



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



In the matter of:)
)
) ISCR Case No. 16-02683
)
Applicant for Security Clearance)

Appearances

For Government: Robert B. Blazewick, Esq., Department Counsel
For Applicant: *Pro se*

01/12/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline J, criminal conduct. He has been arrested twice since his previous DOHA case, including once while on probation. The security concerns under Guideline E, personal conduct, are found for Applicant since they are duplicative. Applicant's eligibility for access to classified information is revoked.

Statement of the Case

Applicant submitted a security clearance application (SCA) in June 2015, in connection with his employment in the defense industry. (GE 1) On October 6, 2016, following a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. The action was taken under Executive Order (Exec. Or.) 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 effective within the DOD on September 1, 2006.

Applicant submitted an incomplete answer to the SOR on November 21, 2016. He answered the SOR again on January 18, 2017, and requested a decision on the administrative (written) record, in lieu of a hearing. On February 10, 2017, Department Counsel made a timely request to convert the case to a hearing, and informed Applicant by mail.¹

The case was assigned to me on May 12, 2017. On June 19, 2017, DOHA issued a Notice of Hearing scheduling the case for August 2, 2017. Applicant did not appear when that hearing convened.² During an August 7, 2017 conference call with the parties, Applicant indicated that he never received a copy of the Notice of Hearing. I therefore issued an order rescheduling the case at a later date.³

On October 26, 2017, DOHA issued a Notice of Hearing re-scheduling Applicant's case for November 14, 2017. The hearing convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through 7, which were admitted.⁴ Applicant testified but submitted no exhibits. I left the record open to enable Applicant to submit additional documentation, which he did. Applicant submitted one document on December 12, 2017. It was marked as Applicant's Exhibit (AE) A and admitted without objection. The record closed on December 13, 2017. DOHA received the transcript on November 27, 2017.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG). The new AGs became effective on June 8, 2017, for all adjudicative decisions on or after that date.⁵ Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Amendments to the SOR

At the start of the hearing, the Government submitted a proposed amendment to the SOR, concerning SOR ¶¶ 1.a and 1.b. (HE III) I initially denied the motion since Applicant indicated that he had not seen it before the hearing. (Tr. 25-27; 42-43) The Government also moved to withdraw SOR ¶ 1.d. That motion was granted without objection. (Tr. 28)

¹ November 14, 2017 Transcript (Tr.) at 7-9. All transcript cites are from this hearing, but for footnote 2.

² See August 2, 2017 Transcript.

³ Hearing Exhibit (HE) I; Tr. 10-13.

⁴ Applicant objected to GE 3 and GE 4, but I overruled the objections. (Tr. 38-45)

⁵ I provided Applicant a copy of the new AGs at the hearing. (Tr. 18-20)

At the conclusion of the hearing, the Government renewed its motion to amend SOR ¶ 1.b to conform to the record evidence, reflecting the correct state where Applicant was arrested and also to reflect the specific alcohol-related offenses charged. That motion was granted without objection. (Tr. 100-103)⁶

The Government moved to amend SOR ¶ 1.a to conform to the record evidence, clarifying that the first offense listed in the allegation was “(1) Assault & Battery - 2nd degree” (rather than a “2nd offense”). The Government also moved to withdraw SOR ¶ 1.c. Both motions were granted without objection. (Tr. 104-106)

Findings of Fact

In his answer to the original SOR, Applicant admitted SOR ¶¶ 1.a, 1.e and 1.f, with explanations. He denied ¶¶ 1.b, 1.c, and 1.d. He did not answer ¶ 2.a, but since it is a cross-allegation, I consider it admitted in part, and denied in part. His admissions are incorporated into the findings of fact.

In addition, GE 7 is the decision from Applicant's prior DOHA case, ISCR Case No. 08-01554 (May 11, 2011), in which another administrative judge granted Applicant a clearance.⁷ I also incorporate the findings of fact from that decision into my findings here. After a thorough and careful review of the pleadings, the exhibits submitted, and the hearing testimony, I make the following additional findings of fact.

Applicant is 29 years old. He has never married and has no children. He grew up in a small southern town (in State 1), and he graduated from high school there in May 2006. He graduated third in his class of 85 students. In August 2006, he moved to another state, and began working for his current employer, a defense contractor at a naval shipyard. He has worked there ever since. In 2011, he graduated from the shipyard's apprentice school, a four-year program. He currently holds a confidential clearance. (Tr. 53-55; 84-85; GE 1; GE 7 at 2)

In November 2005, when he was a senior in high school, Applicant was driving home from a football game with a friend, when another car tried to run him off the road. He pulled over, and the other car followed him. When he got out of the car, he recognized the occupants of the other car as a group of bullies who had previously attacked him on more than one occasion. Applicant testified that “they picked a fight with me, and, you know, I had no choice but to fight back.” The police arrived, and both combatants were charged with disorderly conduct. Applicant was fined \$247 plus costs. (SOR ¶ 1.f)(Tr. 56-58; GE 5; GE 7 at 1-2)

SOR ¶ 1.e concerns another arrest, later in November 2005, for assault and battery. Applicant admitted the allegation and said he was found not guilty. He offered

⁶ As amended, SOR ¶ 1.b now reads, “You were arrested in June 2009 in [State 2] and charged with Driving, Attempting to Drive, While Impaired by Alcohol.”

⁷ GE 6 is the SOR from Applicant's prior case.

no factual details about what led to the charge. There are no documents about this charge in the Government's case, nor any hearing testimony about it. This offense is also not specifically addressed in the prior DOHA decision, GE 7. It is therefore unclear to me whether SOR ¶ 1.e is a separate incident from SOR ¶ 1.f, or whether it was a later charge stemming from the same incident. In any event, both charges are misdemeanors, and they occurred over 12 years ago, when Applicant was in high school.

In February 2006, Applicant was shot in the leg by a brother of one of the bullies. On the night of April 8-9, 2006, Applicant was at a party, when he was involved in a fight with two of the same bullies who had confronted him previously. (GE 7 at 3)

The next night, while taking out trash at the restaurant where he worked, Applicant was approached by an armed man. He later learned the man was the brother of the man who previously shot him in the leg. Applicant retreated but the assailant followed. Applicant knocked the gun out of his hand. When the assailant continued to advance, Applicant picked up the pistol and shot him twice. The assailant died shortly thereafter. (GE 7 at 3)

Applicant was charged with murder. (SOR ¶ 1.d) He was held in jail until April 19, 2006, when he was released on bond, allowed to finish high school and, later, to begin an apprenticeship with his current employer, in another state. He was indicted for murder in July 2006. In October 2009, he was found not guilty after a jury trial. (GE 7 at 4) The Government withdrew SOR ¶ 1.d.⁸

SOR ¶ 1.c alleges that Applicant was arrested in September 2006 in his native state and charged with giving false information to the police. Applicant denied the allegation, noting he was not living there at the time. In September 2006, he was found not guilty after a bench trial. (GE 4; GE 7 at 4) The Government withdrew SOR ¶ 1.c.

SOR ¶ 1.b originally alleged that in June 2009, Applicant was arrested in his native state and charged with driving while intoxicated (DWI). Applicant denied ¶ 1.b, stating, "I was never arrested in [his native state] and wasn't charged with Driving While Intoxicated." This proved to be correct, as the Government conceded when it amended the allegation to amend both the charge and the state where the arrest occurred.

However, Applicant was arrested in June 2009, for driving, or attempting to drive, while impaired by alcohol, in another state, State 2. Court records indicate Applicant was pulled over on an interstate highway. He pleaded guilty in March 2010, received probation before judgment and was fined. He reported the offense on his SCA, and noted that he successfully completed a nine-month probation term. At hearing,

⁸ SOR ¶ 1.d also alleged a charge of assault and battery, but Applicant denied that he was charged with that offense in April 2006, and the Government did not produce any documents establishing that charge.

Applicant acknowledged the arrest but said the charge was “*nolle prossed*” and he denied pleading guilty. (Tr. 81-83; (GE 1 at 29-30; GE 2; SOR ¶ 1.b, as amended)⁹

In December 2013, Applicant returned to his native state for the Christmas holidays. While out with friends in a nearby city he was not familiar with, Applicant got into an altercation at a local lounge. He testified that while he was exiting the establishment, he and others were surrounded by a group of men he did not recognize. Applicant testified that “this big brawl broke out, and I was the only one in handcuffs . . . but I was charged with a lot of stuff that I didn’t do. It was kind of the wrong place, wrong time. But, you know, I do take responsibility.” (Tr. 69-70)

Applicant was arrested and charged with one count of assault and battery, second degree, one count of disorderly conduct, and one count of resisting arrest. He disclosed the charges (which were then pending) on his SCA. Applicant stated on his SCA that he defended himself when he was attacked, and also asserted that he had been falsely accused. (Tr. 68-71; GE 1 at 25-27; GE 2; SOR ¶ 1.a)¹⁰

In July 2015, Applicant pleaded guilty to the second degree assault and battery charge. He was sentenced to three years’ probation, with all but 30 months suspended, and 100 hours of “public service employment.” The charges of disorderly conduct and resisting arrest were dismissed. (GE 2)

Applicant testified that he kept his employer’s facility security officer (FSO) informed about his case. (Tr. 68, 72-73) His probation was transferred to his current home state. He completed probation successfully on June 1, 2017. (Tr. 72-76; AE A)

At some point in early 2016, while he was on probation,¹¹ Applicant was arrested in his current home state and charged with Driving under the Influence of alcohol (DUI). He testified that he was asleep in his car, outside a friend’s house. He was awakened

⁹ Although Applicant’s June 2009 offense (SOR ¶ 1.b) occurred before his prior DOHA hearing (March 2011), the decision in that case made no reference to that charge. It did refer to a June 2008 reckless driving charge, in another state, State 3. (GE 7 at 5; Tr. 86-90). The June 2008 charge was not alleged in either the SOR in Applicant’s previous case (see GE 6), or in this one. In this hearing, Applicant also acknowledged another reckless driving charge, in his current home state, around that time. (Tr. 89) I will not consider either of these offenses as disqualifying conduct. However, I can consider them in weighing evidence of mitigation or changed circumstances, whether Applicant has demonstrated sufficient rehabilitation, and under the whole person concept. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). Therefore I considered these charges accordingly.

¹⁰ On his SCA, Applicant reported that the felony resisting arrest charge in SOR ¶ 1.a included an element of “with a deadly weapon.” The text of SOR ¶1.a therefore includes that language, and Applicant admitted that portion of the allegation in his answer. GE 2, however, does not reflect that the resisting arrest charge included a deadly weapon element.

¹¹ Applicant was unable to pinpoint the exact time of his most recent arrest beyond an unspecified date in early 2016. (Tr. 92-95)

by lights shining on his car. The police pulled up, and he was charged with DUI, first offense. (Tr. 78)

Applicant testified that he later went to trial and was found guilty. His driver's license was suspended for a year, from August 2016 to August 2017. (Tr. 92-94) He completed an alcohol safety awareness class, and some alcohol counseling. Applicant reported his DUI arrest to his probation officer. He stated that he did not have to go to court (in his native state) for a probation violation hearing, and he did not believe his offense led to any negative consequences related to his probation. (Tr. 78-80). His driver's license is no longer restricted. There is no indication in the record of whether he received any probation or jail time for that offense. Applicant testified he told his FSO and his supervisor about the arrest. (Tr. 96-99)¹²

Applicant testified that he drinks occasionally when he socializes with friends. Most of his friends are from work, and none are involved in criminal activity. Applicant testified that he has learned from the alcohol awareness class he had to take as a result of his DUI. (Tr. 90-92)

Unlike at his prior DOHA hearing, Applicant submitted no character evidence. He acknowledged that he had made mistakes, some larger than others, but he takes his job and his integrity seriously. (Tr. 111)

Policies

It is well established that no one has a right to a security clearance. As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials."¹³

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 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,

¹² The Government did not amend the SOR to add Applicant's 2016 DUI. I therefore have not consider it as independently disqualifying conduct. However, I have considered it in weighing mitigation, changed circumstances and rehabilitation, and under the whole person concept. ISCR Case No. 03-20327 at 4.

¹³ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 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.

Analysis

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant has a criminal record going back to November 2005, when he was in high school. This includes arrests for disorderly conduct, and assault and battery (SOR ¶¶ 1.f & 1.e), a murder charge in April 2006 (SOR ¶ 1.d), a September 2006 charge of giving a false statement to the police (SOR ¶ 1.c), a June 2009 arrest for driving or attempting to drive while impaired (SOR ¶ 1.b), and a December 2013 arrest for second degree assault and battery, disorderly conduct, and resisting arrest (SOR ¶ 1.a). SOR ¶¶ 1.c and 1.d were withdrawn. AG ¶¶ 31(a) and (b) apply to the remaining allegations.

The following mitigating conditions for criminal conduct are potentially applicable, under AG ¶ 32:

(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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Of the four criminal conduct allegations remaining in the SOR, two of them occurred in November 2005, when Applicant was in high school. Applicant's June 2009 DWI was not addressed in his prior DOHA case, but nonetheless precedes it.

However, since his prior DOHA hearing, in March 2011, Applicant has been arrested twice more. His first offense (SOR ¶ 1.a) led to a conviction for second degree assault and battery, and 30 months of probation. While on probation, Applicant was arrested for DUI, in early 2016. He testified that he went to trial and was found guilty. His driver's license was suspended for a year, until August 2017. That DUI was not alleged in the SOR, but I can and do consider it in analyzing mitigation.

I also consider that Applicant has had several arrests for assault and battery and disorderly conduct, both many years ago, but also much more recently. He has two alcohol-related driving offenses, one before his prior DOHA case, but also one occurring less than two years before this hearing. He also has two other reckless driving charges from seven or eight years ago (not alleged).

Applicant has also been through a murder trial, an experience which might have led to a long jail sentence had he been convicted. He wasn't, but the fact that he was

found not guilty and given a second chance might have led him to make better subsequent choices in life. Unfortunately, he hasn't done that.

Similarly, I also consider that Applicant has been through the security clearance application process before, and he went to hearing in 2011 on many of the same issues as he faced here. While I can mitigate the offenses which occurred before his prior hearing, I cannot do so for the most recent offense alleged, his December 2013 arrest (SOR ¶ 1.a).

Applicant was also re-arrested while he was on probation. While that offense was not alleged, it (like SOR ¶ 1.a) significantly undercuts any evidence of mitigation and calls into direct question his ability and willingness to follow rules and regulations, a trait that is required of anyone entrusted with access to classified information. Applicant is no longer on probation. Especially given his history, his criminal offenses are too recent for me to conclude that they are in the past and unlikely to recur. More time without criminal involvement is needed for Applicant to show that he can again be considered a suitable candidate for access to classified information. AG ¶¶ 32(a) and 32(d) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. . . .

SOR ¶ 2.a is merely a cross-allegation of the criminal conduct allegations in SOR ¶ 1. The judgment concerns associated with that conduct are sufficiently addressed under Guideline J above, and are not addressed separately here. Were the personal conduct security concerns alleged alone, they would be unmitigated under the same rationale as set forth above under criminal conduct, but in this case they are redundant and unnecessary. I therefore find for Applicant as to SOR ¶ 2.a.

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 and E in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to classified information.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Withdrawn
Subparagraph 1.d:	Withdrawn
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2: Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to continue Applicant's access to classified information. Eligibility for access to classified information is revoked.

Braden M. Murphy
Administrative Judge