



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



In the matter of:)
)
) ISCR Case No. 11-09882
)
Applicant for Security Clearance)

Appearances

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

01/09/2014

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline J, criminal conduct, and Guideline G, alcohol consumption, but failed to mitigate the concerns under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 12, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct; and Guideline E, personal conduct. DOD acted 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 by the DOD on September 1, 2006.

Applicant answered the SOR on April 7, 2013, and requested a hearing. On August 23, 2013, Department Counsel amended the SOR to add allegations under Guideline G, alcohol consumption. Applicant submitted an answer to the amended SOR on September 11, 2013. The case was assigned to another administrative judge on September 19, 2013, and reassigned to me on September 25, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on the same date, and the hearing was originally scheduled for October 10, 2013. As a result of the government-wide shut down, which occurred from October 1, 2013, to October 11, 2013, the scheduled hearing was postponed. On October 17, 2013, DOHA issued a subsequent notice of hearing, scheduling the hearing for October 22, 2013. The hearing commenced on October 22, 2013, but shortly into the hearing, Applicant informed me that due to her removing retained counsel from the case, she had not received the Government's exhibits (this was through no fault of Department Counsel). I recessed the hearing and directed Department Counsel to provide Applicant the documents. On October 22, 2013, DOHA issued a notice of hearing setting the hearing for October 30, 2013. The hearing was held as scheduled. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's exhibit index was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through M, which were admitted into evidence without objection. DOHA received the hearing transcripts (Tr.1) on October 28, 2013, and (Tr.2) on November 7, 2013.

Findings of Fact

In Applicant's answer, she admitted all the allegations in the SOR, except for SOR ¶ 2.a. She also admitted all the amended allegations.¹ After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 38 years old. She is single and has two children. Since November 2010, she has worked for a defense contractor. She has deployed in her current position on four occasions. She has a bachelor's degree. She was on active duty in the Air Force from 2001 to 2007. She received an honorable discharge. She also served in the Air Force Reserve beginning in 2008. It is unclear from the record whether she is still serving in the Air Force Reserve. She previously held a security clearance.²

Applicant's admitted conduct raised in the SOR and the amended SOR includes: (1) being arrested for driving under the influence of alcohol (DUI), and other related charges in December 2010 (See SOR ¶ 1.a); (2) being charged with misdemeanor aggravated assault and battery in May 2010; being arrested for assault with a deadly weapon and domestic violence in December 2009; and being arrested for battery

¹ Applicant originally submitted an answer to the amended SOR, through her retained counsel, denying those allegations. Upon releasing her retained counsel and assuming *Pro se* representation, she submitted an answer admitting the amended allegations. Tr.2 14-18.

² Tr.2 35, 102; GE 1; AE I.

domestic violence in January 2008 (See SOR ¶¶ 1.b through 1.d); (3) making deliberate false statements in her security clearance application (SCA) completed in April 2011 when she failed to disclose her arrests for three domestic violence offenses listed in SOR ¶¶ 1.b through 1.d; and by failing to report her arrest for DUI in December 2010 to her employer (See SOR ¶¶ 2.a and 2.b). The conduct alleged in SOR ¶¶ 1.a, 1.c, and 1.d was also alleged as alcohol consumption under Guideline G in the amended SOR. (See SOR ¶¶ 3.a and 3.b)

Applicant began drinking alcohol when she was 18 years old. She reported in her security clearance interview that she typically drinks one to two drinks per week and that she becomes intoxicated once every two to three months. It takes her anywhere from two to five or six drinks to become intoxicated. Recently, it takes less drinks for her to become intoxicated (about two drinks), but she does not know why. In her hearing testimony, she stated that she stopped drinking alcohol in May 2013. She also signed a statement of intent to “never abuse alcohol again.” She currently attends about three Alcoholics Anonymous (AA) meetings per week. She is also working on her third step of the AA 12-step recovery program.³

In December 2010, Applicant stopped at a local bar after work. She drank about four to five shots of brandy while there. She did not live far from the bar, so when she decided to leave she thought she could make it home without a problem. In the bar parking lot she hit another vehicle as she tried to leave. The car’s owner called the police who arrived and investigated. The police report for the incident indicated that Applicant appeared to have the smell of an alcoholic beverage coming from her person, exhibited slurred speech, was argumentative and unresponsive, and was wobbling. She also failed the horizontal gaze nystagmus test and a preliminary breath test indicated she had a blood alcohol level of .312 percent (.08 percent is the legal limit). Based upon all the foregoing, she was arrested for DUI. She pled guilty in June 2011 and completed all the requirements of her sentence in May 2012. Applicant reported the DUI arrest to her Air Force Reserve supervisor immediately after the arrest. She did this because she believed she had a duty to do so. She did not formally report the arrest to her civilian chain of command because she was unaware of any requirement to do so.⁴

In May 2010, Applicant was arrested for a domestic battery offense during an altercation with her boyfriend. This occurred at her residence. She claimed that both she and her boyfriend were throwing compact discs at each other during an argument and one hit him in the face leaving a mark. He called the police and she was arrested and spent a day in jail before the charges were dropped. She admitted in her amended answer that this incident was fueled by her alcohol intoxication. She believes she was ordered to attend a day-long anger management class, but was not sure when she did so.⁵

³ Tr.2 45-46, 62, 64; GE 5; AE C .

⁴ Tr.2 49, 52-54; GE 2; AE A-B.

⁵ Tr.2 70, 74; GE 5; AE D; Amended Answer.

In December 2009, Applicant was arrested for aggravated assault with a deadly weapon and domestic battery during an altercation with her daughter. Applicant was heavily under the influence of alcohol on the evening in question. She passed out on the couch from an evening of heavy drinking. Her daughter found her that way at about 5:30 am the next morning. Her daughter woke her up as she began getting ready for school. Applicant became enraged at her daughter and assaulted her. Later, Applicant bit her daughter on the arm and then picked up a knife and began swinging it at her daughter. Applicant also struck her daughter in the head with her fist. Applicant's son was also present and witnessed the incident. The police were called and arrived. Their report indicates that upon contact with Applicant they could smell a strong odor of alcohol coming from her person. Applicant told the police that she was defending herself against her daughter. The report noted Applicant had no physical marks on her, although her daughter did. The police also noted that the physical evidence and the witness statements corroborated that Applicant's daughter was the victim. Applicant was charged and in February 2010 pleaded guilty to a lesser offense of disturbing the peace. Applicant's statements to the defense investigator and her hearing testimony are inconsistent with the police report and witness reports about what occurred during this incident. I do not find Applicant's testimony credible.⁶

In January 2008, Applicant was arrested on a charge of domestic battery when she became involved in a physical altercation with her mother and stepfather. Applicant's excessive drinking contributed to this incident. The police were eventually involved and Applicant was arrested. Although she claimed self-defense in her statement to a defense investigator, she admitted responsibility for this incident in her testimony. She spent one or two days in jail before the charges were dropped.⁷

Applicant completed her SCA in April 2011. In the application she was asked about whether, in the last seven years, she had ever been arrested by any law enforcement officer. She answered yes to the question and listed her December 2010 DUI arrest. She did not list her three domestic violence-related arrests in May 2010, December 2009, and January 2008. When specifically asked by a defense investigator in May 2011 if she had any other arrests other than the December 2010 DUI, she answered "no". When the investigator then confronted her by saying that the investigation checks her police record, she finally admitted the December 2009 arrest after several more denials. Again, after prompting from the investigator, Applicant finally admitted the May 2010 and January 2008 arrests. Applicant's explanation for not listing the arrest information on her SCA was that she completed the form while she was deployed and did not remember the incidents and did not have access to her records. She testified that she remembered the arrests, but since she could not recall the details she did not want to put down any information that was not correct, so she did not list the

⁶ Tr.2 77, 81, 83; GE 3, 5; AE F.

⁷ Tr.2 66, 69; GE 5.

three arrests. She further testified that she had no intent to hide this information from the Government. I do not find Applicant's testimony credible.⁸

Applicant offered job evaluation reports that characterized her as exceptional, outstanding, and superior. She provided a certificate of completion for a training class and a number of promotions, awards, and certificates she received over the course of her Air Force career. She also offered several character letters from coworkers and friends. She is described as having a high work ethic, and as being trustworthy, committed, and dependable.⁹

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.

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

⁸ Tr.2 85-90; GE 5.

⁹ AE E, G-H, J-M.

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 that an 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

The security concern relating to the guideline for criminal conduct is set out in 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant’s numerous domestic battery arrests and her DUI constitute criminal action on her part. I find that both disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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.

Applicant's most recent arrest is over three years old. She has had no further incidents since that time. In this case, this is a sufficient amount of time to determine whether her rehabilitative efforts have been successful. Additionally, she provided evidence of successful job training and good work performance. Both AG ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(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.

Applicant failed to list her three domestic violence arrests from 2010, 2009, and 2008 on her 2011 SCA. She testified she remembered the arrests, but did not want to list them on the SCA because she could not remember specific details. Later, in the investigation, it took several promptings by a defense investigator to finally have her admit these arrests. This reluctance and her explanation for not listing the information on the SCA cause me to find her overall testimony on these points not credible. She deliberately failed to list these arrests on her security clearance application in 2011. AG ¶ 16(a) applies.

Applicant was not aware of a requirement to notify her civilian employer about any DUI arrests. She did notify her military supervisor because she believed she had a

military duty to do so. The Government produced no evidence to indicate Applicant was aware of a duty to inform her civilian supervisor. I find the Government failed to establish AG ¶ 16(c) regarding SOR ¶ 2.b.

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

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

I considered all of the facts and circumstances surrounding Applicant's falsifications. Rather than disclosing the information about her prior arrests at the first opportunity during her security clearance interview, Applicant chose to continue her pattern of denial even when initially confronted by the investigator. It was only after repeated prompting that she revealed the details of the arrests. AG ¶ 17(a) does not apply. Falsifying information on a security clearance application is not a minor offense and doing so casts doubt on her trustworthiness, reliability, and good judgment. AG ¶ 17(c) does not apply.

Guideline G, 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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant's domestic violence arrests when she was intoxicated and her DUI conviction support the application of the above disqualifying conditions.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(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 last adverse alcohol incident is over three years old. She has become abstinent since May 2013 and has indicated an intent not to abuse alcohol in the future. She also is an active participant in AA, where she attends about three meetings a week. AG ¶ 23(a) applies.

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. I considered Applicant's multiple deployments, her job evaluations, her coworker support, and the remoteness of her criminal offenses and alcohol incidents. However, I also considered that she was not truthful when completing her SCA by failing to list her three prior domestic violence arrests. Her intentional lack of honesty is a security concern. Despite mitigating both the criminal conduct and alcohol consumption concerns, Applicant failed to provide sufficient evidence to mitigate the personal conduct security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns under Guidelines J and G, but she failed to mitigate the security concerns arising under Guideline E.

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 J: Subparagraphs 1.a - 1.d:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E: Subparagraph 2.a: Subparagraph 2.b:	AGAINST APPLICANT Against Applicant For Applicant
Paragraph 3, Guideline G: Subparagraphs 3.a-3.b:	FOR APPLICANT For 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.

Robert E. Coacher
Administrative Judge