DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 14-02537
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

08/19/2015

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), H (Drug Involvement), and E (Personal Conduct). The concerns raised by Applicant's drug involvement are mitigated, but concerns raised by his criminal conduct and personal conduct are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on January 24, 2014. On February 13, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, H, and E. The DOD acted under Executive Order 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), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on March 4, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 6, 2015,

and the case was assigned to me on May 8, 2015. On the same day, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 3, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. I kept the record open until June 10, 2015, to enable Department Counsel to submit a memorandum of law on an issue of collateral estoppel that arose during the hearing. He timely submitted Hearing Exhibit I. DOHA received the transcript (Tr.) on June 12, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 50-year-old information technology specialist employed by a defense contractor since April 2011. He has worked continuously for defense contractors since May 1997. He worked as a marine electrician at a naval shipyard from July 1985 to January 1988. He has held a security clearance since January 1988. (GX 2 at 13.)

Applicant married in March 1994 and divorced in June 2000, due to his wife's infidelity. He remarried in March 2001. In a sworn statement executed in January 2004, he stated he and his wife had separated due to his wife's abuse of alcohol and prescription drugs. His wife filed a petition for divorce, which was granted in March 2007. (GX 2 at 5; GX 3 at 1-2.) He cohabited with a domestic partner from 2009 to 2013. He has a 21-year-old son from his first marriage.

In his January 2004 statement, Applicant admitted that he used marijuana about twice a year from about 1996 or 1997 until December 2001. He stated that he stopped using marijuana because he wanted to be a good role model for his son. He stated that he would not use marijuana or a controlled substance again. (GX 3 at 3.) When he submitted his SCA in January 2014, he disclosed that he used marijuana about 12 times between January 1998 and January 2001, a shorter period than what he disclosed in 2004. (GX 1 at 29.)

In a personal subject interview (PSI) in February 2014, Applicant stated that he used marijuana for stress relief about 12 times between January 1998 and January 2001, while he was going through the divorce from his first wife and trying to get full custody of his son. A friend, with whom he no longer associates, gave him the marijuana. (GX 2 at 12.) In his answer to the SOR, he stated that he used marijuana instead of a drug that had been prescribed for him as a sleep aid, because the prescribed drug had undesirable side effects such as grogginess and upset stomach.

Applicant has a history of arrests and convictions for domestic violence. In October 1990, he was arrested for assault and battery. According to Applicant, he and

his wife were arguing, she threw a pair of pliers at him, and he shoved her. The charges were dismissed. (GX 3 at 3.)

In April 1999, Applicant was arrested for spousal abuse and assault and battery. The spousal-abuse charges were dismissed in May 1999 upon request of the complainant. In July 1999, the prosecutor declined to prosecute the assault and battery.

On October 2001, Applicant was arrested for an assault and battery. His wife came home intoxicated about 1:00 a.m., while he was asleep. She became angry because she was locked out. When Applicant awakened and unlocked the door, she began hitting him. He told her that he would punch her in the nose if she hit him again. She hit him and he punched her. In May 2002, he pleaded guilty and disposition was deferred. He agreed to attend an 18-week anger management and domestic violence prevention program and maintain good behavior for one year. He complied with his agreement, and the charges were dismissed in June 2003. (GX 3 at 2; GX 4 at 4; GX 6.)

On September 2004, Applicant was arrested for domestic assault and battery. He pleaded not guilty in juvenile and domestic relations court but was convicted and sentenced to a year in jail and a $1,500 fine. (Tr. 29.) He appealed to the circuit court in December 2004. In November 2005, before the circuit court, he pleaded guilty and was sentenced to 12 months in jail (suspended) and fined $100. (GX 4 at 3; GX 6.) Although the court records reflect a guilty plea before the circuit court, he testified that, pursuant to a plea agreement, he entered an "Alford plea," not admitting his guilt but admitting that there was sufficient evidence to convict him.[1] (Tr. 43.)

On November 3, 2006, Applicant was arrested for domestic assault. His wife accused him of spitting on her and elbowing her in the nose. In May 2007, he pleaded guilty and was sentenced to six months in jail (with all but one day suspended). (GX 4 at 1; GX 6.)

On November 16, 2006, Applicant was arrested for violating a protective order. The violation occurred when Applicant used his garage-door opener so that his son could enter the house where his wife lived. In May 2007, Applicant entered an "Alford plea." He was sentenced to 30 days in jail (with 29 days suspended), and placed on unsupervised probation for two years. (GX 4 at 2.)

In January 2014, Applicant was arrested for assault and battery. He pleaded not guilty but was convicted and sentenced to 180 days in jail, with 160 days suspended, and placed on unsupervised probation for 2 years. (GX 5; GX 6.) He testified that he received ten days of credit for good behavior and spent only ten days in jail. (Tr. 30.) He served his sentence on weekends. (Tr. 37.) In his PSI and answer to the SOR, Applicant stated that this incident occurred when his former cohabitant got on top of him in bed. He was not interested in having sex with her, and he pushed her off the bed with sufficient force that she hit her head on a dresser and injured her ear. (GX 2 at 8;

[1] *North Carolina v. Alford,* 400 U.S. 25 (1970).

Answer to SOR.) At the hearing, he testified that the incident was "horseplay" and he did not intend to inflict injury. (Tr. 30.) He testified that he broke off the relationship a few days later, but she did not file a complaint until three or four weeks later. He testified that his former cohabitant is a wealthy woman, was bitter about their breakup, and "you don't do those kinds of things to [her]." (Tr. 35, 54.)

All of Applicant's arrests and convictions were for misdemeanors. He asserted that his former cohabitant and two ex-wives are good friends and have colluded to harm his reputation by filing domestic violence complaints against him. (Tr. 72.)

Applicant testified that he has coached youth sports for 20-plus years. He was required to disclose his criminal record in order to be a coach, and the parents trusted him with their children. (Tr. 32.)

Applicant's deputy project manager has known him for 14 years and has been his supervisor since October 2003. He regards Applicant as an "invaluable asset" to the program and the U.S. Government. He does not believe Applicant should have been convicted of the last two incidents of domestic violence. He has no reservations about Applicant's character and trusts him "without question." (AX A.)

One of Applicant's colleagues submitted a statement attesting to his good character, patience, kindness, enthusiasm, dedication, and honesty. (AX B.) Another colleague regards Applicant as highly skilled, dedicated, and trustworthy. This colleague is aware of some of the issues regarding Applicant's off-duty conduct, but states that he has never witnessed any issues or hostilities with his co-workers. (AX C.) A third colleague, who has known Applicant for ten years, considers him skillful, level headed, and responsible. (AX D.) in January 2013 and April 2014, Applicant was a member of team that received a "team excellence" award from the rear admiral in command of the organization for which Applicant provides support. (AX F; AX G.)

Collateral Estoppel

On my own motion, I raised the issue whether collateral estoppel applied to Applicant's testimony regarding the criminal conduct alleged in SOR ¶¶ 1.e-1.h, and I requested Department Counsel to submit a memorandum of law on the issue. His submission is attached to the record as Hearing Exhibit I.

The doctrine of collateral estoppel generally applies in DOHA hearings and precludes applicants from contending that they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). There are exceptions to this general rule, especially with respect to misdemeanor convictions based on guilty pleas. Relying on federal case law, the Appeal Board has adopted a three-part test to determine the appropriateness of applying collateral estoppel to misdemeanor convictions. First, the applicant must have been afforded a full and fair opportunity to litigate the issue in the criminal trial. Second, the issues presented for collateral estoppel must be the same as those resolved against the applicant in the

criminal trial. Third, the application of collateral estoppel must not result in "unfairness," such as where the circumstances indicate lack of incentive to litigate the issues in the original trial. Federal courts recognize that an individual may not have an incentive to fully litigate a misdemeanor offense because there is less at stake or because a plea bargain creates a disincentive to litigate the issues. ISCR Case No. 04-05712, 2006 WL 354122 (App. Bd. Oct. 31, 2006) (citations omitted).

The doctrine of collateral estoppel does not preclude applicants from explaining their conduct and presenting it in a meaningful context, in an effort to mitigate the security concerns raised by it. ISCR Case No. 11-00180 at 7 (App. Bd. Jun. 19, 2012). In this case, Applicant explained the circumstances of each criminal offense to which he pleaded guilty. He did not deny the acts that resulted in his criminal convictions. Thus, I conclude that the collateral estoppel does not apply to his testimony.

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, *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 AG. 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." *See* 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; *see* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges eight arrests between October 1990 and January 2014, all for misdemeanors arising from domestic conflicts. (SOR ¶¶ 1.a-1.h). The concern raised by 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."

Applicant's admissions in his January 2004 statement, his SCA, his February 2014 PSI, and at the hearing, along with the documentary evidence submitted by Department Counsel, establish that Applicant was found guilty of domestic assault in October 2001 but the charges were dismissed after he completed a diversion program. The evidence also establishes that he was convicted of domestic violence on four subsequent occasions, and that he is on probation for the latest conviction. His record of arrests, convictions, and sentences establishes the following disqualifying conditions under this guideline: AG ¶ 31(a) ("a single serious crime or multiple lesser offenses"), AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted"), and AG 31(g) ("the individual is currently on probation").

The following mitigating conditions are potentially applicable:

> 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;
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> AG ¶ 32(c): evidence that the person did not commit the offense; and
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> AG ¶ 32(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.

AG ¶ 32(a) is not established. Applicant's most recent incident of domestic violence is less than two years old, and he is still on probation for it. His convictions are numerous, the underlying conduct did not occur under circumstances making it unlikely to recur.

AG ¶ 32(c) is established for the arrests and charges in SOR ¶¶ 1.b and 1.c. Applicant admitted these arrests, but claimed that the charges were false and made by his first wife in an effort to gain advantage in the custody battle over their son. His claim is corroborated by dismissal of the charges in SOR ¶ 1.b and the prosecutor's decision not to prosecute the charges in SOR ¶ 1.c. It is not established for SOR ¶ 1.a. Application of this mitigating condition to SOR ¶¶ 1.e-1.f is precluded by collateral estoppel.

AG ¶ 32(d) is not fully established. In spite of his domestic problems, Applicant has been actively involved in his community for many years. He has complied with court orders for counseling and has not violated his probation. He is well respected among his supervisors and co-workers. However, he has not expressed remorse. Instead, he has portrayed himself of a victim of three dysfunctional relationships and collusion among the women involved.

Guideline H, Drug Involvement

The SOR alleges that Applicant used marijuana on at least 12 occasions between 1998 and 2001, while holding a security clearance (SOR ¶ 2.a). The concern under this guideline is set out in AG ¶ 24: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Drugs are defined in AG ¶ 24(a)(1) as "[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens)."

Applicant's admissions in his January 2004 statement, his most recent SCA, his February 2014 PSI, and at the hearing establish the following disqualifying conditions under this guideline:

> AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction";
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> AG ¶ 25(c): illegal drug possession [incidental to his use of marijuana]. . . ; and
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> AG ¶ 25(g): any illegal drug use after being granted a security clearance.
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> The following mitigating conditions are potentially relevant:
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> AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
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> AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

The first prong of AG ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). The evidence establishes that Applicant's drug use is not recent. He voluntarily stopped using marijuana about 14 years ago, in order to set a good example for his son. He voluntarily disclosed his drug use in January 2004, but was allowed to retain his clearance. While his drug use while holding a security clearance was a serious breach of trust and occurred multiple times for a period of at least three years, the security concerns raised by it are mitigated by the passage of time.

AG ¶ 26(b) is established. In his January 2004 statement, Applicant promised that he would not use marijuana or controlled substances again, and he has complied with his promise. He no longer associates with the friend who gave him marijuana. The pressures caused by his first divorce and the custody battle are gone, and he has abstained from drug use for more than 14 years.

Guideline E, Personal Conduct

The SOR cross-alleges the criminal conduct and drug involvement under this guideline (SOR ¶ 3.a). The 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 information. . . ."

Applicant's record of domestic violence and his drug use while holding a security clearance establish the following disqualifying conditions under this guideline:

> 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 person may not properly safeguard protected information;
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> AG ¶ 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 person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and
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> AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

> 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;
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> 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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not fully established. While Applicant's domestic violence convictions were misdemeanors, they demonstrate a pattern of unacceptable violence. The incidents were not infrequent and did not occur under unique circumstances making them unlikely to recur.

AG ¶ 17(d) is not fully established. Applicant has acknowledged his behavior, and he has alleviated the factors that caused his inappropriate behavior by terminating his relationships with all three women involved. However, he demonstrated at the hearing that he is not remorseful for his conduct and is reluctant to accept responsibility for it. Instead, he has blamed the women involved and claimed that he is the victim of collusion among them.

AG ¶ 17(e) is established for Applicant's drug involvement, because he voluntarily disclosed it in 2004. It is not fully established for his domestic violence incidents. While his convictions are a matter of public record, he has portrayed himself as a victim of collusion among the three women involved.

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(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.

I have incorporated my comments under Guidelines J, H, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has worked in support of national defense and held a security clearance since 1988. He is highly regarded by his supervisors and peers. He is a devoted father and involved in community youth activities. However, his long track

record of domestic violence raises serious doubts about his judgment, reliability, and trustworthiness.

After weighing the disqualifying and mitigating conditions under Guidelines J, H, 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 drug involvement, but he has not mitigated the security concerns raised by his criminal conduct and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Subparagraphs 1.d-1.h:	Against Applicant
Paragraph 2, Guideline H (Drug Involvement)	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge