



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02086

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 30, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR on August 11, 2017, and requested a hearing before an administrative judge. The case was assigned to me on May 2, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 16, 2018. I convened the hearing as scheduled on July 24, 2018. The Government offered exhibits

(GE) 1 through 3. There were no objections to the exhibits, and they were admitted into evidence. Applicant testified and did not offer any exhibits. DOHA received the hearing transcript on August 1, 2018.

Findings of Fact

Applicant admitted all of the SOR allegations except ¶¶ 1.b and 1.f, which he denied with explanations. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 48 years old. He earned an associate's degree in 2005. He married in 2000 and divorced in 2006. He has two children from the marriage, ages 21 and 23. He has two other children from different relationships, ages 25 and 27 years old. He has been employed by a government contractor since 2006.¹

In April 1992, Applicant had a person in his car that he did not know. He was stopped by the police. He stated he did not know the person had marijuana. He panicked and lied to the police when he gave them a false name, address, and birthdate. He was arrested and charged with giving false name, address, or birthdate to law enforcement officer and driving while license suspended. His driver's license was suspended at the time, but Applicant stated he did not know it. He was convicted of both misdemeanor offenses and confined in jail for 23 days.²

In October 1995, Applicant was arrested and charged with battery-domestic violence and obstruction without violence. The incident involved his girlfriend, who later became his wife. The domestic violence charge was dismissed and the obstruction without violence charge was nolle prossed.³

In February 1996, Applicant was arrested and charged with resisting an officer. He admitted the allegation in SOR ¶ 1.h, but could not recall the facts. Documents support that he pled nolo contendere.⁴

In January 2001, Applicant was charged with assault/bodily harm less than murder, a felony. The charge was not prosecuted.⁵

Applicant testified that he was arrested and convicted three times for driving under the influence of alcohol or while intoxicated (DUI). He testified he was arrested in state A in 1997 (SOR ¶1.g); his second arrest was also in state A in 2001 (not alleged); and his

¹ Tr. 14-17.

² Tr. 29-31.

³ Tr. 37-38; GE 3.

⁴ Tr. 38; GE 3.

⁵ Tr. 39-40; GE 3.

third arrest was in state B in 2001 (SOR ¶ 1.e).⁶ He completed the terms of each sentence. He testified his driver's license was suspended by state B in 2001, and he moved to state A in 2002. He testified that he did not drive from 2001 to 2007. During his interview with a government investigator, Applicant stated that he drove a vehicle beginning in 2002 to the date of his interview in December 2016. He denied at his hearing that he drove from 2002 to 2007, but admitted that it was possible that he may have driven once or twice during that time. He petitioned state B in 2007 for his driver's license to be reinstated. His petition was denied.⁷

Applicant was arrested in April 2012 in state A and charged with knowingly driving on a suspended license. He pled nolle contender and was convicted. He was placed on probation. He was sentenced to jail time and served it on weekends for three months. Applicant testified that he drove a vehicle in 2012 knowing his license was suspended and had not been reinstated at the time of his arrest.⁸

Applicant disputed he was charged in February 2013, with a probation violation-driving while license suspended. This charge was dismissed.⁹

Applicant testified that he resumed driving in 2007 knowing his license was suspended in 2001. From 2007 to 2012, he estimated he drove about twice a week when he could not get a ride to work. He understood each time he drove he was violating the law. He understood that when he drove another person's car without a license, he was uninsured. Applicant continues to drive without a license. He estimated that from 2012 to the present he has driven about three to four times a week. He explained the reason is he has to get to work. He does not drive anywhere else. He tries to find a ride, but is not always successful. He understands he is repeatedly breaking the law. He acknowledged he takes a risk each time he drives and understands it is not legal. Applicant was asked at his hearing if he planned on driving in the future knowing he has a suspended license. He responded that when he needs to get to work, he will continue to drive.¹⁰

Applicant completed his electronic Questionnaire for Investigations Processing (e-QIP) in August 2015. In response to Section 22, which inquired about his police record, and specifically if he had ever been charged with a felony; convicted of an offense involving domestic violence or a crime of violence; or charged with an offense involving

⁶ GE 2. There was confusion about the dates of Applicant's alcohol-related offenses. The FBI criminal information sheet reports a 1997 DUI arrest in state A (SOR ¶ 1.g) and a 2001 DUI arrest in state B (SOR ¶ 1.e)

⁷ Tr. 19-29, 44-46; GE 1, 2, 3. Any derogatory information that was not alleged in the SOR will not be considered for disqualifying purposes, but will be considered when analyzing Applicant's credibility, when applying mitigating conditions, and in a whole-person analysis.

⁸ Tr. 19, 31-32 GE 2, 3.

⁹ Tr. 33-34; Answer to SOR; GE 2.

¹⁰ Tr. 32-37, 44-49.

alcohol or drugs, he responded “no.” He did not disclose the May 2001 DUI charge; the 2001 felony charge for assault/bodily harm less than murder; the 1997 charge of DUI or the 1995 charge of domestic violence and obstruct without violence.¹¹

Applicant was interviewed by a government investigator in December 2016. He disclosed to the investigator a 1995 arrest for driving under the influence of alcohol. He did not voluntarily disclose his other DUI arrests or convictions. His explanation to the investigator was he made a mistake on the e-QIP.¹²

At his hearing, Applicant stated he did not read the questions correctly and the reasons he did not disclose his conduct were as follows:

I neglected to put some information and it was not intentional. When I was going through it, I should have paid more attention to what it said as far as “ever,” “seven years,” and stuff like that, and I didn’t. That was my mistake.¹³

Applicant stated that when he was asked about the charges by the investigator, he did not deny any of them. He said he answered every question he could based on what he could remember. He stated his failure was not intentional. He also stated he was unaware that the assault charge was a felony and he did not pay attention to the word “ever” in the question. Applicant disclosed in the e-QIP his April 2012 driving on a suspended license charge and that he received probation after his conviction for the charge. He did not disclose any other offenses in the e-QIP. He also disclosed under Section 14: Alcohol-that he had attended a driving under the influence school in 2002, but no other information. It may be understandable that Applicant was unaware he was charged with a felony that was eventually not prosecuted, so he failed to disclose this information. It is not believable that he did not pay close attention to the questions in the e-QIP and failed to disclose any of his alcohol-related offenses and other criminal conduct, which has had a major impact on his life. I find Applicant intentionally failed to disclose this conduct as required on his e-QIP.¹⁴

Policies

When evaluating an applicant’s national security eligibility, the administrative judge must consider the AG. 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.

¹¹ GE 1.

¹² GE 2. The 1995 DUI arrest that Applicant refers to was not alleged in the SOR. Based on Applicant’s testimony he believed he had a 1997 DUI conviction and two 2001 DUI convictions. Only one 2001 DUI conviction was alleged.

¹³ Tr. 18, 42.

¹⁴ Tr. 17-19.

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(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 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 avoided drawing 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to 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 EO 10865 provides that 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 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 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 following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

(d) 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant intentionally failed to disclose his alcohol-related arrests and other offenses as was required in his e-QIP. Although, I believe he may not have disclosed the felony charge that was alleged because he was unaware it was a felony, it is not credible that he did not pay attention to the language of the e-QIP and failed to disclose any of his alcohol-related offenses or other charges. Applicant was convicted of two driving while intoxicated offenses that were alleged in the SOR. His driver's license was suspended and he repeatedly continued to drive for years knowing it was suspended and that he was breaking the law. He intends to continue to do so, knowing he is in violation of the law. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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 take other positive steps to alleviate the stressors, circumstances, or factors that contributed to 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 the vulnerability to exploitation, manipulation, or duress.

There is insufficient evidence to conclude that Applicant made a prompt, good-faith effort to correct his omissions or falsifications before being confronted with the facts. Applicant's alcohol-related conduct appears to be in the past, but he has a lengthy history of failing to comply with the law and repeatedly driving on a suspended license. He has served time in jail, been placed on probation, and continues to drive. He testified that he will continue to do so in the future when he needs to get to work. His offenses are not minor. He has shown he cannot be trusted to obey the law and future criminal conduct is likely to recur. His actions cast doubt on his reliability, trustworthiness, and good judgment. He acknowledges his behavior, but will not change it. None of the above mitigating conditions apply.

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 the 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

Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is a 48 years old. His driver's license was suspended in 2001 after his conviction for driving under the influence, a repeat offense. He did not drive for a period. He requested his license be reinstated and his request was denied. From 2007 to the present he has knowingly driven on a suspended license. He intends to do so in the future. He cannot be trusted to abide by the law. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline E, personal conduct.

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:

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| Paragraph 1, Guideline E: | AGAINST APPLICANT |
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| Subparagraphs 1.a-1.j: | Against Applicant |
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Conclusion

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

Carol G. Ricciardello
Administrative Judge