



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



In the matter of:)
)
-----) ISCR Case No. 23-00355
)
Applicant for security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

02/27/2024

Decision

WESLEY, ROGER C. Administrative Judge

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

Statement of the Case

On April 4, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the personal conduct and criminal conduct guidelines the DCSA CAS 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); Department of Defense (DoD) Directive 5220.6 *Defense Industrial Personnel Security Clearance Review Program*, (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 May 21, 2023, and requested a decision on the written record in lieu of a hearing. Applicant received the File of Relevant Materials (FORM) on October 17, 2023, He was afforded an opportunity to respond to the FORM, but did not object to any of the Government's submissions or supplement the record. The case was assigned to me on February 6, 2024.

Summary of Pleadings

Under Guideline E, Applicant allegedly falsified his electronic questionnaires of investigations processing (e-QIP) of July 13, 2022, by omitting in his response to the information requested under Section 22 of his e-QIP his arrest and charge within the past seven years of felony/battery/domestic violence by strangulation in September 2021. Allegedly, he also falsified his e-QIP of July 13, 2022, by omitting the same September 2021 felony arrest and charge information under Section 22 of his e-QIP in the space calling for the listing of felony charges and convictions, regardless of the date of the offense or offenses.

Under Guideline J, Applicant allegedly was arrested and charged with multiple criminal violations between June 2004 and September 2021. Allegedly, he was arrested and charged (a) in September 2021 with felony battery/domestic violence by strangulation; (b) in January 2011 with violating probation; (c) in January 2010 with speeding/driving on a suspended license; (d) in July 2005 with family violence: battery, cruelty to children/criminal trespass; in September 2004 with driving on a suspended license; and in June 2004 for battery/cruelty to children.

In his response to the SOR, Applicant admitted and denied in part the allegations covered by SOR ¶¶ 1.a and 1.b. He claimed his omissions were not intentional and were based on misunderstandings of the questions raised. Addressing the allegations covered by SOR ¶¶ 2.a-2.f, Applicant admitted each of the allegations with explanations. He claimed the charges covered by SOR ¶¶ 2.a-2.b, 2.d and 2.f were dismissed. He further claimed the charges covered by SOR ¶ 2.e were resolved with a fine. (Item 1)

Findings of Fact

Applicant is a 39-year-old employee of a defense contractor who seeks a security clearance. Allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in July 2019 and has one child from this marriage. (GE 2) He earned an associate degree in August 2010. (GEs 1-2) Applicant reported no military service. Since July 2022, Applicant has been employed by his current employer as an information technology (IT) engineer. (Item 2) Previously, he worked for other employers in various network IT-related positions. (Item 2)

Applicant's e-QIP omissions and criminal history

Asked to complete an e-QIP in July 2022, Applicant omitted material facts specifically related to his September 2021 arrest and charge for felony battery/domestic violence by strangulation when responding to the information covered by section 22 of his e-QIP about felony arrests and charges. Applicant responded negatively, as well, to the questions covered by section 22 of his e-QIP about all prior arrests (both felony and non-felony) without any explanations for his denials.

In a follow-up personal subject interview (PSI) with an investigator from the Office of Personnel Management (OPM) in September 2022, Applicant was asked whether he had any prior criminal offenses covered in section 22 of his July 2022 e-QIP. (Item 3) Before asking for Applicant's responses, the investigator prefaced each of his questions with his emphasis on any offenses Applicant could recollect over his entire life. (Item 3) Responding to the investigator's question, Applicant answered that he had not. (Item 3) After noting Applicant's negative answers, the investigator confronted Applicant with his reported prior arrests between 2004 and 2021.

Addressing the questions posed in Applicant's July 2022 e-QIP, Applicant admitted each of the offenses inquired about by the OPM investigator with explanations and clarifications about the circumstances of the incidents and the dispositions. (Item 3) When asked by the investigator why he did not report these incidents in his 2022 e-QIP, Applicant explained he either thought the incident could potentially look negatively against him (viz., the 2021 strangulation incident), or he could not recall the details of the incidents (viz., the remaining 2004-2005 and 2010-2011 traffic-related, family violence, driving on a suspended license, and battery/cruelty to children offenses. ((Item 3)

Considered together, Applicant's 2022 e-QIP omissions and post-e-QIP PSI admissions (only made after confrontation by the interviewing OPM investigator), and overall credibility assessment, warrant drawn inferences that his withholding of material information about his past arrests and charges were the result of a lack of candor and judgment lapses. Never voluntarily corrected with prompt, good faith explanations, Applicant's material omissions create continuing security concerns about his honesty and trustworthiness,

Other incidents covered in the SOR reflect acts of physical abuse and disregard of his state's traffic laws. Each of the incidents referenced in the SOR were covered in Applicant's September 2022 PSI.

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 aforementioned 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:

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 and adjudicative processes. . . . AG ¶ 15.

Criminal Conduct

The Concern: Criminal activity creates doubt about a person's judgment, reliability, trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 30.

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 material omissions of his criminal arrests and charges over a 10-year history. Additional security concerns are raised independently over his multiple arrests and charges.

Addressing Applicant’s arrest and disciplinary history and failure to voluntarily disclose relevant material information to an OPM investigator when asked to so, security concerns are raised under the personal conduct guideline. Applicant’s presented history of arrests, disciplinary infractions, and candor lapses, for which he failed to voluntarily correct, warrant the application of one disqualifying guideline (DC) of Guideline E. DC ¶ 16(a):

deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities

fully applies to the facts and circumstances covering Applicant’s situation.

Criminal conduct concerns

Additional security concerns are raised independently of Applicant’s e-QIP omissions over his considerable history of arrests and charges over the course of many years spanning 2004-2011. Applicable to Applicant’s situation under the criminal conduct guideline is disqualifying condition (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, or trustworthiness.” Applicant’s covered offenses include a recent felony assault and battery charge as well as family violence and cruelty to children charges in 2005 and 2004, respectively, that cannot be mitigated without more positive evidence of rehabilitation from Applicant.

Whole-person assessment

Whole-person assessment of Applicant’s clearance eligibility requires consideration of whether her debt delinquencies and candor and judgment lapses are fully compatible with minimum standards for holding a security clearance. While Applicant is entitled to credit for his work in the defense industry, his employment contributions are not enough at this time to overcome his repeated failures or inability to

favorably address his judgment lapses associated with his many criminal offenses (some involving domestic violence) over a period of many years and his failures to exercise candor and good judgment when completing his security clearance application.

Overall trustworthiness, reliability, and good judgment have not been established. Based on a consideration of all of the facts and circumstances weighed in this case, it is too soon to make safe predictions that Applicant will be able to undertake reasoned, good-faith efforts to mitigate the Government's personal and criminal conduct concerns within the foreseeable future. More time is needed for him to establish the requisite levels of trust, reliability, and good judgment necessary to establish his overall eligibility for holding a security clearance.

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 personal conduct and criminal conduct security concerns are not mitigated. Eligibility for holding a security clearance 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:

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|---------------------------------|-------------------|
| GUIDELINE E (PERSONAL CONDUCT): | AGAINST APPLICANT |
| Subparagraphs 1a-1.b: | Against Applicant |
| GUIDELINE J (CRIMINAL CONDUCT): | AGAINST APPLICANT |
| Subparagraphs 2.a-2.f: | 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