



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



In the matter of:)
)
) ISCR Case No. 15-06278
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: Shirin Shokrollahi, Esq.

December 14, 2017

Decision

MOGUL, Martin H., Administrative Judge:

Statement of the Case

On May 17, 2016, in accordance with Department of Defense (DoD) Directive 5220.6, as amended (Directive), the DoD issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines G, J, and E.¹ The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

On July 25, 2016, Applicant submitted a written reply to the SOR, and requested the case be decided after a hearing before an administrative judge. (RSOR.) The case was assigned to this administrative judge on October 4, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 13, 2016,

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines, effective September 1, 2006.

scheduling the hearing for November 1, 2016. The hearing was convened as scheduled.

At the hearing, the Government offered Exhibits 1 through 5, which were admitted without objection. Applicant testified on her own behalf and presented eight documents, which were also admitted without objection as Exhibits A through H. The record was left open until November 15, 2016, for receipt of additional documentation. Documents were submitted and have been marked and entered into evidence without objection as Exhibits I through M.

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 national security eligibility for a security clearance. Eligibility for access to classified information is granted.

Findings of Fact

After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 38 years old. She has been married to her wife since 2012, and they have two children. She is currently in graduate school studying for a Master's degree where she is majoring in Systems Engineering. She served in the United States Army from 1996 to 2004, when she received an Honorable discharge. Applicant has been employed by a defense contractor for 12 years as a Systems Engineer, and she seeks a DoD security clearance in connection with her employment in the defense sector. (Tr at 25-28.)

Guideline G – Alcohol Consumption

The SOR lists two allegations (1.a. and 1.b.) regarding Alcohol Consumption, under Adjudicative Guideline G.:

1.a. It is alleged in the SOR that Applicant has consumed alcohol, at times to excess and to the point of intoxication, from about age 16 to at least July 2011.

At the hearing, Applicant admitted this allegation. She testified that from 1999 to 2004 she drank quite frequently every Saturday and Sunday night. (Tr at 30-31.)

1.b. It is alleged in the SOR that Applicant's conduct alleged in subparagraphs 2.a., 2.d., and 2.e., below, constitutes Alcohol Consumption concerns.

Applicant conceded that there were periods in her life when she consumed alcohol to excess, but in 2011, she made a decision to abstain from the consumption of alcohol and she did not consume alcohol until August 2016, when her probation ended. (See 2.e., below.) Since her probation ended she has drunk one glass of wine on three occasions; she never drinks more than one glass of wine or beer since she has a medical condition which is exacerbated if she consumes alcohol. She also has gotten

used to the services of Uber so she insists that she would never drink and drive again. Applicant also testified that because she and her wife have two children, drinking to excess is not conducive to a good family life, which is their goal (Tr at 66-79, 82.)

Applicant conceded that she drove after drinking many more times than the three times which resulted in her being stopped by police officers. When asked why Applicant began drinking again, considering the problems she had from consuming alcohol and driving, Applicant testified that she has never considered herself an alcoholic, and as long as she never consumes more than one drink at one occasion, she should have no further problems. Because of her illness, she affirmed that she would never be tempted to drink more than one drink. (Tr at 107-109.)

Finally, Applicant was shown pictures from Department Counsel taken from Facebook (Exhibit 5), which purportedly show Applicant consuming alcohol in 2012, a period when Applicant had testified she was not consuming alcohol. Applicant credibly testified that she was not drinking any alcohol in the picture, and even though she commented in Facebook on the alcoholic drinks that were in the picture, that information was based on what her wife told her about the alcohol, not her own consuming of alcoholic drinks. (Tr at 96-107.)

Guideline J – Criminal Conduct

The SOR lists six allegations, 2.a. through 2 f., regarding Criminal Conduct, under Adjudicative Guideline J.:

2.a. It is alleged in the SOR that Applicant was arrested on April 5, 2001, and charged with and charged with Driving Under the Influence (DUI) Financial Responsibility, and Speeding.

At the hearing, Applicant admitted this allegation. She testified that she had been drinking before she drove, but her blood alcohol was below the legal limit so the case was dismissed. (Tr at 34-35.)

2.b. It is alleged in the SOR that Applicant was arrested on July 22, 2001, and charged with Tempmark (not further specified) License, and Violation of Promise to Appear. Applicant did not know what this arrest was for, and she could shed no light on why she was arrested for Tempmark, but she did confirm that this incident did not involve an arrest, but she did pay the fine for this incident. She also affirmed that this arrest did not involve alcohol. (Tr at 35-36.) During the hearing, Applicant and Department Counsel indicated that they did know what the Tempmark designation meant. (Tr at 86.)

2.c. It is alleged in the SOR that Applicant was arrested on July 3, 2002, and charged with Speeding and Financial Responsibility. Applicant did not recall this event. She did not believe she was arrested, but she remembered getting some speeding tickets, and she thought this incident may have been a citation for speeding. (Tr at 36-38.)

2.d. It is alleged in the SOR that Applicant was arrested on November 3, 2007, and charged with DUI – Blood Alcohol over .08 within 2 hours of driving, Failure to Stop for a Stop Sign, and not in possession of Driver's License. Applicant plead guilty, was fined and sentenced to 10 days in jail, suspended upon completion of substance abuse screening and follow-up treatment. Applicant was ordered to pay for prison fund assessment, and 12 months ignition interlock device.

Applicant admitted this allegation during her testimony. She testified that she had gone with friends, and consumed three or four alcoholic drinks. As she was driving home, she went through a stop sign on a rolling stop and she was pulled over and arrested by the police. She plead guilty and ultimately met all of the requirements of the guilty plea. (Tr at 38-43.)

2.e. It is alleged in the SOR that Applicant was arrested on May 17, 2009, and charged with Aggravated Driving or Actual physical Control while Under the Influence of Intoxicating Liquor or drugs, a felony, DUI – Blood Alcohol over .08 within 2 hours of driving, Expired out of State Registration, Failure to Drive on the Right Side of Roadway and No Headlights. Applicant is currently on probation for this charge.

Applicant admitted this allegation during her testimony. She explained that there were number of unusual circumstances involved in this case, but ultimately she plead guilty to a DUI, and was sentenced to two weeks of jail time, under a work release program. She also had 18 months of probation, which ended in August 2016. (Tr at 43-50.) she also completed a Mother's Against Drunk Driving course, paid fines and fees, and her license was suspended for one year. Applicant still has an interlock device, which is scheduled to be on her vehicle from July 2016 to July 2017. (Tr at 58-61.)

2.f. It is alleged in the SOR that Applicant was arrested on July 31, 2009, and charged with Urinating in Public and Possession of a Suspended Driver's License.

Applicant admitted this allegation during her testimony. She stated that she was out at a club with her friends and after she went back to a friend's house, but the friend was not there. She had to urinate, and she ended up doing it behind a dumpster. She ultimately received a citation for urinating in public from a police officer who showed up at the scene. She had to do community service for the incident. (Tr at 61-65.)

Guideline E, Personal Conduct

The Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that exhibited questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

3.a. It is alleged in the SOR that Applicant's conduct alleged in paragraph 2., above, constitutes Personal Conduct concerns.

Mitigation

Applicant submitted a number of documents in mitigation, which I have reviewed carefully. They include but are not limited to: Proof of attendance by Applicant of a Substance Abuse Program and a Mothers Against Drunk Driving panel (Exhibit A); a letter from Applicant's wife (Exhibit B); five very positive character letters submitted on Applicant's behalf (Exhibit C); a DD Form 214 showing that Applicant received an Honorable Discharge (Exhibit D); copies of Applicant's current resume, and certificates and degrees she has earned (Exhibits E, F); a packet of Applicant's awards and recognitions (Exhibit G); and Applicant's Performance Evaluations (Exhibit H).

Applicant also submitted several post-hearing documents. They include: a reportable information form and a letter from the security manager of Applicant's employer confirming that Applicant reported her DUI arrests in 2007 and 2009 to her security officer (Exhibits I, J); a medical report in which Applicant was recommended not to consume alcohol among other things (Exhibit K); Applicant's order of discharge from her probation on June 30, 2016 (Exhibit L); and the dismissal of charges from Applicant's 2009 conviction (Exhibit M).

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 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, administrative judges apply the guidelines 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), 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 national security eligibility 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies 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.

Section 7 of Executive Order (EO) 10865 provides that adverse 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 G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment of the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. After reviewing Applicant’s three alcohol related incidents, I find that the evidence is sufficient to raise disqualifying condition (a) in this case.

- (a) alcohol related incidents away from work, such as driving while under the influence, . . . or other incidents of concern, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder.

AG ¶ 23 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 23. Because of the evidence introduced about Applicant’s current minimal alcohol consumption and the lack of evidence regarding criminal conduct relating to alcohol consumption for many years, I find that mitigating factor (a) is applicable and controlling in this case, and I find for Applicant under Guideline G.

- (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 and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.

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:

- (b) (evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted.

Because of the nature of the criminal offenses discussed above, the aforementioned disqualifying condition has been established.

AG ¶ 32 describes conditions that could mitigate a security concern. The following is applicable and controlling under this guideline:

- (d) there is evidence of successful rehabilitation; including but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Because Applicant's last arrest and conviction occurred in 2009, more than eight years ago, she complied with her probation which has ended, and she has a very good employment record I find that this Criminal Conduct mitigating condition is applicable under AG ¶ 32. Applicant's criminal past does not continue to cast doubt on her trustworthiness and judgment. I, therefore, find Guideline J for Applicant.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following 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 individual may not properly safeguard classified or sensitive information.

Because of Applicant's history of alcohol abuse and criminal conduct I find that AG ¶ 16 (c) is potentially applicable as a disqualifying condition in this case:

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(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.

Because so much time has passed since Applicant's last incident involving alcohol I find it is unlikely that such conduct will recur and it does not cast doubt on Applicant's current reliability, trustworthiness and good judgment. I find that AG ¶ 17 (c) is applicable and controlling as the mitigating factor in this case.

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(d):

(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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis. Overall, the record evidence

including the significant factors cited under mitigation leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

| | |
|---------------------------|---------------|
| Paragraph 1, Guideline G: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |
| Subparagraph 2.b: | For Applicant |
| Subparagraph 2.c: | For Applicant |
| Subparagraph 2.d: | For Applicant |
| Subparagraph 2.e: | For Applicant |
| Subparagraph 2.f: | 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 national security eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge