



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



In the matter of:)	
)	
)	ISCR Case No. 14-04179
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

06/30/2016

Decision

HEINY, Claude R., Administrative Judge:

Applicant was arrested a number of times and convicted three times over a 46-year time period. His last arrest in March 2011 resulted in a misdemeanor conviction. Applicant has rebutted or mitigated the Government's security concerns under criminal conduct, personal conduct, and alcohol consumption. Clearance is granted.

Statement of the Case

February 4, 2015, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued a Statement of Reason (SOR) detailing criminal conduct, alcohol consumption, and personal conduct security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On March 4, 2015, Applicant answered the SOR and requested a

¹ 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 (AG) effective within the DoD on September 1, 2006.

hearing. On June 11, 2015, I was assigned the case. On June 17, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on July 9, 2015.

At the hearing, Government's Exhibits (Ex.) 1 through 8 and Applicant's Exhibit A were admitted without objection. The record was kept open to allow Applicant to present additional documents. Documents were received and admitted without objection as Ex. B and C. Applicant testified at the hearing. On July 17, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admits some of the factual allegations in the SOR and gives explanations concerning the other allegations. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 58-year-old program director who has worked for a defense contractor since April 1993 and he seeks to retain a security clearance. From October 1975 through October 1979, he honorably served in the U.S. Air Force. (Ex. 1) Applicant had a security clearance while serving in the Air Force. He obtained a security clearance in 1996 and received a secret clearance in January 2009. (Ex. B, 7) The company's president states Applicant was the first engineer hired by the company in 1993. Applicant demonstrates good work ethics, has sound judgment, is reliable, and loyal. (Ex. B)

In March 2011, Applicant was most recently involved with law enforcement. (Ex. C) In January 2011, he broke a window on a tow truck that was towing his vehicle, which resulted in a misdemeanor conviction for assault. (Ex. 1) In his December 2013 Electronic Questionnaires for Investigations Processing (e-QIP) he listed a number of arrests and convictions including this incident. (Ex. 1) The towing company was attempting to tow his minivan from his house. He threw a scythe at the tow truck, which broke the passenger-side window. (Ex. 7) Court records indicate there was a conviction on the charge of aggravated assault with a deadly weapon and plea of guilty to the lesser charge of deadly conduct. (Ex. 2) Applicant asserts he was convicted of a misdemeanor. He was sentenced to time served, which was the time he spent overnight in jail before being bonded out. (Ex. 7) There was no fine. The company's president told Applicant not to report the incident. (Ex. 4) The record is silent as to when the facility security officer (FSO) learned of the incident.

In November 2007, a fight over the repayment of a \$500 loan resulted in a misdemeanor conviction, which Applicant listed on his e-QIP. (Ex. 1) A friend of his wife's wanted a cell phone, but had no credit. Applicant's wife agreed the other woman could put the \$575 charge on her credit card, if the friend would pay the bill. (Ex. 5) The woman refused to pay the bill. Applicant and his wife ran into the friend and the friend's

husband at a local store. After the friend refused to repay the money, an argument and fight ensued, which resulted in Applicant's arrest. He was convicted of assault and sentenced to 15 months' probation, which ended in September 2009. (Ex. 5) He also successfully completed an anger management class, with sessions that were held once a week for 12 weeks, and he completed 30 hours of community service. (Ex. 7)

In February 2006, Applicant was arrested for driving under the influence of alcohol (DUI), which was a misdemeanor. He listed the arrest on his e-QIP. In May 2008, the charge was dismissed. (Ex. 1) Applicant and his daughter were on their way to the grocery store. (Ex. 5, 6, 7) A deputy sheriff arrested him at a gas station for failing to stop at a red light. (Ex. 5, 6) Applicant was charged with DUI because the deputy sheriff smelled alcohol on Applicant. At the gas station, the deputy sheriff threw Applicant to the ground and then medical care was called for Applicant. Applicant denied that he resisted arrest. The gas station's surveillance tapes supported his assertions. (Ex. 6) No breathalyzer test was taken, and in May 2008, the DUI charge was dismissed. (Ex. 5) He successfully completed alcohol awareness classes. (Ex. 5, 7)

In Applicant's March 2009 personal subject interview (PSI), he said he was most recently intoxicated at least 26 years ago at his brother's wedding in the 1980's. (Ex. 5) In the March 2009 PSI, he stated he drank three or four mai-thais with dinner. He asserted he only drank at home or when he went to a restaurant. (Ex. 5) In his more recent PSI dated February 2014, he stated he was most recently intoxicated at his girlfriend's home two or six months prior to his interview. (Ex. 7) In that PSI he asserted his consumption of alcohol was six drinks (beer or mixed drinks) five or six times a week during a three-hour period. (Ex. 7)

Applicant stated he drinks to be social and to relax, and that ninety-five percent of the time when he drinks he is with friends. (Ex. 7) At that time, he had no plans to alter his drinking habits. (Ex. 7)

On Applicant's e-QIP, he listed that in January 1980 he was arrested for possession of marijuana, a horse tranquilizer, and a marijuana pipe. (Ex. 5) He was 22 years old and out of the Air Force at the time of his arrest. (7) The charge was possession of a controlled substance. (Ex. 1) He sold marijuana to what he later believed was an individual working with the police. He was sentenced to nine months in jail, and he served 40 days in jail before being paroled. (Ex. 1, 5)

On the e-QIP, Applicant listed an August 1990 arrest for possession of a controlled substance, cocaine. The charges were dismissed. He asserted he was out with friends. One of the friends put the cocaine on the console in the car or dropped it on the floor when stopped by police. Applicant asserted he put the cocaine in his pocket so the police would not see it. It was discovered by the police during a search. (Ex. 5, 7)

Applicant did not list a September 1975 arrest for possession of a controlled substance because he forgot about it. (Ex. 5) Applicant was stopped for speeding and a bag of marijuana was found on the ground. No one in the car admitted it was their marijuana. (Ex. 5) Charges were dropped when the judge determined Applicant was

entering the Air Force the week after his hearing. (Ex. 5) Between 1975 and 1980, he used marijuana 30 times. (Ex. 5) He stopped using marijuana in 1980. (Ex. 5) He was serving in the U.S. Air Force these same years. He asserted the last time he used or sold marijuana was in 1980. (Ex. 5)

In September 2013, it was alleged Applicant smelled strongly of alcohol when he visited a customer's testing facility. (Ex. 3, 4) Applicant stated he took some equipment to the test site to be tested. Routinely, when testing at the site the site was completely prepared by a testing site employee before Applicant's arrival. When Applicant arrived the test site was not ready and the prior testing site employee was not available because that person had retired. A new person set up the test. (Ex. 4) Applicant arrived at the test facility at 8 a.m. and the prior testing site employee normally got the testing done by noon. Applicant had a 4 p.m. appointment in a city 165 miles away. (Ex. 4)

The testing facility set up the testing equipment improperly and this mistake resulted in the complete demolition of the flight hardware that Applicant brought to be tested. (Ex. B) Zero tests were completed although 45 tests had been planned. (Ex. A) The facility did not contest that the test had been set up incorrectly. (Ex. B) The actions of the facility resulted in \$15,000 damage to equipment owned by Applicant's company. (Ex. B) Applicant's company no longer uses this testing facility. (Ex. 7) The incident was properly reported by the company's security officer. (Ex. 3, 7)

One employee of the test facility said Applicant smelled of alcohol. Applicant said the previous evening he had consumed a pint of whiskey. It was alleged Applicant was loud, angry, and irate when the test ruined the equipment he brought for testing. (Ex. 3, 4) One employee stated Applicant was calmer and almost apologetic when he left the test facility. (Ex. 4)

The incident was investigated and no adverse action was taken against Applicant for his conduct. The company's president stated he believed the report was "filed by an overzealous FSO wielding her ability to damage the career of the employee without proper investigative due diligence." (Ex. B)

There is no documentation as to the outcome of Applicant's January 1985 arrest for public lewdness (SOR 1.e) or his 1975 arrest for unlawful dealing with fireworks and possession of a controlled substance (SOR 1.g).

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 must be considered 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 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

Adjudicative Guideline (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. Potentially disqualifying conditions are:

- (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;

Between 1975 and March 2011, Applicant was arrested seven times and convicted three times. The arrests resulted in a \$200 fine for the 2011 assault charge, one-year imprisonment (suspended) and 15 months' probation for the 2007 assault charge, and nine months in jail with probation after having served 40 days for the 1980 illegal drug charges. Charges in the 1990 and 2007 arrests were dismissed. The result of the 1975 arrest for dealing with fireworks and possession of a controlled substance and the 1985 arrest for public lewdness are not part of the record, but Applicant admitted the allegations. AG ¶¶ 31(a) and 31(c) apply. AG ¶ 31(d) does not apply because he is not currently on probation.

AG ¶ 32 provides two conditions that could mitigate security concerns. Those that are potentially mitigating are:

- (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.

It is noted there were seven separate arrests over a 41-year period of time. These arrests are not being treated piecemeal. More than half of the arrests occurred decades ago. The four oldest arrests occurred 25, 30, 35, and 40 years ago. Two additional arrests occurred eight years ago and it has been five years since Applicant's most recent arrest. His most recent arrest, although serious, resulted in a misdemeanor conviction for which he paid a \$200 fine. AG ¶ 32(a) applies. Neither his actions of five years ago, nor the other more distant arrests, cast doubt on his current reliability, trustworthiness or good judgment. AG ¶ 32(d) applies because of the passage of time without involvement of law enforcement and his good employment record.

Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

In March 2007, nine years ago, Applicant was arrested and charged with DWI. In September 2013, more than two years ago, he went to a test facility where the testing company's actions destroyed a sizable amount of equipment Applicant had brought to be tested. He became angry when the equipment was destroyed. One of the test facility employees said Applicant smelled of alcohol. The allegation that he was impaired at work by alcohol consumption is not substantiated. During the last seven years, Applicant has admitted to being intoxicated once and also admitted to being intoxicated in the 1980's at his brother's wedding. AG ¶ 22(a) "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other criminal incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," applies.

Prior to his 2007 arrest for DWI, Applicant acknowledged he had some drinks in the back yard before he and his daughter left to go to the grocery store; however, he denied that he was intoxicated, and there was no breathalyzer test. The charges were dismissed following Applicant's attendance at alcohol-awareness classes. The night before the testing facility failure, Applicant acknowledged he drank a pint of whiskey. Appellant's denial that he was intoxicated on this occasion after consuming a pint of alcohol is not accepted as credible? Although irate when the equipment was damaged, Applicant was calmer and almost apologetic when he left the facility. The destruction of the test equipment was the fault of the test facility. There is no indication that Applicant's alcohol consumption the previous evening in any way led to the failure of the testing or adversely affected the test.

AG ¶ 23 provides a condition that could mitigate alcohol consumption security concerns. That potential mitigating condition is:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

Applicant's sole alcohol-related arrest occurred more than nine years ago. Applicant has admitted to being intoxicated only once in the past seven years. This occurred at this girlfriend's house. Additionally, someone said Applicant smelled of alcohol during the 2013 equipment testing failure, which has been described earlier. There is no evidence the intoxication or his use of alcohol led to any other involvement with the law or other adverse actions. The 2013 incident was investigated. No adverse action was taken against Applicant, and the Applicant's company no longer uses that testing facility to test their equipment. The company's president stated he believed the report was "filed by an overzealous FSO . . . without proper investigative due diligence."

It has been nine years since Applicant was arrested for DWI. He successfully completed the alcohol-awareness classes and the DWI charge was dismissed. It has been more than two years since the testing incident where someone said Applicant smelled of alcohol. However, no adverse action was taken against Applicant for his action. He has been intoxicated once in the last seven years and this occurred at his girlfriend's home. Sufficient time has passed to apply the mitigating factor listed in AG ¶23(a).

Personal Conduct

Adjudicative Guideline (AG) ¶ 15 articulates the security concerns relating 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.

The following Personal Conduct Disqualifying Conditions under AG ¶ 16 are 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;

(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

(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.

The criminal conduct allegations listed in SOR ¶ 1. and the alcohol related allegations listed in SOR ¶ 2. have already been addressed. There is no need to address them again under the personal conduct guideline in SOR ¶¶ 3.a and 3.b. The allegation in SOR ¶ 3.c alleges Applicant failed to inform the FSO of the March 2011 incident where he threw a scythe at a tow truck. The company's president stated the company management had knowledge of the incident and surrounding circumstances. The company's president told Applicant not to report the incident. The record is silent as to when the FSO learned of the incident.

Deliberate omissions, concealment, or falsifications of material facts in any written document or oral statement to the Government, when applying for a security clearance, are certainly of security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. The company's management knew of the incident and told him not to report it. Following the advice of the company's president in this particular incident does not establish a deliberate omission, concealment, or falsification of any material fact.

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 the 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. Applicant was convicted in 1980, 2007, and 2011. It has been more than five years since his most recent arrest, which resulted in a misdemeanor conviction and a \$200 fine. His only alcohol-related arrest did not result in a conviction. The only other alcohol related incident was that one person said Applicant smelled of alcohol at work more than two and a half years ago. He has the support of the company's president. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the personal conduct, criminal conduct, and alcohol consumption security concerns.

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, Criminal Conduct:	FOR APPLICANT
Subparagraphs 1.a—1.g:	For Applicant
Paragraph 2, Alcohol Consumption:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant
Paragraph 3, Personal Conduct:	FOR APPLICANT
Subparagraphs 3.a—3.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge