

The evidence potentially raises security concerns under three disqualifying conditions set forth in AG ¶ 31:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(d) individual is currently on parole or probation.

Applicant admitted that he has been charged 16 times with criminal offenses or ordinance violations since 2002. He was arrested four times and placed on probation four times. He remains on probation. The evidence is sufficient to establish the above three disqualifying conditions.

AG ¶ 32 provides four conditions that could mitigate the foregoing security concerns arising under this guideline, two of which may apply:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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.

AG ¶ 32(a) does not apply because sufficient time has not elapsed since Applicant's last incident of criminal behavior. In January 2015 Applicant received a ticket for failing to register a car. Between 2002 and June 2013 he was involved in criminal conduct or ordinance violations 15 times. That pattern of conduct casts doubt on his reliability and good judgment.

Applicant provided some evidence of rehabilitation. He has maintained a steady and successful work history since 2007. He expressed remorse over his past misconduct and his intent to remain free of legal trouble. However, to date, he has not established a track record of complying with legal rules and regulations sufficient to outweigh his 11-year or longer history of misbehavior and criminal violations. AG ¶ 32(d) provides minimal mitigation.

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). They include the following:

- (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 eligibility for a security clearance must include 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 facts and circumstances surrounding this case. Applicant is an intelligent, articulate 30-year-old former Airman, who has an 11-year history of criminal conduct and ordinance violations, beginning while he was in the Air Force and continuing through his employment with a defense contractor. More significantly, he held a security clearance over the entire period of time and remains on criminal probation. He expressed a sincere and mature commitment to living a responsible life, free from legal problems. His actions for the past year or more to change his life are commendable when considered in relationship to a long history of legal problems. However, at this time, the record lacks a sufficient track record of behavioral rehabilitation to assure the Government that similar misconduct will not occur in the future.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance at this time. For these reasons, I conclude Applicant did not mitigate the security concerns arising from his personal and criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E: Subparagraphs 1.a through 1.p:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge