



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



In the matter of:

)
)
)
)
)

ISCR Case No. 15-05826

Applicant for Security Clearance

Appearances

For Government: Ray Blank, Esq., Department Counsel

For Applicant: *Pro se*

06/30/2017

Decision

CURRY, Marc E., Administrative Judge:

Applicant has a history of criminal conduct, and is currently on probation for his latest offense in January 2016. Under these circumstances, it is too soon to conclude that he has mitigated the security concerns. Clearance is denied.

Statement of the Case

On April 29, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines J, criminal conduct, and E, personal conduct, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On May 27, 2016, Applicant answered the SOR allegations, admitting subparagraphs 1.a, 1.c, 1.e, 1.g through 1.i., 1.k, 2.b, and 2.c. He partially admitted subparagraph 2.a and denied the remainder. After requesting a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA), the case was assigned to me on February 13, 2017. On March 2, 2017, I scheduled a hearing for April 7, 2017. The hearing was held as scheduled. I received four Government exhibits (GE 1 – 4), one exhibit from Applicant (AE A), and I considered Applicant's testimony. At the close of the hearing, I left the record open to allow Applicant the opportunity to submit additional exhibits. Within the time allotted, he submitted seven exhibits. Department Counsel did not object, and I incorporated them into the record as AE B through AE H. The transcript was received on April 17, 2017.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing 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 AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.¹

Preliminary Issues

Department Counsel withdrew SOR subparagraphs 1.b, 1.d, and 1.i. (Tr. 7) In addition, on April 5, 2017, Department Counsel filed a notice of amendment (Hearing Exhibit (HE) I), adding subparagraphs 1.m, 1.n, and 2.e, and amending subparagraphs 1.j, 2.a, and 2.e. Applicant admitted all of the amended or supplemental allegations except subparagraph 1.j, which he neither admitted nor denied. I considered subparagraph 1.j denied.

Findings of Fact

Applicant is a 32-year-old single man with one child, age six. He is a high school graduate and earned an associate's degree in electronics and computer engineering in 2013. Since 2013, he has worked for a defense contractor as a sensor and systems technician. He tests avionics equipment to ensure they operate properly. (Tr. 22)

Applicant is highly respected on the job. A former supervisor characterizes him as dependable and ethical. According to a coworker, Applicant has been successful at every job he has held and has exceeded the expectations of his supervisors. (AE C)

Applicant used illegal drugs, including marijuana, cocaine, and prescription drugs, with varying frequency from August 2000 to January 2012. (Answer at 2) In December 2003, he was arrested and charged with possession of marijuana and possession of paraphernalia. (Answer at 1) The state did not prosecute the case and the court placed it

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

on the *stet* docket. (GE 4 at 1) In June 2004, Applicant was charged with failure to drive right of center, negligent driving, violating license restriction, and driving while under the influence (DUI). (GE 4 at 4) None of the charges except the DUI charge was prosecuted. The court deferred judgment on the DUI charge pending Applicant's completion of probation. (GE 4 at 4)

In December 2004, while the aforementioned charges were pending, Applicant was cited with possession of alcohol by a minor. (GE 4 at 9) He was fined \$500 with \$450 suspended.

In August 2005, Applicant decided to go to a friend's house to drink beer. (Tr. 65) When his girlfriend attempted to prevent him from leaving the home, he shoved her to the couch. Consequently, he was arrested and charged with felony second-degree assault. (Answer at 2; GE 3 at 3) The disposition of this charge is unknown from the record.

In February 2006, Applicant was charged with possession of an alcoholic beverage under age 21 and attempting to drive a vehicle while impaired. (Answer at 2; GE 4 at 17) He was found guilty. (Tr. 42) Approximately two weeks later, Applicant was charged with DUI. He pleaded not guilty, but on or about May 25, 2006, was found guilty and sentenced to 60 days in jail, with 60 days suspended. In August 2006, Applicant was charged with first degree assault and DUI. (Answer at 2) In September 2006, Applicant was arrested and charged with driving a motor vehicle on a revoked license. (GE 4 at 23) He was sentenced to 30 days in jail.

Between 2004 and 2006, Applicant violated probation multiple times. (Tr. 56) Consequently, after the September 2006 arrest, Applicant was sentenced to a year of incarceration. He was released after nine months for good behavior. (Tr. 72) In March 2010, Applicant was charged with disorderly conduct.

In January 2012, Applicant was terminated from his job after testing positive for marijuana. (Answer at 2; GE 1 at 20) He had been smoking marijuana before work that morning, and he used marijuana the day after he failed the drug test. (Tr. 51, 77) He has not used marijuana in five years. (Tr. 53)

In April 2014, Applicant was cited for failure to obey a properly placed traffic control device. He was found guilty and fined. (CE 1 at 2)

In January 2016, Applicant was arrested and charged with DUI. (CE 1 at 2) He voluntarily entered a rehabilitation facility pending trial. Applicant pleaded guilty, and the court sentenced him to 30 days in jail, suspended, and ordered him to continue attending the rehabilitation program. In addition, the court sentenced Applicant to five years of supervised probation. (Tr. 55-56)

Applicant attended three to four counseling sessions per week, as part of his rehabilitation program. He successfully completed aftercare in January 2017. (AE A) Upon leaving, the counseling center recommended that he maintain sobriety and drink "no

alcohol whatsoever.” (Tr. 59, 74) Since completely rehabilitation, Applicant has “slipped up here and there.” (Tr. 77) He has a strong support group that is helping him “do the right thing and remain sober.” (AE D)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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, 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline J, Criminal Conduct

Under this guideline, criminal activity “creates doubt about a person’s judgment, reliability, and trustworthiness [and] by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” (AG ¶ 30) Applicant’s

history of criminal conduct triggers the application of AG ¶ 31(b), “evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.”

Applicant admits violating probation orders multiple times, and is currently on probation for his most recent offense in January 2016. AG ¶¶ 31(d), “individual is currently on parole or probation,” and 31(c), “violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program,” apply.

Applicant’s strong work record is sufficient to trigger the partial application of AG ¶ 32(d), “there is evidence of successful rehabilitation: including . . . good employment record.” Conversely, his most recent criminal infraction occurred less than two years ago and he remains on probation. Given Applicant’s history of violating probation orders in the past, it is too soon to conclude that he has mitigated the criminal conduct security concern.

Guideline E, Personal Conduct

Under this guideline, “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 or sensitive information.” (AG ¶ 15) Applicant’s history of substance abuse and traffic and alcohol infractions trigger the application of AG ¶ 16(d)(1), “untrustworthy or unreliable behavior . . .,” and AG ¶16 (d)(3), “a pattern of dishonesty or rule violations.” Applicant has not mitigated this security concern for the same reasons that he has not mitigated the criminal conduct security concern.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).² Considering the nature, seriousness, frequency, and recency of Applicant’s conduct, the rehabilitation that he is currently undergoing is insufficient to carry the burden.

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:

² The factors under AG ¶ 2(d) are as follows:

- (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.

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	WITHDRAWN
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	WITHDRAWN
Subparagraphs 1.e – 1.k:	Against Applicant
Subparagraph 1.l:	WITHDRAWN
Subparagraph 1.m – 1.n:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2:a – 2:e:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge