



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 14-05187
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne M. Strzelczyk, Esq., Department Counsel
For Applicant: *Pro se*

05/17/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant has a long and recent history of criminal conduct and other adverse behavior. He did not mitigate the resulting security concerns about criminal and personal conduct. His request for a security clearance is denied.

Statement of the Case

On January 24, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew his eligibility for a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not

determine that it is clearly consistent with the national interest for Applicant to continue to hold a security clearance.¹

On July 9, 2015, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guidelines² for criminal conduct (Guideline J) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer)³ and requested a hearing. The case was assigned to me on January 8, 2016, and I convened the requested hearing on February 9, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 9.⁴ Applicant testified and presented Applicant's Exhibits (Ax.) A - C. Ax. C was received as a post-hearing submission. All exhibits were admitted without objection, and the record closed on February 25, 2016. A transcript of the hearing (Tr.) was received on February 22, 2016.

Findings of Fact

Under Guideline J, the Government alleged the following:

- In 1990, Applicant was charged and convicted of contributing to the delinquency of a minor, for which he was fined and assessed court costs, and that after he failed to pay the fine and costs, a warrant for his arrest was issued in May 1991 (SOR 1.a).
- In October 1991, he was charged with driving under the influence of alcohol (DUI) and consumption of alcohol by a minor (SOR 1.b).
- In September 1991, he was charged with, and reprimanded for, assault under the Uniform Code of Military Justice (UCMJ) (SOR 1.c).
- In July 1992, he was charged and found guilty of reckless operation (of a motor vehicle) (SOR 1.d).
- In October 1992, he was charged with DUI (SOR 1.e).

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ Included with Applicant's Answer are records pertaining to a 1992 change of duty station while Applicant was on active military duty. Tr. 11 - 12.

⁴ At Department Counsel's request, I have included, as Hearing Exhibit (Hx.) 1, a copy of the October 26, 2015 letter that forwarded Gx. 1 - 9 to Applicant, in accordance with Directive Section E3.1.13.

- In April 1995, he was charged under the UCMJ with disorderly conduct, unlawful entry, and assault, for which he received Article 15 non-judicial punishment (SOR 1.f).
- In January 1997, he was charged under the UCMJ with assault and criminal trespass (SOR 1.g).
- In November 2012, he was charged with (1) improper handling of a firearm in a motor vehicle, (2) resisting arrest, (3) operating a vehicle while impaired, (4) marked lanes, and (5) failure to wear a seatbelt, with count 1 dismissed and a finding of guilty entered on the remaining counts. Applicant served six days of a 180-day jail sentence, completed a driver's intervention program, and his license was suspended for six months (SOR 1.h).
- In September 2013, Applicant was cited for speeding (69 mph in a 45 mph zone) and driving on a suspended license (SOR 1.i).

Under Guideline E, the Government cross-alleged as adverse personal conduct the facts alleged in SOR 1.a - 1.i. In response to the SOR, Applicant admitted all of the allegations except for SOR 1.c and 1.e. In addition to the facts established through Applicant's admissions, I make the following findings of fact.

Applicant is 44 years old and works as a computer operator for a large defense contractor. He has held that position since July 2011. Applicant and his wife have been married since May 1991, and they have two adult children. Applicant served in the U.S. Army from January 1991 until retiring as a staff sergeant in July 2011. He held a security clearance throughout his military career. His eligibility for access to classified information was last reviewed in 2003. (Gx. 1; Tr. 5 - 6)

As alleged in the SOR, Applicant has been charged at least nine times with criminal conduct ranging from speeding and driving on a suspended license, to DUI and assault. Applicant's first offense in 1990, when Applicant was 18 years old, occurred because the passengers in the car he was driving were under 18 years old and were in violation of a curfew for minors. (Gx. 2; Gx. 4; Tr. 32 - 33)

In September 1991, after enlisting in the Army, Applicant was involved in a fight and was charged with assault under the UCMJ. Applicant claims he was new to his unit and was trying to break up a fight. He was given a written as well as an oral reprimand. In October 1991, he was arrested and charged with DUI and consumption of alcohol by a minor. (Answer; Gx. 2; Gx. 5; Tr. 33 - 34, 51 - 52, 65 - 66)

On October 20, 1992, Applicant was arrested and charged with DUI. In response to the SOR, he stated that he did not recall this event and he provided copies of military travel orders to support his claim that he was not in the country at the time of this event. However, he disclosed this arrest in a prior application for clearance, and he discussed the events leading up to his arrest in detail when he was interviewed by a Government

investigator in March 2014. At his hearing, he claimed that he did not remember this arrest. (Answer; Gx. 2; Gx. 3; Tr. 46 - 51)

On April 4, 1995, Applicant and his wife got into an argument that resulted in his wife leaving their residence to go to a friend's house nearby. Applicant had consumed at least six beers that evening and decided later to go to his wife's friend's house to talk to his wife. When he got there, a man he did not know was there and Applicant perceived that his wife was having an affair. Applicant ran into the house and attacked his wife. Military police arrested Applicant and charged him with assault, unlawful entry, drunk and disorderly, and resisting arrest. Through subsequent UCMJ Article 15 non-judicial punishment, Applicant received 14 days of extra duty, was restricted to base for 14 days, and was ordered to complete anger management and marital counseling. (Answer; Gx. 2; Gx. 7; Tr. 35 - 36, 64 - 65)

On January 1, 1997, Applicant, his wife, and another person assaulted a fellow soldier outside his residence. Applicant was charged with assault and criminal trespass. Available information does not indicate what, if any, punishment Applicant received. He had consumed alcohol prior to his arrest. (Answer; Gx. 8; Tr. 36 - 37, 65)

On or about July 30, 2012, Applicant was treated for a gunshot wound he received as the result of his involvement in a fight at his son's residence. Among other effects, the injury impacted his breathing and caused him a great deal of pain. His treatment included, in relevant part, a prescription for oxycodone to manage his pain. On or about November 25, 2012, Applicant met his sister and friends at a bar. Applicant did not drink throughout the evening, but before he left he was persuaded to have a shot of vodka. Applicant also had taken his pain medication around that time, but he thought he would be able to drive home unimpaired before it took effect. On the way home he was stopped by police when he changed lanes as he passed a tow truck on the shoulder of the road. The traffic stop resulted in his arrest for improper handling of a firearm in a motor vehicle (Applicant had a handgun permit from another state for a weapon that was in the car); operating a motor vehicle while impaired (OWI); resisting arrest; and failure to wear a seatbelt. On December 12, 2012, the firearm charge was dismissed, but Applicant was convicted of the other charges and ordered to surrender his driver's license for six months. Applicant also was sentenced to 180 days in jail, all but six of which were suspended for two years. Applicant testified that the resisting arrest charge resulted from his inability, because of his gunshot wound, to physically comply with the officer's directions when he was being apprehended. Applicant was tasered during the arrest and was transported to the hospital for treatment of breathing difficulties. (Answer; Gx. 1; Gx. 2; Gx. 9; Ax. B; Tr. 37 - 42, 43 - 46, 52 - 56, 61 - 64)

Applicant also has committed two significant traffic violations. On or about July 4, 1992, he was arrested and charged with reckless operation and obedience to traffic control device. On July 6, 1992, he pleaded no contest, was found guilty, and fined. On September 20, 2013, he was cited for driving 69 mph in a 45 mph zone, and with driving on a suspended license. The record does not reflect a disposition of this charge. (Answer; Gx. 2; Gx. 6; Tr. 34 - 35, 56 - 58)

Applicant provided information showing that he completed anger management training as directed by his command in 1995, and that he completed a court-ordered driver intervention program in April 2013 as a result of his November 2012 OWI arrest. In 2007, he was trained as a Unit Substance Abuse Prevention Leader. Applicant also provided several letters of support and recommendation from workplace associates. (Ax. A and C; Tr. 58 - 59)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the “whole-person” concept, those 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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy

⁵ See Directive, 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁸

Analysis

Criminal Conduct

The Government’s information, as well as Applicant’s admissions, support the allegations under this guideline. The facts established raise a security concern about criminal conduct that is addressed at AG ¶¶ 30, as follows:

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.

More specifically, available information requires application of the disqualifying condition at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*). Applicant has been arrested or charged with criminal offenses on at least nine occasions since he was 18 years old.

I have also considered the following pertinent mitigating conditions under 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 or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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

(c) evidence that the person did not commit the offense; and

(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.

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

All of these mitigating conditions might apply were it not for the fact that Applicant's criminal conduct recurred in 2012 after more than 15 years without running afoul of the law. While the conduct alleged at SOR 1.a - g occurred up to about age 26. His most recent infractions – the arrest for OWI and resisting arrest, as well as a serious speeding citation – occurred after he turned 40. All but two of the allegations (SOR 1.d and 1.i) involved the consumption of alcohol or other substance. Applicant's denial of SOR 1.e directly contradicted his disclosure of that event in a prior security clearance application. His denial of SOR 1.i is also directly contradicted by the Government's information. Applicant's information is not sufficient to mitigate the security concerns raised by the Government's information about his criminal conduct.

Personal Conduct

These facts also reasonably raise a security concern under this guideline that is expressed at AG ¶ 15, as follows:

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.

More specifically, the disqualifying condition at AG ¶ 16(c) applies here:

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 person may not properly safeguard protected information.

This record shows that Applicant has, throughout his adult life, exhibited poor judgment and a disregard for the law. He has been involved in multiple alcohol-related incidents, he has willingly disregarded the public safety by driving under the influence of alcohol or impaired by prescription painkillers, and he has resorted to physical violence to resolve interpersonal disputes. By contrast, of the mitigating conditions listed at AG ¶ 17, only the following are pertinent to these facts and circumstances:

(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; and

(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.

The available information probative of these issues does not support application of either mitigating condition. While still in the Army, Applicant received alcohol awareness counseling, and he was trained as a Unit Substance Abuse Prevention Leader. He also completed marital counseling and anger management training. Nonetheless, in 2012, after nearly 15 years without apparent incident, he again engaged in criminal conduct and reckless driving behavior. Applicant did not mitigate the security concerns about his judgment, reliability or trustworthiness.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has a good reputation in his workplace, and he served in the Army for over 20 years. His military service included two one-year deployments to Iraq. However, in light of his lengthy record of misconduct during and after his military career, this information is not sufficient to overcome the doubts about his suitability for access to classified information that have been raised by the Government's information. Because protection of the national interest is the principal focus of these adjudications, any lingering doubts must be resolved against Applicant.

Formal Findings

Formal findings 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.i:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge