



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



In the matter of:)
)
) ISCR Case No. 14-06532
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

02/22/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On December 2, 2015, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G, alcohol consumption, and Guideline J, criminal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on February 1, 2016, and elected to have his case decided on the written record. On March 14, 2016, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant, and

it was received on March 30, 2016. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government's evidence or file any additional evidence in response to the FORM. The Government's documents identified as Items 2 through 6 are admitted into evidence. The case was assigned to me on December 27, 2016.

Findings of Fact

Applicant admitted all of the allegations in SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 37 years old. His present employer, a federal contractor, has employed him since December 2010. Prior to this position, he has been employed by other federal contractors since 2001. He married in 2013. He has two children from the marriage.¹

In May 2005, Applicant was charged with simple assault, a misdemeanor. In April 2014, during Applicant's background interview with a government investigator, he explained he was drinking at a bar and ran into an old girlfriend. They started to argue and a man approached Applicant. They had a verbal altercation. Applicant stated the man hit him, and Applicant swung his hand that was holding a beer bottle. A fight ensued and was broken up by the bar bouncer. Applicant was contacted later and advised that the man pressed charges against him. Applicant retained a lawyer and agreed to a monetary settlement of \$10,000 to be paid to the man. Applicant paid \$3,500 immediately and the remaining \$6,500 within 30 days. The charge of simple assault was dismissed. Applicant told the investigator he was not intoxicated at the time, but was drinking socially. He stated that he did not hurt the other man.²

In Applicant's answer to the SOR, Applicant stated he was acting in self-defense. He said the only reason he agreed to a monetary settlement was because he had a work-related trip to Japan, and he wanted to settle the matter to avoid lengthy litigation that would cause him to miss the scheduled trip.³

In October 2011, Applicant was charged with driving under the influence of alcohol. He hired a lawyer and was found guilty of the charge in November 2011. He was required to pay a fine, complete an alcohol education class, and was placed on probation for five years. In May 2014, Applicant was interviewed, and was confronted by the government investigator with information that he was noncompliant with his probation because on May 21, 2012, and September 21, 2012, he failed to make

¹ Item 3.

² Item 4, 5.

³ Item 2.

payments on the fine. The investigator further confronted Applicant with information that his probation was revoked and a warrant was issued on February 28, 2013.

Applicant indicted he had no knowledge of the noncompliance information from May and September 2012, but acknowledged receiving a letter prior to February 28, 2013, stating he was noncompliant with his payments. The letter demanded payment before February 28, 2013, and advised him if he failed to comply, a warrant would be issued. He told the investigator he complied by paying “borderline” on that date, but could not recall the exact date. Presumably, Applicant means he paid on the date the payment was due and assumed everything was resolved with his payment. He explained that he was noncompliant with payment because it slipped his mind, and it was an oversight. He acknowledged receiving the demand letter soon after he missed the payment. He did not personally submit information to the court about completing his court-ordered alcohol class because he believed the facility where he completed the class sent a certificate to the court. He told the investigator that he had no knowledge that his probation was revoked and a warrant was issued. He indicated to the investigator that he would follow up with the appropriate court on May 7, 2014, to resolve the issue as soon as possible.

In his answer to the SOR from February 2016, Applicant stated that he was a day or two late on a payment for the fine, but he took care of it immediately and the fine is paid in full. He stated, “as far as the warrant, I am currently working with the [city] prosecuting office for resolution.”⁴ Applicant did not provide supporting information to show he has resolved the warrant or that his probation has been terminated.

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 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

⁴ Item 2, 5.

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, 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 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 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern for 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.

I have considered all of the disqualifying conditions under AG ¶ 22. The following is potentially applicable:

(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.

Applicant was charged and found guilty of DUI in 2011. AG ¶ 22(a) applies.

I have considered all of the mitigating conditions under AG ¶ 23 and the following is potentially applicable:

- (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.

There is no evidence of subsequent alcohol-related misconduct since Applicant's 2011 DUI conviction. Although Applicant's probation from his DUI conviction was revoked, the evidence supports that it was due to noncompliance with the payment of his fine and not issues related to alcohol abuse. It has been more than five years since the offense occurred. I find AG ¶ 23(a) applies.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern for 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31, and the following three are potentially applicable:

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

Applicant was charged with simple assault in 2005. He agreed to pay an out-of-court financial settlement, and the charge was dismissed. Applicant was convicted of DUI in 2011. Applicant failed to comply with the terms of his sentence, a warrant was issued, and his probation was revoked. Applicant did not submit evidence that his probation was terminated, so the only evidence in the record is that he remains on probation. The evidence raises the above disqualifying conditions.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32, and the following are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, 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) 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 has been on notice since May 2014 that a warrant for his arrest was issued and his probation was revoked. He promised that he would resolve the issue in May 2014. In his February 2016 answer to the SOR, he stated he was working with the office of the prosecutor to resolve the warrant. He failed to provide evidence regarding the status of the warrant and information about whether he is still on probation. There is insufficient evidence to apply AG ¶ 32(a) or AG ¶ 32(d).

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 have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 37 years old. He was charged with simple assault in 2005 and paid a monetary settlement to resolve the charge, which was dismissed. In 2011, he was charged and convicted of DUI. There is no evidence of additional alcohol-related incidents since then. In May 2014, he was made aware that his probation was revoked and a warrant was issued. He indicated he would resolve the matter. In his answer to the SOR in February 2016, he stated he was working to resolve the matter. He did not provide evidence that the matter is resolved, even though he was given an opportunity to do so, after receiving the FORM. Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's eligibility

and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the alcohol consumption security concerns, but failed to mitigate the security concerns arising under the criminal 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 G:	FOR APPLICANT
Subparagraphs 1.a:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge