



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 12-00678
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

February 12, 2014

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on October 5, 2011. On May 29, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G and J for Applicant. 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 after September 1, 2006.

Applicant acknowledged receipt of the SOR on June 12, 2013. He answered the SOR in writing on June 27, 2013, and requested a hearing before an Administrative Judge. DOHA received the request on August 26, 2013, and I received the case assignment that same date. DOHA issued a notice of hearing on September 5, 2013, setting this case for hearing on October 9, 2013. However, due to the Department of Defense furlough of federal employees, the hearing was cancelled. On October 25,

2013, DOHA issued a second notice of hearing, and I convened the hearing as rescheduled on November 6, 2013. The Government offered Exhibits (GXs) 1 through 3, which were received without objection. Applicant testified on his own behalf, as did a Master Gunnery Sergeant who knew Applicant in the Marine Corps, and as did his current supervisor. DOHA received the transcript of the hearing (TR) on November 18, 2013. I granted Applicant's requests, one made at his hearing and one after his hearing, to keep the record open until January 23, 2014, to submit additional matters. On December 4, 2013, he submitted Exhibit (AppX) A , which was received without objection. The record closed on January 23, 2014. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in all the Subparagraphs of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Alcohol Consumption - Guideline G & Criminal Conduct - Guideline J

Applicant is a retired Gunnery Sergeant, who retired from the Marine Corps in January of 2001, after 20 years of active duty. (TR at page 46 line 23 to page 47 line 8, and AppX A.)

2.a. In June of 1983, as a Marine Corporal, Applicant self-referred himself to alcohol counseling. (GX 1 at page 33.) He avers the following:

I just thought I was drinking a lot. I just wanted help before the Marine Corps asked me to get help. . . . I learned a lot. I went through all the AA [Alcoholics Anonymous] Meetings and followed the 12 Step Program. I also was not drinking - - during that time - - for the entire program. (TR at page 45 lines 10~22.)

1.a. In August of 2011, Applicant attended a "company . . . going away party." (TR at page 39 lines 16~17.) He consumed "about six to eight glasses of Vodka and Cran[berry Juice]." (TR at page 50 line 25 to page 51 line 4.) Applicant further avers "Then I made a bad choice, and I got in my vehicle and thought I was able to drive. Obviously, I wasn't. I was pulled over by . . . [traffic police in State A]." (TR at page 39 line 24 to page 40 line 2.) As a result of this arrest, he pled guilty of "DUI [Driving Under the Influence of] Alcohol/.08 Percent." (GX 2 at page 2.) As part of his sentence, Applicant was ordered to complete a six month level 2 first offender alcohol program, and was placed on informal probation for three years. (GX 3 at page 10.)

1.b. In May of 2012, Applicant was charged with violating the terms of his probation, by dropping out of the before-mentioned court-ordered alcohol program when he moved to State B, his current state of residence. (TR at page 41 line 4 to page 45

line 1, and GX 3 at page 5.) His probation runs through October of 2014, three years from the date of his original sentencing. (TR at page 44 lines 18~24.)

Policies

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 adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. (AG Paragraph 2.) The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 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 Paragraph 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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 as to obtaining 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 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.

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

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to Criminal Conduct:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 31(a) provides that “*a single serious crime or multiple lesser offenses*” may raise security concerns. Subparagraph 31(d) “*individual is currently on . . . probation*”; and Subparagraph 31(e) “*violation of . . . probation*” may also raise security concerns. Applicant has a conviction in 2011, and a probation violation in 2012. I find no countervailing mitigating condition that is applicable here. Subparagraph 32(a) requires that “*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.*” The Applicant’s probation violation occurred less than two years ago, and he is still subject to that probation. Although I find against Applicant under this guideline, he should not be dissuaded from reapplying for a security clearance once he successfully completes that probation.

Guideline G - Alcohol Consumption

Paragraph 21 of the adjudicative guidelines sets out the security concern relating to Alcohol Consumption:

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

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 22(a) is applicable and provides that “*alcohol-related incidents away from work, such as driving while under the influence*” may be disqualifying. This is countered, however, by Subparagraph 23(a) as “*so much time has passed . . . that it [the conduct] is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.*” Applicant’s DUI occurred more than three years ago, and his current supervisor feels Applicant “is extremely responsible and has excellent judgment.” Alcohol Consumption is found for Applicant.

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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

Applicant has the unqualified support of two witnesses, one who knew Applicant in the Marine Corps, and one who knows Applicant in the defense industry. (TR at page 19 line 8 to page 28 line 16, and at page 30 line 1 to page 37 line 4.).

I have considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his alleged Criminal Conduct.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline G	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Subparagraph 2.b:

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.

Richard A. Cefola
Administrative Judge