



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



In the matter of:)
)
) ISCR Case: 15-01570
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

February 13, 2017

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of Case

On May 5, 2014, Applicant submitted a security clearance application (e-QIP). On November 8, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines G (Alcohol), J (Criminal Conduct) and E (Personal Conduct) (Item 1.) 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 for Determining Eligibility for Access to Classified Information* (AG), effective within the DOD after September 1, 2006.

Applicant responded to the SOR (Answer) on October 13, 2015. (Item 3.) He requested that his case be decided by an administrative judge on the written record. Department Counsel submitted the Government's written case on January 14, 2016. A complete copy of the File of Relevant Material (FORM), containing four Items, was received by Applicant on January 25, 2016. He was afforded an opportunity to file

objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not submit anything in response to the FORM within the 30-day period that ended February 24, 2016. DOHA assigned the case to me on July 19, 2016.

Ruling on Evidence

Department Counsel avers that part of Item 3, “Applicant’s Response to DOHA Interrogatories” (AR DOHA I), is a Report of Investigation (ROI) from the background investigation of Applicant. She further avers that it consists of “89 pages.” This averment is misplaced as the AR DOHA I consists of only seven pages. The ROI is a separate document and consists of nine pages. The nine-page document is a summary of an interview of Applicant conducted on July 17, 2014. A ROI may be received and considered as evidence when it is authenticated by a witness.¹ Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is acting in good faith, having highlighted the issue in the FORM,² the ROI is not authenticated nor adopted in the Response to Interrogatories by Applicant. Applicant’s failure to raise this issue in a reply to the FORM is not a knowing waiver of the rule.³ Accordingly, the ROI is not admissible and is not considered in this Decision.

Findings of Fact

Guideline G – Alcohol Consumption, Guideline J – Criminal Conduct, & Guideline E – Personal Conduct

Applicant is a 32 year-old “Planning Manager.” (Item 2 at pages 5 and 11.) It is alleged that he has four alcohol-related arrests from 2007~2009. Applicant denies the correctness of the alleged arrest in February of 2009, and the existence of any arrest in September of 2009.

2.b. Applicant admits that in March of 2007, he was charged with, and subsequently found guilty of, Driving with a License Suspended or Revoked License, and Hit and Run. He was fined \$200, and served a day in jail, with 89 additional days being suspended. (Answer at pages 2, 4~5, and 8.) It is not alleged that this conviction is alcohol related.

¹Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing case law that a properly authenticated report of investigation is admissible).

² Department Counsel Brief at 2, notes 5~7.

³Wavier means “[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Black’s Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

1.a. Applicant admits that in April of 2007, he was charged with Driving Under the Influence (DUI). His e-QIP indicates he was found “Guilty” of this “DUI,” and in his Answer he avers “all fines and court orders have been satisfied, and the case is closed. (e-QIP at page 23, and Answer at page 3.)

1.b. Applicant admits that in April of 2008, he was charged with Driving with a License Suspended or Revoked License, and Operating a Motor Vehicle without Ignition Interlock when required. He was found guilty and fined \$1,000, and served 15 days in jail, with 175 additional days being suspended. (Answer at pages 1, 4, and 8~9.) There is no evidence that this conviction is alcohol related.

1.c. and 1.d. These allegations, which Applicant admits and denies, appear to be the result of one and the same incident. In February of 2009, he was arrested for, and subsequently charged with, Driving with a License Suspended or Revoked License. The other alleged charges appear to be related to the April 2008 arrest, alleged in subparagraph 1.b. In any event, again there is no evidence that this arrest is alcohol related.

Although not alleged, it appears from an enclosure to his Answer that Applicant was in an alcohol related treatment program. (Answer at Enclosure B.) It notes that in June of 2015, Applicant “has been discharge[sic] in full compliance with the requirements of his treatment program. His two-year program is complete.” (*Id.*) He further avers in his answer, “I have been abstinent from alcohol for over 5 years, and have no intention of ever consuming it again in my lifetime.”

Policies

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 to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny 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.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining 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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The disqualifying condition raised by the evidence is:

(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 convicted of a DUI in 2008. There is also some evidence of unspecified treatment, ending in 2015. This incident raises security concerns under AG ¶ 22(a).

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns:

(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's alcohol-related incident occurred nearly 10 years ago. He also offered evidence of the successful completion of a treatment program. Applicant has met his burden to mitigate the alcohol-related concerns.

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(a) a single serious crime or multiple lesser offenses;

Applicant had a history of multiple criminal arrests and convictions that occurred from 2007~2009. These offenses give rise to concerns about Applicant's judgment and reliability, both because of the nature of the offenses and the quantity of criminal offenses. The aforementioned disqualifying condition has been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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; 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's last act of criminal conduct occurred nearly seven years ago, in February of 2009. His offenses are not recent, and he has presented evidence to show that similar criminal conduct is unlikely to recur. AG ¶¶ 32(a) and 32(d) provide full mitigation.

Guideline E, Personal Conduct

The security concern for the personal conduct guideline is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(d) credible adverse information that is not explicitly covered under any other Guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment . . . (3) a pattern of dishonesty or rule violation.

Appellant had three arrests during the time frame 2007~2009.

AG ¶ 17 provides conditions that could mitigate security concerns. The following is 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;

Appellant's arrests are relegated to his distant past, more than seven years ago, and unlikely to recur.

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 Guidelines G, J, and E in my whole-person analysis. Applicant's alcohol consumption, criminal conduct, and related personal conduct are things of the past. Overall, the record evidence raises no doubts about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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
Subparagraphs 2.a. and 2.b.:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a.:	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.

Richard A. Cefola
Administrative Judge