



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



In the matter of:)
)
 ---) ISCR Case No. 15-01866
)
 Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: *Pro se*

03/01/2016

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding criminal conduct and personal conduct considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On March 31, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On August 27, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective

¹ Item 3 (e-QIP, dated March 31, 2014).

September 1, 2006. The SOR alleged security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct), and detailed reasons why the DOD CAF was unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a statement notarized September 28, 2015, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.² A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on November 4, 2015, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on November 12, 2015. A response was due by December 12, 2015. As of February 29, 2016, I have not received a response to the FORM. The case was assigned to me on February 17, 2016.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with explanations, all of the factual allegations pertaining to criminal conduct (§§ 1.a. through 1.k.) in the SOR. He failed to answer the conclusory allegation pertaining to personal conduct (§ 2.a.). After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 46-year-old employee of a defense contractor. He has been serving as an avionics specialist with his current employer since September 1997.³ A 1987 high school graduate, Applicant continued his education online in an aeronautical discipline, but has not earned a degree.⁴ Applicant enlisted in the U.S. Air Force Reserve in an inactive capacity in September 1987, and he was honorably discharged in June 1996.⁵ He has a Department of Veterans Affairs rated disability. He was granted a secret security clearance in October 1994.⁶ He was married in July 1991 and divorced in October 2007.⁷ He has three children, born in 1992, 1993, and 1995.⁸ In December 2008, Applicant was given custody of his then minor children when his former wife was

² Item 2 (Applicant's Answer to the SOR, dated September 28, 2015).

³ Item 3, *supra* note 1, at 13.

⁴ Item 4 (Personal Subject Interview, dated April 29, 2014), at 1; Item 3, *supra* note 1, at 12.

⁵ Item 3, *supra* note 1, at 14-15.

⁶ Item 4, *supra* note 4, at 6.

⁷ Item 3, *supra* note 1, at 18-19.

⁸ Item 3, *supra* note 1, at 24-25.

arrested and charged with possession of narcotics with intent to distribute, possession of a firearm, and child endangerment.⁹

Criminal Conduct and Personal Conduct¹⁰

Applicant has a lengthy history of criminal conduct and questionable personal behavior, commencing in August 1993, when he was 24 years old, and continuing through at least June 2015. Included in that history are various arrests for misdemeanors and felonies, as well as citations for traffic infractions. The incidents leading to those arrests and charges involved driving under the influence (DUI); driving while under the influence of alcohol (DWI); unlawful use of weapon; possession/discharge of loaded weapon while intoxicated; possession of up to 35 grams of marijuana; aggravated domestic battery; driving while revoked/driving while suspended; traffic offense - DUI Alcohol or drugs; resisting arrest without violence; resist officer – obstruct without violence; proof of insurance required; no valid certificate of registration; and a parking violation. There are a number of convictions, several charges were dismissed or otherwise not prosecuted, and one resulted in an acquittal. The final disposition is not known for some of the incidents, and some charges were still pending as of the date of the SOR.

(SOR ¶ 1.a.): In August 1993, after consuming two or three beers, Applicant was stopped by the county sheriff, administered a field sobriety test, which he failed, and arrested for DUI. The charge was reduced to reckless driving, and he was subsequently fined \$478, ordered to attend a DUI school, placed on probation for six months, and his base driving privileges were suspended for one year. He purportedly completed the DUI school.

(SOR ¶ 1.b.): In January 2006, after consuming two beers at a bar, engaging in a verbal argument with his girlfriend, and leaving the bar on his motorcycle, Applicant was stopped by the police, administered a field sobriety test, which he failed, and arrested for (1) DWI, a misdemeanor; (2) unlawful use of a firearm, a felony; (3) possession/discharge of loaded weapon while intoxicated, a felony; and (4) possession of 35 grams of marijuana, a misdemeanor. The weapon was Applicant's unloaded .45 caliber handgun which his girlfriend purportedly had placed in his motorcycle saddlebag, without his knowledge, because she no longer wanted it in her home. Applicant contended the marijuana was his girlfriend's, and that she had placed it into his motorcycle saddlebag, also without his knowledge. The state took no further action on the firearm charges, and it is unclear what the result was regarding the drug charge.

⁹ Item 4, *supra* note 4, at 7.

¹⁰ General source information pertaining to Applicant's criminal conduct discussed below can be found in the following exhibits: Item 2, *supra* note 2; Item 4, *supra* note 4; Item 3, *supra* note 3; Item 6 (Federal Bureau of Investigation (FBI) Identification Record, dated April 17, 2014); Item 7 (Case Progress Docket, dated January 6, 2014); Item 8 (Case Progress Docket, dated August 25, 2014); Item 9 (Case Progress Docket, dated August 8, 2014); Item 10 (Case Progress Docket, dated October 22, 2014); Item 11 (Case Progress Docket, dated February 18, 2015); Item 12 (Case Progress Docket, dated June 6, 2015). The described FBI Identification Record is incomplete, and the information appearing in the various case progress dockets reflects court actions, but not even superficial information regarding the individual criminal incidents. There are no police incident reports in evidence.

Applicant was convicted of DWI, placed on probation for two years (to be completed on July 24, 2008), fined, and ordered to perform 40 hours of community service.

(SOR ¶ 1.c.): In March 2007, Applicant was arrested and charged with one count of aggravated domestic battery. He offered two different explanations regarding the incident. He initially told an investigator from the U.S. Office of Personnel Management (OPM) that his dog bit his wife, and that he was arrested and spent the night in jail. He later said in his Answer to the SOR that something (otherwise unspecified) took place after he had informed his wife that he wanted a divorce. She was under the belief that she could receive monetary benefits if she claimed abuse had occurred, but a subsequent physical examination could not support the alleged abuse. The charges were eventually dismissed, *nolle prosequi*.

(SOR ¶ 1.d.): On July 23, 2008, one day before his probation for the 2006 conviction was to have been completed, Applicant was arrested and charged with driving while revoked/driving while suspended. Applicant acknowledged that his driving privileges limited him to driving to and from work, but contended the suspension had already expired the same day. The record is silent as to the result of the arrest.

(SOR ¶ 1.e.): In September 2009, after a verbal dispute with his supposedly intoxicated girlfriend (who had an abrasion on her face from an earlier fall) in her home, which included being punched in the face by her brother, Applicant was arrested for (1) domestic assault 3rd degree, 1st and 2nd offense, a misdemeanor; (2) assault 3rd degree, a misdemeanor; and (3) unlawful use of weapon, a felony. Applicant's girlfriend subsequently denied being harmed by him. No charges were filed.

(SOR ¶ 1.f.): In January 2014, after consuming two beers and two "shots" of an unspecified substance over a five-hour period at a bar, Applicant and his girlfriend left the bar and drove to a restaurant. A dispute ensued in the parking lot as she wanted to eat and he did not. They departed the parking lot and drove towards home when his girlfriend interfered with his operation of the motor vehicle by jerking the steering wheel, pulling on the emergency brake, and attempting to put the vehicle in park, all while Applicant was driving. He pulled over to the side of the road in an effort to calm her down. The sheriff arrived at the scene and administered Applicant a field sobriety test, which he failed. He was arrested and charged with traffic offense - DUI alcohol or drugs, a misdemeanor. He refused to take a breathalyzer test. Applicant pled not guilty to the charge and elected a jury trial. He was acquitted on May 29, 2014.

(SOR ¶ 1.g.): In August 2014, Applicant was arrested and charged with driving while license suspended 1st offense. He was under the mistaken belief that his May 2014 acquittal had absolved him of all issues associated with the DUI, but his earlier refusal to take the breathalyzer test caused his operator's license to remain suspended. He entered a plea of *nolo-contendere*. Adjudication was withheld, and he was sentenced to 15 days house arrest and fined \$298.

(SOR ¶ 1.h.): In August 2014, Applicant was arrested and charged with resisting arrest without violence when he refused the sheriff's request to produce his

identification during an investigation into allegations that Applicant was harassing his former girlfriend. Applicant entered a plea of not guilty. The matter was subsequently dismissed when the prosecutor chose not to prosecute.

(SOR ¶ 1.i.): In October 2014, Applicant's girlfriend obtained a temporary restraining order against Applicant, alleging domestic violence. In July 2015, after several hearing delays and postponements, the order was dismissed. It appears that Applicant and his girlfriend had reconciled.

(SOR ¶ 1.j.): In February 2015, Applicant was arrested and charged with (1) traffic offense – DUI alcohol or drugs, a misdemeanor; (2) resist officer – obstruct without violence, a misdemeanor; (3) proof of insurance required; and (4) no valid certification of registration. There is no evidence of the circumstances which led up to the arrest. Applicant filed a motion to suppress unspecified evidence pertaining to charges (1) and (2). Further actions on those two counts remain unresolved, and the charges are still pending. Applicant entered pleas of guilty to charges (3) and (4), and was assessed fines. The charges were dismissed.

(SOR ¶ 1.k.): In June 2015, Applicant was issued a citation for a parking violation. He contended that the front tire of his parked motorcycle was on the painted dividing line between a parking space and a designated no-parking area. He entered a plea of no plea, and was fined \$130.

Applicant contends that it takes seven or eight beers to make him intoxicated. He does not believe he has an issue with alcohol, and he plans to continue his alcohol consumption of about two beers per week in social settings. In April 2014, he indicated no plan to drive and consume alcohol.¹¹

Character References and Job Performance

Applicant failed to submit any character references or employment assessments. Nevertheless, he self-characterized himself as an honorably discharged, disabled veteran who has, since 2005, supported numerous volunteer efforts with his employer, and he is currently the focal for his employer's participation in a particular community improvement program. He acknowledged that his accumulation of events "paints an unflattering picture" that is but a small part of his total character. He indicated he has received counseling over the past two years to improve his relationship and communication skills, but he failed to submit any documentation to support his claims pertaining to counseling.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security

¹¹ Item 4, *supra* note 4, at 4-5.

emphasizing, “no one has a ‘right’ to a security clearance.”¹² 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”¹³

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”¹⁴ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.¹⁵

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the

¹² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹³ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

¹⁴ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

¹⁵ *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

possible risk the 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. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”¹⁶

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”¹⁷ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline J, Criminal Conduct

The security concern relating to the guideline 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. Under AG ¶ 31(a), “a single serious crime or multiple lesser offenses” is potentially disqualifying. Similarly, under AG ¶ 31(c), if there is an “allegation of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” security concerns may be raised. Applicant’s history of criminal conduct, domestic issues, and traffic infractions, over a 22-year period, consists of 10 incidents involving criminal charges, arrests, convictions, or traffic citations, for a variety of actions, plus one parking violation. AG ¶¶ 31(a) and 31(c) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where “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.” Similarly, AG ¶ 32(c) may apply where there is “evidence that the person did not commit the offense.” Also, AG ¶ 32(d) may apply when “there is evidence of

¹⁶ *Egan*, 484 U.S. at 531

¹⁷ See Exec. Or. 10865 § 7.

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.”

None of the mitigating conditions apply. Applicant’s conduct occurred over a period of 22 years, with the most recent serious incident (the February 2015 arrest and charge of (1) traffic offense – DUI alcohol or drugs, a misdemeanor; and (2) resist officer – obstruct without violence, a misdemeanor) still unresolved. The June 2015 parking violation is not a crime, but merely a civil infraction, and is relatively insignificant. Most of Applicant’s incidents were associated with two rather common themes: his consumption of alcohol and his strained relationship with his girlfriend. Even after realizing the problems his girlfriend created for him, Applicant reconciled with her. That factor, added to his failure to recognize the negative impact alcohol has had on him, and his refusal to abstain from further alcohol consumption, raise the likelihood that additional criminal conduct will recur. Furthermore, those continuing relationships cast doubt on Applicant’s reliability, trustworthiness, or good judgment.

While there is evidence that certain charges have been dismissed or otherwise not prosecuted, as well as one acquittal, those dismissals, non-prosecutions, and the acquittal, do not, without substantially more, necessarily reflect that Applicant did not commit the individual offenses charged. Generally, the passage of time without recurrence of additional criminal activity, can be construed as some evidence of successful rehabilitation. However, in this instance, the criminal activities have continued over time. Applicant’s employment record is unknown. While a person should not be held forever accountable for misconduct from the distant past, in this instance the past is recent, and the concerns about future criminal conduct are continuing.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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. 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 guideline notes a condition that could raise security concerns. Under AG ¶ 16(e), security concerns may be raised when there is a “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing. . . .” As noted above, Applicant’s continuing history of criminal conduct, domestic issues, and traffic infractions, over a 22-year period, consists of 10 incidents involving criminal charges, arrests, convictions, or citations, for a variety of actions, plus one parking violation.

Police and judicial authorities were involved in those incidents. Applicant was convicted of DUI (1993) and DWI (2006), and fined for driving while license suspended 1st offense (2014). And, there is his more recent other parking violation (2015). The two relatively recent serious charges, traffic offense – DUI alcohol or drugs; and resist officer – obstruct without violence, are still pending court action, and have not been resolved. Applicant’s underlying conduct with a number of these incidents involved questionable judgment or an unwillingness to comply with rules and regulations. Likewise, his continued association with his girlfriend and alcohol increase the probability of recurrence. AG ¶ 16(e) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(c) may apply if “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.” Also, AG ¶ 17(d) may apply if “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.” Similarly, if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress,” AG ¶ 17(e) may apply.

AG ¶ 17(c) applies only to the parking citation. AG ¶¶ 17(d) and 17(e) do not apply. Applicant acknowledged that his accumulation of events “paints an unflattering picture” that is but a small part of his total character. He indicated he has received counseling over the past two years to improve his relationship and communication skills, but he failed to submit any documentation to support his claims pertaining to counseling. Furthermore, it should be noted that despite his purported counseling efforts, Applicant’s involvement in questionable and criminal conduct has increased over the past two years, with five incidents (not counting the 2015 parking infraction) occurring since January 2014. In the absence of some significant emotional and attitudinal changes by Applicant, it appears that such overall behavior is likely to recur.

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. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.¹⁸

There is some evidence in favor of mitigating Applicant's conduct. He is an honorably discharged, disabled veteran. He has been with his current employer since September 1997. He claims that he is an active participant in a particular community improvement program. He was awarded custody of his then minor children. He claims to have received counseling over the past two years to improve his relationship and communication skills. Although there were several charges filed against him over the years, some of those charges were subsequently dismissed for various reasons, and he was acquitted of one alcohol-related traffic offense.

The disqualifying evidence under the whole-person concept is more substantial. Applicant's conduct occurred over a period of 22 years. He has been convicted of some charges, fined, ordered into house arrest, placed on probation, ordered to attend DUI school, required to perform community service, had his operator's license suspended, and had a temporary restraining order issued against him. As noted above, his consumption of alcohol and his strained relationship with his girlfriend are generally common themes. Although Applicant seemingly recognized his issues regarding his girlfriend, nevertheless, he reconciled with her. That, added to his minimizing the significance of alcohol on his conduct, raises the likelihood that additional criminal conduct will recur. Those continuing relationships cast doubt on Applicant's reliability, trustworthiness, or good judgment. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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. through 1.e:	Against Applicant
Subparagraph 1.f.:	For Applicant
Subparagraphs 1.g. through 1.j:	Against Applicant
Subparagraph 1.k.:	For Applicant

¹⁸ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a.:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge