



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



In the matter of:)
)
-----) ISCR Case No.20-02745
)
Applicant for Security Clearance)

Appearances

For Government: Carroll Connelly, Esq., Department Counsel
For Applicant: Allen Edmunds, Esq.

06/16/2021

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant mitigated criminal conduct and sexual behavior concerns. Eligibility for access to classified information or to hold a sensitive position is granted.

Statement of the Case

On November 23, 2020, the Department of Defense (DoD) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the criminal conduct, sexual behavior, and personal conduct guidelines the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on December 11, 2020, and requested a hearing. The case was assigned to me on April 7, 2021. A hearing was scheduled for August 17, 2021, and heard on the scheduled date by video teleconference. At the hearing, the Government's case consisted of four exhibits. (GEs 1-4) Applicant relied on ten exhibits (A-J) and one witness (himself). The transcript (Tr.) was received on May 24, 2021.

Procedural Issues

Before the opening of the hearing, the Government withdrew the allegations covered by subparagraphs 3.a and 3.b of Guideline E. Prior to the close of the hearing, Applicant requested the record be kept open to permit him to supplement the record with a Presidential policy statement covering the revitalizing America's foreign and National Security policy institutions. For good cause shown, Applicant was granted two days to supplement the record. (Tr. 33) The Government was afforded two days to respond. Within the time permitted, Applicant provided a Presidential memorandum covering revitalization needs for America's foreign policy and national security workforce. Applicant's post-hearing submission was admitted without objection as AE K.

Summary of Pleadings

Under Guideline J, Applicant allegedly (a) received a court martial in April 2006 for the offense of rape, indecent exposure acts, and failure to obey an order or regulation (providing alcohol to minors). Allegedly, he was found guilty of committing indecent acts, sentenced to reduction in rank to private (E1), confinement to eight months, and receipt of a bad conduct discharge. Also alleged under Guideline J was Applicant's arrest and charge in January 2009 for disorderly conduct. Allegations raised under J, subparagraph 1.a, were incorporated and re-alleged under Guideline D.

Under Guideline E, Applicant allegedly (a) falsified the security clearance application he completed in August 2019 by omitting his 2006 court martial when answering question covered by section 22 of the application and (b) later falsifying facts in his answers to questions posed to him by an authorized investigator in an October 2019 interview by omitting the felony charges stemming from his April 2006 court martial.

In his response to the SOR, Applicant admitted each of the allegations with explanations and clarifications. He claimed to have served only five of his eight-month sentence and was released early for good behavior. He claimed to have accepted full responsibility for his actions and has since acquired maturity since his 2005 incident. Additionally, Applicant claimed that his 2005 incident was an isolated one that has never been repeated.

Addressing his 2019 disorderly conduct arrest and charge in his response, (SOR ¶ 1.b), Applicant claimed this was an unusual situation that arose in a bar with two bar patrons under the influence initiating a shoving exchange that resulted in all involved (Applicant included) being taken into custody by arresting police. Applicant claimed that

he pled guilty to disorderly conduct on the advice of counsel and has experienced no recurring incidents since his disorderly conduct conviction.

In his response to the allegations covered by Guideline E of the SOR, Applicant neither admitted nor denied the allegations covered by SOR ¶ 3.a and denied the allegations covered by SOR ¶ 3.b. He claimed he could not recall his answer to the question posed in his security clearance application and tried to be as honest as possible in responding to the questions put to him by the interviewing investigator in his October 2019 interview. These Guideline E charges were withdrawn by the Government before the taking of evidence at the hearing.

Findings of Fact

Applicant is a 37-year-old material coordinator of a defense contractor who seeks a security clearance. Applicant denied each of the allegations in the SOR, and findings of fact follow.

Background

Applicant married in December 2016 and has two children from this marriage (ages two and three) and a stepson (age 10). (GEs 1-2; Tr. 19) His youngest children reside with him. Applicant earned a high school diploma in 2002 and completed specialized military training in 2003. (GEs 1-2 and AE H) Since 2008, Applicant has taken radiography courses at a local community college to improve his technical skills. (AE B).

Applicant enlisted in the U.S. Army Inactive Reserve in January 2003 and served four and one-half years in the Inactive Reserve. He was court-martialed in June 2006 and received a bad conduct discharge. (GEs 1-4 and AE E; Tr. 21)

Since August 2020, Applicant has been employed by his current employer as a warehouse specialist, and has recently been promoted to a position described as a material coordinator. (AE B; Tr. 20) Previously, he worked for other non-military employers in various capacities. He believes, but is not fully certain, that he held a security clearance during his military enlistment. (GE 2) Currently, he does not hold a security clearance. (GE 1 and AE B; Tr. 30)

Applicant's criminal history

In April 2005, Applicant and two other Army unit members engaged a female (of adult age at the time with a reported birthdate of March 1984) in her room and took turns sleeping and having sexual intercourse with her. (GEs 2-4; Tr. 22-23) The following day this female made allegations of rape against Applicant and two other service members in the room with Applicant, including a senior non-commissioned officer (NCO) in Applicant's command. (GE 4; Tr. 22-23) Without more information in the administrative record, the probative proof is too inconclusive to facilitate hard findings of whether Applicant's actions with the female were accompanied by consent

(express or implied), consistent with Applicant's consent claims in his October 2019 personal subject interview (PSI). Background investigation summaries of the incident were inconclusive as they pertain to Applicant.

Applicant was later charged with three counts under the Uniform Code of Military Justice (UCMJ): Rape (Article 120 of the UCMJ), Indecent Exposure (Article 134 of the UCMJ), and Indecent Acts (Article 134 of the UCMJ). (GE 3) A general court martial was convened in April 2006 on the three charged counts. (GE 3; Tr. 21)

Records document that the rape and indecent exposure charges against Applicant were dismissed on the Government's motion. (GE 3) On the third charge of wrongfully committing an indecent act with an incapacitated woman, Applicant was convicted of wrongfully committing an indecent act with a woman by having sex with her, while three other soldiers (including a senior NCO in Applicant's command) were in the room. The words "with an incapacitated woman" were dismissed and excepted from the conviction by the presiding military judge (presumably based on findings that the victim was of adult age at the time of the incident) upon motion by the Government. (GEs 3-4) Without access to the transcript of Applicant's court-martial proceedings, precise reasons for the Government's motion for deletion of the words "with an incapacitated woman" cannot be fully accessed and determined.

Following his conviction, Applicant was sentenced to a reduction in rank (from an E4 to an E 1), confined for eight months, and issued a bad conduct discharge. (GEs 2-3) Applicant served five months of his confinement sentence before he was released for reasons of good behavior without ever petitioning the Army's Board of Corrections for sentence relief. (GEs 2-3 and AEs D-E; Tr. 21, 31) Applicant confirmed that he did not attend any classes or receive any classes as the result of the incident.

Applicant assured that he had learned important lessons from his court martial, and with his increased maturity and professional and family responsibilities, he would never commit any such acts like the ones covered in his 2006 court-martial, or do anything to jeopardize his career and place the United States at risk. (GE 2; Tr. 23, 27-28) Applicant's assurances are convincing and accepted.

In January 2009, Applicant was arrested and charged with disorderly conduct following a shoving match initiated by several patrons in a bar. (GE 2; Tr. 24-25) After spending the weekend in jail, he pleaded guilty to the charge on the advice of counsel and was placed on probation. Since this 2009 incident, Applicant has had no other incidents involving law enforcement. He does not associate with persons who are involved in drugs or other criminal activities and rarely consumes alcohol. (AE K)

Corroborating his assurances, Applicant provided persuasive evidence of stabilizing his life and demonstrating that he can be trusted with classified and sensitive information. In March 2021, he voluntarily submitted to a psychological evaluation from a licensed clinical social worker (LCSW), who is also a licensed substance abuse counselor (SAP). (AE G; Tr. 25-26)

After taking background history from Applicant, the retained counselor administered standardized tests. Results of these tests revealed Applicant to exhibit no evidence of either a sexually aberrant disorder or alcohol disorder. (AE G; Tr. 27-28) She credited Applicant with rare consumption of alcohol and a healthy life filled with strong family commitment bonds and contributions to his community through volunteerism. (AE G) Based on the information provided to her, the retained LCSW and SAP found Applicant to present no risk of relapse or return to his previous behavior. (AE G; Tr. 25-27)

Endorsements, awards, and performance evaluations

Applicant is highly regarded by his current supervisors, friends, and former supervisors and colleagues who have worked with him and had opportunities to forge close relationships with him. (AE A) All credit Applicant with qualities of honesty, work ethics, dedication, reliability, and trustworthiness. (AE A)

Applicant's 2020 performance evaluation credited Applicant with being a valuable member of his warehouse team. (AE I) He was favorably credited with following all company timekeeping policy and training compliance requirements. (AEH) Recently, he was promoted to a position described as a material coordinator. (AE H) Military awards and certificates of recognition include the following: Purple Heart, Army Commendation Medal, Army Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, and Combat Infantry Badge. (GE 3 and AE E)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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. Eligibility for access to classified information may only be granted "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 adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as

considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Criminal Conduct

The Concern: 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. AG ¶ 18.

Sexual Behavior

The Concern: Sexual behavior that involves a criminal offense: reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the

standards in thi Guideline may be raised solely on the basis of the sexual orientation of the individual. AG ¶ 12.

Burdens of Proof

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 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 “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. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Security concerns are raised over Applicant’s of committing indecent acts, for which he was sentenced to six months of incarceration (released after five months for good behavior). Applicant’s court-martial conviction was cross-alleged under Guideline D. Additional security concerns relate to a disorderly conduct conviction in 2009.

Criminal conduct concerns

Applicant’s 2006 court-martial conviction based on a single charge of committing an indecent act and an ensuing disorderly conduct conviction in 2009, considered together warrant the application of one of the disqualifying conditions (DCs) of the criminal conduct guideline: DC ¶ 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.” Because the allegations covered by SOR ¶ 2.a are cross-alleged under Guideline D, DCs ¶¶ 13(a), “sexual behavior of a criminal nature, whether or not the individual has been prosecuted,” and 13(d), “sexual behavior of a public nature or that reflects lack of discretion or judgment,” apply as well.

Allegations of charges related to admitted indecent acts in 2005 and disorderly conduct in 2009 covered by SOR ¶¶ 1.a and 2.a and not expressly denied need not require any independent proof of their occurrence. See Directive 5220.6 at E3. 1.1.14; *McCormick on Evidence*, § 262 (6th ed. 2006) In Applicant’s case, the alleged indecent acts and disorderly conduct in the SOR are documented and create some judgment issues. See ISCR Case No. 03-01059 at 3 (App. Bd. Sept. 24, 2004).

A good deal of time has elapsed since Applicant’s convictions in 2006 and 2009, for indecent acts and disorderly conduct, respectively. Since these convictions, Applicant has exhibited remarkable maturity and responsibility in his work and fulfilling his family responsibilities at home. His progress entitles him to the benefits of a number of MCs under both cited guidelines. MCs ¶¶ 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 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,” of Guideline J apply to Applicant’s situation. For those allegations cross-alleged under Guideline D, MCs ¶¶ 14(b), “the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or judgment,” and 14(c), the behavior no longer serves as a basis for coercion, exploitation, or duress,” apply.

To date, Applicant has provided convincing evidence of major improvements in his exercising his professional responsibilities at work and in his caring for his family at home. With over 15 years of elapsed time without any recurrence of the type of misbehavior covered by his 2006 court martial and 2009 disorderly conduct incident, Applicant has made a persuasive showing of his overcoming his mistakes and errors of the past with convincing evidence that he has achieved the level of reliability, trust, and good judgment required for holding a security clearance.

Whole-person assessment

Whole-person assessment of Applicant’s clearance eligibility requires consideration of whether by his action over the past 15 years he has demonstrated sufficient restoration of maturity and responsibility to satisfy the minimum standards for holding a security clearance. Since his 2006 and 2009 convictions, Applicant has matured and exhibited significant progress in fulfilling the demands and responsibilities of his work and family obligations.

Based on the evidence developed and presented, Applicant is highly regarded by his current supervisors, friends and former supervisors and colleagues who have worked with him and had opportunities to forge close relationships with him. He has solid performance evaluations to his credit and was recently recognized by his employer with a promotion to his current position as a material coordinator. Before his military discharge in 2006, he was a noted recipient of many awards recognizing his service contributions. Considered together, Applicant's judgment and trust gains over the past 15 years outweigh the aged incidents covered in the SOR.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude criminal conduct and sexual behavior security concerns are mitigated. Eligibility for access to classified information is granted.

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:

GUIDELINE J (CRIMINAL CONDUCT)):	FOR APPLICANT
Subparagraph 1.a-1.b:	For Applicant
GUIDELINE D (SEXUAL BEHAVIOR):	FOR APPLICANT
Subparagraph 2.a:	For Applicant
GUIDELINE E (PERSONAL CONDUCT):	WITHDRAWN

Conclusion

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

Roger C. Wesley
Administrative Judge