



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 13-00292
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Nathaniel J. Webb, III, Esq.

07/29/2014

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant established his eligibility for access to classified information. He has reformed his past behavior and the circumstances that contributed to his past conduct have substantially changed. Together, these significant changes mitigate the security concerns raised by his past criminal conduct. Clearance is granted.

Statement of the Case

On January 8, 2014, the Department of Defense (DOD), in accordance with DOD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline J (Criminal Conduct). Applicant timely answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

On April 3, 2014, Department Counsel indicated the Government was ready to proceed with a hearing in the case. On April 15, 2014, a notice of hearing was issued setting the hearing for May 15, 2014. The hearing was held as scheduled. Department Counsel offered exhibits (Gx.) 1 – 6, which were admitted into evidence without

objection. Applicant testified and called his estranged wife as a witness. The hearing transcript (Tr.) was received on May 28, 2014.

Findings of Fact

Applicant is in his late forties. He served in the U.S. military from 1985 to 1990. He held a top secret clearance while in the military. Currently, Applicant is an electrician for a defense contractor and has been working for his present employer since 2008. He recently completed on-the-job training, was promoted to a supervisory position, and is on track for greater responsibility and leadership. He also has a part-time job driving a taxi to help his children pay for their educational and other living expenses.¹

Applicant admits he had issues with alcohol in the past. He began drinking and abusing alcohol when he joined the military. His excessive alcohol use led to driving under the influence (DUI) convictions in 1990 and 1997. He attended and successfully completed all required alcohol safety courses following the 1997 conviction. He has not been diagnosed with alcohol abuse or dependence. He has not been cited or arrested for DUI since the 1997 incident. He now drinks occasionally, but has not consumed alcohol in several months because he does not have the desire to drink.²

Applicant recognizes he made poor decisions in the past due to his alcohol use. After the 1997 incident, he made a promise to himself and his family never to be involved in another alcohol-related incident. His estranged wife, who disapproves of alcohol use in general, testified that some of Applicant's past problems were, in part, caused by his alcohol use. She continues to see him regularly and has not seen any sign that he currently has an alcohol problem.³

Applicant and his wife of over 20 years are currently separated. They have three children, ranging in age from 19 to 23. Their married life together was described by his estranged wife as "rocky."⁴ They argued regularly and separated repeatedly over the course of the marriage. At times, the police were called. Applicant was arrested on domestic-related charges in 2004, 2006, 2009, 2010, and 2012. All the charges were dropped or dismissed, except for convictions in 2004 for violating a protective order and 2006 for assault.⁵

Applicant's wife testified at hearing that, while they lived together, she was, at times, the aggressor and would call police as a way to provide them the necessary time apart. She explained that in 2004 she secured a temporary protective order (TPO)

¹ Tr. at 24-31, 41-43, 54; Gx. 1.

² Tr. at 15-16, 37-39; Answer; Gx. 2, Gx. 4 – 5.

³ Tr. at 38-39, 56-59, Gx. 5.

⁴ Tr. at 55, 61.

⁵ Tr. at 60-61; Answer; Gx. 1 – 4.

because Applicant's attempts to reconcile following their latest argument bordered on harassment. She secured the TPO as a means to separate from her husband. Applicant failed to abide by the TPO and returned to the family home before the 72-hour temporary order expired. Applicant's wife testified that no violence or other aggravating circumstances were involved when the TPO was violated. She allowed Applicant to return to the family home when the TPO expired. She did not seek a permanent order of protection and one was not issued. She adamantly denies that Applicant physically abused her or their children.⁶

Applicant and his wife have lived apart since 2010. Applicant was arrested in 2012 for trespassing when he went to his wife's home to speak with their daughter. His daughter did not want to speak with him and he refused to leave. His wife was upset because he had not asked permission to come over to her new home. She called the police, and Applicant was arrested and charged with trespassing. The charge was later dropped. Applicant has not been involved in any further domestic-related incidents.⁷

Applicant voluntarily disclosed his domestic-related criminal charges on his security clearance application and discussed them fully during the ensuing background investigation. His relationship with his wife has normalized. They remain separated, but speak on a regular basis regarding their children and other issues. He is actively involved with his church. He has a healthy and supportive relationship with his children.⁸ Applicant's wife testified that, in her opinion, Applicant is a "good person. He does good, he works hard, and he really tries. Just together we weren't really good. But he is a really good person."⁹

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

⁶ Tr. at 47-51, 60-67. No police report or other evidence was offered that contradicts the information provided by Applicant and his estranged spouse regarding any of the domestic-related incidents. The testimony of a spouse or partner, who is allegedly the victim of domestic violence, denying abuse by the alleged perpetrator is normally viewed with understandable skepticism. However, in this case, Applicant's wife does not have any underlying bias or motive to fabricate. She is not financially or otherwise dependent on Applicant. She separated from Applicant, moved into her own home, and has been living on her own for the past four years. Furthermore, her testimony did not mirror Applicant's testimony word-for-word, which would raise a suggestion of coaching or undue influence. Additionally, her demeanor and manner of speech is reflective of a strong-willed individual who is unafraid to tell the truth. For all the following reasons, I found her testimony denying physical abuse credible.

⁷ Tr. at 53-61, 67-69; Gx. 4.

⁸ Tr. at 55-56, 67-69; Answer.

⁹ Tr. at 55.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.¹⁰ However, as the Appeal Board has unequivocally held, there is no *per se* rule in security clearance cases requiring disqualification. A judge must decide each case based on its own merits.¹¹

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.¹²

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." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

¹⁰ See *also*, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) ("Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.").

¹¹ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

¹² See, ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013) (security clearance determinations require administrative judges to make predictive judgments about an individual's ability and willingness to protect and safeguard classified information). See *also*, ISCR Case No. 11-12202 at 5 (The "Adjudicative Guidelines are designed to *predict*. The prediction in nonsecurity violation cases is made by identifying and then evaluating behaviors or circumstances that have an articulable nexus to the ability or willingness to safeguard classified information.") (emphasis in original).

Analysis

Guideline J, Criminal Conduct

The security concern regarding criminal conduct is explained at 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.

Applicant's criminal offenses raise this security concern, and trigger application of the following Guideline J disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The guideline also sets forth a number of conditions that may mitigate the criminal conduct concern. I have considered all the listed mitigating conditions and only the following warrant full discussion:

AG ¶ 31(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 31(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's past criminal conduct was, in part, a byproduct of his excessive alcohol use and volatile marriage. Applicant demonstrated, through his words and the absence of any alcohol-related offenses over the past 17 years, that it is unlikely he will again be involved with such an offense. Although only two years have passed since his last domestic-related incident, the family dynamics that, in part, contributed to his conduct have substantially changed.¹³ Applicant and his wife have now been permanently separated for a significant period of time. Over the past two years, Applicant has come to terms with their separation and now has a healthy, respectful relationship with his wife and family. Also, over the past two years, Applicant's employment record has been good. He was recently promoted to a supervisory role,

¹³ Recognition that Applicant's family circumstances played a role in his past conduct does not excuse or condone his conduct. Applicant understands that his past conduct was wholly inappropriate and demonstrated, over the past two years, that he will not reengage in such inexcusable conduct.

and is on track for a larger leadership role with his employer. AG ¶¶ 31(a) and 31(d) apply.¹⁴

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁵ I hereby incorporate my comments under Guideline J and highlight some additional whole-person factors. Applicant served in the U.S. military and held a top secret clearance for five years without issue. He has worked as a defense contractor for the past six years and proven to his employer that he possess the necessary qualities to be entrusted with a supervisory position. He secured part-time work to help his adult children pay for their education and living expenses. He voluntarily disclosed the adverse information regarding his past criminal conduct. He has overcome his past issues with alcohol and now has a healthy and respectful relationship with his wife and children. These whole-person factors, coupled with the mitigation conditions noted above, mitigate the security concerns raised by his past criminal conduct. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for access to classified information

Formal Findings

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

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a – 1.i:	For Applicant

¹⁴ I also considered AG ¶ 31(c), because no evidence was presented to substantiate SOR ¶ 1.b, alleging that Applicant was arrested on a domestic-related charge in 1992. Additionally, no evidence was presented that Applicant actually committed the domestic-related offenses for which he was arrested in 2009 and 2010, as alleged in SOR ¶¶ 1.g and 1.h. However, the lack of evidence as to these three allegations is not case dispositive, nor mitigates Applicant's overall criminal conduct. Instead, as more fully explained herein, Applicant mitigated the criminal conduct concern by demonstrating true reform.

¹⁵ The non-exhaustive list of adjudicative factors are: (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.

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge