



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



In the matter of:)
)
) ISCR Case No. 15-08747
)
Applicant for Security Clearance)

Appearances

For Government: Charles C. Hale, Esq., Department Counsel
For Applicant: *Pro se*

03/30/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant did not mitigate security concerns pertaining to Guidelines J (criminal conduct), G (alcohol consumption), and E (personal conduct). Clearance is denied.

Statement of the Case

On June 10, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J, G, and E. On June 26, 2016, Applicant responded to the SOR, and elected to have the case decided on the written record in lieu of a hearing.

The Government's written case was submitted on August 25, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on February 2, 2017. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any

additional information within the 30-day period. On October 16, 2017, the case was assigned to me. The Government exhibits, Items 1 through 7, and FORM response, are admitted in evidence.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a – 1.c, 2.c, with explanations; and denied SOR ¶¶ 2.a and 2.b. He did not admit or deny ¶ 2.c. His admissions are accepted as findings of fact. Additional findings of fact follow.

Background Information¹

Applicant is a 36-year-old field service representative employed by a defense contractor since April 2012. He seeks to retain his security clearance for his current employment. Applicant received his GED “around 2000,” and took online college courses during the 2006 to 2007 timeframe. (Items 3, 4) Applicant served in the U.S. Army from 2004 to 2011, and was honorably discharged. (Item 3) He married in 2004, and has four minor children. (Items 2, 3)

Criminal Conduct/Alcohol Consumption/Personal Conduct

Alcohol consumption concerns are cross-alleged in SOR ¶ 2.a with criminal conduct concerns in SOR ¶¶ 1.a and 1.b, and personal conduct concerns are cross-alleged in SOR ¶¶ 3.d with criminal conduct concerns in SOR ¶¶ 1.a through 1.c. Additionally, the SOR alleges three additional personal conduct concerns not cross-alleged.

Criminal conduct concerns stem from three separate arrests in 2006, 2007, and 2015. Applicant discussed these arrests during his April 28, 2015 Office of Personnel Management Personal Subject Interview (OPM PSI) and in his SOR answer. (Items 2, 4)

In April 2006, Applicant was charged with driving while ability impaired and speeding. The district attorney dismissed the speeding charge. In June 2006, Applicant was found guilty of driving while ability impaired and received a 12 month deferred sentence within which he was required to complete 24 hours of community service, complete a Level II alcohol education course, pay various fines and fees, and receive no new offenses. (SOR ¶¶ 1.c, 2.a; Items 2, 4, 7)

In June 2007, Applicant was charged with reckless driving, failure to display proof of insurance, failure to report an accident, and leaving the scene of an accident, all while serving a 12-month deferred sentence following his 2006 conviction. The district attorney dismissed the failure to display proof of insurance,

¹ The limited background information regarding Applicant was derived from the FORM and was the most current information available.

failure to report an accident, and leaving the scene of an accident. Applicant pled guilty to reckless driving, and was sentenced to 25 hours of community service and to pay various fines and fees. (SOR ¶ 1.b; Items 2, 4, 6)

In March 2008, Applicant was arrested on a warrant issued for his failure to appear in court in compliance with the terms of his June 2006 court ordered deferred sentence. Applicant explained in his April 2015 OPM PSI and SOR answer that his court appearance conflicted with a required unit training exercise. Applicant's platoon sergeant was supposed to inform the court of the conflict and get his appearance date changed. Upon completion of the exercise, Applicant went to the courthouse to check on his new appearance date and was arrested. Apparently, his platoon sergeant did not follow through as promised. Applicant successfully vetted for a security clearance after this incident while he was in the Army. (SOR ¶ 3.c; FORM; SOR answer)

In January 2015, Applicant was charged with weapon prohibited use-drunk with gun, driving while ability impaired, driving under the influence *per se*, and speeding too fast for conditions. The district attorney dismissed weapon prohibited use-drunk with gun, driving under the influence *per se*, and speeding too fast for conditions. In March 2016, he was convicted of driving while ability impaired, and sentenced to 24 months of unsupervised probation, ordered to attend Level II alcohol education course and 68 hours of therapy to be completed within 22 months, 30 days in jail suspended, and no alcohol or illicit drugs for the duration of his probation. Also, the court ordered him to pay various fines and fees. (SOR ¶¶ 1.a, 2.a; Items 2, 4, 5)

When completing his February 2015 security clearance application, Applicant was cited with deliberate falsification for failing to list his January 2015 weapon prohibited use-drunk with gun charge and his April 2006 driving while ability impaired charge. With regard to the weapons issue, Applicant explained in his SOR answer, "[I] honestly thought I DID NOT need to (list this charge). I thought the charge DID NOT exist anymore. Had I known that charge was still pertinent, I would have without a doubt disclosed that information." (SOR ¶¶ 3.a, 3.b; SOR answer)

With regard to the driving while ability impaired charge, Applicant explained that he disclosed his April 2006 arrest when he completed his 2010 security clearance application. He acknowledges that he should have been more attentive when completing his February 2015 security clearance application and apologized. Department Counsel conceded in his FORM that Applicant disclosed the April 2006 charge in his 2010 security clearance application and timely reported the April 2006 charge and January 2015 charge to his security manager. (SOR ¶¶ 3.a, 3.b; SOR answer)

During his April 2015 OPM PSI, the investigator discussed other mistakes Applicant made when completing his security clearance application to include discrepancies regarding residence/employment, education, and relatives. (Items 3, 4)

Character Evidence

Applicant stated that he felt “disgusted” after receiving his SOR. He is an honorably discharged veteran and been deployed twice in combat. He believes himself to be trustworthy, reliable, and committed. Applicant feels that he paid his debt to society for his older charges and overall these charges do not reflect the husband, father, DOD contractor, loyal citizen, and veteran he is. He is hard working, loves his job and country, and would never compromise national security. (SOR answer)

Department Counsel Comments

Department Counsel noted in his FORM that Applicant did not provide mitigating evidence such as character references, documentation supporting his involvement in or completion of an alcohol rehabilitation program, probation reports, or evidence of community involvement. The FORM also noted that Applicant’s SOR answer relies simply on his age, passage of time since the incidents, the timing of these events between his deployments to Iraq, and how he reported the incidents on other occasions.

Policies

This case is adjudicated 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 (AG), which became effective on June 8, 2017.

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, administrative judges apply the guidelines 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(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 the national security.”

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

Section 7 of 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

Criminal Conduct

AG ¶ 30 articulates the security concern concerning 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.

The Government established its case under Guideline J through Applicant's admissions and the evidence presented. A review of the evidence supports application of three criminal conduct disqualifying conditions: AG ¶ 31(a) “a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness”; AG ¶ 31(b) “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, prosecuted, or convicted”; and AG ¶ 31(c) “individual is currently on parole or probation.”

Four 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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(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.

None of the criminal conduct mitigating conditions are fully applicable. As noted under Department Counsel Comments, the shortcomings of Applicant's SOR response were pointed out to him. If additional mitigating evidence exists, it was not sufficiently presented in the FORM.

Alcohol Consumption

AG ¶ 21 articulates the security concern concerning 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.

The Government established its case under Guideline G through Applicant's admissions and the evidence presented. A review of the evidence supports application of two alcohol consumption disqualifying conditions: AG ¶ 22(a) "(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder"; and AG ¶ 22(c) "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder."

Four alcohol consumption mitigating conditions under AG ¶¶ 23 are 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 judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

None of the criminal conduct mitigating conditions are fully applicable. As noted in Department Counsel Comments, the shortcomings of Applicant's SOR response were pointed out to him. If additional mitigating evidence exists, particularly with regard to documentation supporting involvement in or completion of an alcohol rehabilitation program, it was not sufficiently presented in the FORM.

Personal Conduct

The security concern relation 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 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.

The Government established its case under Guideline E through Applicant's admissions and the evidence presented. A review of the evidence supports application of AG ¶ 16(d) as a disqualifying condition that could raise a security concern:

(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) any disruptive, violent, or inappropriate behavior; (3) a pattern of dishonesty or rule violations;

AG ¶ 17 provides three potential mitigating conditions:

(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.

With regard to the falsification allegations listed in SOR ¶¶ 3.a and 3.b, Applicant denied deliberately falsifying his February 2015 security clearance application adding that he listed his 2006 charge on a previous security clearance application and his failure to list his 2015 charge was caused by an inattention to detail. He was open and forthcoming during his OPM PSI and in his SOR answer. I note that Applicant made several other mistakes when completing his security clearance application that were apparently viewed as inadvertent.

Based on the available information, it appears Applicant was confused or careless when completing his June 2015 SF-86. His lack of attention to detail cannot be imputed as a willful and deliberate attempt to undermine the investigative process. Although the information he provided about his past financial situation proved to be incorrect, as was other information he provided, I attribute these lapses to carelessness and am satisfied that he did not deliberately and intentionally fail to disclose his delinquent debts with intent to deceive.² Additionally, Applicant's explanation surrounding his March 2008 arrest for failure to appear in court is credible particularly in

² The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

light of the fact that he promptly reported it to his security manager, he successfully vetted for a security clearance after this incident, and there is no evidence he was convicted for this arrest. I find for Applicant with regard to SOR ¶¶ 3.a through 3.c.

However, with regard to SOR ¶ 3.d, none of the personal conduct mitigating conditions are fully applicable. As noted in Department Counsel Comments, the shortcomings of Applicant's SOR response were pointed out to him. If additional mitigating evidence exists, it was not sufficiently presented in the FORM.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, G, and E in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the criminal conduct, alcohol consumption, and personal conduct security concerns.

In closing, Applicant chose to rely on the written record versus a hearing. In so doing, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, and articulate his position limiting my assessment to those facts discussed in the FORM. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2. Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a – 3.c:	For Applicant
Subparagraph 3.d:	Against Applicant

Conclusion

In light of all of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT TUIDER
Administrative Judge