



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



In the matter of:)
)
-----) ISCR Case No. 14-01415
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

08/27/2014

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding criminal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On June 7, 2012, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On May 23, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued her a Statement of Reasons (SOR), under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline J (Criminal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is

¹ GE 1 (SF 86, dated June 7, 2012).

clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on June 2, 2014. In a sworn statement, dated June 9, 2014, Applicant responded to the SOR allegations, and elected to have her case decided on the written record in lieu of a hearing. Nevertheless, on July 14, 2014, pursuant to Paragraph E.3.1.7 of the Directive, Department Counsel requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on July 16, 2014. The case was assigned to me on July 18, 2014. A Notice of Hearing was issued on July 25, 2014, and I convened the hearing, as scheduled, on August 12, 2014.

During the hearing, three Government exhibits (GE 1 through GE 3) and five Applicant exhibits (AE A through AE E) were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on August 19, 2014. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. She submitted additional documents which were marked as exhibits (AE F through AE N) and admitted into evidence without objection. The record closed on August 26, 2014.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in the SOR pertaining to criminal conduct (§ 1.a.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 49-year-old employee of a defense contractor, and she is seeking to retain the secret security clearance which was granted to her in 2003.² She has been employed by the same defense contractor since January 2002, and currently serves as a material planner.³ She has never served with the United States military.⁴

A high school graduate, Applicant attended one semester of college in 1982 but hurt her back, causing her to be hospitalized in traction and quit school. She eventually attended a community college but never obtained a degree. Since her injury, Applicant has had continuing back problems. Applicant was married in 1983, and divorced in 1993; and married a second time in December 1996.⁵ She has one son, born in 1997.⁶

² GE 1, *supra* note 1, at 27; Tr. at 6.

³ GE 1, *supra* note 1, at 9.

⁴ GE 1, *supra* note 1, at 11; Tr. at 26.

⁵ GE 1, *supra* note 1, at 13; Tr. at 26.

⁶ GE 1, *supra* note 1, at 15-16.

Criminal Conduct

On April 10, 2013, one of Applicant's friends had a birthday, but because that friend's celebration plans started to unravel, she was upset. Applicant agreed to meet her after work at a local restaurant and bar. Over a two and one-half hour period, from about 7 p.m. until 9:30 p.m., Applicant ate chicken wings and consumed three beers.⁷ Shortly after leaving, while driving home, Applicant received some text messages and, as she subsequently admitted, stupidly proceeded to respond while she was driving. While doing so, her vehicle crossed the white traffic line. The police observed her crossing the white line and pulled her over.⁸ After slowly exiting her vehicle, Applicant was administered a field sobriety test which included walking a straight line and balancing, but because Applicant has back and balance problems, she failed the test.⁹ She was charged with one count of driving under the influence (DUI), a misdemeanor, and one count of failure to use designated lane - single lane, an infraction.¹⁰ She did not feel that she was impaired.¹¹ There is no evidence that Applicant ever underwent a breath or blood analysis.

On December 9, 2013, after entering a plea of *nolo contendere* to the DUI charge, Applicant was convicted of that charge. No evidence was produced against her for the remaining charge, and it was dismissed. She was placed on supervised probation for a period of 11 months, 25 days; ordered to pay \$1,221 in fines, court costs, and other costs; ordered to attend DUI School within ten months; ordered to attend two meetings of Alcoholics Anonymous (AA) within ten months; her driver's license was revoked for six months (with a business-only exception); and her vehicle was ordered to be impounded for ten days.¹² Applicant's probation could be terminated after three months if all the conditions of the probation have been completed.¹³ At the time of the DOHA hearing, she had complied with all of the probation provisions with the exception of the one that required that her vehicle be impounded for ten days.¹⁴

In part, because of Applicant's back problems, a chiropractor has been treating Applicant for about three or four years giving her periodic balance tests to see how well she is progressing. The chiropractor has been unable to evaluate her fully because she is unable to tolerate the testing on the computerized Comprehensive Assessment of

⁷ Tr. at 23, 33; GE 2 (E-mail, dated May 9, 2013).

⁸ Tr. at 23, 33; GE 2, *supra* note 7. Applicant explained that she was scared and intimidated because there were six police cars with flashing lights there at the time of the stop. Tr. at 34-35.

⁹ Tr. at 34-36.

¹⁰ GE 3 (Sentencing Information, downloaded May 3, 2014), at 1; GE 3 (DUI Uniform Traffic Citation, dated April 10, 2013); GE 3 (Uniform Traffic Citation, dated April 10, 2013).

¹¹ Tr. at 33.

¹² GE 3 (Sentencing Information), *supra* note 10; Tr. at 42.

¹³ GE 3 (Court Minutes/Order – Plea, dated December 9, 2013).

¹⁴ Tr. at 39-40.

Posture and Stability (CAPS) machine. The evaluation entails the patient standing with her arms relaxed, by her side, with her eyes closed, on an unstable surface for approximately 30 seconds. Applicant was not able to tolerate that testing or even the testing on a stable surface.¹⁵ Applicant attributed her inability to balance during the field sobriety test for her failure to pass the test.¹⁶ In addition, during January and February 2013, Applicant had been experiencing a variety of issues including memory loss and her leg suddenly giving out. She put off going to the doctor for fear that she might have multiple sclerosis (MS), a condition which her brother has.¹⁷ On June 10, 2013, Applicant was diagnosed with type II diabetes.¹⁸ According to Applicant's doctor, diabetics do not process alcohol the same way as "normal healthy people."¹⁹ After a period on medication, Applicant now adheres to a special diet and tests her sugar levels on a daily basis.²⁰

Other than the one incident of April 2013, Applicant has never had any drug, alcohol, or other criminal incidents or problems. She has never been diagnosed as an alcoholic. She does not consider herself to be an alcoholic.²¹ Applicant conceded she made a mistake, and vows it will never happen again.²²

Character References and Work Performance

Applicant's work performance appraisals from her employers reflect an individual characterized as a "high contributor," who has become a group leader.²³ Over her years with her employer, Applicant has received many certificates of recognition, letters of appreciation, special team awards, and positive written commentaries from a variety of directors, managers, and supervisors, for her outstanding efforts, attitude, performance, and achievements.²⁴ Applicant's plant manager, two program managers, the senior manager of security operations, and colleagues, all strongly support the retention of her security clearance. They have known her for a variety of years, from two and one-half

¹⁵ AE N (Letter, dated May 24, 2013); Tr. at 36.

¹⁶ Tr. at 35-36.

¹⁷ Tr. at 27-29.

¹⁸ Tr. at 36-37; AE M (Letter, dated June 24, 2013). Department Counsel stipulated to the diagnosis during the hearing as it was in digital form on her mobile phone. Tr. at 37.

¹⁹ Tr. at 23.

²⁰ Tr. at 29-30.

²¹ Tr. at 43.

²² Tr. at 53.

²³ AE A (Performance Summary Report, dated October 1, 2011); AE B (Performance Summary Report, dated October 1, 2012); AE C (Performance Summary Report, dated October 1, 2013).

²⁴ AE E (Various Certificates, Letters, and E-mails, various dates). Applicant was also awarded several challenge coins by her employer and government customers of her employer. See AE D (Photocopies of Challenge Coins).

years to over two decades. They have characterized in positive terms: Applicant consistently performs at a very high level, her depth of knowledge is unsurpassed, she is an excellent example of a fully engaged team member, she is a dedicated worker and a loving mother, she is professional, knowledgeable trustworthy, conscientious, extremely helpful and well prepared, respected, and extremely competent, with integrity and ethical decision making.²⁵

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”²⁶ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”²⁷

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”²⁸ The Government initially has the burden of producing evidence to establish

²⁵ AE F (Character Reference, dated August 19, 2014); AE G (Character Reference, dated August 19, 2014); AE H (Character Reference, dated August 21, 2014); AE I (Character Reference, dated August 22, 2014); AE J (Character Reference, dated August 21, 2014); AE K (Character Reference, dated August 20, 2014); AE L (Character Reference, undated).

²⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁷ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²⁸ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.²⁹

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 and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."³⁰

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."³¹ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It 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. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct 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 guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), *a single serious crime or multiple lesser offenses* is potentially disqualifying.

²⁹ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁰ *Egan*, 484 U.S. at 531

³¹ See Exec. Or. 10865 § 7.

Similarly, under AG ¶ 31(d), if the *individual is currently on parole or probation*, security concerns may be raised. Applicant's history of criminal conduct consists of one arrest and conviction for misdemeanor DUI, and, as part of the same incident, one count of failure to use designated lane - single lane, an infraction. She is currently on probation. AG ¶¶ 31(a) and 31(d) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where *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*. In addition, AG ¶ 32(d) may apply when *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*.

AG ¶¶ 32(a) and 32(d) apply. Applicant's sole incident of criminal conduct occurred in April 2013 and there is no evidence that similar conduct occurred thereafter. To the contrary, other than that one incident, Applicant has never had any drug, alcohol, or other criminal incidents or problems. There is no evidence of a diagnosis by a duly qualified medical professional of alcohol abuse or alcohol dependence, nor any evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. Her plea of *nolo contendere* to the DUI charge, her acknowledgment to the police officer that she had consumed three beers, and her inability to step out of the vehicle more quickly or maintain her balance during the field sobriety test, served as the conclusive evidence against her.

One such incident, which occurred over 16 months ago, during a lifetime of 49 years, appears to be aberrant behavior, even if she was actually impaired. Furthermore, considering Applicant's physical conditions directly associated with both the impairment and balance issues, it appears that the combination of those physical conditions may have directly contributed to her failed field sobriety test. Now aware of her physical conditions, and vowing not to find herself in a similar situation, such criminal behavior is unlikely to recur. There is substantial evidence of successful rehabilitation: with the exception of not yet having her vehicle impounded for ten days, Applicant has complied with her other probation provisions; she has a good employment record; she has expressed genuine remorse; she has reformed her habits; and there has been no recurrence of criminal activity. A person should not be held forever accountable for an isolated incident of misconduct from the past, especially if there is a clear indication of subsequent reform, remorse, or rehabilitation. In this instance, I conclude that Applicant's actions no longer cast doubt on her reliability, trustworthiness, or good judgment.

Whole-Person Concept

Under the whole-person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

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. I have incorporated my comments under Guideline J in my analysis below.

There is some evidence against mitigating Applicant's conduct. In April 2013, after consuming three beers and then driving home, Applicant was charged with misdemeanor DUI and failure to use designated lane - single lane, an infraction, after her vehicle failed to remain in the designated travel lane. Upon her conviction for DUI, she was placed on supervised probation; ordered to pay \$1,221 in fines, court costs, and other costs; her driver's license was revoked; and her vehicle was ordered to be impounded. She remains on probation because her vehicle has not yet been impounded for ten days.

The mitigating evidence under the whole-person concept is more substantial. Other than that one incident, Applicant has never had any drug, alcohol, or other criminal incidents or problems. There has been no recurrence of criminal activity. There is no evidence of a diagnosis or an evaluation of alcohol abuse or alcohol dependence. The combination of her physical conditions likely directly contributed to her failed field sobriety test. She is now aware of her physical conditions and limitations, and vowed not to find herself in a similar situation. With the exception of not yet having her vehicle impounded for ten days, Applicant has complied with all her probation provisions; she attended DUI School and two meetings of AA; she has a good employment record; she has expressed genuine remorse; she has reformed her habits; and such criminal behavior is unlikely to recur.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³² Overall, the

³² See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude she has mitigated the criminal conduct security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude she is eligible for access to classified information.

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:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge