



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 18-00975
)	
Applicant for Security Clearance)	

Appearances

For Government: Ross Hyams, Esq., Department Counsel
 For Applicant: *Pro se*
06/17/2019

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 16, 2017. On December 21, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, E, and G. The DOD CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on February 21, 2019, and requested a decision on the record without a hearing. Applicant completed two attachments to the SOR answer, one on January 17, 2019 and another on February 21, 2019. The record does not explain the reason for the two attachments. There is only one SOR answer in the record. On March 28, 2019, the Government sent a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 9, to Applicant. He

was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the FORM on April 2, 2019, and did not respond. Items 1 through 3 are the pleadings in the case. Items 4 through 9 are admitted into evidence. The case was assigned to me on May 31, 2019.

Procedural Matter

Unless otherwise indicated by citation to another part of the record, I have extracted the below findings of fact from Applicant's SOR answer (Item 3), his SCA (Item 4), and the summary of his two security clearance interviews (SI), dated December 2017 (Item 5) and October 2009 (Item 6). Item 6 was not authenticated as required by Directive ¶ E3.1.20. However, Applicant was informed by the Government that he was entitled to make corrections, additions, deletions, and updates to Item 6. Applicant was also informed that he was entitled to object to consideration of Item 6 on the ground that it was not authenticated. Applicant did neither in his response to the FORM. Therefore, I conclude that he has waived any objection to Item 6. I did not consider the summary of court records contained on the second page of Item 6.

Findings of Fact

Applicant, age 32, was married in 2013 and has three minor children. He received a high school diploma in 2005. He has been enrolled in a community college since August 2017, as part of the apprenticeship program with which he has been employed since January 2017. Applicant was previously granted a DOD security clearance in 2010.

The SOR alleged twelve criminal charges including assault and strangulation of a family member (SOR ¶¶ 1.b, 2.a), three incidents of driving under the influence (DUI) (SOR ¶¶ 1.a, 1.k, 1.l, 2.a, 3.a), four incidents of contempt of court (SOR ¶¶ 1.d, 1.e, 1.g, 1.h, 2.a), and four incidents of driving on a suspended license (SOR ¶¶ 1.c, 1.f, 1.i, 1.j, 2.a). In his SOR answer, Applicant admitted the following Guideline J allegations: SOR ¶¶ 1.a through 1.c, 1.f, and 1.k. Applicant did not respond to the Guideline E and G allegations, which I have construed as denials.

In December 2016, Applicant was involved in a disagreement with his wife concerning their child. Applicant's wife alleged that he assaulted and strangled her, for which he was arrested and charged (SOR ¶ 1.b). Applicant claimed that his wife tried to run him over with a vehicle, and admitted that he grabbed her in an effort to stop her from doing so. However, he denied either assaulting or strangling his wife. A court dismissed both charges. Applicant and his wife have since reconciled and remain married. (Item 5 at 6 and 8; Item 9 at 5). The Government did not provide any documents to challenge Applicant's version of the facts surrounding the incident or the court's disposition. (Item 9 at 5, details only the charges).

Applicant admitted two of the three alleged DUI charges. The record established one DUI in 2009 (SOR ¶ 1.k) and another in 2017 (SOR ¶ 1.a). A 2007 DUI (SOR ¶ 1.l) was alleged based on the apparent mistaken reliance of a date referenced as "possibly

in 2007” in one portion of Applicant’s 2017 SI. (Item 5 at 7). However, in another portion of that same 2017 SI, the “possibly in 2017” reference was corrected to 2009. (Item 5 at 7-8). Applicant provided inconsistent accounts of the facts and circumstances of his 2009 DUI during his 2008 and 2017 SIs. The Government neither alleged nor otherwise noted the discrepancy, nor did it provide any documents to detail the facts and circumstances of the 2009 DUI.

In February 2009, Applicant did not feel impaired and believed that he was okay to drive after consuming alcohol. The facts and circumstances surrounding his consumption of alcohol prior to driving are uncertain given Applicant’s differing accounts. He was pulled over by a police officer for speeding. A breathalyzer revealed a blood alcohol count of .12%. Applicant was arrested and charged with DUI. In June 2009, a court adjudicated him guilty and sentenced him to 90 days in jail (suspended), restricted his driver’s license for a year, ordered him to attend Alcohol Safety Action Program (ASAP) classes, and fined him \$250. (Item 5 at 7-8; Item 6 at 1; Item 8 at 15-16; Item 9 at 5).

Applicant’s March 2017 DUI occurred three days after he submitted his SCA. On that occasion, he consumed five beers over the course of two to three hours while he was at a bar with a friend. He did not feel impaired and believed that he was okay to drive when they left to meet another friend. Applicant hit a guard rail after being cut off by a semi-truck on an interstate highway. The officer responding to the accident smelled alcohol on Applicant’s breath and administered a breathalyzer, which registered a blood alcohol count of .12%. Applicant was arrested and charged with DUI. In January 2018, a court adjudicated him guilty and sentenced him to 6 months in jail (all but 10 weekend days suspended), placed him on unsupervised probation for three years, restricted his driver’s license for three years, ordered the installation of an interlock device on his vehicle for six months, ordered him to attend ASAP classes, and fined him \$500. Applicant completed his jail term in February 2018. (Item 5 at 6-8; Item 7; Item 8 at 1-2).

Applicant does not believe that he has a problem with alcohol and has never been diagnosed alcohol dependent or an alcohol abuser. He began consuming alcohol at the age of 21, regularly consuming approximately two beers a week in social settings with others. After his daughter was born in February 2014, he reduced the frequency of his consumption to special occasions approximately twice per year, during which he would drink to intoxication (approximately five beers). As of December 2017, Applicant had not consumed any alcohol since his March 2017 DUI and expressed a future intent to abstain from any consumption of alcohol or driving after consuming alcohol. He cited his daughter and career as motivation for the abstention. (Item 5 at 9).

In his SOR answer, Applicant denied all four contempt of court charges alleged in SOR ¶¶ 1.d, 1.e, 1.g, and 1.h. In August 2009, a court adjudicated Applicant guilty in absentia of the June 2009 charge alleged in SOR ¶ 1.h. (Item 8 at 17-18). The charges alleged in SOR ¶¶ 1.d, 1.e, and 1.g involved a mistaken identity and were dismissed by the court in December 2015. (Item 5 at 8; Item 8 at 3-8, 9 at 5).

Applicant was convicted of two of the four driving on suspended license charges alleged in the SOR; the other two were dismissed by the court. Despite Applicant's claim that his license had been reinstated at the time he was charged in April 2009 (SOR ¶ 1.i), the court adjudicated him guilty in June 2009 and fined him \$100. (Item 6 at 1; Item 8 at 11-12). In June 2013, a court adjudicated Applicant guilty of the March 2013 charge (SOR ¶ 1.c), sentenced him to 30 days in jail (suspended), suspended his driver's license for 90 days, and fined him \$750. (Item 8 at 9-10). Although Applicant did not claim mistaken identity as to the November 2010 charge (SOR ¶ 1.f), the record suggests that it was dismissed for that reason on December 2015. (Item 8 at 7-8). The November 2010 charge was initiated by the same complainant and adjudicated at the same time as the other mistaken identity charges noted above. Applicant's February 2009 charge (SOR ¶ 1.j) stemmed from his 2009 DUI, and was dismissed by the court on the same day that the DUI was adjudicated. (Item 8 at 13-14).

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." (*Egan* 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." (EO 10865 § 2).

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." (EO 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. (*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. (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. (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; AG ¶ 2(b)).

Analysis

Guideline J (Criminal Conduct)

The concern under this guideline 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 alleged 2007 DUI was not established by the evidence. Applicant’s 2009 and 2017 DUIs and other charges establish the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(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

AG ¶ 31(c): individual is currently on parole or probation.

All of the charges except for the 2009 and 2017 DUIs have been mitigated by the following applicable factor:

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.

Neither of the following applicable mitigating conditions under this guideline are established as to the 2009 and 2017 DUIs:

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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's 2009 and 2017 DUIs establish a pattern of criminal misconduct that casts doubt about Applicant's judgment, reliability, and trustworthiness, and calls into question his ability or willingness to comply with laws, rules, and regulations. Applicant remains under the court's jurisdiction in connection with the 2017 DUI through at least 2021. There has not been a passage of time sufficient to conclude that his questionable judgment and criminal misconduct will not recur.

While I do not consider any physical assault of a spouse to be a minor offense, I find that Applicant's arrest for assault and strangulation resulted from isolated circumstances that are unlikely to recur. Applicant has not been convicted of a charge related to contempt of court since 2009 or driving on a suspended license since 2013. I find that sufficient time has elapsed that those incidents are unlikely to recur.

Guideline E (Personal Conduct)

The security concern under this guideline, as set out in AG ¶ 15, includes: "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 or sensitive information."

The alleged 2007 DUI was not established by the evidence. Applicant's 2009 and 2017 DUIs and other charges establish the general concerns involving questionable judgment and unwillingness to comply with rules and regulations, and the following specific disqualifying condition 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 individual may not properly safeguard classified or sensitive information.

Incorporating my comments under Guideline J, the security concerns raised under this guideline have been mitigated by the following applicable factor as to all the charges except for the 2009 and 2017 DUIs:

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.

Guideline G (Alcohol Consumption)

The concern under this guideline is set out in AG ¶ 21: Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Applicant's excessive alcohol consumption, resulting in his 2009 and 2017 DUIs, establishes the following disqualifying conditions under this guideline:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Neither of the following applicable mitigating conditions under this guideline are established:

AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

The security significance of Applicant's 2009 DUI is brought current by his more recent 2017 DUI. Together they raise questions about Applicant's good judgment, reliability and trustworthiness. Of particular concern is the fact that he was arrested for his second DUI three days after he completed his SCA. Applicant has not demonstrated a sufficient pattern of modified behavior for me to conclude that his excessive consumption of alcohol and questionable judgment are behind him.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guidelines J, E, and G in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines J, E, and G, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by the excessive alcohol consumption, personal conduct, and criminal misconduct underlying his two DUI charges, the most recent of which occurred in 2017 and for which he is currently on probation. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b – 1.j:	For Applicant
Subparagraphs 1.k:	Against Applicant

Subparagraphs 1.l:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant (as to subparagraphs 1.a and 1.k)
	For Applicant (as to subparagraphs 1.b – 1.j and 1.l)
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant (as to subparagraphs 1.a and 1.k)
	For Applicant (as to subparagraph 1.l)

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge