



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



In the matter of:)	
)	
(Redacted))	ISCR Case No. 09-06643
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

February 28, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 30, 2008. On June 23, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on June 30, 2010; answered it on July 19, 2010; and requested a hearing before an administrative judge. DOHA received the request on July 22, 2010. Department Counsel was ready to proceed on October 20, 2010, and the

case was assigned to an administrative judge on October 22, 2010. DOHA issued a notice of hearing on November 10, 2010, scheduling it for December 14, 2010. The case was reassigned to me on November 22, 2010, to resolve a scheduling conflict. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 14 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through Q, which were admitted without objection. DOHA received the transcript (Tr.) on December 22, 2010.

Findings of Fact

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

Applicant is a 57-year-old network engineer employed by a federal contractor since October 2010. He has worked for federal contractors since May 1997, except for a period from November 2008 to June 2009, when he was laid off. (AX M.) He married in April 2005. He has four children from previous relationships and an 18-year-old stepson.

Applicant did not finish high school, but he obtained his general educational development certificate in August 1991. (AX N at 1.) He completed training at a computer learning center in July 1992 and was commended for exemplary attendance and outstanding scholastic accomplishment. (AX N at 2-5.) He received an Associate in Arts degree in computer information systems in June 1994. (AX N at 6.)

Between March 1997 and October 2000, Applicant received several certificates in system administration. (AX N at 8-11.) He received a team achievement award in 2002.

(AX N at 12.) He completed numerous technical training courses between July 2002 and December 2005. (AX N at 13-15, 17-22.) He was qualified as a "Six Sigma Specialist" in December 2004. (AX N at 7.) He received his Bachelor of Science in computer networking in September 2005. (AX N at 16.)

In December 2005, Applicant received an achievement award and a cash bonus. (AX N at 23.) He completed five additional technical training courses between June 2006 and August 2010. (AX N at 24-28.)

Applicant first received a security clearance in 1997. (Tr. 37.) His clearance was revoked in March 2005 after he admitted using cocaine. (GX 11 at 19-20; GX 14 at 53.) This revocation of his clearance was alleged in SOR ¶ 1.g.

When Applicant submitted his SCA in October 2008, he disclosed that he was charged with possession of marijuana in May 1973, being drunk in public in November 1982, driving while intoxicated in March 1988, driving while impaired in November 1988, and driving under the influence in June 1997. (GX 3 at 30-34.) These arrests are alleged in SOR ¶¶ 1.a-1.d, and 1.f. Applicant timely reported his various arrests to his facility security officer. (GX 13 at 1.)

The May 1973 marijuana offense was disposed of by a \$25 fine. (GX 6 at 3.) The marijuana was found in a car occupied by Applicant and a girlfriend. He claimed that the marijuana belonged to his girlfriend. (GX 9 at 5.) The record does not reflect the disposition of the November 1982 arrest for being drunk in public. The March 1988 arrest resulted in a \$150 fine and probation for one year. (AX D.) The November 1988 arrest for driving while impaired resulted in Applicant being placed on supervised probation for one year. (GX 9 at 4.) After his June 1997 arrest for driving under the influence, he was put on probation for three months in a diversion program, his driver's license was suspended for three months, he was required to undergo a drug and alcohol evaluation, and he was required to perform 16 hours of community service. (AX E.)

In December 2000, Applicant was charged with assault and battery. (GX 6 at 3.) This arrest is alleged in SOR ¶ 1.e. The charges were disposed of by *nolle prosequi*. (GX 7.) This arrest arose from a loud argument between Applicant and his live-in girlfriend, now his wife. It was one of a series of incidents during their tumultuous relationship, which Applicant attributed to her bipolar disorder and resulting infidelity. Applicant's one-time use of cocaine in September 2004 also was triggered by his now wife's behavior.

Applicant testified he was at a party and intoxicated when he used cocaine. (Tr. 38-39.) His one-time use of cocaine occurred in a city where he no longer lives, and he does not associate with the persons with whom he used cocaine. (Tr. 31.) He informed his facility security officer about his cocaine use a week or two afterwards. (Tr. 49.) He later admitted his cocaine use while undergoing a polygraph examination in connection with an application to obtain a higher level clearance, and he disclosed it on his SCA in October 2008.

Applicant occasionally attends Alcoholics Anonymous (AA) meetings. He began attending AA meetings after his problems with drinking and driving, and he last attended a meeting about two months before the hearing. (Tr. 42.) At the hearing, he submitted a statement of intent to never use illegal drugs again, and agreeing that any illegal drug use will result in automatic revocation of his security clearance. (AX O.) He voluntarily submitted to drug tests on October 11, 2010, and December 9, 2010, both of which were negative for marijuana, cocaine, and several other drugs. (AX L; AX Q.)

In January 2005, Applicant voluntarily sought psychiatric counseling because of his feelings of guilt about using cocaine, and his desire to understand why it happened and how to prevent it. He had eight counseling sessions, the most that his insurance would cover, and provided copies of the medical records to his facility security officer. (Answer to SOR; AX G; Tr. 33.)

In June 2007, Applicant and his wife separated, and Applicant assumed responsibility for her son. (Answer to SOR.) In August 2007, Applicant obtained a protective order against his now wife after she threatened to injure her stepson. He later

requested that the protective order be lifted because a psychological evaluation determined that her behavior was caused by improper medication. (GX 8.) They began living together again in 2008. His wife is undergoing counseling and taking medications. He describes their present situation as “peaceful.” Applicant testified that he has accepted the fact that she has a problem with her bipolar disorder and they are dealing with it. (Tr.47-48.)

Applicant has nine brothers and seven sisters. After the SOR was issued, four of Applicant’s siblings wrote letters on his behalf. These letters describe him as bright, generous, considerate, honest, hard working, determined, and devoted to raising his teenaged stepson. (GX 13 at 2-7.)

Applicant’s performance appraisal for 1999 was “fully satisfactory.” (AX H.) His performance appraisal for 2001 recited that his performance was “very good.” (AX I.) His performance appraisal for 2004 described him as a “very good supervisor,” well liked, and one who always completed tasks on or ahead of schedule.” (AX J.) For 2006, Applicant submitted the form listing his individual goals and accomplishments, but the form reflected no appraisal of his performance. (AX K.) Applicant did not submit performance appraisals for the periods not covered above.

In July 2010, Applicant’s supervisor at his previous job submitted a letter strongly recommending him for a top secret clearance. His supervisor described him as skillful, trustworthy, and having a passion for his work. (Attachment to Answer to SOR.)

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, 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 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 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 E, Personal Conduct

The SOR alleges Applicant was arrested for possession of cocaine in May 1973 (¶ 1.a), charged with being drunk in public in November 1982 (¶ 1.b), charged with operating a motor vehicle while impaired in November 1988 (¶ 1.c), charged with driving under the influence in June 1997 (¶ 1.d), charged with assault and battery in December 2000 (¶ 1.e), and used cocaine once in September 2004 while holding a security clearance (¶ 1.f). In SOR ¶ 1.g, it alleges that Applicant was disapproved for additional access to classified information and his current access was revoked in March 2005, based on the conduct alleged in ¶¶ 1.a-1.f.

The allegation in SOR ¶ 1.g does not state an independent basis for security concerns. Instead, it merely recites the consequences of the conduct alleged in SOR ¶¶

1.a-1.f. As such, SOR ¶ 1.g duplicates those paragraphs. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). I will resolve SOR ¶ 1.g in Applicant's favor.

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's candor during the security clearance process is not at issue in this case. His voluntary disclosure is the only evidence of his cocaine use. The relevant disqualifying conditions are:

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; and

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.

Applicant admitted his arrest for possession of marijuana, his multiple arrests for alcohol-related conduct, the domestic dispute underlying his arrest for assault and battery, and his one-time use of cocaine while holding a security clearance. His admissions are corroborated by the Government's evidence. Thus, I conclude that AG ¶¶ 16(c) and (e) are established, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts.

The relevant mitigating conditions are:

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;

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.

Applicant has a long history of misconduct, ending with his cocaine use in September 2004 while holding a security clearance. I have considered each individual incident as well as his pattern of misconduct as a whole. Only one of his offenses, the domestic disturbance in December 2000, happened under unique circumstances, i.e., his wife's bipolar disorder, which is now under control. His last offense, the use of cocaine, was the most serious, but it happened more than six years ago. Under AG ¶ 17(c) conduct may be mitigated if "so much time has passed" that it does not cast doubt on Applicant's current reliability, trustworthiness, and good judgment.

There are no "bright line" rules for determining how much time must pass in order to mitigate security concerns based on personal conduct. 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).

I conclude that Applicant's record of misconduct is mitigated by the passage of time. His use of cocaine occurred more than six years ago, and it occurred 31 years after his previous drug-related misconduct. He promptly reported his misconduct to his facility security officer, expressed remorse, and obtained psychiatric counseling to help him understand why it occurred and how to prevent recurrence. He has resolved his domestic issues, has continued to perform well at work, and no longer associates with drug users. He has submitted a statement of intent to refrain from illegal drug use and agreed that any further illegal drug use will result in revocation of his security clearance. There has been no further misconduct of any kind since September 2004. Under all these circumstances, his record of misconduct, ending with his one-time use of cocaine more than six years ago, does not cast doubt on his current reliability, trustworthiness, or good judgment. Thus, I conclude that AG ¶ 17(c) is established.

I further conclude that AG ¶ 17(d) is established by Applicant's acknowledgment of his behavior, full disclosure to security officials, voluntary receipt of counseling, changed family and social circumstances, and his demonstrated intent to avoid further misconduct, including his agreement to automatic revocation for any further illegal drug use. AG ¶ 17(e) is established by his full disclosure of his misconduct.

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 the applicant's conduct and all the 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.

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 E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has progressed from a high school dropout and irresponsible young man to a mature, well-educated, responsible adult. He began his career as a federal contractor in May 1997, shortly before his DUI arrest in June 1997. He successfully completed a diversion program, and he was working hard and progressing rapidly in his career, until he became involved with his now wife at a time when she had severe mental problems that he was not equipped to handle. While under stress from his domestic situation, he stumbled badly when he became intoxicated at a party and consumed cocaine. He realized his mistake and reported it to his facility security officer, disclosed it to a security investigator who was evaluating him for a higher level of clearance, and disclosed it on his SCA. His feelings of guilt and fear for the future led him to obtain psychiatric counseling and gain insight into his situation and his behavior. He voluntarily assumed sole responsibility for his stepson when his wife was virtually incapacitated by her mental disorder. He, his wife, and his stepson are now together, and the family atmosphere, in his words, is "peaceful."

Applicant has been employed by federal contractors and held a security clearance for many years. He enjoys a reputation for trustworthiness and dedication. He was sincere, candid, remorseful, and credible at his hearing.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on personal conduct. Accordingly, I conclude he has 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 E (Personal Conduct) FOR APPLICANT

Subparagraphs 1.a-1.g: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge