



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



In the matter of:)
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-----) ISCR Case No. 14-04199
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)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Edward O. Lear, Esquire

September 3, 2015

Decision

MOGUL, Martin H., Administrative Judge:

On December 2, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. The action was taken under Executive Order 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On December 20, 2014, Applicant replied to the SOR (RSOR) in writing, and she requested a hearing in this case. The case was assigned to this Administrative Judge on February 18, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 19, 2015, and I convened the hearing as scheduled on March 26, 2015. At the hearing, the Government offered Exhibits 1 and 2, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A through K, which were also admitted without objection. One additional document was submitted post-hearing and has been identified and entered into evidence without

objection as Exhibit L. Three additional witnesses testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on April 3, 2015. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and her witnesses, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record discussed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 60 years old. She is twice married and divorced, and she has no children. She is a high school graduate and has attended community college. Applicant is employed by a defense contractor, and she seeks a DoD security clearance in connection with her employment in the defense sector.

(Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness. The following allegations are cited in the SOR as tending to show that:

1.a. It is alleged in the SOR that in April 2003, Applicant was arrested and charged with (1) Assault with a Deadly Weapon Other Than a Firearm; and (2) Burglary, both felonies. It is also alleged that Applicant plead no contest to the lesser offense of Battery, and she was sentenced to one day in jail, ordered to pay a fine of \$825, ordered to complete Anger Management Classes and sentenced to serve three years of probation. Applicant admitted this allegation in her RSOR. Applicant's testimony regarding this event will be reviewed below.

1.b. It is alleged in the SOR that in December 2003, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI), and (2) Driving With a Measurable Blood Alcohol Content Level of 0.08% or more. It is also alleged that Applicant plead guilty to Count (2) and was sentenced to serve two days in jail; to pay a fine of \$1,856; to attend a an alcohol education program and a First Offender DUI program; and she was sentenced to serve five years probation. Applicant admitted this allegation in her RSOR, but she wrote that the arrest occurred in September 2003. Applicant's testimony regarding this event will also be reviewed below.

1.c. It is alleged in the SOR that in January 2008, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI) With a Measurable Blood Alcohol Content Level of over 0.08%, and (2) DUI Causing Injury. It is also alleged that Applicant plead no contest to Count (2) and was sentenced to serve 30 days in jail; to pay a fine of \$1,615; to attend an alcohol education program for multiple DUI Offenders; and she was sentenced to serve five years probation. Applicant admitted this allegation in her RSOR, but she wrote that the arrest occurred in September 2007.

Applicant testified that the three arrests and convictions, listed as 1.a. through 1.c., above, occurred during her “dark period.” She explained that in 2001, after she and her husband had been married a little over 10 years, he told her that he was having an affair, and he was planning to leave her that very day to live with the other woman, which he did. She averred that she was “devastated” and “in shock.” Since they worked at the same facility, she continued to see him, and they continued to have contact. He continued to tell her that he might want to come back to her so she could never have closure. After this event she began to consume far more alcohol than she had previously done. She described her drinking during this period as four or five drinks at a time, maybe four or five days a week, both in private and at public social clubs. (Tr at 76-80.)

Applicant testified that the event that caused the arrest and conviction, listed as 1.a., above, occurred when she went to the apartment of the man who was still legally her husband and his new girlfriend. Applicant explained that the girlfriend opened the door and then stood back so Applicant entered the apartment. Applicant and the girlfriend got into a shouting match, and then the girlfriend shoved Applicant. Applicant claimed she started to leave the apartment when the girlfriend started moving toward her again. Applicant picked up a chair and swung it at her, striking her in the arm. Later that evening, after Applicant went home, the police arrived at her home and arrested her. Applicant conceded that she had been drinking alcohol before the incident took place, and alcohol contributed to the event. Applicant testified that she has never had another incident with this woman after this event. (Tr at 80-83.)

Applicant explained that the second arrest and conviction, listed as 1.b., above occurred because Applicant had been drinking at a social club with friends, and she drove home. Applicant conceded that she was intoxicated when she drove home. Applicant averred that after this incident her alcohol consumption was reduced to about one or two glasses of an alcoholic beverage a week. (Tr at 84-86.)

Applicant testified that the third the arrest and conviction, listed as 1.c., above, occurred when Applicant had again been drinking at a social club with friends, and she drove home after consuming too much alcohol. (Tr at 86-88.)

Applicant testified that since the last arrest in 2007, she has never driven a vehicle after consuming even one drink of alcohol, whether at a social club or at a friend’s home. (Tr at 88-90.)

1.d. it is alleged in the SOR that Applicant executed a Security Clearance Application (SCA) on February 21, 2013. (Exhibit 1.) The SOR further alleges that Applicant falsified material facts in response to the questions under “Section 22 - Police Record” by falsely denying that she had ever been charged with a felony offense, when in fact she was arrested and charged with two felony offenses, as set forth in subparagraph 1.a., above. Applicant denied this allegation in her RSOR.

Applicant testified that she never meant to mislead the Government, as she believed that she was charged with a misdemeanor, not a felony. She also explained

that she was nervous when she completed the SCA and this was partially the reason for her errors. (Tr at 60-63.) Applicant explained that the 2013 application was the first SCA she ever completed, and she did not receive any special instructions as to how to fill out the form. (Tr at 94.)

1.e. The SOR alleges that Applicant falsified material facts in response to the questions under "Section 22 - Police Record," of the 2013 SCA by falsely alleging that she had never been issued a summons, arrested, charged, convicted or sentenced for any offense or specifically with any drug or alcohol related offense, when in fact she failed to disclose the information listed on the SOR as 1.c., above. Applicant denied this allegation in her RSOR.

Applicant testified that she also did not mean to mislead the Government, as she believed that the Government was only looking for information for the last seven years prior to her completion of the SCA, which was why she did not include her 2003 DUI arrest and conviction. However, as she testified, Applicant did include the 2007 DUI arrest, alleged as subparagraph 1.c. (Tr at 64-66.)

1.f. The SOR alleges that Applicant falsified material facts in response to the questions under "Section 24 - Illegal Use of Drugs," of the 2013 SCA by falsely alleging that she had never received counseling or treatment as a result of her use of alcohol, when in fact she failed to disclose her court-ordered alcohol treatment as part of her sentence for her 2007 DUI, as set forth in subparagraph 1.c., above. Applicant denied this allegation in her RSOR.

Applicant testified that she also did not mean to mislead the Government, as she believed that her court ordered classes would not be considered counseling or treatment. She explained that after the 2007 arrest, Applicant could have taken inpatient or outpatient treatment instead of serving time in jail, but she took the jail time so she did not believe she received counseling. (Tr at 99-101.)

Mitigation

As mentioned above, three additional witnesses testified on behalf of Applicant. These include a retired Air Force colonel, who has known Applicant as a close friend for 15 years; a police officer and former city councilman, who has known Applicant in a professional capacity and as a friend for 17 years; and another retired Air Force officer, who is married to the first witness, and who has also known Applicant as a good friend for approximately 15 years. All of the witnesses testified that Applicant is an honest, trustworthy individual who had gone through a bad period as a result of her ex-husband, but who has now recovered. It was confirmed that Applicant does not drive after consuming any alcohol, and Applicant is honest and truthful and would not have knowingly attempted to furnish untruthful information to the United States Government. (Tr at 21-53.)

Applicant also submitted a number of documents in mitigation. These included a positive current employee evaluation, (Exhibit A); a completion certificate for an anger

management course taken by Applicant after her first 2003 arrest, (Exhibit B); a notice of completion certificate establishing Applicant completed her required DUI course after her 2003 DUI arrest, (Exhibit C); a number of positive certificates of recommendation received by Applicant from her employer, (Exhibits D through I); Petitions for Dismissal for all of the three convictions of Applicant, listed as 1.a. through 1.c., above, (Exhibit J); and finally 13 extremely positive character letters written on Applicant's behalf. (Exhibit K.) Exhibit L included the court issued Orders For Dismissal for the three criminal convictions, listed as 1.a. through 1.c., above.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing the adjudicative process. The administrative judge's over-arching 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 access to classified information will be resolved in favor of 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. Under Directive ¶ 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 as to obtaining a favorable clearance decision.

A person who applies for access to classified information 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 access to classified information. 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 information.

Section 7 of Executive Order 10865 provides that adverse 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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgement, 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 Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that exhibited questionable judgement, lack of candor, dishonesty, unreliability, and untrustworthiness.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. Because Applicant testified credibly and with a legitimate explanation that she did not knowingly and wilfully provide to the Government false or untruthful relevant information requested on a security clearance questionnaire, I do not find that Applicant’s conduct supports disqualifying conditions ¶ 16(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 . . . determine security clearance eligibility or trustworthiness” Because Applicant’s criminal conduct happened in 2003 and 2007, and there has been no evidence of any criminal conduct since that time, and Applicant currently consumes much less alcohol and never drives a vehicle after any consumption, I do not find that ¶ 16(c) is applicable, “a whole-person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations.” I, therefore, resolve Guideline E for Applicant.

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(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.

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. Based on all of the reasons cited above as to why no disqualifying conditions apply under Guideline E, and the extremely positive testimony of the three character witnesses and the laudatory character letters, I find that the record evidence leaves me no with significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns under the whole-person concept.

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 E:	FOR APPLICANT
Subparagraphs 1.a. - 1.f.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge