DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: D. Christopher Russell, Esq.

08/06/2018

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. His background includes six incidents during 2003-2015 in which he was arrested or charged or convicted of criminal offenses, many of which are relatively low-level matters (e.g. disorderly conduct). Taken together as a whole, as opposed to being viewed in a piecemeal fashion, the multiple incidents reflect a recurring pattern of poor judgment or an unwillingness to abide by rules and regulations or both. Although he presented a good case in reform and rehabilitation, it is too soon to tell if his recurring pattern is a thing of the past and that he will be a law-abiding person in the future. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on March 13, 2009.[1] This document is commonly known as a security clearance application. After completion of a background investigation, he was

[1] Exhibit 1.

granted a security clearance in about October 2009. He completed and submitted another security clearance application in October 2014 as part of a regular periodic reinvestigation.[2] Thereafter, on December 21, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline J for criminal conduct and Guideline E for personal conduct, although the latter is simply a cross-allegation to the matters alleged under the former.

Applicant, without the assistance of counsel, answered the SOR on January 29, 2017. He admitted the allegations and provided explanations in a ten-page memorandum. He also requested a decision based on the written record in lieu of a hearing. He changed his mind in August 2017 and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on August 10, 2017, and a hearing was scheduled for September 28, 2017. The hearing was postponed at Applicant's request. The case was reassigned to me on October 18, 2017. The hearing took place as scheduled on April 12, 2018. Applicant appeared with counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-7. Applicant offered documentary exhibits, which were admitted as Exhibits A-H. Applicant called three character witness and presented his own testimony. The hearing transcript (Tr.) was received on April 24, 2018.

Procedural Matters

With the agreement of counsel, I took administrative or official notice that the state criminal statute to which Applicant pleaded guilty to, as alleged in SOR ¶ 1.c, is a misdemeanor offense, not a felony offense as alleged.[3]

Findings of Fact

Applicant is a 31-year-old employee who is seeking to retain a security clearance previously granted to him. He has worked in the field of information technology since early 2009. He is currently employed as a web-software developer for a company in the defense industry. He has been so employed since mid-2015, and he currently earns an annual salary of about $87,000. He has a good employment record.[4] His former program manager appeared as a witness at the hearing, and she described Applicant

[2] Exhibit 2.

[3] Tr. 85-86; Appellate Exhibit I.

[4] Exhibits B, C, and E.

as follows: (1) an average to above average employee; (2) exemplary technical expertise; (3) strong work ethic; (4) interacted well with others; and (5) had a positive attitude about work.[5] In addition, three co-workers submitted highly favorable letters of recommendation in which they described Applicant's attributes as a good employee as well as their opinions that Applicant is a trustworthy person who is suitable for continued access to classified information.[6]

Applicant's formal education includes a high school diploma awarded in 2004. He then attended college during 2006-2008, with the award of a bachelor's degree in computer science in 2011. He married for the first time in 2012 and divorced in 2015. He married for the second time in 2018. He has seven minor children in his household; three from his first marriage; two from his current marriage; and two stepchildren.

Applicant does not dispute his history of criminal activity.[7] Four of the six incidents occurred during 2003-2006, when he was in high school or shortly thereafter before he left his state of residence to attend college in 2006. He disclosed the four incidents in his 2009 security clearance application. The last two incidents occurred in 2010 and 2015, after the Defense Department granted him a security clearance in 2009. He disclosed the 2010 incident (mistakenly as 2012) in his 2014 security clearance application. The incidents are discussed below *seriatim*.

The first incident occurred on October 30, 2003, when the then 17-year-old Applicant was charged with the misdemeanor offense of possession of marijuana.[8] He pleaded guilty to the charge in April 2004, but the judgment of guilty was deferred for one year provided there were no further criminal charges and all conditions were met, the case would be dismissed. The conditions specified no use, possession, or consumption of alcohol or a controlled substance. The state court issued an order to show cause in August 2004 and scheduled the case for a probation violation hearing. In due course, he was found guilty as charged with possession of marijuana, the delay for the deferred sentence was revoked, and a conviction was entered. The state court sentenced him to pay a total of $1,010; ten days in jail; seven months of probation; and suspended his driver's license for 30 days followed by restrictions for 150 days. He was discharged from probation ahead of schedule in October 2004.

The second incident occurred on July 22, 2004, when Applicant (still a minor) was charged with operating a vehicle with the presence of a controlled substance.[9] This incident was the trigger for the order-to-show-cause and probation-violation hearing mentioned in the previous paragraph. Several months later in June 2005, he pleaded

[5] Tr. 68-82.

[6] Exhibits D-1, D-2, and D-3.

[7] Answer to SOR; Exhibits 3-7 and A, F, and H.

[8] Exhibit A at 1-5.

[9] Exhibit A at 6-11.

guilty to a reduced charge of operating a vehicle while visibly impaired. The state court sentenced him to a $1,000 fine; 30 hours of community service; 15 days in jail with credit for 1 day and 14 days suspended; continued counseling, no use, possession, or consumption of alcohol or controlled substances and random testing for the same; and 12 months of probation. About three months later in September 2005, the state court issued an order to show cause to Applicant to show why he should not be held in criminal contempt of court for failure to perform community service, as ordered. That matter was resolved when he completed the community service in December 2005. The state court scheduled a probation-violation hearing in March 2006, based on charges brought against him in February 2006. The matter was removed from the court's docket and Applicant was discharged from probation in April 2006.

The third incident occurred on August 31, 2004, when Applicant (a few months shy of his 18th birthday in October) was charged with the offense of minor in possession of alcohol.[10] The charge was dismissed in September 2004 without a finding of guilt or a sentence.

The fourth incident occurred on February 10, 2006, when the then 19-year-old Applicant was charged with (1) assaulting, resisting, or obstructing a police officer, and (2) possession of a controlled substance, second offense, a felony-level offense.[11] The former charge was dismissed and the latter charge was reduced to a misdemeanor offense of possession of a controlled substance (marijuana) in April 2006.[12] The state court sentenced him to a $1,500 fine; 365 days in jail with credit for 1 day served and 364 days suspended; 90-day tether; 18 months of probation; random drug and alcohol testing; no use, possession, or consumption of alcohol or illegal drugs; suspension of his driver's license for 30 days followed by restrictions for 150 days; and weekly testing for the presence of THC (the active ingredient in marijuana). In August 2006, the state court gave him permission to move to another state to enroll in college and study computer science. He began his college studies in October 2006, and he was formally discharged from probation in November 2006. He had no drug- or alcohol-related incidents in his college years during 2006-2008, and he has had no such incidents since beginning employment in 2009.

The fifth incident occurred on March 31, 2010, when the then 23-year-old Applicant was cited for disorderly conduct and released.[13] The statement he provided his company's security office was different than what is reported in the police report. Applicant was in a confrontation with a person who accused him of assault after Applicant intervened and attempted to break up a previous confrontation in a store parking lot between the person and another individual. The matter was dismissed without a conviction after Applicant completed an anger-management program.

[10] Exhibit A at 12.

[11] Exhibit A at 13-18.

[12] Exhibits F and H; Appellate Exhibit I.

[13] Exhibit 4.

The sixth incident occurred on April 19, 2015, when the then 28-year-old Applicant was arrested for disorderly conduct/domestic violence stemming from an argument with his then wife.[14] The incident took place the day before Applicant and his then wife separated in light of the pending divorce later that year. He was served with a protection order while in jail and released. The matter was dismissed without a conviction after he completed a two-day anger-management program.

Concerning the last two incidents, Applicant concedes that he "really messed up."[15] He stated that he got caught up in situations where emotions were running high and he put himself in positions where he was cited and arrested by the police. He believes additional charges of disorderly conduct are highly unlikely, because he has learned his lesson.[16]

Besides the former program manager, Applicant presented two witnesses, both older men with military experience, who are involved with Applicant through their church membership. The first witness served as Applicant's instructor in the church's 20 to 22 week discipleship training course, which Applicant completed in May 2012.[17] He stated that Applicant had been saved, that he was a faithful attendee of church services, and that he was a trustworthy, reliable, and truthful person. The witness saw a change in Applicant in that he was easy to get along with, not easy to upset, and in better control of his life.[18] The second witness, a deacon in the church, worked extensively with Applicant during a church construction project. He stated that he found Applicant to be a reliable and trustworthy person who was also a loving father. In addition, Applicant presented highly favorable letters of recommendation from a police officer from Applicant's home town, his father, and a former employer from his home town.[19]

Law and Policies

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.[20]

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[14] Exhibit 5.

[15] Tr. 41.

[16] Tr. 36-37.

[17] Exhibit G.

[18] Tr. 52.

[19] Exhibits D-4, D-5, and D-6.

[20] The 2017 AG are available at http://ogc.osd.mil/doha.

It is well-established law that no one has a right to a security clearance.[21] As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[22] 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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[23] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[24]

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[25] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[26]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[27] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[28] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[29] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[30]

Discussion

The criminal conduct and personal conduct concerns are discussed together because they are based on the same set of facts and circumstances.[31] In analyzing this

[21] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[22] 484 U.S. at 531.

[23] 484 U.S. at 531.

[24] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[25] Directive, ¶ 3.2.

[26] Directive, ¶ 3.2.

[27] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[28] Directive, Enclosure 3, ¶ E3.1.14.

[29] Directive, Enclosure 3, ¶ E3.1.15.

[30] Directive, Enclosure 3, ¶ E3.1.15.

[31] AG ¶¶ 30 and 15.

case, I considered the following disqualifying and mitigating conditions as most pertinent under Guidelines J and E, respectively:

> AG ¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
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> AG ¶ 31(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;
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> AG ¶ 31(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program;
>
> 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;
>
> AG ¶ 32(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement;
>
> 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; and
>
> 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.

Applicant's background includes six incidents during 2003-2015 in which he was arrested or charged or convicted of criminal offenses, many of which are relatively low-level matters (e.g. disorderly conduct). Taken together as a whole, as opposed to being viewed in a piecemeal fashion, the multiple incidents reflect a recurring pattern of poor judgment or an unwillingness to abide by rules and regulations or both. It is noteworthy that the four incidents during 2003-2006 were considered in 2009, when the Defense Department determined that Applicant was then an acceptable security risk. Subsequently, he was involved in two additional incidents of criminal activity, the first in

2010 and the second in 2015. Both occurred when Applicant was in his 20s with a full-time job as a cleared employee in the defense industry. He promptly reported both incidents. Neither was particularly serious nor resulted in a conviction. But taken together with the four previous incidents, I am left with substantial doubt about whether Applicant can stay out of trouble. The frequency and recency of the incidents give me pause. The trend line, six run-ins with the law during a 12-year-period, is not in Applicant's favor.

Applicant's history of criminal activity reflects a pattern of poor judgment or unwillingness to abide by rules and regulations or both. Although he presented a good case in reform and rehabilitation—for example, his extensive involvement in his church—it is too soon to tell if his recurring pattern is a thing of the past and that he will be a law-abiding person in the future. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. Nevertheless, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a -1.d:	Against Applicant
Subparagraph 1.e:	For Applicant[32]
Subparagraphs 1.f -1.g:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge

[32] As far as I can determine, Applicant was involved in six not seven incidents, as alleged in the SOR. The matters in SOR ¶¶ 1.d and 1.e concern the same incident, and so this duplication is resolved in Applicant's favor.