



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 14-04454
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Richard W. Rataczak, Esq.

05/29/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on September 11, 2012. On October 27, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E and J. 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 the DOD on September 1, 2006.

Applicant received the SOR on November 14, 2014; answered it on November 28, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 16, 2015. The case was assigned to me on January 23, 2015, reassigned to another administrative judge on February 3, 2015, to balance

the workload, and reassigned back to me on March 4, 2015, due to the assigned administrative judge's family medical situation. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 4, 2015, scheduling the hearing for March 24, 2015. An amended notice of hearing was issued on March 17, 2015, rescheduling the hearing for March 25, 2015. Applicant waived the 15-day notice requirement of Directive ¶ E3.1.8. (Tr. 6.) I convened the hearing as rescheduled. Government Exhibit (GX) 1 was admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on April 6, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a, 1.b, 1.d, and 1.e. He denied SOR ¶ 1.c. At the hearing, SOR ¶ 1.c was withdrawn. (Tr. 9.) Applicant's admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 35-year-old engineering technician employed by a federal contractor since February 2008. He is responsible for electronic repairs on Navy vessels and equipment. He also is the contract team lead for detachments supporting deployed Navy ships. (Tr. 19.) He has worked for federal contractors since July 2003, except for a two-month period of unemployment in 2004, when his employer went out of business. He has held a security clearance since 2009. (Tr. 30-31.).

Applicant attended college from August 1998 to December 2000, but he did not receive a degree. He married in March 2011. He and his wife have lived together for about 11 years. They have three children, ages 11, 10, and 3. Applicant's 12-year-old son was born during a previous relationship and does not live with him. (Tr. 65-66.)

When Applicant submitted his SCA in September 2012, he disclosed that he was arrested in December 2009 for driving while intoxicated (DWI), speeding, and having an open container of alcohol in his vehicle. The open container belonged to a passenger. He also disclosed that the DWI and open-container charges were dismissed but that he paid a fine for speeding. (GX 1 at 28-29.) This arrest and its disposition are alleged in SOR ¶ 1.a, but the date of the offense is alleged to have been October 2009.

In the same SCA, Applicant disclosed that he was charged with speeding and DWI in July 2012. (GX 1 at 29-30.) At the hearing, he testified that his blood-alcohol level when he was arrested was .09%. He pleaded guilty to reckless driving as a lesser offense of DWI and was sentenced to 30 days of community service and unsupervised probation for 12 months. He was required to attend an alcohol and drug education course, which caused him to miss time at work. He found the course embarrassing because his children asked what kind of school he was attending. (Tr. 54.) During the course, he learned: "There's a lot of messed up people out there and it made me realize that I didn't want to be in that position again because they are just not the type of people

that I wanted to be around or hear every day.” (Tr. 44.) He testified that he now rarely consumes alcohol. When he does, it is at home on weekends. (Tr. 47.)

SOR ¶ 1.d alleges that Applicant was arrested in May 2002 for a hit-and-run resulting in injury, a felony. He testified that he rented a car for a friend, who was involved in an accident and ran away because he did not have a driver’s license. Applicant was charged because he was the registered driver on the rental contract. On the advice of his attorney, he pleaded guilty to a misdemeanor rather than risk a felony conviction. (Attachment to answer; Tr. 50-51.)

SOR ¶ 1.e alleges that Applicant was arrested in November 2001 and charged with possession of marijuana. In his answer, Applicant admitted the allegation and stated that the charge was dismissed. (Attachment to answer.) At the hearing, he testified that he was treated as a first offender, completed a diversion program, and the charge was dismissed. (Tr. 42-43.)

Applicant’s supervisor, a retired Navy officer, has known Applicant for about seven and one-half years. He has promoted Applicant twice during that time. He considers Applicant an honest, forthright, trustworthy person and an experienced, talented technician. Applicant voluntarily self-reported the incidents in 2009 and 2012. His supervisor has never observed anything about Applicant’s behavior or work performance that would suggest an alcohol problem. (Tr. 18-37; AX A.)

Applicant’s operations manager, who has known him for seven years, submitted a statement supporting continuation of Applicant’s security clearance. He states: “[Applicant] consistently demonstrated honesty and integrity, trustworthiness, and good judgment. He continually models such behavior now and enforces it amongst his subordinate employees.” As a supervisor in a high-visibility activity, Applicant “has represented this organization in exemplary fashion.” (AX B.)

In addition to his primary job, Applicant works part time at his family-owned automotive service center. (AX A.) About a year ago, he was licensed as a tugboat captain. He testified that a blood-alcohol level of .04% while driving would jeopardize his tugboat license. (Tr. 47-48.)

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). Finally, 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 E, Personal Conduct

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. . . .” The conduct disclosed by Applicant on his SCA and during his testimony at the hearing establishes the following disqualifying 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;

AG ¶ 16(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 person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; 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.

AG ¶ 17(c) is established. Although several of the offenses for which he was arrested were not minor and did not occur under unique circumstances, the conduct alleged in the SOR is not recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation 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 most recent arrest was almost three years ago. Since that arrest, he has turned his life around. He established himself as a valuable employee, a respected leader, and a devoted and responsible father. He was candid, sincere, remorseful, and credible at the hearing.

AG ¶ 17(d) is established. Applicant has acknowledged his behavior. Although his attendance at an alcohol education course was court-ordered, it opened his eyes to the nature and consequences of his behavior. He now consumes alcohol infrequently and is focused on his job and his family.

AG ¶ 17(e) is established. Applicant disclosed his behavior in his SCA. He self-reported his two DWI arrests to his supervisor, and he was open and candid at the hearing.

Guideline J, Criminal Conduct

The SOR cross-alleges Applicant’s personal conduct under this guideline. 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.” Applicant’s disclosures on his SCA and admissions at the hearing establish two disqualifying conditions: AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

The relevant mitigating conditions are:

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.

Both mitigating conditions are established, for the reasons set out in the above discussion of Guideline E.

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.

After weighing the disqualifying and mitigating conditions under Guidelines E and J, considering the factors in AG ¶ 2(a), and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his personal conduct and criminal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 1.a, 1.b, 1.d, and 1.e:	For Applicant
Subparagraph 1.c:	Withdrawn
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge