



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



In the matter of:)
)
) ISCR Case No. 12-05876
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

07/27/2017

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the personal conduct, alcohol consumption, and criminal conduct concerns raised by his 12-year history of criminal conduct. Clearance is denied.

Statement of the Case

On August 3, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the personal conduct, alcohol consumption, and criminal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

¹ The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on September 1, 2006.

Applicant timely answered the SOR and requested a hearing. On March 13, 2017, I issued a prehearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses, and the parties complied.² At the hearing, convened on April 18, 2017, I admitted Government's Exhibits (GE) 1 through 10 and Applicant's Exhibits (AE) A through F, without objection. After the hearing, Applicant submitted AE G, which was also admitted without objection.³ I received the transcript (Tr.) on April 27, 2017.

Procedural Matters

Implementation of Revised Adjudicative Guidelines

While the case was pending decision, the Direct of National Security (DNI) issued Security Executive Agent Directive 4, establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The 2017 AG superseded those implemented in September 2006, and they are effective for any adjudication made on or after June 8, 2017. Accordingly, I have decided this case under the 2017 AG.

Motion to Amend the SOR

At hearing, Department Counsel moved to amend the SOR, striking the allegation in SOR ¶ 1.a and adding an addition allegation under each guideline regarding a January 2017 DUI for which, at the time of hearing, Applicant was pending trial. Applicant received the notice of the amendment in March 2017 and provided a written answer admitting the allegations. Accordingly, the SOR was amended, without objection, to include SOR ¶¶ 1.m, 2.b, and 3.a under the personal conduct, criminal conduct, and alcohol consumption guidelines, respectively.

Findings of Fact⁴

Applicant, 38, overcame great personal adversity to complete his education, culminating in a bachelor's degree in 2003. He has also earned credits toward a master's degree. Applicant has worked for a federal contractor for over 10 years and has held a security clearance since at least 2005. Applicant has worked for his current employer since approximately November 2011. He completed his most recent security clearance application in November 2014. In response to questions about his police record, Applicant disclosed arrests in July 2013 and May 2014, but noted that he had

² The prehearing scheduling order and the discovery letter are appended to the record as Hearing Exhibits (HE) I and II.

³ Correspondence regarding Applicant's post-hearing submission is appended to the record as HE III.

⁴ Unless otherwise indicated, I have extracted these facts from Applicant's statements in his security clearance applications (GE 1 -4), the criminal records provided by both parties (GE 5-8, 10; AE A-C, G), information from the Joint Personnel Adjudication System (GE 9), and the transcript of the hearing.

not been convicted of any criminal offense. However, the ensuing investigation revealed a more extensive criminal history.

In April 2005, Applicant was charged with second-degree assault (SOR ¶ 1.a). Applicant maintains that he was falsely accused, but accepted probation before judgment at the advice of counsel.

Between 2009 and 2013, the Applicant was charged with driving under the influence of alcohol (DUI) five times: April 2009 (deferred conviction, SOR ¶ 1.c); November 2009 (conviction, SOR ¶ 1.d); March 2010 (dismissed due to faulty breathalyzer equipment, SOR ¶ 1.f); and June 2013 (convicted of reckless driving, SOR ¶ 1.i). He admits to consuming alcohol only before the April 2009 incident. Around that time, he was dealing with depression and grief, and admits to consuming alcohol regularly. Applicant denies having consumed alcohol before his other DUI arrests, claiming to have not had a drink for a number of years, though he could not recall the date he stopped consuming alcohol.

He also testified that on at least two occasions his family pressured him to get counseling for his issues. Applicant denied that his family was concerned about his alcohol use, but admitted that he started counseling before his third DUI arrest in March 2010 for grief-related issues. He also admitted that the therapist recommended he abstain from alcohol. At hearing, Applicant admitted completing a previously undisclosed, state-sponsored, inpatient alcohol treatment program after his fourth DUI arrest in 2013. However, he claims that he had not consumed alcohol for several years before entering the program. Applicant does not believe he has an alcohol problem.

Between March 2010 and October 2013, Applicant was charged with driving on a suspended license four times in March 2010 (SOR ¶ 1.f), December 2012 (SOR ¶ 1.g), January 2013 (SOR ¶ 1.h), and October 2013 (SOR ¶ 1.i). Each charge was dismissed. Applicant claims that he did not engage in any behavior that would have caused his license to be suspended. He believes younger cousins accumulated unpaid parking tickets using his car.

In July 2013, Applicant was charged with felony possession of a deadly weapon and malicious destruction of property related to a days-long altercation between Applicant, an ex-girlfriend, and her new boyfriend. Each party accused the other of criminal conduct. Ultimately, the charges were dismissed and the charges were expunged from Applicant's record.

Despite his multiple arrests, Applicant's clearance has never been suspended or revoked. However, he was terminated from a job in January 2008 for failing to properly disclose the April 2005 assault incident on a job application. Applicant maintains that he appropriately answered the question, which sought information about convictions not arrests. The application is not in the record.

In January 2017, Applicant was arrested for DUI for the fifth time after a police officer approached Applicant's car while he was sleeping, behind the wheel, on the

shoulder of a major interstate highway. He denies having consumed alcohol. He claims his car may have smelled of alcohol after a relative spilled a drink in the car earlier in the day. As of the hearing, Applicant was awaiting trial.

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 AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security." 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 protect 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

The record establishes a *prima facie* case under the criminal conduct, alcohol consumption, and personal conduct guidelines. Applicant has engaged in a pattern of conduct that shows poor judgment, suggests a complete and total disregard for the law, and an inability and unwillingness to follow rules and regulations.⁵ The record presents credible evidence that applicant has repeatedly engaged in criminal conduct, including multiple alcohol-related offenses.⁶ Since being granted a security clearance 12 years

⁵ See AG ¶¶ 15, 21, and 30.

⁶ AG ¶¶ 31(b) and ¶ 22 (a).

ago, Applicant has been charged with 5 DUIs, 4 license suspensions, and 3 violent crimes. Applicant's history of alcohol-related arrests also suggests habitual or binge consumption of alcohol to the point of impaired judgment.⁷ All of which supports a negative whole-person assessment that casts doubt on his continued suitability to handle and safeguard classified information.⁸

After reviewing the relevant mitigating conditions under each guideline, I find that Applicant failed to meet his burdens of production or persuasion regarding mitigation. None of the available mitigating conditions available under the relevant guidelines apply. Applicant failed to refute concerns related to his criminal history. The seriousness of Applicant's misconduct is not diminished by a singular conviction despite his multiple arrests. The number of dismissed charges are not evidence of Applicant's innocence of the underlying conduct. There are many reasons a prosecutor may decide not to charge or prosecute an individual. Many of those reasons, such as availability of witnesses or standards of proof, have nothing to do with the security significance of the underlying conduct.

Applicant also failed to assuage concerns about his use of alcohol. The record is clear. Applicant has an alcohol problem that he is unable or unwilling to acknowledge. The problem is serious and ongoing. Given Applicant's attitude about his criminal history and alcohol consumption, problems in these areas are likely to recur. Therefore, it follows that Applicant is likely to engage in conduct that continues to cast doubt on his judgment, reliability, and trustworthiness.

Whole-Person Concept

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). The facts in this case support an unfavorable whole-person assessment. In the 12 years Applicant has held a security clearance, he has shown little regard for the fiduciary relationship he voluntarily entered into with the Government. He has demonstrated that he does not understand the connection between his off-duty conduct and his responsibilities as a clearance holder. In addition, Applicant's inconsistent statements about his alcohol use, treatment history, and the circumstances surrounding his arrest, in particular his repeated assertions that he did not consume alcohol before four of his five DUI arrests, renders his statements unreliable. Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances.⁹ Applicant's conduct and his inability to acknowledge or deal with his problems raises concerns about his judgment, reliability, and trustworthiness that make his continued access to classified information an unacceptable security risk.

⁷ AG ¶ 22 (c).

⁸ AG ¶ 16 (c).

⁹ *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).

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, Personal Conduct:	AGAINST APPLICANT
Subparagraph 1.a:	Withdrawn
Subparagraphs 1.b -1.i, 1.l - 1.m:	Against Applicant
Subparagraphs 1.j - 1.k:	For Applicant
Paragraph 2, Criminal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Paragraph 3, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 3.a – 3.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

Nichole L. Noel
Administrative Judge