



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



In the matter of:)
)
) ISCR Case No. 17-01554
)
)
Applicant for Security Clearance)

Appearances

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

November 19, 2018

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On December 1, 2015, Applicant submitted a security clearance application (SCA). On June 5, 2017, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines H, G, and J. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing (Answer) on August 22, 2017, and requested a hearing before an administrative judge. The case was assigned to another judge on October 10, 2017, and reassigned to me on December 4, 2017. The Defense Office of Hearings and Appeals (DOHA) had already issued a Notice of Hearing on November 20, 2017. I convened the hearing as scheduled on December 5, 2017. The

Government offered Government Exhibits (GXs) 1 through 14, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (TR) on December 13, 2017. The record was left open for the receipt of additional evidence. On February 20, 2018, Applicant Exhibits (AppXs) 1 through 10 were submitted, and received without objection. The record closed at that time.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions¹ issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as implemented in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new AG promulgated in SEAD 4.

Findings of Fact

Applicant admitted to the allegations in SOR ¶¶ 1.b, 1.c., 2.b., 2.c., 3.c., 3.d., and 3.f. Except for allegations ¶¶ 3.e. and 3.g., Applicant denied the remaining SOR allegations, not based on the underlying facts but based on the "terminology." As to allegations ¶¶ 3.e. and 3.g., the Government admits it has submitted nothing in support of these allegations; and as such, ¶¶ 3.e. and 3.g. are found for Applicant. (TR at page 50 line 9 to page 51 line 4.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following additional findings of fact.

Applicant is a 37-year-old employee of a defense contractor. (TR at page 14 line 23 to page 16 line 9, and GX 1 at page 5.) He has been employed with the defense contractor since August of 2016. He is unmarried, and has no children. (TR at page 14 line 23 to page 16 line 9, and AppXs 1~9.)

Guideline H - Drug Involvement and Substance Misuse

1.a. Applicant used marihuana with varying frequency from about June of 1999 until January of 2013, a period of about 14~15 years. (TR at page 16 line 12 to page 19 line 12, and GX 2 at page 10.)

1.b. Applicant admits using ecstasy on one occasion in August of 2014. (TR at page 19 lines 13~18, GX 2 at page 10.)

1.c. Applicant admits using cocaine on three occasions in August of 2015. (TR at page 19 line 19 to page 22 line 6, GX 2 at page 10.)

¹ SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

Guideline G: Alcohol Consumption & Guideline J: Criminal Conduct

2.a. and 3.a. In May of 2015, Applicant was cited for Possession of [an] Open Alcohol Beverage. (TR at page 27 line 13 to page 29 line 8.) He and an acquaintance were seated “at a bus stop . . . [with] two 12 ounce cans” of alcohol. (*Id.*) Applicant was fined about \$150 as a result of this infraction.

2.b. and 3.a. In January of 2016, Applicant was arrested for and subsequently convicted of Driving Under the Influence of Alcohol (DUI). (TR at page 29 line 9 to page 31 line 9, and GX 2 at page 9.) He was ordered to pay a fine of about \$600 and placed on probation for three years. (*Id.*)

2.c. 3.a. In October of 2016, only about ten months later, Applicant was again arrested for and subsequently charged with a DUI. (TR at page 31 line 9 to page 37 line 23, and GX 5.) As a result of this conviction, he was fined about \$2,200, sentenced to 30 days in jail, and placed on probation for five years. (*Id.*)

Guideline J: Criminal Conduct

In about 2001, Applicant’s driver’s license was suspended due to his failure to pay child support for a child that he allegedly fathered. While Applicant has submitted documentation demonstrating that the child was later determined not to be his (AppXs 1~9), this suspension remained in effect until July of 2013. (AppXs 6 and 7.)

3.b. In June of 2008, Applicant was arrested for and subsequently charged, in part, with Driving on a Suspended License, and Driving without a Valid License. (TR at page 48 line 16 to page 55 line 9, and GXs 1, 2 and 13.) He failed to appear in court, was subsequently convicted as charged, and ordered to pay a fine. (*Id.*)

3.c. In June of 2010, Applicant was arrested for and subsequently charged with Driving without a Valid License. (TR at page 48 line 16 to page 55 line 9, and GXs 1, 2 and 13.) He was again convicted as charged, and ordered to pay a fine. (*Id.*)

3.d. In February of 2010, Applicant was arrested for and subsequently charged with Driving on a Suspended License. (TR at page 48 line 16 to page 55 line 9, and GXs 1, 2 and 13.) He again failed to appear in court, was subsequently convicted as charged, also found to be in violation of probation, and sentenced to 15 days in jail. (*Id.*)

3.e. and 3.g. are one and the same alleged act of criminal conduct. As noted above under Findings of Fact, these allegations are found for Applicant.

3.f. and 3.h. are one and the same act of criminal conduct. In February of 2011, Applicant was arrested for and subsequently charged with Driving on a Suspended License, and Driving without a Valid License. (TR at page 48 line 16 to page 55 line 9, and GXs 1 at page 51, and 2 and 9.) He failed to appear in court, was subsequently convicted as charged, also found to be in violation of probation, and sentenced to 90 days in jail. (*Id.*)

3.i. In January of 2012, Applicant was arrested for and subsequently charged with Driving on a Suspended License, and Knowingly Driving on a Suspended License. (TR at page 48 line 16 to page 55 line 9, and GXs 1 at page 51, and 2 and 9.) He failed to appear in court, was subsequently convicted as charged, also found to be in violation of probation, and sentenced to 90 days in jail. (*Id.*)

1.j. This alleged allegation of Knowingly Driving on a Suspended License in June of 2016, is found for Applicant; as noted above under Findings of Fact, his suspension was lifted in July of 2013.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline H - Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline at AG ¶ 25 contains seven conditions that could raise a security concern and may be disqualifying. Two conditions are established:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Appellant smoked marijuana over a period of 14~15 years, and also used ecstasy in 2014 and cocaine in 2015. Therefore, AG ¶¶ 25 (a), and (c) are established.

The guideline at AG ¶ 26 contains four conditions that could mitigate security concerns. Two conditions may be applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this

problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

None of these are applicable. His drug involvement is fairly recent, and he has submitted no evidence of a statement of intent to abstain from future involvement.

Guideline H is found against Applicant.

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 or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline at AG ¶ 22 contains seven conditions that could raise a security concern and may be disqualifying. One condition clearly applies:

- (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.

Applicant has three alcohol-related incidents between May of 2015 and October of 2016. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline at AG ¶ 23 contains four conditions that could mitigate security concerns. Two conditions may apply:

- (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; 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.

While Applicant is currently enrolled in an “18 month Program” (AppX 10), it is too soon to say that his alcohol consumption is not problematic. Guideline G is also found against Applicant.

Guideline J: Criminal Conduct

AG ¶ 30 sets forth the security concerns pertaining to 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 three conditions that could raise a security concern and may be disqualifying in this case:

(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;

(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, formally prosecuted or convicted; and

(c) individual is currently on parole or probation.

Applicant was convicted of seven offenses, the two most recent of which are alcohol related. He is still on probation for five years as the result of his October 2016 DUI. The evidence establishes the above disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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.

Sufficient time has not passed since Applicant's 2016 conviction, given the fact that he was previously convicted of six other driver-related incidents and is still on probation. The evidence does not establish mitigation under either of the above conditions.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable 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. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the alcohol, drug and criminal conduct concerns.

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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraphs 3.a~3.d:	Against Applicant
Subparagraph 3.e:	For Applicant
Subparagraph 3.f:	Against Applicant
Subparagraph 3.g:	For Applicant
Subparagraphs 3.h and 3.i:	Against Applicant
Subparagraph 3.j:	For Applicant

Conclusion

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

Richard A. Cefola
Administrative Judge