



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



In the matter of:

ISCR Case No. 17-02287

Applicant for Security Clearance

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: *Pro se*

January 31, 2018

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On March 2, 2015, Applicant submitted a security clearance application (SF-86). On August 18, 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 J and E. 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 June 8, 2017.

Applicant answered the SOR in writing (Answer) on September 9, 2017, and requested a hearing before an administrative judge. The case was assigned to me on December 8, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on December 8, 2017. I convened the hearing as scheduled on December 19, 2017. The Government offered Government Exhibits (GXs) 1 through 7,

which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (TR) on December 28, 2017. The record was left open for the receipt of additional evidence. On December 22, 2017, Applicant Exhibit (AppX) A was submitted, and received without objection. The record closed at that time.

Findings of Fact

Applicant denied all the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 43-year-old employee of a defense contractor. (GX 1 at page 5.) He has been employed with this defense contractor since February of 2015. (GX 1 at page 12.) He has held a security clearance since May of 2010. (GX 1 at page 39.) He is not married, but has one child, age 22. (TR at page 18 line 23 to page 19 line 5.)

Guideline J – Criminal Conduct & Guideline E – Personal Conduct

1.a. and 2.a. In January of 2011, Applicant was cited, in part, for: Disregarding a Stop Sign; Delinquent Vehicle Tax; No Current Safety Check; Registration Not in Vehicle; and No Motor Vehicle Insurance. (TR at page 20 line 13 to page 21 line 16, and GXs 4~7.) He has paid the resulting \$454 fine. (AppX A at pages 2~9.)

1.b. and 2.a. In September of 2011, Applicant was cited, in part, for: Failure to Obey Traffic Control Device at Intersection; Delinquent Vehicle Tax; No Current Safety Check; Registration Not in Vehicle; Failure to Possess Driver License/Insurance Card; and Liability Insurance Required. (TR at page 21 line 21 to page 24 line 25, and GXs 4~7.) He has paid the resulting \$429 fine. (AppX A at pages 2~9.)

1.c. and 2.a. In January of 2013, Applicant was cited, in part, for: Disregarding a Stop Sign; Delinquent Vehicle Tax; No Current Safety Check; Registration Not in Vehicle; and Failure to Possess Driver License/Insurance Card. (TR at page 25 lines 1~24, and GXs 4~7.) He has paid the resulting \$359 fine. (AppX A at pages 2~9.)

1.d. and 2.a. In May of 2013, Applicant was arrested, in part, for: No Passing Vehicle in Same Lane and Criminal Contempt - Misdemeanor; Delinquent Vehicle Tax; and No Current Safety Check. (TR at page 26 line 2 to page 29 line 19, and GXs 4~7.) He has paid the resulting \$237 fine. (AppX A at pages 2~9.)

1.e. and 2.a. In August of 2013, Applicant was arrested, in part, for: Driving without a Valid Driver's License; Delinquent Vehicle Tax; and No Current Safety Check. (TR at page 26 line 2 to page 29 line 19, and GXs 4~7.) He has paid the resulting \$140 fine. (AppX A at pages 2~9.)

1.f. and 2.a. In February of 2014, Applicant was arrested, in part, for: Driving without a Valid Driver's License; No Motor Vehicle Insurance and Criminal Contempt - Misdemeanor; Delinquent Vehicle Tax, and No Current Safety Check. (TR at page 26

line 2 to page 29 line 19, and GXs 4~7.) He has paid the resulting \$140 fine. (AppX A at pages 2~9.)

1.g. and 2.a. In June of 2014, Applicant was arrested, in part, for: No Right Turn on Red – Yield to Pedestrian, Unsafe Movement in Turning; Driving without a Valid Driver's License; No Motor Vehicle Insurance and Criminal Contempt - Misdemeanor; Registration Not in Vehicle; and No Current Safety Check. (TR at page 26 line 2 to page 29 line 19, and GXs 4~7.) He has paid the resulting \$334 fine. (AppX A at pages 2~9.)

1.h. and 2.a. In February of 2015, Applicant was cited and charged with Driver License Required for Moped. (TR at page 29 line 20 to page 30 line 11, and GX 5.) He has paid the resulting \$122 fine. (AppX A at pages 2~9.)

1.i. and 2.a. In December of 2015, Applicant was arrested for, and subsequently pled Nolo Contendere to "1) DUI by MNTL IMPAIR – 1st OFNS," and "2) No Motor Vehicle Driver's License." (TR at page 30 line 12 to page 35 line 1, and GX 6 at page 14.) He was sentenced to two days in jail, fined about \$299, his driver's license was revoked for one year, and he was ordered to attend Driver Education as well as Substance Abuse Assessment, Treatment, and Rehab. (*Id.*) Applicant completed the "Impaired Driving Education Course," but it is unclear as to results of any assessment. (AppX A at page 1.)

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 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 two 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; 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 person was formally charged, formally prosecuted or convicted

Applicant has multiple vehicle code citations and arrests occurring between 2011~2015. His driver's license was recently revoked for one year after his DUI conviction. The evidence establishes the above two 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 most recent conviction, given the fact that he has multiple citations and four previous vehicle code related arrests. The evidence does not establish mitigation under either of the above conditions.

Guideline E, Personal Conduct

The security concern relating to the guideline for Financial Considerations 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(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 individual may not properly safeguard classified or sensitive 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 government protected information;

- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources;

Applicant has a plethora of traffic related offenses. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

- (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; and
- (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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

None of the mitigating conditions apply. From the evidence of record; and particularly from Applicant's testimony, it appears that he believes that the rules and regulations do not apply to Applicant, as he excused his behavior throughout his hearing.

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 J and E in my whole-person analysis. 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 Criminal Conduct and Personal Conduct security 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 J:	AGAINST APPLICANT
Subparagraphs 1.a.~1.i.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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