



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 17-03048
)
 Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

08/16/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant incurred numerous misdemeanor criminal and traffic offenses from 2006 to July 2016. Her most recent charge was for driving while intoxicated. She pled guilty to driving under the influence, and remains on probation for that offense until about May 2020. Applicant did not provide sufficient information to mitigate the criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 2, 2016. On September 13, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns under Guideline J, criminal 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 Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on October 4, 2017, and requested a hearing. The case was initially assigned to another administrative judge, who scheduled the hearing for February 27, 2018. The day before the hearing, Applicant requested a continuance, which was granted. The case was assigned to me on March 20, 2018. On March 23, 2018, a notice of hearing was issued scheduling the hearing for April 26, 2018. The hearing convened as scheduled.

Department Counsel offered Government Exhibits (GE) 1 through GE 3, which were admitted without objection. Applicant and one other witness testified. She did not submit any exhibits. I held the record open to allow Applicant the opportunity to submit additional documentation after the hearing. Applicant timely submitted four documents, which were marked as Applicant's Exhibits (AE) A through AE D, and admitted without objection.¹ DOHA received the hearing transcript (Tr.) on May 8, 2018. The record closed on June 1, 2018.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-1.n.² Her admissions and other comments are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 34 years old. She has never married and has no children. She has a general equivalency diploma (GED) and has taken some college courses. At the time of the hearing, she was living at home with her parents. Since October 2015, she has worked in the property inventory office of her employer, a defense contractor. She earns \$15 an hour and has no other jobs. She has never held a security clearance. (Tr. 11-12, 27-31, 49-51; GE 1; AE C)

Between May 2006 and July 2016, Applicant incurred numerous misdemeanor criminal charges and traffic citations. These include two charges of assault on a family member, in 2006 and 2015 (SOR ¶¶ 1.a and 1.m); failure to appear at a court hearing, in 2006 (SOR ¶ 1.a); littering (2007) (SOR ¶ 1.b);³ marijuana possession, in 2009 (SOR ¶ 1.f); destruction of property, in 2014 (SOR ¶ 1.l);⁴ and driving while intoxicated (DWI), in July 2016 (SOR ¶ 1.n). She has also incurred three citations for having an expired car inspection sticker, in 2007, 2008, and 2012 (SOR ¶¶ 1.c, 1.e, 1.k); and seven citations

¹ AE A concerns Applicant's completion of her alcohol safety awareness program (ASAP); AE B is a Compliance summary from the Department of Motor Vehicles; AE C is an academic transcript. AE D is a character letter.

² Due to an oversight, Applicant did not answer SOR ¶¶ 1.f and 1.l in her SOR response, but she admitted those allegations during the hearing. (Tr. 14-15)

³ Tr. 33; GE 1 at 36; GE 3.

⁴ SOR ¶ 1.l lists this offense as occurring in June 2012. In fact, it occurred in March 2014 (GE 1 at 38; GE 2; GE 3 at 23)

for speeding, all between 2007 and July 2016 (SOR ¶¶ 1.d, 1.g, 1.h, 1.i, 1.j, 1.k, and 1.n). (GE 1; GE 2; GE 3)

Applicant testified that the expired inspection citations were due to absentmindedness. She testified that the speeding tickets all occurred at the same spot on an interstate highway, and that she got them all while driving to work. At some point, she was placed on a six-month probationary driver improvement program. (Tr. 34-35; 52-53)

In May 2006, Applicant and her boyfriend got into an argument. He spat in her face, and she hit him in the shoulder. Applicant was argumentative when the police arrived. She was arrested and charged with assaulting a family member. She inadvertently missed a court date, so she was charged with failure to appear (FTA). The assault charge was dismissed, but she was found guilty of FTA. (SOR ¶ 1.a) (Tr. 32-33)

In February 2009, Applicant was pulled over by the police. A police dog detected marijuana in the car. Applicant said the marijuana "had been sitting in my house." She was "on my way to get rid of it, give it away" when she was pulled over. (Tr. 33-34) She was charged with marijuana possession, first offense. Disposition was deferred, and she completed a substance abuse education program. (SOR ¶ 1.f) Applicant disclosed on her SCA that she used marijuana about once every six months between about January 2002 and March 2010 (she meant 2009, as she testified that she did not use marijuana after her arrest). (Tr. 54-55)

In March 2014, Applicant was renting a room from someone. She testified she had a lot of animosity towards him, because he had assaulted her, and she had to get ten stitches near her eye. (Tr. 36) At some point, the individual called her and asked to meet:

I forgot why he wanted me to meet him. His house had caught fire, and he was staying at a hotel. He wanted me to meet him there, and he said he had stuff of mine in his truck. When I got there, the truck was locked, my stuff was in there. He wasn't answering his phone. And it was stupid. . . . I just put a scratch on it [the door of the truck].⁵

Applicant was charged with misdemeanor destruction of property valued at less than \$1000. The charge was dismissed. (SOR ¶ 1.l) Applicant acknowledged her wrongdoing: ("That was uncalled for. I shouldn't have done that.") (Tr. 37)

In May 2015, Applicant and her cohabitant/fiancé had a heated argument. "I said some things that really upset him, and he grabbed me, and I grabbed him back. We kind of got into a little scuffle." Someone called the police, and Applicant was arrested and charged with assault on a family member. (SOR ¶ 1.m). Her fiancé acknowledged his part in the incident, and had the charge dismissed in court. (Tr. 37-38; GE 1 at 39)

⁵ Tr. 35-36.

Applicant began working at her current job in October 2015. She submitted her SCA in January 2016. She disclosed her criminal offenses up to that point, including the offenses at SOR ¶¶ 1.a, 1.b, 1.f, 1.l, and 1.m. (GE 1)

In July 2016, Applicant was still living with her fiancé. They had gone out to dinner, and had some drinks before going home. Applicant was having a glass of wine at home when she received a call from a former cohabitant. He was at a bar in a neighboring town, and had called Applicant because he was too drunk to drive himself home. Applicant finished her glass of wine, and got in the car to go get him. (Tr. 39-40)

When Applicant picked the man up, he was inebriated and combative during the drive home. Applicant “got a little aggravated and started speeding.” A police car was following her, and pulled her over. The officer “could smell the liquor coming off my passenger because he smelled like a brewery.” (Tr. 39) Applicant failed a field sobriety test and blew a blood-alcohol level of 0.10 on a breathalyzer. (Tr. 40)

Applicant was arrested and charged with DWI-first offense, and reckless driving/speeding. In January 2017, she pleaded *nolo contendre* (no contest) in her state’s general district court. She appealed to her state’s circuit court, and in May 2017, she pleaded guilty to driving under the influence of alcohol (DUI). The reckless driving/speeding charge was nolle prossed. (Tr. 40-42; GE 3 at 26-27, 29)

Applicant was sentenced to 360 days in jail, 350 days suspended. An ignition-interlock device was placed on her car, and her driver’s license was restricted.⁶ She was ordered to attend an alcohol safety awareness program (ASAP), fined and ordered to pay court costs. She was also sentenced to three years of unsupervised probation. (SOR ¶ 1.n) (Tr. 42-47)

Applicant served the jail time on weekends. She completed the ASAP program in September 2017. The ignition-interlock device was removed from her car in mid-January 2018. Applicant’s full driving privileges were reinstated in May 2018. (AE A; AE B) She remains on unsupervised probation (“good behavior”) until May 2020. (Tr. 45-47) Applicant is not allowed to consume alcohol while on probation. She considers that a speeding ticket would violate her “good behavior” requirement. (Tr. 47)

Applicant no longer lives with her former fiancé, and she has moved back in with her parents. (Tr. 50-51) She is now in a relationship with someone who does not drink. (Tr. 57-58) She no longer goes out to drink. She has taken up other pastimes, such as painting and drawing. She has resumed pursuing her education, though she is not currently in school. Applicant is also seeing a professional counselor. Applicant’s DWI was a wake-up call for her. She is more conscious now of the need to slow down and to be a defensive driver. She wants to have a more positive future and is continuing to work to change her behavior. (Tr. 57-60)

⁶ Applicant could only drive to court, school, work, and to medical appointments. (Tr. 43)

Applicant's father is retired from the U.S. military, and currently works as a DOD civilian. He has had a clearance for many years. He encouraged Applicant to be "brutally honest" in disclosing her record on her SCA. He testified that his daughter has taken time to mature, but he has seen a "remarkable turnaround" in her behavior in recent years. (Tr. 62-68)

Applicant's supervisor for the last two years provided a reference letter. He attested to Applicant's reliability, efficiency, and trustworthiness. She has an increased sense of self-awareness since her incident (the DWI). She volunteers to assist others in the workplace and is of good moral character. She is thought of as kind and well-liked by her co-workers. (AE D)

Policies

It is well established that no one has a right to a security clearance.⁷ As the Supreme Court noted 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."⁸

The AGs 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 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." Under ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under ¶ 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

⁷ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance").

⁸ 484 U.S. at 531.

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;
- (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; and
- (c) individual is currently on parole or probation.

Between 2006 and July 2016, Applicant incurred numerous misdemeanor criminal charges and traffic citations. Her most recent offense was a DWI (pled down to DUI). She remains on probation for that offense until May 2020. AG ¶¶ 31(a), 31(b), and 31(c) apply.

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.

Applicant has a significant history of failure to comply with the law. Her offenses are numerous, frequent, and recent. Several of her charges involve disputes and altercations with co-habitants. For now, she is rectifying that by living at home with her parents. She has numerous speeding tickets. These citations are minor, but they are also numerous and recent, as the latest citation occurred in July 2016. That shows her driving issues are not sufficiently in the past to be considered resolved.

Most troubling is the fact that Applicant's most recent offense, the July 2016 DWI arrest, is also the most serious. That offense also occurred after she submitted her SCA, in January 2016. The timing of the offense, and its seriousness, weighs heavily against a finding that Applicant is fully rehabilitated.

It is not surprising that Applicant's DWI offense (pled down to DUI) resulted in a lengthy probation term. She gets some credit under AG ¶ 32(d) for being in compliance with her probation requirements without incident. She is also credited with an excellent employment record, and with pursuing her education.

Nevertheless, Applicant had only completed one year of the three-year probationary period when the record closed. She remains on probation until May 2020. She has not established that her criminal behavior happened under such unusual circumstances, that it is unlikely to recur, or that it does not cast doubt on her reliability, trustworthiness, or good judgment. AG ¶ 32(a) does apply, and AG ¶ 32(d) only partially applies, as noted above. Applicant did not provide sufficient evidence to mitigate the criminal conduct security concerns.

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(c):

- (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 J in my whole-person analysis.

Applicant credibly testified that she was remorseful for her actions. She recognizes the significance of her conduct. She testified credibly that her most recent arrest was a wakeup call and that she is working to improve her behavior, her driving, and her compliance with the law. But she remains on probation for her DUI offense for almost another two years. More time is needed for her to establish a track record of maturity, good judgment, impulse control, and compliance with the law without further incidents before she can be considered a suitable candidate for access to classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. Eligibility for access to classified information is denied.

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**

Subparagraphs 1.a-1.n: **Against 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge