



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



In the matter of:)
)
 ---) ISCR Case No. 18-01148
)
 Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esquire, Department Counsel
For Applicant: *Pro se*

01/31/2019

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On December 7, 2016, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to those interrogatories, but he failed to date his response. On June 11, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 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 Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find 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 as to when Applicant received the SOR as there is no receipt in the case file. In a sworn statement, dated July 9, 2018, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by DOHA on August 10, 2018, and he was afforded an opportunity 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 Adjudicative Guidelines applicable to his case. Applicant received the FORM on October 1, 2018. Applicant's response was due within 30 days of the receipt of the FORM. Applicant apparently chose not to respond to the FORM, for as of January 29, 2019, he had not done so. The case was assigned to me on January 25, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted with comments all of the factual allegations pertaining to criminal conduct in the SOR (SOR ¶¶ 1.a. through 1.i.), but he failed to admit or deny the cross-allegations pertaining to personal conduct (SOR ¶ 2.a), so a denial was registered for him. Applicant's admissions and comments are incorporated herein as findings of fact. 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 35-year-old employee of a defense contractor. He has been serving as a condenser maintenance worker with his current employer since July 2017. A 2001 high school graduate, Applicant earned college and vocational credits but no degree. He enlisted in the U.S. Navy in September 2001, and served on active duty until September 2009, when he was honorably discharged. He remained in the active reserve, with deployments to Guam and Afghanistan, and he re-enlisted on active duty in November 2014. Applicant was discharged in April 2016, and he was issued a general discharge under honorable conditions. He was granted a secret clearance in 2004. Applicant has never married. He has no children.

Criminal Conduct and Personal Conduct

In part, because of Applicant's consumption of alcohol, he has a lengthy history of disregarding laws, rules, and regulations. The SOR alleged nine incidents of criminality and personal conduct by Applicant commencing in 2003, and continuing until at least 2017.

(SOR ¶¶ 1.a.): In March 2003, when he was a 19-year-old seaman (E-3), Applicant received non-judicial punishment for violation of Article 91 (Disrespect toward Superior

Petty Officer), Uniform Code of Military Justice (UCMJ). He was restricted to the vessel for five days. Applicant denied, and there is no independent evidence to the contrary, that he was reduced in rank as alleged in the SOR, although Applicant caused some controversy initially by saying the allegation was accurate. He described the episode leading up to his discipline, as follows: He was sitting with his roommate during lunch when he got up to obtain some additional beverage, but when he returned, someone was sitting in his place, although Applicant's full tray of food was still unmoved. He asked the individual to move so he could finish his meal and was told to wait because the individual was talking to someone. Applicant placed his hands under the individual's armpits to assist him out of the seat. Applicant was not aware of the individual's rank at the time. With added maturity, Applicant realized that he could have handled the situation better by simply moving his seat to finish his lunch.¹

(SOR ¶ 1.b.): In September 2007, Applicant was arrested and charged with Driving While Intoxicated (DWI) – 1st offense, a misdemeanor. Although the Federal Bureau of Investigation (FBI) Identification Record reported that he was convicted of the charge on November 7, 2007, and sentenced to 12 months and 5 days, with 12 months suspended, along with unsupervised probation, Applicant stated, and the SOR alleged, that he was sentenced to 10 days in jail.² The trial court apparently also mandated that Applicant install an ignition interlock or car breathalyzer,³ suspended his operator's license for one year, and ordered him to attend an Alcohol Safety Action Program (ASAP).⁴ Applicant described the events leading up to his arrest: He had attended a friend's promotion party-cookout, consumed three of four mixed vodka drinks, and then went to another event that was motorcycle-related. That event became somewhat raucous, and when the police arrived, everyone departed. Applicant was stopped one block from the party and administered a sobriety test, which he failed.⁵

(SOR ¶¶ 1.c., 1.d., and 1.e.): As noted above, because of the court sentence associated with Applicant's September 2007 DWI, he was required to attend ASAP. He repeatedly failed to do so, claiming that he did not have sufficient funds available because of the costs associated with the ignition interlock, attorney and court fees, and his increased insurance costs.⁶ In March 2008, he was required to show cause on a charge of ASAP Non-Comply. On April 24, 2008, he entered a plea of guilty and was ordered to pay court costs of \$76. He paid his court costs in March 2009.⁷ In September 2008, he

¹ Item 4 (Applicant's Response to the Interrogatories, undated, at 4; Item 2, (Applicant's Answer to the SOR, dated July 9, 2018), at 1.

² Item 6 (FBI Identification Record, dated December 9, 2016, at 2).

³ Such a device prevents drunk drivers from driving their vehicle. It is connected to the vehicle, and it has a preset level for blood alcohol concentration (BAC) determined by the state. If a would-be driver blows into the device when he or she is over the set BAC limit, the vehicle will not start.

⁴ Item 4 (Enhanced Subject Interview, dated October 13, 2017), at 10-11.

⁵ Item 4 (Interview), *supra* note 4, at 10-11.

⁶ Item 2, *supra* note 1, at 1.

was again required to show cause on a charge of ASAP Non-Comply. On May 7, 2009, he entered a plea of not guilty, but was found guilty, and he was ordered to pay court costs of \$76. He paid his court costs in December 2009.⁸ In May 2010, he was again required to show cause on a charge of ASAP Non-Comply. On June 24, 2010, he entered a plea of not guilty, but was found guilty. The case was immediately appealed,⁹ because Applicant claimed that he had actually fulfilled his ASAP obligation.¹⁰

(SOR ¶ 1.f.): In October 2015, Applicant was charged with DWI – 2nd offense, a misdemeanor. On January 4, 2016, he was found guilty and sentenced to 60 days (50 days suspended), fined \$500, ordered to pay \$296 in court costs, and his operator's license was restricted for three years, commencing on January 4, 2016. He paid his fine and court costs on April 7, 2016.¹¹ Applicant described the events leading up to his arrest: A girlfriend was being transferred so a group of friends decided to take her out. One of the friends – a designated sober driver – got angry towards the end of the evening and as she was departing in another vehicle, she threw Applicant's keys out the window to him, leaving him without a designated driver. Although Applicant denied being intoxicated, he drove the vehicle away, and was stopped. He acknowledged that he made an irresponsible decision.¹²

(SOR ¶ 1.g.): In March 2016, Applicant was charged with Contempt of Court, a misdemeanor.¹³ Applicant's descriptions associated with this incident are somewhat inconsistent. He initially claimed it was about a missed court date, but later claimed that the charge was associated with his failure to enroll in ASAP by a certain date. He displayed proof that he was enrolled in a class that was scheduled to commence in April 2016. The charge was eventually dismissed on July 25, 2016.¹⁴

(SOR ¶ 1.h.): In March 2016, Applicant received non-judicial punishment for violation of Article 92 (Failure to Obey a Lawful Order), UCMJ. The charge was related to his October 2015 DWI. He was restricted to the vessel for 45 days and reduced from E-6 to E-5. Applicant was also notified that he was to be administratively processed for discharge.¹⁵

⁷ Item 5 (Traffic/Criminal Case Details, dated March 25, 2009).

⁸ Item 5 (Traffic/Criminal Case Details, dated December 17, 2009).

⁹ Item 5 (Traffic/Criminal Case Details, dated June 24, 2010).

¹⁰ Item 2, *supra* note 1, at 1; Item 4 (Interview), *supra* note 4, at 11.

¹¹ Item 5 (Traffic/Criminal Case Details, dated April 7, 2016); Item 6, *supra* note 2.

¹² Item 2, *supra* note 1, at 2; Item 4 (Interview), *supra* note 4, at 7-8.

¹³ Item 6, *supra* note 2.

¹⁴ Item 6, *supra* note 2; Item 2, *supra* note 1, at 2; Item 4 (Interview), *supra* note 4, at 13.

¹⁵ Item 4 (Interview), *supra* note 4, at 13; Item 2, *supra* note 1, at 2.

(SOR ¶ 1.i.): In February 2017, Applicant was charged with Operating Suspended/Revoked, a misdemeanor, essentially driving after a forfeiture of an operator's license. On March 17, 2017, he was convicted as charged and sentenced to 30 days (suspended), 3 additional months of suspension, fined \$250, and ordered to pay \$91 in court costs. He paid his fine and court costs on June 7, 2017.¹⁶ Applicant described the events leading up to his arrest: Because he could no longer afford to reside in his home, and he was unable to find someone to assist him in moving his belongings to storage, he moved them himself on two trips. On the third trip, he was stopped by the same officer who had stopped him in October 2015. Applicant acknowledged that he made a foolish decision.¹⁷

Applicant contended that he completed a four-week ASAP in May 2016, and that as of October 2017, he was still participating in another 18-week class that was temporarily interrupted by a job-related trip to sea. He failed to submit any documents to support his contentions related to his attendance or completion of the ASAP programs. He denied ever being diagnosed for any alcohol-related condition. He also finally realized that drinking and driving resulted in his having to pay expensive fines, and that is something he no longer wishes to do. Although he used to drink three to four mixed vodkas during the weekends, he now claims that, as of September 2017, he stopped consuming alcohol.¹⁸

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."¹⁹ 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."²⁰

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

¹⁶ Item 5 (Traffic/Criminal Case Details, dated June 7, 2017); Item 2, *supra* note 1, at 3.

¹⁷ Item 2, *supra* note 1, at 3.

¹⁸ Item 4 (Interview), *supra* note 4, at 14.

¹⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

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."²¹ 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.²²

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 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."²³

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."²⁴ 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,

²¹ "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).

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

²³ *Egan*, 484 U.S. at 531.

²⁴ See Exec. Or. 10865 § 7.

and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts and factors, I conclude the following with respect to the allegations set forth in the SOR:

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 conditions under AG ¶ 31 that could raise security concerns:

- (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;
- (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;
- (d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program; and
- (e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

In 2003, Applicant was disciplined for disrespect toward a superior petty officer. Between 2007 and 2017, Applicant established a lengthy pattern of criminality involving repeated traffic-related violations for which he was charged, convicted, and fined. He was convicted on two occasions of DWI. His repeated failures to timely complete ASAP resulted in three incidents where he was required to show cause on charges of ASAP non-comply and one charge of contempt of court. His most recent violation was for operating a vehicle on a suspended license. Applicant was discharged from the U.S. Navy, and he was issued a general discharge under honorable conditions – a level lower than honorable. His operator's license is still suspended. AG ¶¶ 31(a), 31(b), 31(d), and 31(e) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from criminal conduct. They include:

(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;

(c) no reliable evidence to support that the individual committed the offense;
and

(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.

AG ¶ 32(a) applies solely to Applicant's 2003 incident, an action that occurred when he was a 19-year-old seaman, and the circumstances are both unusual and unlikely to recur. As for the remaining allegations, none of the mitigating conditions apply. Applicant's continuing unwillingness to comply with laws, rules, and regulations is troubling, for he routinely ignores the law when he consistently drives a vehicle without a license, or when it has been suspended or revoked. While Applicant routinely acknowledges his criminal conduct and recognizes his irresponsible and foolish decisions, he simply continues to repeat them. Under these circumstances, there is little, if any, evidence of rehabilitation. While a person should not be held forever accountable for misconduct from the past, in this instance, the criminal conduct is routinely continuing. Given his cavalier attitude towards laws, rules, and regulations, Applicant's history of criminal conduct, under the circumstances, continues to cast doubt on his reliability, trustworthiness, or good judgment.

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with

medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

My discussion related to Applicant's criminal conduct is adopted herein. Applicant's continuing – at least until the most recent incident of February 2017 – unwillingness to comply with laws, rules, and regulations is troubling. With respect to the incidents of criminal-personal conduct discussed above, the general concern of questionable judgment, or unwillingness to comply with rules and regulations set forth in AG ¶ 15 has been established.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

(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; and

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

For the reasons set forth above, as it pertains to the 2003 incident, AG ¶ 17(c) applies solely to that incident. However, because of Applicant's continuing unwillingness to comply with laws, rules, and regulations, especially related to the unlawful driving issues, as well as his failures to timely complete ASAP, AG ¶ 17(c) does not apply. Although Applicant routinely acknowledged his criminal conduct and recognized his irresponsible and foolish decisions, he nevertheless continued to repeat them as recently as February 2017. Although he claimed to have successfully completed at least one ASAP, and claimed that he was in the process of completing another ASAP, Applicant failed to submit any documentation to support his claims. Furthermore, while he claimed to have taken positive steps to reduce or eliminate the factors that contributed to his behavior, to wit: he stopped consuming alcohol, he offered no documentary evidence to support that claim. Under these circumstances, AG ¶¶ 17(d) and 17(e) have not been established. Applicant's actions under the circumstances continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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 SEAD 4, App. A, ¶ 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.

Under SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant 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 the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁵

There is some evidence mitigating Applicant's conduct. Applicant is a 35-year-old employee of a defense contractor, serving as a condenser maintenance worker with his current employer since July 2017. He served in an enlisted capacity with the U.S. Navy on active duty or in the active reserve from September 2001 until April 2016; was deployed to Guam and Afghanistan; and received an honorable discharge in September 2009. He was granted a secret clearance in 2004.

The disqualifying evidence under the whole-person concept is more substantial. During a 10-year period starting in 2007, Applicant was convicted of two DWIs; one operating a vehicle with a suspended license; charged three times with failing to comply with ASAP participation; and disciplined under Article 15, UCMJ, for failure to obey a lawful order. In addition, because of his lengthy period of repeated misconduct, in April 2016, he received a general discharge under honorable conditions. Applicant's operator's license is still suspended.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

²⁵ 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).

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
Subparagraph 1.a.:	For Applicant
Subparagraphs 1.b. through 1.i.:	Against Applicant
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