



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 15-00095
)
 Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley Esq., Department Counsel
For Applicant: *Pro se*

02/16/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On July 30, 2015, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The DOD acted under Executive Order 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) implemented by DOD on September 1, 2006.

Applicant answered the SOR on August 21, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 23, 2015, and the case was assigned to me on October 23, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 29, 2015, scheduling the hearing for November 18, 2015. I convened the hearing as

scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on November 30, 2015.

Findings of Fact¹

In his answer to the SOR, Applicant admitted SOR ¶ 1.a and denied SOR ¶ 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 52-year-old engineering manager employed by a defense contractor since August 1987. He has held a security clearance since August 1988.

In 1987, Applicant received a bachelor's degree in electrical engineering. He is currently enrolled in a master's degree program in engineering management, and he expects to receive his degree in the spring of 2016. (Tr. 14.)

Applicant married in December 1990. He and his wife have three adult children. While their children were in high school and college, Applicant was deeply involved in school activities and coached community athletic teams. (Tr. 19.)

After their youngest child graduated from college, Applicant and his wife began experiencing the "empty-nest syndrome" and marital difficulties. Applicant testified that their marital difficulties were based on large part on his stubbornness and alcohol consumption. (Tr. 17.) He began drinking heavily and losing his temper more often. His work requires him to be a "fixer" and he was frustrated that he could not fix his marriage. He testified that he recognizes in hindsight that he was too stubborn to listen to his wife's concerns about their marriage. (Tr. 53-54.)

In December 2012, Applicant went to a concert with their 30-year-old son. Before the concert, he went to his son's home, where he consumed several mixed drinks. They had dinner at a neighborhood restaurant, where Applicant had another mixed drink. They proceeded to the concert venue, where Applicant consumed about six beers. At the concert, a young man engaged Applicant in conversation. Applicant testified that "this guy [was] lying about a lot of stuff and he kind of [was beginning] to annoy me because things didn't add up." They began arguing. The man held a beer bottle over Applicant's head, but did not spill anything on him or touch him. (Tr. 34-35.)

Applicant was carrying a folding tool in his pocket designed for escape from an automobile, with a heavy pointed end for breaking glass at one end and a sharp knife for cutting a seat belt at the other end. As the argument escalated, Applicant took out the tool, unfolded it, and held it below his waist. The man was bigger than Applicant, in good physical condition, was talking loudly, and was standing close to Applicant. Applicant testified that he was afraid of being attacked. He "flicked" the knife upward

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to other documents in the record.

and cut the man's crotch. As they were being separated, Applicant told the man, "You don't know how lucky you are." (Tr. 32-38, 60, 70.)

Applicant was arrested for malicious wounding, a felony, and disorderly conduct, a misdemeanor. He was taken to the police station where he fell asleep in a cell. He testified that he could not clearly remember what had happened. He was held in jail for ten days before he was released on bond. (Tr. 40-41.)

Applicant was indicted for the felony in February 2013. He hired an attorney, who was able to negotiate a plea agreement. In November 2013, Applicant pleaded guilty to misdemeanor assault and battery and disorderly conduct. He was sentenced to 12 months in jail, all of which was suspended, and he was placed on unsupervised probation for five years. (GX 2; GX 3.) He also was required to obtain counseling for anger management and alcohol abuse, perform 50 hours of community service, and pay the victim \$7,500 as restitution for his injury. He completed all the court-ordered conditions of his probation.

Applicant obtained the court-ordered anger-management counseling from the psychotherapist that he and his wife had been seeing for marriage counseling. His psychotherapist is a licensed professional counselor and a marriage and family therapist. The psychotherapist found that Applicant was forthcoming about the incident, accepted responsibility, and demonstrated true remorse. Applicant and the psychotherapist discussed the need for Applicant to reduce his alcohol use. In a letter attached to Applicant's answer to the SOR, the psychotherapist stated, "I have participated in multiple security clearance interviews and . . . [i]n no way do I know anything that would make [Applicant] a threat to the security of our country." (Enclosure to Answer.) The psychologist's letter does not include a specific medical diagnosis.

Applicant received the court-ordered alcohol counseling at a community services center. The record does not reflect the counselor's credentials. He described his alcohol counseling as "basic alcohol education." (Tr. 42-44, 48-49.)

Applicant self-reported the incident to his supervisor, triggering the investigation into his eligibility to continue his security clearance. (Answer to SOR.) He also sought counseling from his pastor, from whom he had been receiving marital guidance. (Enclosure to Answer.)

Applicant admitted that the incident at the concert was "alcohol-fueled." He testified that he is not an alcoholic, but the letter from his psychotherapist does not address the question whether he is alcohol dependent. Applicant also admitted that there had been incidents during the preceding year when he had consumed too much alcohol, lost his temper, or otherwise reacted inappropriately to stress. (Tr. 52, 61.) He stopped drinking after the incident. As of the date of the hearing, he had resumed drinking alcohol at social events "in a controlled environment," away from noisy, boisterous crowds. (Tr. 45-47.)

Applicant testified that his conduct was out of character, because he has always been able to walk away from a potential confrontation. He explained,

I've always been a dominant person in the environment that I'm in, because I'm an extrovert and I'm a thinker, . . . [and] I've coached kids and pointed out inappropriate action of both parents, coaches, and other kids. That was always my strength. That was my rock. That was who I was and what I sat on. And that was my soapbox. And then, you know, to have this happen and fall short and be that guy, it's just not my character. And it was just me having a meltdown.

(Tr. 58-59.)

Applicant testified that he and his wife have “rekindled” their marriage, and they have booked a Caribbean vacation to celebrate their 25th wedding anniversary. (Tr. 19; Answer to SOR.) Applicant is no longer involved in coaching, because his children are grown and living away from home. He now volunteers for church-related activities and has been involved in prison ministry for several years. (Tr. 66-68; AX A.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The concern raised by 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.” Disqualifying conditions under this guideline include AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”), AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”), and AG ¶ 31(d) (“individual is currently on parole or probation”). Applicant’s arrest for a felony, conviction of two misdemeanors, and probation for five years establish all three disqualifying conditions.

The following mitigating conditions are potentially relevant:

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

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant's criminal conduct was more than three years ago, which is a "significant period of time." However, for the past two years he has been on probation, with the prospect of serving 12 months in jail for any further criminal conduct. He also has been under the pressure of retaining his clearance and his job.

There are several unanswered questions regarding the circumstances of the incident. Applicant has not plausibly explained why he was carrying a vehicle-escape tool in his pocket while attending a concert. He also has not plausibly and credibly explained why he unfolded the tool, positioned it next to the other man's crotch, and flicked it upward before the other man made any physical contact with him. He has not convincingly explained why he did not attempt to withdraw from the confrontation.

Although Applicant was convicted only of a misdemeanor, that conviction was the product of a plea agreement and does not necessarily negate the seriousness of his crime. The seriousness of his crime is reflected in the long period of probation that was imposed.

Applicant's criminal conduct was undoubtedly due in part to his emotional stress about the state of his marriage and his excessive alcohol consumption. He testified that he and his wife have reconciled, but the evidence is sparse regarding any change in his domineering personality, reduction in his stress level, or lessening of marital discord. He appears to have moderated his alcohol consumption, but it is unclear to what extent his moderation is motivated by the pressure of saving his job and avoiding jail time. He will be on probation for almost three more years. His psychotherapist whole-heartedly supports continuing his security clearance, but he articulated no medical basis for his support. Based on all the evidence, I am not convinced that sufficient time has passed to mitigate his conduct. I conclude that AG ¶¶ 32(a) and 32(d) are not established.

Guideline E, Personal Conduct

The SOR cross-alleges Applicant's criminal conduct under this guideline. The concern under this guideline 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 information. . . ."

Applicant's conduct establishes the following mitigating conditions under this guideline:

AG ¶ 16(c): 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 person may not properly safeguard protected information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

AG ¶ 17(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;

AG ¶ 17(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Although Applicant was convicted of a misdemeanor assault instead of a felony, the circumstances of his conduct reflect that it was not "minor" within the meaning of AG ¶ 17(c). It was preceded by about a year of excessive alcohol consumption and bursts of temper. For these reasons, and for the reasons set out in the above discussion of Guideline J, I conclude that AG ¶ 17(c) is not established.

AG ¶ 17(d) is partially established, because Applicant has acknowledged his behavior, obtained counseling, and expressed a sincere desire to change his conduct. However, for the reasons established in the above discussion of Guideline J, I am not satisfied that his conduct will not recur when the pressure of protecting his job is removed or if he finds himself in a stressful social situation.

AG ¶ 17(e) is established. Applicant disclosed his conduct to his wife and his employer, and his convictions are a matter of public record.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has worked for his current employer and held a security clearance for more than 27 years. He is devoted to his family and active in his community. He is highly regarded by his employer. He was candid, sincere, and remorseful at the hearing. However, his introduction of a dangerous weapon into a drunken argument is difficult to understand. It was not an isolated incident, because it was preceded by a year of drunken and angry conduct. Applicant has not carried his heavy burden of overcoming the security concerns raised by his serious criminal conduct. "Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude

