



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-10490
)
Applicant for Security Clearance)

Appearances

For Government: Mel Howry, Esquire, Department Counsel

For Applicant: *Pro se*

August 23, 2013

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on February 3, 2011. (Government Exhibit 1.) On August 6, 2012, the Department of Defense issued a Statement of Reasons (SOR) to Applicant, which detailed security concerns under Guidelines G (Alcohol Consumption), J (Criminal Conduct) and F (Financial Considerations). 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.

Applicant answered the SOR in writing on September 18, 2012, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 8, 2013. This case was assigned to me on May 23, 2013. DOHA issued a notice of hearing on May 30, 2013. I convened the hearing as scheduled on July 18, 2013. The Government offered Government Exhibits 1 through 11, which were received without objection. Applicant testified on his own behalf, called his wife as an additional

witness, and submitted Applicant Exhibits A through M, which were received without objection. DOHA received the transcript (Tr.) of the hearing on July 30, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 69, married and has a bachelor's degree from one of the United States military academies. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment.

Paragraph 1 (Guideline G - Alcohol Consumption)

The Government alleges in this paragraph that Applicant is ineligible for a clearance because he used intoxicants to excess. Applicant admitted the factual allegations of the SOR under this paragraph. Those admissions are findings of fact.

Applicant began drinking alcohol in about 1961. From 1975 through 1990 Applicant was involved in several alcohol-related incidents, which included four arrests for driving under the influence of alcohol in 1975, 1988, 1989, and 1990. In addition, Applicant received treatment in 1986 and 1990 as a result of his alcohol use. As a result of this history the Directorate for Industrial Security Clearance Review (DISCR)¹ issued Applicant an SOR in 1993.² (Subparagraph 1.b.) A hearing was held and a decision favorable to Applicant was issued on December 29, 1993.³ The factual conclusions of that decision are incorporated here by reference.

Applicant did not have another alcohol-related incident for over 18 years. However, he was arrested on July 3, 2009, and charged with Driving Under the Influence of Alcohol (DUI), and Driving With a Blood Alcohol Content of .08% or Above. (Government Exhibit 5.)⁴ He was found guilty after a trial and sentenced to five years probation. He remained on probation at the time of the hearing. As part of his sentence he was also required to attend a three-month DUI program, which he successfully completed. (Government Exhibit 4.)

According to Applicant this last incident was not indicative of his drinking pattern. He suffered from a very serious life-threatening medical emergency in 2008. As a result of this event, and the medication he is taking to control its effects, his alcohol consumption must be moderated. In addition, Applicant states that he normally has no

¹This was the predecessor agency of the Defense Office of Hearings and Appeals.

²ISCR Case Number 93-0509. (Government Exhibit 3 at 6-8.)

³Government Exhibit 3 at 1-5.

⁴Applicant had concerns about the validity of this police report, as well as the conduct of the officers during his arrest. (Tr. 87-92; Applicant Exhibit D.)

more than one drink at a time, usually with a meal, and hardly ever drinks outside the home. (Tr. 92.) Applicant's wife confirmed that he no longer drinks and drives. (Tr. 57.)

Applicant went on to testify that he has been intoxicated maybe once per year since 1992. He was adamant in stating that he has not drank alcohol to excess since 2009, and that event was an aberration. (Tr. 117-125.)

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for a clearance because his conduct under Paragraph 1, above, shows criminal conduct, which creates doubt about a person's judgment, reliability, and trustworthiness. Accordingly, Applicant's history of alcohol-related criminal incidents is cognizable under this guideline, as well as Guideline G.

Paragraph 3 (Guideline F - Financial Considerations)

The Government alleges that Applicant is ineligible for a clearance because he is financially overextended and, therefore, at risk of having to engage in illegal acts to generate funds. Applicant admitted all the factual allegations in the SOR. Those admissions are findings of fact.

Applicant did not file state or Federal tax returns for several years. As a result of his failure to file the tax returns, the state and Federal tax authorities filed three tax liens against Applicant. (Subparagraphs 3.a., 3.b., and 3.c.) All of the tax returns have now been filed. (Tr. 105-106; Government Exhibit 7.) Accordingly, all three tax liens have been released. (Government Exhibit 10; Applicant Exhibits E, F and G.)

Applicant went into great detail about the personal situation that led him not to file his taxes in a timely fashion. He acknowledges his negligence and stubbornness in not filing his returns sooner and states he will not engage in such conduct in the future. Applicant's tax situation is complex, and he spent a great deal of time explaining how he prepared his tax returns, once the decision was made to file them. (Tr. 99-111, 125-148; Applicant Exhibit B.)

Applicant's financial situation is stable and he showed that he should have no problem paying his income tax liabilities into the future. (Tr. 97-99; Applicant Exhibits E, F, G and I.)

Mitigation

Applicant states that he has, "A long and successful career of now more than 41 years doing the same thing and a long and successful career of working on . . . projects requiring security clearances." (Tr. 115; Applicant Exhibits J and K.) Concerning having a security clearance Applicant stated, "I feel I am very honorable and honest. And, contrary to - - I don't think I would ever even under torture reveal anything, any more

than any of the guys in that movie about the Hanoi Hilton. I would never reveal anything about the Government or any security things. It would grind inside of me.” (Tr. 162.)

Applicant’s wife testified on his behalf. She describes him as a person of “high ethics.” (Tr. 40-41.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline G - Alcohol Consumption)

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

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.

Applicant was involved in four alcohol-related incidents between 1975 and 1990. He also had an additional alcohol-related incident in 2009.

There are two Disqualifying Conditions that apply to this case under 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 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.

Under the particular facts of this case, the following mitigating conditions currently apply to Applicant's situation pursuant to AG ¶ 23:

(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; and

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).

Applicant had a serious alcohol problem at the time DISCR filed an SOR concerning Applicant in 1993. As a result of the treatment he received, and the impact of the case, he did not have any alcohol-related incidents for almost 19 years. The arrest in 2009 was an aberration, which Applicant credibly avers will not occur again. He has not been recently diagnosed as alcohol dependent or an alcohol abuser. He has, however, on his own and as a reaction to a serious medical condition, considerably reduced his alcohol usage.

Both of the above mitigating conditions apply. When they are viewed along with the whole-person concept discussion below, the facts support a finding for Applicant under Paragraph 1 of the SOR.

Paragraph 2 (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.

I have considered the disqualifying conditions under AG ¶ 31 and especially considered the following:

- (a) a single serious crime or multiple lesser offenses; and
- (d) individual is currently on parole or probation.

As stated above, Applicant was arrested for alcohol-related criminal offenses in 1975, 1988, 1989, 1990 and 2009. He is currently on informal probation for the last offense. Both of the disqualifying conditions apply to his conduct.

I have examined the mitigating conditions and there is one that applies under AG ¶ 32:

- (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.

While Applicant did have a serious criminal history until 1990, he did not have another incident until 2009, almost 18 years later. He has shown that the conduct was unusual, and is unlikely to recur. I have specifically considered the fact that Applicant remains on probation for another two and a half years. Under the particular circumstances of this case, he has mitigated the security significance of his criminal conduct. Paragraph 2 is found for Applicant.

Paragraph 3 (Guideline F - Financial Considerations)

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant, for various reasons, including negligence, failed to file tax returns for several years.⁵ As a result tax liens were filed against him. All the tax returns have been filed and the liens released. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties under AG ¶ 20;

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

For several years Applicant, somewhat stubbornly, believed that his personal situation did not require him to file tax returns. This conduct resulted in the filing of the tax liens in question. Applicant is not a tax protestor and, eventually, he determined that it was in his best interest to file all the applicable tax returns, which he has done. As a result of his filing of the tax returns, both the state and Federal tax authorities have released their liens. He credibly indicates that this conduct will not occur in the future. His financial situation is stable. This paragraph is found for Applicant.

⁵The SOR does not contain any allegations concerning a failure of Applicant to file income tax returns. However, that failure will be considered in this Decision as part of the requirement for me to consider all the available facts and circumstances.

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. My Guideline G, J and F discussions are applicable here as well.

Applicant engaged in two separate periods of alcohol use and abuse resulting in alcohol-related criminal incidents, the most recent of which occurred about four years ago. The record shows that since his last alcohol-related incident he has changed his life in fundamental ways. He successfully attended a DUI program, understands the nature of his conduct, has reduced his alcohol intake severely, and credibly established that such conduct will not happen in the future.

Turning to the financial concerns, Applicant has also mitigated the security significance of this conduct. The tax returns have been filed and the liens released. Applicant realizes that his personal situation did not excuse him from filing tax returns.

Applicant's conduct was serious, but there is considerable evidence of rehabilitation. Applicant is an intelligent man with a long history of outstanding achievement. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is very little likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his Alcohol Consumption, related Criminal Conduct, and his Financial Considerations. On balance, I

conclude that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance.

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 G:	FOR APPLICANT
Subparagraphs 1.a. through 1.d.:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraphs 3.a. through 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.

WILFORD H. ROSS
Administrative Judge