



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



In the matter of:)
)
) ISCR Case No. 15-01583
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

12/14/2016

Decision

COACHER, Robert E., Administrative Judge:

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

Statement of the Case

On January 28, 2016, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct and Guideline E, personal conduct. DoD acted under Executive Order (EO) 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) implemented by the DoD on September 1, 2006.

Applicant answered the SOR on February 25, 2016, and requested a hearing. The case was assigned to me on May 24, 2016. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on July 20, 2016, and the hearing was convened as scheduled on August 23, 2016. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant testified, but did not offer any documentary evidence. DOHA received the hearing transcript (Tr.) on August 31, 2016.

Procedural Ruling

Motion to Amend SOR

Upon motion by Department Counsel, I amended the SOR by cross-alleging SOR ¶¶ 1.a – 1.g, and 1.i – 1.r as allegations under Guideline J, criminal conduct. The amended allegations are numbered SOR ¶¶ 2.a – 2.g, and 2.i – 2.r. Applicant did not object to the amendment and the motion was granted.¹

Findings of Fact

In Applicant's answer, he admitted all the allegations (with explanations) in the SOR, except for SOR ¶¶ 1.f, 1.j, 1.q, 2.f, 2.j, and 2.q. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings, transcript, and exhibits submitted, I make the following additional findings of fact.

Applicant is 31 years old. He is divorced, but now engaged and has two children. His fiancée is expecting. Since March 2014, he has worked for a defense contractor as a technician. He has an associate's degree. He has no military background and has never held a security clearance.²

Applicant's conduct raised in the SOR and the amended SOR includes:

- (1) in June 2001 arrested and charged with battery and disorderly conduct;
- (2) in June 2002 arrested and charged with battery, disorderly conduct, and obstruction;
- (3) in November 2002 arrested and charged with burglary, criminal damage, and theft;
- (4) in June 2003 arrested and charged with aggravated assault and disorderly conduct;
- (5) in April 2004 arrested and charged with disorderly conduct;
- (6) in August 2004 arrested and charged with driving under the influence (DUI) and purchasing liquor as a minor;
- (7) in April 2005 arrested and charged with DUI, fleeing, driving on a suspended license, and reckless driving;
- (8) in December 2005 fired from job because of excessive absences;

¹ Tr. 10-13.

² Tr. 73-74; GE 1.

(9) in May 2006 arrested and charged with making a false report and liquor law violation;
(10) in August 2006 arrested and charged with license suspension and possession of controlled substance;
(11) in August 2006 arrested and charged with DUI and marijuana possession;
(12) in March 2011 arrested and charged with open alcoholic container;
(13) in August 2011 arrested and charged with disorderly conduct;
(14) in November 2011 arrested and charged with domestic violence;
(15) in March 2012 arrested and charged with felony assault and false reporting;
(16) in October 2012 arrested and charged with DUI;
(17) in December 2012 arrested and charged with DUI (duplication with (16) above);
(18) in July 2015 arrested and charged with interference with law enforcement, open container, and speeding.

Applicant explained that he grew up in a small town with very little to do but drink alcohol and get into trouble. All the conduct recited above in (1) through (7) fell into that category. During his short marriage from 2011 to 2012, he drank heavily and this resulted in disputes with his ex-wife where law enforcement was called and charges were filed against Applicant. These charges were either dismissed or reduced to lesser charges. He was found not guilty of the October 2012 charges by a jury. The July 2015 charges happened when his cousin used his truck to evade the police and Applicant was charged because of the incident. The charges were dropped after Applicant agreed to make a charitable donation.³

Applicant stopped drinking alcohol and spends time with his family. He has not been on probation since 2013. He is working on his bachelor's degree. Applicant admitted his wrongdoing, but believes he has turned the corner and matured. Applicant listed all his criminal activity in his security clearance application. I found Applicant's testimony credible.⁴

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 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

³ Tr. 27-29; 34, 36-38, 40, 42.

⁴ Tr. 30-32.

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.

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

Analysis

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 an Applicant’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 in this case. The following are potentially applicable:

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

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's numerous criminal charges meet both disqualifying conditions.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(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 has turned his life around and now finds importance in spending time with his family. He no longer drinks alcohol and his last conviction dates back to 2006. Given his turnaround of behavior, I find it is unlikely that future criminal behavior will recur. His recent behavior no longer casts doubt on his reliability, trustworthiness, and good judgment. Under these circumstances, his last criminal act is sufficiently attenuated after considering his behavior in its totality. AG ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. The following disqualifying condition is potentially applicable:

(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;

(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 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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources; 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's firing from a job falls under AG ¶¶ 16(d) and 16(e). The remaining criminal acts meet the conditions in AG ¶¶ 16(c) and 16(e).

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's job firing was minor and occurred 11 years ago. AG ¶ 17(c) applies. He has turned his life around and now finds importance in spending time with his family. He no longer drinks alcohol and his last conviction dates back to 2006. Given his turnaround of behavior, I find it is unlikely that future criminal behavior will recur. His recent behavior no longer casts doubt on his reliability, trustworthiness, and good judgment. Under these circumstances, his last criminal act is sufficiently attenuated after considering his behavior in its totality. AG ¶¶ 17(d) and 17(e) 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 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 considered Applicant's youth and immaturity at the time many of the criminal offenses occurred. I also considered that Applicant admitted all his criminal conduct in his security clearance application. Applicant cleaned up his act by stopping his alcohol consumption and focusing on his family. Applicant provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without 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 Guidelines.

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.r:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a - 2.g:	For Applicant
Subparagraphs 2.i - 2.r:	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.

Robert E. Coacher
Administrative Judge