



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



In the matter of:)
)
) ISCR Case No. 11-15188
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Ronald Sykstus, Esq.

04/16/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On November 14, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR on December 29, 2014, and requested a hearing before an administrative judge. The case was assigned to me on February 5, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 19, 2015. I convened the hearing as scheduled on March 12, 2015. The

Government offered exhibits (GE) 1 through 10, which were admitted into evidence without objection. Applicant and three witnesses testified on his behalf. He offered Applicant's Exhibits (AE) A through OO, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 20, 2015.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His admissions are incorporated into the findings of facts. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 57 years old. He honorably retired from the Army in 1995 in the paygrade E-7. Since his retirement he has worked for the federal government as a civilian employee and for a federal contractor. He has been employed with his current employer since 2010. He has been married twice. His first marriage ended in divorce, and he has three grown daughters. He has been married to his current wife for 12 years.¹

Applicant has two driving under the influence of alcohol (DUI) convictions. In 1983, he was found guilty and fined for the offense. In 1993, he was again found guilty of DUI. He paid a fine, his military base driving privileges were suspended for one year, and he received a Letter of Reprimand. He does not recall if he was ordered to attend alcohol counseling.²

In 1996, Applicant was charged with malicious wounding, a felony. The charge was dismissed in 1998, and he was ordered to attend anger management. The offense stemmed from an argument Applicant had with his first wife when he learned she had been unfaithful to him. An altercation ensued and Applicant slapped her, and she fell.³

In March 2011, Applicant was at home talking on Skype to a female friend. The friend wanted to visit him. Applicant's wife did not want the friend to visit. Applicant had consumed alcohol. He became agitated about the situation, and while talking to his friend, shot three rounds from his pistol into the ceiling of his home. He was in the home alone at the time. Because his friend was concerned about Applicant's safety, she contacted his wife, who in turn contacted the police to execute a health and safety check. At the time, Applicant and his wife were having marital difficulties. When the police arrived they took Applicant into custody.⁴

¹ Tr. 25-32.

² Tr.42-47, 66, 93; GE 7 and 8.

³ Tr. 41-42, 92; GE 9.

⁴ Tr. 34-37, 84-91.

The police transported Applicant to a hospital for a mental evaluation due to the discharge of the firearm. Applicant understood the reason he was taken to the hospital was because he had shot a firearm, and people were concerned he would hurt himself. He spent approximately two days in the hospital. Although he had consumed alcohol prior to the incident, Applicant did not believe the reason he was sent to the hospital was because of an alcohol issue, but rather because of his marital issues and his use of a firearm. He stated he never discussed with anyone at the hospital his alcohol consumption, but he did disclose he had consumed alcohol before the incident. The discharge summary from Applicant's hospital stay noted that Applicant believed he was in the hospital because he had a drink and shot his gun three times through the ceiling of his house. He was evaluated by a medical doctor who was board certified in adult, child, and adolescent psychiatry.⁵ The DSM-IV-TR discharge diagnoses stated:

AXIS I: Mood Disorder NOS. Alcohol Abuse.

AXIS II: None.

AXIS III: COPD, IBS, sleep apnea, and history of motor vehicle accident.

AXIS IV: Psychosocial stressors: Problems with primary support, marital problems.

AXIS V: Discharge GAF: 50/60.

The psychiatrist recommended Applicant follow up with a marriage counselor, which he did. His prognosis was "fair with treatment." Applicant stated he had never seen the discharge summary until days before his hearing. He was unaware of its contents. He was unaware that the discharge summary included a diagnosis of alcohol abuse or any other diagnosis. Applicant's wife reported the incident immediately to his facility security officer, and Applicant also reported it when he was released from the hospital.⁶

In May 2011, Applicant was charged with disorderly conduct, a misdemeanor, for the event that took place in his home in March for discharging his firearm while intoxicated. He was found guilty and placed on probation for a year. He was ordered not to consume alcohol or have a firearm in his home for one year. He was released from probation after six months, and continued to comply with the one-year abstinence requirement. He does not believe he has a problem with alcohol. The extent of his current alcohol consumption is possibly a drink once or twice a week with dinner. He does not drink to intoxication. Other than the incident above, he stated he does not handle firearms after consuming alcohol.⁷

Applicant answered "no" on his security clearance application (SCA) dated February 5, 2010, in response to Section 22, which asked if he had ever been charged with any offense related to alcohol or drugs. He also answered "no" to the inquiry if he had ever been charged with any felony offense. During Applicant's personal subject

⁵ Tr. 37-39, 62-67, 112-113; GE 4.

⁶ Tr. 39-41, 47-48, 65-67, 79; GE 4.

⁷ Tr. 34, 77-83; 97; GE 3.

interview with an investigator from the Office of Personnel Management, Applicant denied having alcohol-specific treatment or counseling. In response to interrogatories, he denied receiving any medical treatment, counseling, or supportive treatment from a drug or alcohol rehabilitation center or other organization.⁸

Applicant explained that he believed he was sent to the hospital because he discharged a firearm and not for an alcohol problem. He did not believe he had been treated for an alcohol problem, therefore he had nothing to disclose. Because he only recently became aware of the contents of the discharge summary, he did not disclose to the government investigator that he had alcohol treatment or counseling. All of Applicant's subsequent counseling related to his marriage. Applicant stated that he did not disclose his 1993 or 1983 DUI convictions or felony arrest because he believed the questions only referred to disclosing offenses within the past seven years. He stated he misread the question. He disclosed the felony arrest on his 2003 SCA.⁹

The DOD CAF requested Applicant obtain an evaluation by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program. The evaluation was required to consider the information contained in Applicant's interrogatory. An evaluation was conducted by a licensed clinical social worker, who is a psychotherapist. Based on her evaluation, Applicant did not meet the criteria for a diagnosis of alcohol abuse. He did meet the criteria for a diagnosis of substance intoxication, due to impaired judgment at the time he fired his gun three times into his ceiling in his home.¹⁰

Applicant's wife testified on his behalf. She is a retired federal employee and was familiar with requirements for completing a SCA. She assisted Applicant when he completed his SCA and interrogatory. She confirmed that Applicant did not disclose his hospital stay because he was not admitted for alcohol treatment, but rather because he shot his gun and the concern was for his safety, or that he might be suicidal at the time. She indicated they were having serious marital problems at the time, and she had sought advice from an attorney, causing Applicant to be distressed. She also confirmed that they discussed with a "clearance lady" whether he needed to disclose his prior felony arrest and were told by her that he only needed to go back seven years. Applicant's wife was aware of an assault incident with his ex-wife, but was not aware that it was a felony charge. In his wife's previous job before she retired, she assisted people with completing the SCA, and she believed they only had to disclose information within the past seven years. She acknowledged she gave her husband incorrect advice.¹¹

⁸ Tr. 48-50, 53-65; GE 1.

⁹ Tr. 49-51, 53-67, 69-70, 73; GE 1 and 6.

¹⁰ Tr. 51-53, 70-73; GE 5.

¹¹ Tr. 32, 99, 119-135.

I find Applicant did not deliberately omit, conceal, or falsify relevant facts when he completed his SCA. Applicant had previously disclosed on an earlier SCA his felony arrest. Because his two DUIs occurred 17 years and 27 years earlier, his belief that they did not need to be disclosed because they were beyond seven years was reasonable. In addition, he relied on his wife who was familiar with the completion of the application.

I also find that Applicant did not provide false or misleading information to the government investigator when he did not disclose alcohol counseling or treatment because he did not know that he was diagnosed with alcohol abuse, and he reasonably believed the reason he was admitted to the hospital related to the discharge of a firearm in his house. His follow-up treatment was with a marriage counselor, which was the recommendation he received upon discharge. This explanation is also consistent with why he did not make a similar disclosure in his interrogatory.

Applicant's wife testified that she grew up in a family where her father was an alcoholic, and it had a major effect on her. She does not believe Applicant has an alcohol issue, but acknowledged he likely would not have shot his gun if he had not consumed some alcohol. When he was released from the hospital, they went to marriage counseling. They have resolved their marital issues and have a good relationship.¹²

A former supervisor, who served with Applicant while they were in the military and has recently worked with him in his civilian job, testified that he has never known Applicant to have any alcohol-related problems. He would never question Applicant's integrity. He stated that Applicant is an excellent worker who is well-respected.¹³

Applicant's upper-level supervisor, who has known Applicant since 2009, testified that Applicant is one of his best employees. He considers him loyal and faithful. He is a person who knows what needs to get done and then completes the task. He and Applicant shoot guns together. The witness does not shoot with anyone who has been drinking. He and Applicant socialize together. The witness has never observed Applicant consume alcohol. He has never questioned Applicant's integrity.¹⁴

Applicant provided numerous documents, including performance appraisals, awards, letters of appreciation, military medals, military evaluations, and certificates of achievements.¹⁵

Policies

¹² Tr. 105-115.

¹³ Tr. 137-144.

¹⁴ Tr. 144-162.

¹⁵ AE A through OO.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

AG ¶ 15 sets out the security concern 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.

I have considered the disqualifying conditions under personal conduct AG ¶ 16 and the following 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;

(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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant discharged a firearm in his home after consuming alcohol and was found guilty of disorderly conduct in March 2011. He was arrested in 1996 for malicious wounding, a felony. He was convicted of DUI in 1993 and 1993. AG ¶¶ 16(c) and 16(e) apply to these facts.

I found Applicant did not intentionally or deliberately failed to disclose that he participated in alcohol counseling or treatment in his interrogatory or during his personal

subject interview by a government investigator, or that he had been diagnosed with alcohol abuse. I also did not find Applicant intentionally falsified his SCA by failing to disclose he was charged with a felony or information about his two DUI convictions. My analysis is stated above. Therefore, none of the above disqualifying conditions apply to these allegations. I find in favor of Applicant on those allegations.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17, and the following are potentially 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; and

(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.

Applicant acknowledged that when he shot his gun in the ceiling he had consumed alcohol and was upset with his wife. They were experiencing marital problems at the time. Since then they completed marriage counseling and are together leading happy lives. Applicant has not repeated any similar behavior. His conduct happened under unique circumstances. The factors and stressors that were affecting Applicant's behavior are no longer present and similar conduct is unlikely to recur. Applicant was recently re-evaluated by a licensed clinical social worker who did not find that he was an alcohol abuser. Applicant consumes alcohol responsibly, and there have been no additional incidents. Applicant's earlier DUIs were 17 and 27 years ago. These events are mitigated by the passage of time. AG ¶¶ 17(c) and 17(d) apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 57 years old. He served honorably in the military. He provided considerable information about his exemplary and outstanding work performance and military career. He had two DUI convictions, one in 1983 and another in 1993. An incident involving a firearm created a concern in March 2011. Applicant was dealing with the stress of marital problems and reacted inappropriately. He sought counseling with his wife and their problems have been resolved. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the personal conduct guideline.

Formal Findings

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

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a-1.i:	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 a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge