



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 21-01409
)	
Applicant for Security Clearance)	

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

05/25/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on October 19, 2020. On August 10, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The DOD CAF acted under Executive Order (Exec. Or.) 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), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on August 20, 2020, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 14, 2021. Scheduling of the hearing was delayed by COVID-19 restrictions on duty and travel.

The case was assigned to me on February 15, 2022. On April 26, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant by email that the hearing was scheduled to be conducted by video teleconference on April 26, 2022. (Hearing Exhibit (HX) I.) I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit documentary evidence. DOHA received the transcript (Tr.) on May 5, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 1.b. He did not expressly admit or deny the allegation in SOR ¶ 2.a, cross-alleging the criminal conduct in SOR ¶¶ 1.a and 1.b as personal conduct. His admissions in his answer are incorporated in my findings of fact.

Applicant is a 32-year-old structural designer employed by a defense contractor since September 2014. He received a security clearance in December 2014. He has a high school education.

Applicant married in March 2011. After several years in a mutually difficult marriage, his wife filed a divorce petition, which was granted in April 2017. They have an eight-year-old son, who lives with his mother.

Applicant testified that he was drinking heavily after the divorce and described himself as a "mess." He was angry and upset. His ex-wife had begun a relationship with another man within a week after the divorce, and she and their son had moved in with the other man. (Tr. 27.)

In 2018, Applicant posted "a couple hundred" intimate images of his ex-wife on pornographic websites on the Internet. Applicant's ex-wife had taken the images and sent them to him. (Tr. 25.) Before and during the marriage, they had sent sexually-oriented pictures of themselves to each other. (Tr. 55.) The images that Applicant posted on the Internet included images of his ex-wife performing sexual acts. (Tr. 23.) His ex-wife did not consent to posting the images on the Internet. (Tr. 27.)

When Applicant's ex-wife discovered the images, she filed a criminal complaint against Applicant for disseminating voyeuristic material. A warrant for Applicant's arrest was issued but not served. He tried to remove the images, with limited success. He estimated that 95% of the images were removed from the websites where he had posted them, but he could not estimate how many had been shared and redistributed. (Tr. 30.)

In late 2018, Applicant's ex-wife and their son moved back in with him. (Tr. 33.) In January 2019, his ex-wife accused him of raping their son, who was five years old at the time. She had a drink in her hand and was poking him in the chest with a crowbar. Applicant believed that she was drunk. (Tr. 54.) When she tried to prevent him from leaving the room, he slapped her. After he slapped her, she applied dark makeup to make

it appear that she had been bruised, posted a photo of herself on Facebook, and notified the police that she had been assaulted. (Tr. 36-40.) Applicant was arrested, charged with assault and disorderly conduct, fingerprinted, and released on his own recognizance

Applicant was interviewed by an investigator from the child protective service office, and his son was examined by medical personnel, but no further action was taken regarding his ex-wife's accusation of raping their son. (Tr. 37-38.) He hired an attorney to defend himself against the charge of assaulting his ex-wife.

Later in January 2019, Applicant was stopped by police for a traffic infraction, and the police discovered the outstanding warrant for disseminating voyeuristic material. He was arrested pursuant to the outstanding warrant, taken to the police station, and held until his ex-wife picked him up at the jail and took him to the courthouse to appear in response to the assault charge. Under the law of the state where the alleged conduct occurred, disseminating voyeuristic material and assault in the third degree are Class A misdemeanors, and disorderly conduct is a Class C misdemeanor. The charges of assault and distribution of voyeuristic material were consolidated into a single trial in mid-2019. In November 2019, the court ordered Applicant to attend an eight-week family-violence education class, and the judge informed him that all the charges against him would be dismissed if he successfully completed the class. The class was delayed by COVID, but Applicant successfully completed the class in October 2020. The charges of assault, disorderly conduct, and distribution of voyeuristic material were dismissed on November 27, 2020. Applicant was required to pay \$400 for the class, plus attorney's fees. (GX 2 at 9-18.)

Applicant testified that he stopped drinking in mid-2018 and concentrated on physical fitness. (Tr. 33.) In March or April 2019, before the court-ordered classes began, he started consulting with a family psychologist. (Tr. 51-52.) He found the personal counseling and the court-ordered classes very helpful. (Tr. 47.) He regrets his behavior. He and his ex-wife now have limited their contact to matters involving their son. He is now in a committed relationship with another woman "who even goes to church on Sundays." (Tr. 59.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

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, 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." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.

Analysis

Guideline J, Criminal Conduct

The SOR alleges that in January 2019, Applicant was arrested and charged with disseminating voyeuristic material after posting intimate images of his ex-wife online (SOR ¶ 1.a), and that he was arrested and charged with third-degree assault and disorderly conduct (SOR ¶ 1.b). 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 following disqualifying conditions are raised by the evidence:

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; and

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.

The following mitigating conditions are potentially relevant:

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.

Both mitigating conditions are established. The conduct alleged in the SOR occurred more than three years ago. All the offenses were misdemeanors and were dealt with by the local court as minor offenses. They happened under circumstances that are unlikely to recur.

The conduct alleged in SOR ¶ 1.a was an emotional reaction to a painful divorce, fueled by excessive alcohol consumption, immaturity, and Applicant's lack of appreciation for the impact of posting material on a pornographic website. He stopped drinking in mid-2018.

The conduct alleged in SOR ¶ 1.b was triggered by an unfounded accusation by Applicant's ex-wife shortly after their divorce. Applicant sought personal counseling in addition to the court-ordered counseling and has gained insight into his behavior.

There is no evidence of any other criminal conduct. I am satisfied that the behavior alleged in the SOR is unlikely to recur.

Guideline E, Personal Conduct

The SOR cross-alleges Applicant's criminal conduct as personal conduct under this guideline. The security concern under this guideline is set out in AG ¶ 15: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . ." The following disqualifying conditions under this guideline are raised by the evidence.

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; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

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

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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 and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was candid, sincere, and remorseful at the hearing. He has worked for a defense contractor and held a security clearance for more than seven years. He has stopped drinking. He is no longer in a dysfunctional relationship. After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his criminal conduct and personal conduct.

Formal Findings

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

Paragraph 1, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge