



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



In the matter of:)
)
) ISCR Case No. 16-02502
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines J (criminal conduct) and E (personal conduct). Clearance is denied.

Statement of the Case

On August 18, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On December 21, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Exec. Or. 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines J and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that her case be submitted to an administrative judge for a determination whether her clearance should be granted or denied.

Applicant subsequently responded to the SOR. On February 27, 2017, Department Counsel was ready to proceed. On May 16, 2017, DOHA assigned Applicant's case to me. On May 18, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for June 15, 2017. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibit (AE) A, which was received into evidence without objection. I held the record open until July 28, 2017, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE B through E, which were received into evidence without objection. On June 23, 2017, DOHA received the hearing transcript (Tr.).

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which are applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective on June 8, 2017. I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact

In her SOR answer, Applicant admitted SOR ¶¶ 1.a and 1.b, and denied SOR ¶ 1.c, with explanations, and provided documentation. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 28-year-old janitorial custodian employed by a defense contractor since June 2015. She seeks a security clearance to enhance her position within her company. (GE 1; Tr. 10-11, 30-31)

Applicant dropped out of high school when she was 16 and earned her GED in 2011. (Tr. 12-13) She was awarded an American Red Cross certificate as a nurse assistant in 2014. (Tr. 17) Applicant married in January 2016, and has one minor child from her marriage, one minor child from a previous relationship, and one minor stepchild. (GE 1, Tr. 14-16) Applicant's husband is employed full-time as store manager for a parts store. (Tr. 16)

¹ The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

Criminal Conduct/Personal Conduct

Personal conduct concerns are cross-alleged under criminal conduct concerns. These concerns stem from three separate assault-related arrests in 2009, 2012, and 2014. Applicant discussed these arrests during her December 12, 2015 Office of Personnel Management Personal Subject Interview (OPM PSI), in her SOR answer, and during her testimony. (GE 3)

In September 2009, Applicant was driving accompanied by a female friend when her friend saw Applicant's cousin driving the car ahead of them. Her friend instructed Applicant to cut her cousin off and stop her car so her friend could fight her cousin. Applicant refused and passed her cousin's car while her friend "shouted abuse" at her cousin until her car was out of sight. A few days later, Applicant was pulled over by the police and informed that her cousin had filed a police report regarding the incident. Applicant was taken into custody and charged with reckless endangerment. During her December 2015 OPM PSI, she stated that she was driving the car. (GE 3) However, during her hearing, Applicant testified that her friend was driving the car and not her. (Tr. 18-10) In any event, in December 2009, Applicant went to trial and was found not guilty. (SOR answer; GE 3; Tr. 19)

In May 2012, Applicant was pregnant and living with her boyfriend and father of her oldest child. She testified that her boyfriend was intoxicated, became irate, hit her, and she hit him back to defend herself. Applicant then called the police. Both she and her boyfriend were arrested and charged with domestic violence assault. Applicant and her boyfriend both refused to press charges against each other. In July 2012, the prosecuting attorney moved that the case be nolle prosequi as there was "no victim." (SOR answer; GE 3; Tr. 20-21)

In September 2014, Applicant and her stepsister were involved in a physical altercation at the home of Applicant's mother. Their relationship had deteriorated following the divorce of her parents over a number of issues. Applicant testified that her stepsister started the altercation by pulling her hair. The two of them ended up fighting using closed fists. Applicant broke her stepsister's nose. Applicant's stepsister claimed that she "chipped her tooth of a bridge with six teeth with no busted lip." Her stepsister filed a police report that led to Applicant being arrested for third degree assault. The district attorney noted in his pleadings that Applicant broke her stepsister's nose and injured her jaw. (SOR answer; GE 3, GE 4; Tr. 21-24)

In May 2017, Applicant pled guilty to amended harassment and was sentenced to 30 days imprisonment, suspended for two years, placed on probation for two years, ordered to pay a \$25 fine, \$25 to the victim's compensation fund, court costs as assessed by the court clerk, and assessed a bail bond fee of \$100. Applicant also agreed to pay her stepsister about \$11,000 at the rate of \$500 a month to compensate her for medical bills. Applicant disputes the amount of damages claimed by her stepsister adding that she accepts responsibility for breaking her nose, but not damaging her teeth. (SOR answer; GE 3, GE 4; AE A;

Tr. 24-29) Applicant's probation officer advised that Applicant is in good standing and has followed through with all of her obligations. (AE B)

Character Evidence

Applicant stated that is "very honest about situations." She stated that her employer would say that she is hard working, reliable, on time, and always does her job. (Tr. 30) Applicant's employer recommended that she be granted a secret security clearance. (AE D) Her latest employee performance evaluation was favorable and stated that she "is such a good employee and an asset" to the company. (AE E)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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 adjudicative guidelines. 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 "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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1.

Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination

about applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Criminal Conduct

AG ¶ 30 articulates the security concern concerning criminal conduct:

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.

The Government established its case under Guideline J through Applicant's admissions and the evidence presented. A review of the evidence supports application of three criminal conduct disqualifying conditions: 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"; 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 person was formally charged, prosecuted, or convicted"; and AG ¶ 31(c) "individual is currently on parole or probation."

Four criminal conduct mitigating conditions under AG ¶¶ 32 are potentially applicable:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(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 ¶ 32(d) is partially applicable. Applicant has done everything that could be expected of her since her May 2017 conviction. Her two-year probation ends in May 2019. Given the cumulative and repetitive nature of Applicant's conduct, none of the other mitigating conditions are fully applicable. Applicant demonstrated remorse during her hearing and wants to put these events behind her. However, additional time without further misconduct is required.

Personal Conduct

The security concern relation to the Guideline for personal conduct 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.

The Government established its case under Guideline E through Applicant's admissions and the evidence presented. A review of the evidence supports application of AG ¶ 16(d) as a disqualifying condition that could raise a security concern:

(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: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information . . . ; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶ 17 provides three potential mitigating conditions:

(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;

(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

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

The discussion under criminal conduct is incorporated in this section. Personal conduct concerns were raised as a result of Applicant's three arrests and one conviction discussed above. Partial application of AG ¶¶ 17(d) and 17(e) is warranted for reasons discussed under criminal conduct. However, full application is precluded as a result Applicant's current probation status, and the repetitive nature of similar offenses.

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 the 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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guidelines J and E is incorporated in this whole-person section. However, further comments are warranted.

Applicant's positive employment recommendation, employee performance evaluation, and probation officer's report weigh in her favor. She is attempting to recover from the fallout of her past behavior. Applicant is married now and responsible for raising her young children.

Security clearance adjudications are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Applicant's three assault-related arrests and her recent 2017 conviction and current probationary status do not reflect favorably on Applicant. I recognize and applaud the efforts Applicant has made and encourage her to continue with her current course of action. However, further time is required to put her past misconduct behind her, especially given the fact she is currently on probation.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

Formal Findings

Formal findings For or Against the 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	AGAINST APPLICANT
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	AGAINST APPLICANT

Conclusion

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

Robert Tuider
Administrative Judge