



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 18-00103
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Brittany Muetzel, Esq., Department Counsel  
For Applicant: *Pro se*

09/06/2018

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on July 8, 2016. On January 31, 2018, 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 (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on March 16, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 17, 2018,

and the case was assigned to me on May 18, 2018. On the same day, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 11, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I kept the record open until June 25, 2018, to enable him to submit additional documentary evidence. He timely submitted AX C and D, which were admitted without objection. DOHA received the transcript (Tr.) on June 20, 2018.

### **Findings of Fact<sup>1</sup>**

In Applicant's answer to the SOR, he commented on each of the allegations but did not expressly admit or deny them. I have treated his answers as denials.

Applicant is a 53-year-old field service technician employed by a defense contractor since February 2016. He has worked for federal contractors for about 28 years. (Tr. 19, 75.) He stated in his SCA that he had never received a security clearance. However, he testified that he received a security clearance in 2016 and a "red badge" from his current employer (probably an interim clearance), and that he previously held a clearance in 2003. (Tr. 7, 76; GX 1 at 39.)

Applicant married in June 2002 and divorced in July 2009. He married his current spouse in July 2011. He has two adult children from previous relationships and four stepchildren, ages 31, 28, 25, and 14.

The SOR alleges 11 arrests and use of marijuana from about 1980 to at least 2013. The arrests and marijuana use are alleged as personal conduct under Guideline E but are not cross-alleged under Guideline H (Drug Involvement and Substance Misuse) or J (Criminal Conduct). The evidence concerning each of the allegations in the SOR is summarized below. The allegations are discussed in chronological order rather than the order in the SOR, except for SOR ¶ 1.i, which is discussed last.

**SOR ¶ 1.k: arrested in October 1983 and charged with felony aggravated sexual battery.** Applicant testified that he was arrested after his ex-wife's sister accused him of making "an advance" to her, but she later admitted that her accusation was false. (Tr. 37-37.) The court records do not reflect the disposition of this arrest. (GX 2 at 1.)

**SOR ¶ 1.j: arrested in July 1984 and charged with felony abduction and assault.** Applicant testified that he was arrested on a weekend when he was scheduled for visitation with his daughter. His daughter's mother resisted his efforts to take his daughter, and he pulled his daughter away from her and left. He was accused of

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<sup>1</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

kidnapping his daughter and assaulting his daughter's mother.<sup>2</sup> (Tr. 37-38.) The charges were dismissed. (GX 2 at 1.)

**SOR ¶ 1.i: arrested in October 2004 and charged with contempt of court.** The court records reflect that Applicant was fined. (GX 2 at 1-2.) At the hearing, Applicant was unable to provide any information about this arrest. (Tr. 39.)

**SOR ¶ 1.h: arrested in June 2005 and charged with felony breaking and entering with intent to commit a felony, trespassing, and using profane or threatening language over a public airway.** The court records do not reflect the disposition of the felony charge of breaking and entering. Applicant testified that he was charged breaking and entering after he was in an argument with his ex-wife, talking from the outside of her cousin's house through a window, and during the argument he pulled down an exterior storm window and broke it. He was not arrested at the scene, but he later learned that there was a warrant for his arrest, and he turned himself in. He testified he was convicted and sentenced to seven days in jail, which he completed on weekends, and placed on probation for a year. (Tr. 40.)

The court records reflect that Applicant also was convicted of trespassing, a misdemeanor, and sentenced to 12 months in jail, with 11 months suspended, and placed on unsupervised probation. He was convicted of the profane-language offense and sentenced to 12 months in jail, suspended, and unsupervised probation. (GX 2 at 2.)

**SOR ¶ 1.g: arrested in September 2005 and charged with driving under the influence (DUI), assault and battery, felony by eluding police department and endangering a person or police car, and felony hit-and-run resulting in personal injury.** Applicant testified that this incident occurred after he and his ex-wife had a telephonic argument. He decided to drive to his father's house after the argument, and his ex-wife crossed his path and was driving in front of him. He followed her to his father's house, and his ex-wife called the police. Applicant backed out the driveway and hit his ex-wife's car, but he kept on driving until he was stopped by another police car in a parking lot. (Tr. 44-45.) He was convicted of DUI and sentenced to 12 months in jail, with 11 months suspended, and placed on unsupervised probation. He was convicted of assault and battery on a family member and sentenced to 12 months in jail, suspended. He was convicted of eluding the police, but no sentence is reflected in the court records. He was convicted of a hit-and-run resulting in personal injury and property damage, and sentenced to 12 months in jail, suspended. (GX 2 at 3.)

**SOR ¶ 1.f: arrested in January 2006 and charged with violating a protective order.** Applicant violated a protective order by calling his wife on the telephone. (Tr. 48.) He was convicted and sentenced to 12 months in jail, with 11 months and 20 days suspended. (GX 2 at 3.)

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<sup>2</sup> Applicant referred to his daughter's mother as his wife, but his SCA does not reflect that he was married in 1984.

**SOR ¶ 1.e: arrested in February 2007 for using profane and threatening language over a public airway.** Applicant was involved in a conversation with a “friend of a friend.” The conversation “got a little out of control,” and profanities were exchanged. (Tr. 49.) Applicant was convicted, but the court records do not reflect a sentence. (GX 2 at 4.)

**SOR ¶ 1.d: arrested in June 2007 and charged with assault and battery on a family member.** Applicant was arrested for grabbing his 20-year-old son, who was living with Applicant and had brought a woman to Applicant’s home for the night. Applicant told his son to pack his belongings and move out. His son called the police, who arrested Applicant. (Tr. 50-51.) The charges were *nolle prosequi*. (GX 2 at 4.)

**SOR ¶ 1.c: arrested in May 2009 and charged with assault and battery.** Applicant testified that this arrest occurred after he told a woman with whom he had a relationship that he wanted to terminate the relationship. He asked her to leave his home, and she refused. He suggested that they go outside and talk on the front porch, but when she stepped outside he closed the door and locked her out. She called the police and accused Applicant of assaulting her. When the case went to trial, the woman recanted her accusation. (Tr. 53-54.) The charges were dismissed. (GX 3.)

**SOR ¶ 1.b: arrested in May 2012 and charged with assault on family member.** This arrest, as well as the May 2009 and June 2007 arrests arose after loud arguments. On this occasion, Applicant and his wife had a loud argument outside their home and then went inside. A neighbor called the police and reported that they were having a physical altercation. (Tr. 54-56.) Applicant was found not guilty. (GX 2 at 4.)

**SOR ¶ 1.a: arrested in April 2013 for drunk in public, violation of protective order, and trespass.** Applicant testified that his wife obtained a protective order after an argument. Applicant admitted that he tends to be “boisterous” and a “little intimidating,” but he denied any physical contact. After his wife obtained the protective order, he contacted her and told her that he intended to go to the marital home and gather his tools and some clothing. A neighbor saw him and called the police. He testified that he misunderstood the protective order and thought it required him to stay away from his wife but did not prevent him from being on the property. (Tr. 20-21, 56-57.) Applicant was convicted *in absentia* of being drunk in public and fined \$250. The trespassing charge was dismissed. The court records do not reflect a disposition of the charge of violating a protective order.

Applicant testified that he was intoxicated when the arrests alleged in SOR ¶¶ 1.a-1.e, 1.g, 1.h, and 1.i-1.j occurred. He testified that at his trial following his April 2013 arrest, the judge offered him an opportunity to enter a rehabilitation program, which included treatment for substance abuse. He testified that he told the judge, “[Y]ou gave me an opportunity, and I will make sure that you don’t have to worry about seeing me anymore.” (Tr. 65.)

Applicant entered the rehabilitation program in May 2013 and completed it in September 2013. (AX C; AX D; Tr. 22.) He testified that, unlike earlier treatment programs, he took this one seriously and stopped drinking. (Tr. 22-23.) He had completed a four-week rehabilitation program in January 2006, but he did not stop drinking after completing that program. (Tr. 46-47.) Although he has never been diagnosed by a medical professional as having an alcohol use disorder, he believes that he is an alcoholic. (Tr. 73.) He has not consumed alcohol since he entered the rehabilitation program in 2013. (Tr. 72.) He attended Alcoholics Anonymous (AA) meetings while in the rehabilitation program. He realized that he had “given up on [himself],” that alcohol and marijuana were causing his behavior and disrupting his home life, and that he needed to change the way he dealt with problems. (Tr. 35.) He did not continue AA attendance after he completed the rehabilitation program, but he found a friend with similar alcohol-related problems, and they routinely call each other when they are “feeling a certain way about things.” (Tr. 62-63.)

Applicant and his wife have attended multiple sessions of marriage counseling from church-related providers and are determined to change their methods of resolving disagreements. (Tr. 26.) He testified that marriage counseling was “an eye opener” for him. Their most recent marriage counseling was about six months before the hearing. (Tr. 69.) His wife did not testify, but she attended the hearing to provide moral support for him. (Tr. 5.)

**SOR ¶ 1.I: used marijuana, with varying frequency, from about 1980 to at least 2013.** Applicant disclosed in his SCA that he first used marijuana in June 1980 and used it “every now and then with friends.” (GX 1 at 35-36.) At the hearing, he testified that he used marijuana two or three times a month, and that after 2005, his usage was “pretty frequent,” not daily but at least weekly. (Tr. 31.) He stopped using it in May 2013, when he entered the substance-abuse program.

A former employer submitted a letter supporting Applicant’s effort to obtain a security clearance. The former employer states that Applicant worked for him in 2009 and is a caring and considerate person and a hard worker who was willing to work extra hours to take care of customers. (AX B.) The commissioner of a youth athletic association, who has known Applicant for 20 years, states that he is well known for his work ethic, positive attitude, teamwork mentality, and leadership. He states that Applicant “is well respected throughout the organization for dedication to teaching young men discipline, perseverance, and manhood [while] learning the fundamentals of football, basketball, and baseball.” (AX A.)

### **Policies**

“[N]o 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 applicants

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 § 2.

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, 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.” Exec. Or. 10865 § 7. 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. 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## 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. . . .” The evidence summarized above is insufficient to establish the allegations in SOR ¶¶ 1.b, 1.c, 1.d, 1.j, and 1.k. However, the evidence is sufficient to establish the remaining allegations in the SOR and to raise the following potentially disqualifying conditions 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;

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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . (2) any disruptive, violent, or other inappropriate behavior; [and] (3) a pattern of dishonesty or rule violations . . . ;

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . ;

AG ¶ 16(f): violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

AG ¶ 16(g); association with persons involved in criminal activity.

AG ¶¶ 16(c), 16(d), and 16(e) are established by the evidence of Applicant's alcohol-related and drug-related misconduct. AG ¶ 16(f) is not established, because there is no evidence that Applicant's purchase, possession, and use of marijuana violated any “written or recorded commitment” to his employers “as a condition of

employment” between 1980 and 2013. However, AG ¶ 16(g) is established by his association with drug users and drug sellers.

The following mitigating conditions under this guideline are potentially applicable:

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;

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;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

AG ¶ 17(f): the information was unsubstantiated or from a source of questionable reliability; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(a), 17(d), 17(e), and 17(g) are established. Some of Applicant's offenses, such as the use of profane language alleged in SOR ¶ 1.e, were minor. All of Applicant's conduct was alcohol-related and occurred more than five years ago, before he decided to take a rehabilitation program seriously. He no longer consumes alcohol, uses marijuana, or associates with persons involved with drugs. He has openly disclosed his past misconduct and has reformed his behavior to eliminate vulnerability to exploitation, manipulation, or duress. He is actively involved in his community and enjoys an outstanding reputation as a role model in youth athletic activities. AG ¶ 17(f) is applicable to the allegations in SOR ¶¶ 1.b, 1.c, 1.d, 1.j, and 1.k, which are not supported by substantial evidence.

### **Whole-Person Concept**

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 applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).<sup>3</sup>

I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant was candid, sincere, remorseful, and credible at the hearing. He and his wife decided in 2013 to change past behavioral patterns and to support each other. They have received extensive marriage counseling and are actively working to preserve and strengthen their marriage in an alcohol-free and drug-free environment. After weighing the disqualifying and mitigating conditions under Guideline E and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his personal conduct.

### **Formal Findings**

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

Paragraph 1, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraphs 1.a-1.i:

For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman  
Administrative Judge

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<sup>3</sup> The factors are: (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.