



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



In the matter of:)
)
) ISCR Case No. 20-01249
)
Applicant for Security Clearance)

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: *Pro se*

03/01/2023

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate criminal conduct and personal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On June 21, 2022, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the criminal 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 July 7, 2022 and elected to have his case decided on the written record, in lieu of a hearing. Applicant received the File of Relevant Material (FORM) on December 5, 2022, and interposed no objections to the materials in the FORM. Applicant did not respond to the FORM. The case was assigned to me on January 26, 2023.

Summary of Pleadings

Under Guideline, Applicant allegedly was arrested and charged on multiple occasions between July 2004 and March 2018 with criminal violations. Arrests and charges are alleged as follows: in July 2004 for violation of The Controlled Substances, Drug, Device, and Cosmetic Act; in December 2011 for operating under the influence of alcohol (DUI); in January 2012 for driving on a suspended license, in March 2012 for violating the conditions of release after drinking in violation of the court-order issued in relation to his 2011 charge of operating under the influence of alcohol; in March 2018 for driving and operating under the influence of drugs or liquor (DUI); and in July 2017 for domestic violence assault, obstructing the report of a crime and violation of condition of release. The allegations were cross-alleged under Guideline E.

In his response to the SOR, Applicant admitted each of the allegations under the cited SOR guidelines with explanations and clarifications. He claimed he was charged with possession of a small amount of marijuana. He also claimed to have paid his levied fines and complied with all court-ordered probation requirements associated with his arrests. Applicant claimed, too, in his response to have an installed breathalyzer in his car that he will retain for another four months. And, he claimed that his conduct that led to his assault and obstruction charges in 2017 would never result in any recurrent incidents on his part.

Findings of Fact

Applicant is a 37-year-old of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in March 2016 and has no children from this marriage. (Item 3) He earned a high school diploma in June 2003 and reported no military service. (Item 3)

Since April 2018, Applicant has worked for his current employer, who has sponsored him for a security clearance. (Item 3) Contemporaneously, he has worked for another employer (a non-DoD employer) as a painter. Between July 2011 and December 2017, he worked for other employers in various jobs. (item 3) Applicant reported brief periods of unemployment between January 2014 and March 2017 and two years of self-employment between September 2009 and July 2011. He has never held a security clearance. (Item 3)

Applicant's history of drug and alcohol-related and other offenses

Between July 2004 and March 2018, Applicant was involved in multiple criminal offenses, for which he was arrested, charged, and convicted. (items 1-5) Specifically, he was arrested, charged, and convicted of the following offenses: in July 2004 for violation of the Controlled Substances, Drug, Device, and Cosmetic Act; in December 2011 operating under the influence of alcohol (DUI); in January 2012 for driving on a suspended license; in March 2012 for violating the conditions of release after drinking in violation of the court-order issued in relation to his 2011 charge of operating under the influence of alcohol; in March 2018 for driving and operating under the influence of drugs or liquor (DUI); and in July 2017 for domestic violence assault, obstructing the report of a crime and violation of condition of release.

One of the incidents covered by the SOR was an alcohol-related one that resulted in his arrest in December 2011 for driving under the influence (DUI). Arrest records confirm that his blood-alcohol content (BAC) registered .22 % prior to his arrest. (Items 4-5)

Applicant was again arrested and charged with DUI in March 2018. (Item 3) The reported police account for this incident confirmed that after Applicant had consumed a number of mixed vodka drinks during a six-hour stay in a local bar, he chose to drive home after turning down an offer from friends to put him up in a local hotel across the street. (Item 4) Because Applicant refused to blow into a police-offered breathalyzer, his BAC percentage for his 2018 incident is not known. (Item 5)

In 2017, Applicant was charged with domestic violence assault of his wife with a related charge of obstructing a report of a crime. (Items 4 and 5) These charges were dismissed, in part because Applicant's wife declined to testify. (Item (item 2)

Remaining charges covered in the SOR consist of his January 2012 arrest and charge of driving on a suspended driver's license and his March 2012 charge of violating the conditions of release after drinking in violation of the court-ordered alcohol-abstention conditions in relation to his 2011 DUI charge. (Items 3-4) Both of these arrests and dispositions reflect a pattern criminal behavior.

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 AG 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. The AG 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 person's ability or willingness to comply with laws, rules, and regulations. . . . AG ¶ 30.

Personal Conduct

The Concern: 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. . . . AG ¶ 15.

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 lengthy history of multiple criminal offenses spanning the years of 2004 through 2018. Applicant's arrest history includes a

controlled substance violation in 2004, three DUI offenses (spaced between 2011 and 2018), violating conditions of release related to his 2011 DUI offense, and a driving on a suspended license offense in 2012. Additional security concerns arise out of charges of domestic violence assault filed against Applicant in July 2017 that were dismissed before they could be tested at trial due to Applicant's wife's declination to testify. Considered together, these charges raise security concerns over whether Applicant's actions reflect a pattern of misbehavior incompatible with the judgment, reliability, and trustworthiness requirements for gaining access to classified information.

To be sure, Applicant's three DUI offenses (2011-2018) would likely not meet the track record requirements for denying clearances under Guideline G (alcohol consumption), if cross-alleged separately under that guideline. Historically, the Appeal Board has generally required a track record of alcohol-related incidents of more recent occurrence than the dated 2011 and 2012 incidents in this record. See ISCR Case No. 95-0731 at 3 (Sept. 1996); ISCR Case No. 94-1081 at 5 (August 1995). Applicant's 2011 and 2012 DUI incidents have not been cross-alleged under Guideline G, and for good reason.

Based on the evidence produced at hearing, one of the DCs covered by the criminal conduct guideline is applicable to the developed facts in evidence. DC ¶ 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, and trustworthiness," applies to Applicant's situation.

Cross-alleged under Guideline E are the same criminally-related incidents involving Applicant. DC ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of . . . (3) a pattern of dishonesty or rule violations . . .," applies to Applicant's situation, as well.

Applicant's series of criminal incidents (mostly alcohol-related) and single domestic violence assault incident reflect multiple lapses of Applicant judgment and maturity on his part. When considered together in this context, the six SOR-covered incidents support a troubling pattern of questionable judgment, untrustworthiness, and unreliability, properly alleged and pursued under both Guideline J and Guideline E.

In the past, the Appeal Board has addressed multiple criminal offenses stitched together to raise security concerns over an applicant's overall judgment, trustworthiness, and reliability. In ISCR Case No. 03-08475 at 5-8 (App. Bd. Sept. 14, 2007), the applicant accumulated seven traffic-related offenses and one DUI offense. Similar to the array of offenses cited in this case, the traffic-related offenses considered in ISCR Case No. 03-08475 were comprised of speeding, license plate offenses, disobeying road sign, driving with a suspended license, and a DUI. Like the multiple

traffic and alcohol-related offenses cited in ISCR Case No. 03-08475, most of the incidents individually could be expected to fall into minor categories if assessed individually.

Considered together in the context of a pattern-display of lapses in judgment, Applicant's covered actions reflected, in the Appeal Board's judgment in ISCR Case No. 03-08475, an unwillingness to comply with rules and regulations. Other Appeal Board cases involving multiple traffic-related offenses also sustained clearance denials for reasons of demonstrated lack of overall judgment sufficient to raise security concerns over the applicant's cited inability to follow rules and regulations over a prolonged period of years. See ISCR Case No. 11-14899 at 1-3 (App. Bd. April 15, 2015; ISCR Case No. 10-0928 at 4 (App. Bd. March 5, 2012)

Adding to raised security concerns over Applicant's judgment lapses over the course of many years are the charged domestic violence assault charge filed against him in July 2017 based on lodged formal complaints from his wife. While the charges were dismissed based on his wife's declination to testify, Applicant's reported actions reflect still another incident of poor judgment on Applicant's part.

Without more time and demonstrated lessons learned from his lengthy history of criminally-related incidents, none of the potentially available mitigating conditions under Guidelines J and E are available to Applicant at this time. More documented efforts by Applicant to adhere to a demonstrated track record of compliance with rules and regulations are needed to meet established criteria of eligibility to hold a security clearance.

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of criminally-related offenses over a considerable period of years (2004-2018), when taken together contextually reflect collective judgment lapses incompatible with his holding a security clearance. While Applicant is entitled to credit for his civilian contributions to the defense industry, his contributions are not enough at this time to overcome his pattern history of criminally-related drug, traffic, alcohol-related offenses, along with his more recent domestic violence-related incident, covered by both the criminal and personal conduct guidelines.

Summarized, more time is needed for Applicant to demonstrate his understanding and commitment to adhering to the rules and regulations placed in force by his state's domestic criminal and civil laws covering domestic partners. Applicant's collective actions to date fall short of what is required to carry his persuasive burden of demonstrating he meets the minimum eligibility criteria for gaining access to classified and sensitive information.

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

personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

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):	AGAINST APPLICANT
Subparagraphs 1.a-1.f:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	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.

Roger C. Wesley
Administrative Judge