



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 15-05597
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

01/30/2017

Decision

BORGSTROM, Eric H., Administrative Judge:

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

Statement of the Case

On February 12, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. The action was taken under Executive Order (EO) 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 responded to the SOR on March 3, 2016, and he elected to have the case decided on the written record in lieu of a hearing. On April 4, 2016, the Government submitted its file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on April 13, 2016. He was afforded an opportunity to respond to the FORM within 30 days of its receipt and to file objections

and submit material to refute, extenuate, or mitigate the security concerns. Applicant provided a FORM response on April 30, 2016. The case was assigned to me on December 15, 2016.

Procedural Issues

In the FORM, Department Counsel references FORM Items 1-3.¹ FORM Item 3 is an unauthenticated summary of a December 16, 2014 interview with a government background investigator. In the FORM, Department Counsel advised Applicant that he could object to FORM Item 3 and it would not be admitted, or that he could make corrections, additions, deletions, and update the document to make it accurate. Applicant was informed that his failure to respond to the FORM or to raise any objections could be constituted as a waiver, and the evidence would be considered by me. Applicant responded to the FORM, and he raised no objections. Given Department Counsel's advisement and Applicant's education and work experience, I find his waiver to be knowing and intelligent.² Therefore, FORM Item 3 is admitted into evidence as Government Exhibit 3.

FORM Item 2, a September 2014 security clearance application (SCA) is admitted into evidence as Government Exhibit (GE) 2, without objection.³

In his FORM response, Applicant included a two-page letter, which is admitted into evidence as Applicant Exhibit (AE) A.

Findings of Fact

Applicant is 56 years old. From March 1979 to March 1999, he served active duty in the U.S. military, from which he received an honorable discharge. Following his military retirement, he worked for multiple DOD contractors, and he had some extended periods of unemployment. He has been employed full time by a DOD contractor since September 2014.⁴

Applicant received his general equivalency degree (GED) while serving in the military. In September 2008, he attained his bachelor's degree. Since July 2013, he has been pursuing an associate's degree, and he intends to pursue a second bachelor's degree.

¹ FORM Item 1 consists of the SOR and Applicant's response to the SOR. These documents are pleadings and are part of the record.

² See ISCR Case No. 15-05252 at 3 (App. Bd. Apr. 13, 2016) (Applicant's waiver of the authentication element must be knowing and intelligent. The Judge's exclusion of the Report of Interview, containing mitigating evidence, was found to be error following an applicant's appeal.).

³ See ISCR Case No. 14-06781 at 3 (App. Bd. Dec. 16, 2016)(By not responding to the Government's FORM, "Applicant waived any objection he might have had to this document.").

⁴ GE 2.

Applicant was married in May 1984, and he has been separated since December 2010. He and his wife have two adult children.⁵

The SOR alleges that Applicant engaged in criminal conduct on multiple occasions between 1990 and 2014. In his response to the SOR, Applicant neither explicitly admits nor denies the specific SOR subparagraphs; however, he does admit specific criminal behavior.

In 1990, Applicant was charged with (1) Unlawfully Carrying a Pistol and (2) Disorderly Conduct. Applicant explained that he had been given several firearms following the death of his stepfather, and that he was transporting the firearms from Missouri to South Carolina for registration and proper storage. En route, he fell asleep and was startled by law enforcement. One of the firearms was confiscated.⁶ Although Applicant admits that he was arrested, there is no evidence of any formal charges or convictions, and Applicant stated that no punishment or sentence was imposed.

In 1992, Applicant was charged with Driving Under the Influence (DUI). He admitted the arrest, but was found guilty of a lesser offense (Reckless Driving) and fined.⁷ The 1990 and 1992 arrests are listed in SOR ¶¶ 1.a. and 1.b.

SOR ¶ 1.c. alleges that Applicant was charged with Reckless Driving in 2007. No record evidence was offered to substantiate this allegation.

In 2008, Applicant was charged with (1) Driving While Impaired (DWI); (2) Reckless Driving; and (3) Open Container. Applicant admits his blood alcohol level exceeded the legal limit and that he was charged with DWI/DUI. He pled guilty. He received a suspended jail sentence, was fined, and was ordered to complete alcohol education.⁸ This incident is listed in SOR ¶ 1.d.

In 2010, Applicant was charged with DUI – 2nd Offense. He pled guilty. He was sentenced to 90 days in jail, fined, and ordered to complete alcohol education. This conviction is referenced SOR ¶ 1.e.⁹

As a result of the 2010 conviction, Applicant's driver's license was suspended. At the time, he believed that he was granted a restricted license for travel to and from work. In 2014, Applicant was charged with Driving after Forfeiture of License, and he was subsequently cited for Failure to Appear on this charge. Applicant was under the mistaken impression the court hearing had been continued. The charges were handled

⁵ GE 3; AE A.

⁶ Response to SOR; GE 3; AE A.

⁷ GE 3; AE A.

⁸ GE 3.

⁹ GE 3.

concurrently, and he was fined approximately \$260.¹⁰ These 2014 matters are listed in SOR ¶¶ 1.f. and 1.g.

Applicant has taken full responsibility for his past criminal conduct and poor judgment. He has taken several steps to ensure that such incidents do not recur. Most importantly, he has not consumed any alcohol since his 2010 DUI arrest. He has moved across the country for his new employment, he holds a leadership position in a trade association, and he mentors at-risk youth. He has returned to school and has excelled academically.¹¹

Policies

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 to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 decision.

The protection of the national security is the paramount consideration. As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the 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." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

¹⁰ GE 3.

¹¹ GE 3; Response to the SOR; AE A.

¹² *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). See *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

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. 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 the 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.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security 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.”

Disqualifying conditions under this guideline include AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”). Applicant's criminal conduct in 1992, 2008, 2010, and 2014 triggers AG ¶ 31(a). Because the Government did not present substantial evidence of any criminal behavior as to the 1990 incident (SOR ¶ 1.a.) and did not present any evidence as to the alleged 2007 incident (SOR ¶ 1.c.), it did not meet its evidentiary burden as to these two allegations.

Security concerns raised by criminal conduct may be mitigated by the following conditions:

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; and

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.

The first prong of AG ¶ 32(a) focuses on whether the criminal conduct 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.¹³ 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.”¹⁴

While not dismissing or disregarding the 2014 charges, Applicant’s criminal conduct predominantly occurred over six years ago. Applicant was responsible and criminally culpable for the 2014 charges, resulting from his forfeited driver’s license. However, his erroneous belief that he had a restricted license is reasonable. More importantly, Applicant’s relocation across the country, his sobriety, new employer, and academic endeavors have cultivated an environment that such criminal behavior is unlikely to recur. Considering the totality of Applicant’s criminal behavior, sufficient time has elapsed and the contributing circumstances are unlikely to recur, such that his past criminal conduct does not cast doubt on his reliability, trustworthiness, and good judgment. Therefore, AG ¶ 32(a) applies.

As discussed above, Applicant has excelled academically, he has attained a leadership position in a trade association, and he serves as a mentor to at-risk youth. He relocated away from the circumstances and situations linked to his past criminal behavior, and he has been sober for at least six years. Critical to his successful rehabilitation is Applicant’s unconditional acknowledgement of his past poor judgment and criminal conduct. Given the totality of the evidence, I conclude that AG ¶ 32(d) applies.

Applicant has accepted responsibility for his past criminal behavior. Sufficient time has elapsed, circumstances have changed, and Applicant has demonstrated successful rehabilitation to sufficiently mitigate the criminal conduct security concerns.

Guideline E, Personal Conduct

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.

Under Guideline E, the SOR cross-alleges the criminal conduct previously alleged under Guideline J. Criminal behavior or rule violations trigger AG 16(d)(3):

¹³ See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

¹⁴ *Id.*

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:

(3) a pattern of dishonesty of rule violations.

Applicant's criminal behavior spanned five incidents over a 22-year period.¹⁵ Thus, AG ¶ 16(d)(3) applies.

The following mitigating condition is potentially relevant:

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 the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur:

As discussed above, Applicant has unconditionally accepted responsibility for his past criminal behavior. His relocation, new employer, constructive community involvement, and sobriety, are all positive steps to alleviate the stressors, triggers, and circumstances that contributed to his past misconduct. Thus, AG ¶ 17(d) applies.

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 relevant 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.

¹⁵ The Government did not establish any criminal conduct as to SOR ¶¶ 1.a. and 1.c.

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 light of all the facts, I have considered the potentially disqualifying and mitigating conditions. I have incorporated my comments under Guidelines J and E and the factors in AG ¶ 2(c) in this whole-person analysis.

Applicant sincerely acknowledges his past poor judgment and criminal behavior, and he presented tangible evidence of rehabilitation and lifestyle changes – namely his sobriety and academic endeavors. Taken with his honorable military service and other changed circumstances, such criminal behavior and poor judgment are unlikely to recur. I conclude Applicant sufficiently mitigated the criminal conduct and personal conduct security concerns.

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
Subparagraphs 1.a. – 1.g.:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a.	For Applicant

Conclusion

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

Eric H. Borgstrom
Administrative Judge