



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



In the matter of:)	
)	
)	ISCR Case No. 17-03759
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: A. Jay Fowinkle, Esq.

10/15/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On November 27, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal 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 December 22, 2017, and January 22, 2018, 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 22, 2018. I convened the hearing as scheduled on July 25, 2018. The

Government offered exhibits (GE) 1 through 4. Applicant testified and offered Applicant Exhibits (AE) A through D. There were no objections to any of the exhibits, and they were admitted into evidence.¹ DOHA received the hearing transcript on August 2, 2018.

Findings of Fact

Applicant admitted the sole SOR allegation. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 31 years old. He earned a bachelor's degree in 2010. He worked from June 2010 until August 2011. He has worked for his present employer, a federal contractor, since June 2016. He is not married and has no children.²

In July 2010, Applicant was arrested and charged with homicide-negligent manslaughter-weapon-killing human other than by murder or homicide-felony 2nd degree. He pled nolo contendere to manslaughter. He did not have a plea agreement. He was sentenced to five years of imprisonment, followed by ten years of probation. Applicant was incarcerated from approximately August 2011 to April 2015. He is on probation until approximately 2025.³

The circumstances surrounding the charge and conviction are as follows. Applicant was a senior in college and had secured employment that began in June 2010. In April 2010, Applicant and his roommate, who was his best friend, were consuming alcohol and watching television. Applicant admitted they both had too much to drink that night. Applicant went to the kitchen to get more alcohol. Applicant kept a loaded handgun in their apartment under his bed. He owned the gun legally and had a concealed weapon permit for it. He stated he had the gun because he liked shooting when he was growing up and also for personal protection. His roommate got the gun, walked into the kitchen where Applicant was and handed the gun to Applicant.⁴

Applicant testified that it was the first time in his life he did not check to see if the gun was loaded. Applicant pulled the trigger believing nothing would happen. The gun discharged killing his best friend.⁵

Applicant takes full responsibility for his actions and offered no excuses. He testified that every day he lives with the fact that he killed his best friend. He has not forgiven himself. He considered his friend his brother. Applicant has wanted to die. He fights the pain and darkness from his action. He now does what he can to bring joy to

¹ Hearing Exhibits I and II are the Government's exhibit list and discovery letter.

² Tr. 20-21, 38.

³ Tr. 31; 48-50; GE 3, 4.

⁴ Tr. 29-31, 43, 48, 57-58.

⁵ Tr. 29-31.

others and carry his friend's legacy. He stated that he cannot erase the tragedy that occurred, but he will continue to strive to be a better person.⁶

Applicant has been diagnosed with post-traumatic stress disorder (PTSD), major depression, and anxiety disorder. Before this event, he did not have mental health issues. Since then, he had suicidal thoughts and was consumed with guilt. Since October 2017, he has been voluntarily treated by a licensed mental health counselor. He is on prescribed medication for depression and anxiety.⁷

Applicant served four years and three months of his five-year prison sentence where he received psychiatric care because he was on medication at the time. He received psychiatric treatment for about three years. In April 2015, he was transferred to work release. He was required to find his own job. He found one and began work in June 2015. He was released to go to work and then had to return to prison each day. He stayed in the work release program until he was released from prison in November 2015. Upon his release, he went to live with his father. It took him seven to eight months to find a job. His current employer is aware of his felony conviction.⁸

Applicant testified that the terms of his probation are that he cannot have a firearm and cannot use drugs or alcohol. He was tested weekly for a period and is now tested monthly. He is required to give talks about the dangers of guns and alcohol. He cannot travel outside a three-county area without permission. He must report to his probation officer if he moves residences. He is required to report the type of car he drives and driver's license information. He must report his place of employment and if it changes. He must not have any association with criminal activity. He is prohibited from contact with the victim's family. He must report to his probation officer each month in person. Applicant will be eligible for release from probation in 2025. Once he has completed fifty percent of his supervised probation, he may apply for early termination of his probation.⁹

Applicant admitted that he used alcohol one time while on probation, and it occurred after his mother passed away. He explained that he had no medical insurance to see a mental health counselor and he was in emotional pain. He has otherwise been compliant with the terms of his probation.¹⁰

Applicant participated in online schooling while in prison, so he could get a job upon his release. He has worked on certification programs since his release. He purchased a car and has a credit card that he is current on payments. Applicant had a credit card before he went to prison. When he was incarcerated, he had not had time to

⁶ Tr. 29-31.

⁷ Tr. 31-34, 46-47; AE B.

⁸ Tr. 21, 51-57.

⁹ Tr. 34-35, 39-43; AE C.

¹⁰ Tr. 43-44.

put his financial affairs in order, and he believed the credit card had been paid, but apparently it had not. He defaulted on the credit card, but has subsequently paid it. He is paying his student loans on time.¹¹

Applicant testified that prior to his incarceration he was working and received two peer-to-peer awards from his company. He provided character letters, including from the president of the company where he is currently employed. Those writing letters are aware of Applicant's conviction. His work record is described as impeccable. He embraces the opportunity to work with enthusiasm and ambition. He exceeds performance expectations and is reliable and dependable. He has earned the full trust of those he works for and with. Applicant is hard-working, self-motivated, humble, grateful, honest, mature, respectful, compliant with rules and regulations, and trustworthy. He is devoted to his family. Applicant was in the Boy Scouts and attained the rank of Eagle Scout.¹²

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.

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."

¹¹ Tr. 35-37; AE D.

¹² Tr. 25-27; AE A.

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 J: Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following are potentially applicable:

- (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

In 2010, Applicant was arrested, charged, and convicted of manslaughter when he tragically killed his friend with a gun. He was incarcerated for almost five years and is on supervised probation until 2025. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

- (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 tragically killed his friend. He was drinking alcohol at the time. He served almost five years in prison for his offense. He participated in a work release program. He has a good job and is highly regarded by his employer and those with whom he works. He is remorseful and takes full responsibility for his conduct. He suffers the emotional trauma one would expect from a life-altering tragedy. Except for one violation of using alcohol after his mother passed away, he is in compliance with the terms of his probation. It is unlikely Applicant will be involved in future criminal conduct, but the fact is that he remains on supervised probation until 2025. The state where the offense occurred has deemed Applicant must be supervised while on probation due to the seriousness of his conduct. AG ¶¶ 32(a) and 32(d) have some application, but while he is on probation, it is too soon to conclude that Applicant's conduct has been sufficiently mitigated and there are no 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 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 J 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 31 years old. He was convicted of manslaughter when he killed his friend with a gun while they were drinking alcohol. He completed his prison sentence, but

