



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 16-02673
	)	
Applicant for Security Clearance	)	

Appearances

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

10/31/2017

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 22, 2012 (SCA-1), and another on June 2, 2014 (SCA-2). On September 12, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted 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 (2006 AG).

Applicant answered the SOR on October 10, 2016, and December 6, 2016, and requested a decision on the record without a hearing. On February 3, 2017, the Government sent a complete copy of the file of relevant material (FORM) to Applicant, including documents identified as Items 1 through 9. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on February 15, 2017, and did not respond. Items 1 through 3 are the pleadings in the case. Items 4 through 10 are admitted into evidence.

I admitted the attachments to Applicant's SOR answer into evidence as Applicant Exhibits (AX) A through I, The case was assigned to me on October 2, 2017.

On June 8, 2017, the DOD implemented new AG (2017 AG).¹ Accordingly, I have applied the 2017 AG.² However, I have also considered the 2006 AG, because they were in effect on the date the FORM was completed. I conclude that my decision would have been the same under either version.

Findings of Fact³

Applicant, age 45, married his second wife in 2011. He does not have any children. He received his G.E.D. in 1990. He has worked for his current employer since 2015. The DOD granted Applicant a security clearance in 2005.

The SOR alleged that Applicant was arrested and charged with DUI offenses twice in 1992 and twice in 1998, with driving while his license was suspended or revoked twice in 1992 and once in 1999, and with violating his probation in 2004 (SOR ¶¶ 1.a through 1.h). It also alleged that Applicant failed to disclose his four DUI offenses on SCA-1 or SCA-2 (SOR ¶¶ 1.i and 1.j), and that he falsified material facts about them during his 2014 and 2016 security clearance interviews (SOR ¶¶ 1.k and 1.l). Applicant admitted each SOR allegation in his SOR answer.

In 2012, Applicant signed SCA-1 certifying that the statements made therein were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." In 2014, he signed SCA-2 certifying same. The "Section 22 - Police Record" questions in SCA-1 and SCA-2, and Applicant's responses thereto, are identical. He was interviewed twice in connection with SCA-2, in 2014 and 2016.⁴

In "Section 22 - Police Record" of SCA-1 and SCA-2, Applicant answered "No" to the question of whether he had "EVER been charged with an offense involving alcohol or drugs" and otherwise failed to report his four DUI offenses. In the "Additional Comments" section of SCA-1, he stated "I am a 100% law abiding American" and a

¹ On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD-4 ¶ B, *Purpose*). The SEAD-4 became effective on June 8, 2017 (SEAD-4 ¶ F, *Effective Date*). The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD-4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD-4 ¶ C, *Applicability*).

² ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

³ Unless otherwise indicated by citation to another part of the record, I extracted these facts from the SOR Answer (Item 3), SCA-1 (Item 4), and SCA-2 (Item 5). Because Applicant did not respond to the FORM and affirmatively waive any objection to the reports of his security clearance interviews (Item 6 through 8), I will consider only those facts contained therein that are not adverse to Applicant, unless they are contained in other evidence or based upon Applicant's admissions in the SOR Answer.

⁴ Item 4 through 7.

“straight laced . . . do the right thing US citizen.” In the “Additional Comments” section of SCA-2, he stated “I am a 100% law abiding American citizen” and a “do the right thing American.”⁵

During his 2014 security clearance interview, he initially confirmed his “no” response to having ever been charged with a criminal offense involving alcohol. Then, after being confronted with his DUI history, Applicant admitted to only his May 1992 DUI offense, stated that he did not agree with any of the other DUI offenses, and then clarified that he has only ever received one DUI in his entire lifetime. He claimed that he did not list his May 1992 DUI offense on SCA-2 because it happened a long time ago and he did not realize that it was an “EVER” question.⁶

During his 2016 security clearance interview, he provided details about his two 1992 DUI offenses. Initially, he vehemently denied his two 1998 DUI offenses, and averred that perhaps the record was incorrect because he had never been arrested for DUI more than twice in his life. Then, after further questioning, he eventually admitted his two 1998 DUI offenses. He admitted that he lied about his number of DUI offenses on SCA-2, and during both his 2014 and 2016 security clearance interviews, because he was embarrassed that he had been arrested so many times.⁷

In his SOR answer, Applicant acknowledged that his past criminal history resulted from “very poor choices” he made as a “very young man.” He regrets “every single incident.” He blamed “some” of those choices on his tumultuous childhood. He attributed his lack of candor during the security clearance process to having a very hard time talking about his past and being embarrassed by it. He is “extremely embarrassed” and “very sorry” for his “actions.” Applicant averred that he is a “good person” and has “tried to put those 20+ years” in his past. He further contended that his current wife has made him a “better man,” and put him “on the path of straight and narrow, period!”

As a defense contractor, Applicant deployed to Kuwait to serve the U.S. Army between 2004 and 2005, and to Afghanistan between 2008 and 2013. For his service, he received a certificate of appreciation in 2011, and numerous coins.⁸ He has also been highly regarded for his work performance.⁹

⁵ Item 4 at 32-33, and 41; Item 5 at 33-34, and 41.

⁶ Item 7 at 3-4.

⁷ Item 6 at 3-4.

⁸ AX A and E.

⁹ AX B, C, and F through AX I.

Policies

“[N]o one has a ‘right’ to a security clearance.”¹⁰ 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.”¹¹ 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.”¹²

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, an administrative judge applies these guidelines 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 and 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 that 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.”¹³ 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.¹⁴ “Substantial evidence” is “more than a scintilla but less than a preponderance.”¹⁵ The guidelines presume a nexus or

¹⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹¹ *Egan* at 527.

¹² EO 10865 § 2.

¹³ EO 10865 § 7.

¹⁴ See *Egan*, 484 U.S. at 531.

¹⁵ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.¹⁶ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹⁷ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹⁸

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."¹⁹ "[S]ecurity clearance determinations should err, if they must, on the side of denials."²⁰

Analysis

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

¹⁶ See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹⁷ Directive ¶ E3.1.15.

¹⁸ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁹ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

²⁰ Egan, 484 U.S. at 531; See also AG ¶ 2(b).

Based on the uncontroverted SOR allegations and Applicant's admissions to deliberately falsifying, concealing, and omitting material facts about his DUI history from SCA-1 and SCA-2 and during his 2014 and 2016 security clearance interviews, the following disqualifying conditions under this guideline apply:

AG ¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶ 16(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant's pattern of criminal misconduct, as alleged in SOR ¶¶ 1.a through 1.h, establishes the following additional disqualifying condition under this guideline:

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.

Applicant was between the ages of 19 and 26 when he was arrested for his four DUI offenses, and three "driving while license suspended or revoked" offenses. He was age 32 when arrested for his probation violation. These offenses collectively establish a pattern of questionable judgment that calls into question Applicant's ability or willingness to comply with laws, rules, and regulations. Nevertheless, given the time that has passed without the recurrence of similar offenses, he could have demonstrated successful rehabilitation were it not for his lack of candor about his DUI history during his security clearance investigations process. Based on all the evidence, Applicant has not demonstrated a sufficient pattern of modified behavior for me to conclude that his questionable judgment is behind him.

While I considered the circumstances of his upbringing, service to the U.S. Army, especially as relates to his combat zone duty, and stellar work performance, they do not suffice to overcome the concerns under this guideline, especially as relates to his lack of candor during the security clearance process.

An applicant's completion of a security questionnaire is the initial step in requesting a security clearance and the investigative process is contingent upon the honesty of the applicant. Beginning with an applicant's responses in the application,

The security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program.²¹

I have serious doubts about Applicant's current reliability, trustworthiness, and good judgment. Neither of the potentially applicable mitigating conditions under this guideline applies.²²

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

I have incorporated my comments under Guideline E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the

²¹ ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

²² AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts); 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).

context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his pattern of criminal misconduct, and his lack of candor about his DUI history on two security clearance applications and during two security clearance interviews. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 2.a – 2.l: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge