



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-04217
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

09/06/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate personal conduct security concerns. She resumed engaging in a pattern of self-destructive and questionable behavior shortly after having her clearance reinstated in 2006. She failed to recognize the security significance of her past criminal conduct, does not take full responsibility for her recent criminal conduct, and is unwilling to get the necessary professional help to prevent future recurrence of similar conduct. Clearance is denied.

Statement of the Case

On July 11, 2016, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the personal conduct guideline. Applicant answered the SOR and requested a hearing.

On May 9, 2017, a date mutually agreed to by the parties, the hearing was held. Applicant testified at the hearing and the exhibits offered by the parties were admitted into the administrative record without objection.¹ The hearing transcript (Tr.) was received on May 17, 2017, and the record closed on May 23, 2017.

¹ Government Exhibits 1 – 4; Applicant's Exhibits A – D. Department Counsel's discovery letter, scheduling correspondence, the case management order, and post-hearing correspondence are attached to the record as Appellate Exhibits I – IV, respectively.

Findings of Fact

Applicant, 57, has worked for the Federal government as a contractor for approximately 20 years. She holds a master's degree in business administration and an undergraduate degree in information technology. Her recent performance evaluations reflect that she exceeds expectations and she was recently identified as a top performer during a military exercise.

Applicant met her late husband when she was 17 years old. They had two children, who are now young adults. She primarily raised her children on her own, because her husband was in and out of prison for most of their relationship. Applicant's daughter and grandchild currently live with her, and Applicant financially supports them.

Applicant's life after high school was marred by significant substance abuse issues, which led to her conviction and incarceration on drug-related charges in 1988. She served about 11 months in prison and went through an intensive two-year substance abuse rehabilitation program. She was advised, as part of her aftercare recovery, to abstain from all alcohol and illicit drug use. She states that she has not used any illegal drugs since her conviction and incarceration in 1988.²

In approximately 2005, Applicant's security clearance was suspended due to her criminal history. The following year, the DoD reviewed Applicant's case and granted her a security clearance because:

- (a) she had abstained from alcohol and drugs and she had not been involved in criminal activity for 18 years; and
- (b) she earned her undergraduate and master's degrees after being released from prison and successfully completing the rehabilitation program.³

In 2007, Applicant's late husband was released from prison and she resumed consuming alcohol. She was then involved in a number of criminal incidents, some of which involved alcohol.⁴

- In April 2009, Applicant was arrested for public swearing, obstruction of justice, and public intoxication. She and her late husband were returning from the funeral. Her husband had consumed alcohol at the funeral and was stopped by police on suspicion of drunk driving. Applicant started yelling at the police, who were trying to question her husband. She was arrested and charged, but the prosecutor declined to go forward on the charges.⁵

² Tr. 13-17, 32-41; Exhibits 1, 2, A – C. These non-alleged matters were considered for the limited purpose of assessing Applicant's mitigation case.

³ Exhibit 1 at 47; Exhibit 4.

⁴ Tr. 17-33; Exhibit 2, Interview Summary.

⁵ Tr. 30-32; Answer; Exhibit 2, Interview Summary at 4-5.

- In March 2011, Applicant got into a verbal argument with another parent in the school parking lot. She was cited for using abusive (foul) language. The other parent was not charged. The charge was subsequently dismissed.⁶
- In March 2012, Applicant was arrested for drunk driving. She had been with her husband at a bar, but claims not to have consumed alcohol. She was initially stopped by police for trying to help her stepson allude capture by police. She was convicted of refusing to take a test to measure her blood alcohol content, and her license was suspended for 12 months. She maintains her innocence.⁷
- In August 2012, Applicant was arrested for public intoxication and swearing. She was at the beach with her husband and his friend, a parolee. She claims that only her husband and his friend were drinking alcohol. She became belligerent and verbally abusive towards police when they attempted to question her husband's friend. She was then arrested, but the prosecutor declined to pursue the charges.⁸
- In December 2012, Applicant was arrested for assaulting a minor. She and her husband were visiting friends. At some point an argument ensued, the police were called, and Applicant and her husband were arrested. She was arrested for allegedly assaulting her friend's teenage daughter. It is unclear from the record whether alcohol played a direct role in the incident. The charge against Applicant was dismissed after the alleged victim and her family declined to cooperate with the authorities.⁹

In 2013, Applicant's husband died. She states that she subsequently stopped consuming alcohol. She cared for her parents in their final years, and is now helping to raise her grandchildren. She is receiving limited grief counseling through monthly check-in phone calls from a nurse. She self-reported her criminal history on a security clearance application she submitted in March 2014. Other than neighbors calling police to report a loud argument between Applicant and her daughter around Christmas time in 2013 or 2014, the record is silent on any other police involvement.¹⁰

Applicant met with a clinical psychologist in January 2017. He noted that Applicant's criminal history was due to her association with others involved in illegal activity and her inappropriate reaction in certain stressful situations. He also noted that Applicant is facing a number of stressors in her life. The psychologist, who is aware of the limited grief counseling Applicant is receiving, made a "strong recommendation" that she obtain further counseling or, at a minimum, employ "a life coach who can help her with

⁶ Tr. 28-30; Answer; Exhibit 2, Interview Summary at 5.

⁷ Tr. 23-28; Answer; Exhibit 2, Interview Summary at 5-6.

⁸ Tr. 20-23; Answer; Exhibit 2, Interview Summary at 6-7.

⁹ Tr. 17-20; Answer; Exhibit 2, Interview Summary at 7.

¹⁰ Tr. 32-42; Exhibit 1 at 37-43; Exhibit A at 6.

her decision-making as to whom she associates and how she handles her emotions when angry or displeased.”¹¹ Applicant did not follow the psychologist’s recommendations.¹²

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4).¹³

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. 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 commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14.¹⁴ Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and conduct all hearings in a timely and orderly manner. Judges must carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

¹¹ Exhibit A at 3.

¹² Exhibit A at 3; Tr. at 37-42.

¹³ ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards); Tr. 44-49 (Applicant waived issue as to applicable guidelines).

¹⁴ See also ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017) (favorable decision reversed because Department Counsel failed to present sufficient evidence); ISCR Case No. 14-05986 (App. Bd. May 26, 2017) (rejecting argument that non-alleged conduct can be the sole basis for an adverse decision).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). *See also* SEAD-4, ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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.

Analysis

Guideline E, Personal Conduct

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.¹⁵

In assessing Applicant's case, I considered all the disqualifying and mitigating conditions listed under Guideline E, including the following:

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 individual may not properly safeguard classified or sensitive information;

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; and

¹⁵ AG ¶ 15.

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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

A year after DoD reinstated Applicant's security clearance, which had been suspended due to her history of serious substance abuse issues and criminal conduct, Applicant resumed using alcohol. By doing so, she disregarded the recommendation of her substance abuse program counselors. She was then involved in a number of incidents over a prolonged period of time, where her conduct and judgment fell far below that expected of clearance holders – much less one whose clearance had been suspended for similar concerns. Most of the recent incidents involved alcohol. AG ¶ 16(c) applies.

Applicant's self-destructive behavior appears to be, in part, attributable to a bad relationship. Her late husband passed away in 2013, and no record evidence was offered that she has engaged in other criminal behavior or to refute her assertions that she no longer consumes alcohol. However, Applicant's failure to follow her own psychologist "strong recommendation" that she obtain counseling and her refusal to accept responsibility for her criminal conduct (2012 conviction) undercuts the mitigating value of the passage of time. AG ¶ 17(c) partially applies, AG ¶ 17(d) does not apply.

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 whole-person factors listed at AG ¶ 2(d). I hereby incorporate my above analysis and highlight some additional whole-person factors.

Applicant has worked for the Federal government as a contractor for nearly 20 years. She had her oldest child at a relatively young age and, after serving time in prison and going through an intensive substance abuse rehabilitation program, she earned advanced educational degrees. This favorable information led the Defense Office of Hearings and Appeals to grant her a security clearance in 2006. This earlier adjudication should have put her on notice that similar conduct could jeopardize her clearance and presumably the job that is dependent on maintaining a clearance. Notwithstanding this risk and the clear recommendation of the substance abuse program that she abstain from alcohol, Applicant resumed drinking alcohol. She then engaged in a long pattern of highly destructive (criminal) behavior. Her conduct from 2009 to 2012 continues to raise questions about her present judgment and reliability.

Furthermore, Applicant has not obtained the counseling strongly recommended to her by her own clinical psychologist. Her refusal to obtain such counseling indicates an unwillingness on her part to confront the underlying issues that contributed to her recent

questionable conduct. Overall, the record evidence leaves me with questions and doubts about Applicant's present eligibility for a security clearance.¹⁶

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 E (Personal Conduct):	AGAINST APPLICANT
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Subparagraphs 1.a – 1.e:	Against Applicant
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Conclusion

In light of the circumstances presented by the record in this case, it is not clearly consistent with the interest of national security to continue Applicant's eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹⁶ I considered the exceptions in SEAD-4, Appendix C. However, none are warranted in this case. See SEAD-4, ¶ E.3 and Appendix A, ¶ 2(h); *contrast with* ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011) (under previous version of the guidelines, judges had "no authority to grant an interim, conditional or probationary clearance.")