



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



In the matter of:)
)
) ISCR Case No. 15-08840
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2018

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate concerns raised by his history of alcohol and substance abuse and related misconduct. Clearance is denied.

Statement of the Case

On June 8, 2016, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct, drug involvement and substance misuse, and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to deny or revoke his security clearance.

¹ The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on September 1, 2006.

Applicant answered the SOR and requested a decision without a hearing.² The Government submitted its written case on October 3, 2016. A complete copy of the file of relevant material (FORM) and the Directive were provided to Applicant. He received the FORM on October 19, 2016, and provided a response in November 2016. The documents appended to the FORM are admitted as Government's Exhibits (GE) 1 through 9³ and Applicant's Exhibits (AE) A through D, are admitted without objection.

While the case was pending decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing the 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 The 2017 AG superseded the AG implemented in September 2006, and they are effective for any adjudication made on or after June 8, 2017. Accordingly, I have applied them in this case.

Findings of Fact

Applicant, 36, has worked for his current employer as an electronics technician since April 2015. Between 2007 and present, Appellant has held five position with federal contracting companies. Applicant reported that he applied for and received his first security clearance in February 2009 and completed his most recent security clearance application in May 2015. Based on information from the two investigations, the SOR alleges the following: a 2012 DUI conviction and subsequent probation sentence; use of marijuana in March 2015, which resulted in a failed random urinalysis test and the termination of his employment; and termination from employment in September 2009 and May 2011 for tardiness.⁴

Over the course of 14 years, Applicant was fired four times for violating employer's rules or policies. Applicant was fired in 2004 for failing to show up for an assigned shift. Three years later in May 2007, Applicant was fired from a gas station for failing to attend a mandatory safety meeting. Applicant also admits that he was fired from positions with federal contracting companies in September 2009 and March 2011 for violating the terms of his probationary employment period by reporting to work late. Applicant admits he had a past problem with alcohol. He regularly consumed alcohol to the point that he experienced difficulty waking up for work in the morning, causing him to report to work late. His alcohol consumption habits also frequently prevented him

² GE 1.

³ GEs 8 and 9 are reports of investigation (ROI) summarizing the interview Applicant had with a background investigator in April 2009 and September 2017, respectively. While Applicant did not specifically waive any objections to the admissibility of the ROI, in his response to the FORM, he addressed and provided documents for issues only addressed in those documents. Accordingly, I construe Applicant's conduct as a waiver of any objections to the ROI.

⁴ GE 3-9; AE A.

from taking his children to school, which resulted in a 2011 citation from the local sheriff's office.⁵

Applicant's alcohol consumption resulted in a 2012 DUI conviction. He was fined, required to attend an alcohol counseling class, and was placed on three years unsupervised probation. In May 2015, Applicant's probation was revoked for failure to pay the assessed fine, which he could not pay after being fired from his job two months earlier. The court extended Applicant's probation two years until October 2017. Applicant successfully completed the terms of his sentence and was released from court supervision.⁶

In March 2015, Applicant was fired from a third federal contracting company for failing a random drug test. Applicant obtained a medical marijuana card and used the drug to treat severe pain. He claims to have used the drug once. At the time, Appellant was still on probation for the 2012 DUI conviction. Even though Applicant was working for a federal contracting company, it is unclear if the security clearance Applicant received in 2009 was active. Applicant's drug use is not limited to the March 2015 incident. In his 2009 security clearance application, Applicant admits that he used methamphetamines four times between August 2004 and October 2005. He also used marijuana three times between March 2003 and May 2005. In 2013, Applicant claimed responsibility for marijuana police found in his home, during a search the court ultimately deemed illegal, to protect his wife from possible criminal liability. He received a citation, but was not prosecuted.⁷

Applicant claims that he has not used drugs since March 2015 and that he has not consumed alcohol since his DUI arrest, over six years ago. He is able to report to work on time and his children now have improved attendance records. Applicant offers his record with his current employer, of which he did not provide any documentation, and a recent his credit report, which shows his open accounts in good standing with no missed payments, as evidence of his rehabilitation, reform, and security worthiness.⁸

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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's

⁵ GE 3-9; AE A.

⁶ GE 6-7; AE C.

⁷GE 4, 6-7, 9.

⁸ GE 3; AE A, D.

overarching 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 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.” 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

The record establishes the Government’s *prima facie* case under the criminal conduct, drug involvement and substance misuse, and personal conduct guidelines. The record establishes that Applicant was convicted of a DUI in 2012, and that he violated the terms of his probation, resulting in the extension of his probation by two years.⁹ The record also establishes that in March 2015, Applicant used and tested positive for an illegal drug, marijuana.¹⁰ Finally, the record establishes that between 2009 and 2015, Applicant was fired from three jobs for violating his employers’ policies. These terminations, which resulted from Applicant’s alcohol and substance abuse,

⁹ AG ¶¶ 31(b) and (d).

¹⁰ AG ¶¶ 25(a)-(b).

supports a negative whole-person assessment of questionable judgment, unreliability, unwillingness to comply with rules and regulations, or other characteristics that indicate Applicant may not properly safeguard classified or sensitive information.¹¹

After reviewing the relevant mitigating conditions under each guideline, I find that Applicant failed to meet his burdens of production or persuasion regarding mitigation. None of the available mitigating conditions available under the relevant guidelines apply. Each instance of alleged misconduct involved alcohol or substance abuse. Despite the age of the events, Applicant claims of six years of sobriety and his statements that he will not engage in illegal drug use in the future do not carry much weight. Aside from attending a court-ordered alcohol education class, Applicant has not submitted to substance abuse counseling. He did not provide any evidence of a sobriety management plan, such as participation in Alcoholics or Narcotics Anonymous. Furthermore, he did not provide a written statement of intent to abstain from future drug use with automatic revocation of his security clearance for any violation. Given his history of alcohol and substance abuse, Applicant failed to establish that relapse and the associated personal and professional misconduct is unlikely to recur.

Whole-Person Concept

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). In addition to the alleged conduct, unalleged conduct is relevant in a whole-person assessment. Here, Applicant's personal and professional conduct shows a disregard for the law, rules, and regulations. He has also demonstrated a history of poor judgment. Because of his years of employment with federal contracting companies and his prior investigation for access to classified information, Applicant knew or should have known about the prohibition against illegal drug use and the use of random drug tests to ensure compliance with the policy. Despite this, Applicant still chose to use illegal drugs, in violation of federal law, his employer's policy, and without regard for the potential consequences. The favorable information Applicant presented does not outweigh the security concerns in this case.

¹¹ AG ¶ 16(d).

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, Criminal Conduct	AGAINST APPLICANT
Subparagraph 1.a	Against Applicant
Paragraph 2, Drug Involvement and Substance Misuse:	AGAINST APPLICANT
Subparagraph 2.a	Against Applicant
Paragraph 3, Personal Conduct	AGAINST APPLICANT
Subparagraphs 3.a – 3.c	Against Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge