



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



In the matter of:)
)
-----) ISCR Case No. 17-00791
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esquire, Department Counsel
For Applicant: Andrew P. Bakaj, Esquire

08/28/2019

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On April 30, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The action was taken under Executive Order 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) effective within the DOD on or after June 8, 2017. On May 21, 2018, Applicant timely submitted a response in which he admitted all allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on October 12, 2018. DOHA issued a notice of hearing on December 12, 2018, setting the hearing for January 17, 2019. The hearing was convened as scheduled.

The Government offered eight documents, accepted without objection as exhibits (Exs.) 1-8. Applicant offered testimony, introduced one witness, and 23 documents, which were accepted without objection as Exs. A-W. He was given through January 25, 2019, to submit additional documents. On that date, one additional reference was accepted without objection as Ex. X. Applicant was granted additional time to submit

additional material through March 1, 2019. The transcript (Tr.) was received on January 28, 2019. With no additional material received by March 1, 2019, the record was closed. Based on the exhibits, testimony, and record as a whole, I find Applicant mitigated all security concerns.

Findings of Fact

Applicant is a 53-year-old systems engineer who has served in the same position for the past 15 years. He has maintained a security clearance without incident since 2006. He excels at work. (Ex. J) Applicant has completed high school and attended some college. He is the divorced father of two grown children. The marriage was contentious and Applicant filed for divorce in 1995 based on her flagrant infidelity. In his spare time, he has volunteered with an organization devoted to women's health issues.

In September 1983, when he was 18 years old, Applicant was stopped for speeding as he enjoyed an end of summer meeting with a high school friend. Applicant had been drinking alcohol and also had used Listerine to freshen his breath. He was arrested after being administered a breathalyzer test (.01). He was charged with driving under the influence (DUI). He was not convicted of DUI, but was given probation before judgment. Applicant completed prescribed classes, as ordered.

In 1991, Applicant was charged with battery following a scuffle at a party where his former wife felt he was flirting with other women. She sprayed Mace (pepper spray) in his face, he lunged, and knocked her over. As he tried to wash the substance from his face, she called the police. The matter was put on the stet docket for a year, during which time no additional incidents occurred and the case was abandoned. Around this time, he learned his former spouse was pregnant, and their relationship improved. (Tr. 49)

Despite getting married in 1993, their relationship had started to decline by August 1994 after Applicant discovered his wife was seeing other men. The clues to this face were not subtle. (Tr. 49-50) A heated argument was verbally waged, and Applicant went to spend the night at his parents' vacant home. The next morning, police arrested him and he was charged with one count of abuse (child under 18), two counts of assault, and two counts of battery. Applicant continues to maintain no physical interaction occurred with either his now former spouse or a child. (Tr. 50-51) Indeed, he stressed that the children were away with his parents. On advice of counsel, and so as not to protract either the process or the marriage, Applicant accepted a plea deal and pled guilty to the battery charges. (see, e.g., Tr. 51, 83) He then attended anger management class, was sentenced to four years suspended confinement, and separated from his spouse.

In 1995, Applicant and his estranged spouse tried to reconcile for the benefit of the children despite his spouse's continued infidelities. (Tr. 52) Their reunion did not hamper her evening activities outside of the home. In February 1996, the spouse came home as Applicant was resting. The spouse went to her room and later emerged to call

the police, claiming he had “smashed [her] headboard and ruined some furniture.” (Tr. 53) She had a temporary protective order instituted, which forced Applicant to vacate the home, and a domestic violence suit was brought against him. He appealed that determination and the matter was subsumed into the on-going divorce and custody case. (Tr. 86) With her trying to harass him through legal process multiple times, Applicant hired a private investigator to “validate the fact that this is her motivation - to replace me, again . . . and move her boyfriend in. . . .” (Tr. 55, 85-86) Among the investigator’s findings were the spouse’s misuse of credit cards, leaving their two children unsupervised, and other incidents she could blame on him. (Tr. 55; Ex. K, Q-T)

In April 1996, Applicant and his estranged spouse had to talk about the children, bills, and the household. The spouse was unhappy taking on her share of responsibilities and threatened to file a harassment charge against him. (Tr. 55) For six months, he was unable to visit the children after he was charged with three counts of violating an ex parte protective order and one count of harassment. The harassment charges were dismissed. (Tr. 56) Around this same time, the spouse went to court to address the misuse of credit card and leaving a child unattended issues. (Tr. 56)

One night in May 1996, under much marital stress, Applicant had a beer or two with a friend. (Tr. 80-81) He later stopped at a diner for something to eat and had one drink. (Tr. 80) When he left, he was pulled over by a policeman who claimed that there had been a call reporting an intoxicated driver. No field sobriety test or breathalyzer was administered, but he admitted to having had alcohol. (Tr. 80) He was arrested and charged with DUI. As a result, he was ordered to one-year unsupervised probation. From this experience, he has learned to never take control of a vehicle after he has had any alcohol to drink, a rule he maintains today. (Tr. 58) Currently, Applicant only drinks a “limited” amount of beer at dinner or on a special occasion. (Tr. 81) He will use Uber if he has had any alcohol.

In 1997, after Applicant and his wife divorced on his petition. Applicant was awarded custody of the two children. They were aged about four and six, respectively. One weekend in June 2001, Applicant took the children to the home of a family friend for a birthday party. (Tr. 59) Applicant’s ex-wife and her most current boyfriend showed up at the event uninvited. (Tr. 59-60) Although it was not one of her weekends for child visitation, she wanted to take the children to make up for times she had failed to adhere to the established weekend custody time schedule.

Applicant was put into a “precarious” position by his ex-wife during a children’s party. (Tr. 60) Her boyfriend got involved and started arguing with Applicant to the point where he “got in [Applicant’s] face and pushed [him] to the ground.” (Tr. 60) While Applicant was on the floor, his ex-wife and her boyfriend took off in a vehicle with the children. That Monday, Applicant received a summons stating he had struck his ex-wife’s boyfriend, despite several witnesses later appearing in court testifying that it was Applicant who was struck. (Tr. 61) Despite their testimony, and despite the boyfriend testifying the ex-wife had started the incident, the judge decided Applicant was guilty of second-degree assault. The ex-wife requested a restraining order from the court, but

her request was denied as there was no evidence any party was in harm. (Tr. 62) She then decided to again request custody of the children. (Tr. 62-63)

In 2006, Applicant's daughter was about 13 or 14 and experiencing some behavioral issues. Applicant was still acting as both father and mother for the child. The daughter would complain to her mother that Applicant was too strict. Applicant's mother again tried to get a restraining order against Applicant in attempt to gain custody of both the children and take them with her to another state. Her two requests were denied by the court and Applicant continued maintaining custody of the children, with his ex-wife only permitted visitation. (Tr. 64-65)

In around 2008, Applicant began dating a woman he met through his volunteering. They enjoyed each other's company and, after about a year, they moved in together. At the time, the girlfriend had two daughters, aged 4 and 6. Applicant moved the four to a better community with superior schools and a safer area. The four got along well and "had a great time." (Tr. 40)

In May 2010, Applicant discovered that his teenage son was getting into the drug scene. Applicant's girlfriend and her daughters were living with Applicant at the time, and they were aware of the son's various forms of misbehavior, leading Applicant to pronounce that smoking was not permitted in the home. (Tr. 65) The son complained to his mother, Applicant's ex-wife. This led her to again pursue a temporary restraining order, this time alleging child abuse, against Applicant. Ultimately, a restraining order was denied. (Tr. 66) This was Applicant's last conflict with his ex-wife. His children, now ages 24 and 26, live separate lives apart from their mother. Although the son still has issues with drugs about which Applicant has struggled, the child's mother maintains little contact with the man. (Tr. 66)

In June 2015, Applicant was leading a household comprised of his girlfriend, her two daughters, the eldest daughter's baby, and Applicant. He was acting as both parent and grandparent, managing the children's schedules, cooking meals, and providing counsel. (Tr. 13) At this time, the younger of Applicant's girlfriend's minor daughters was trying to date a man in his 20s.

When Applicant discovered the man with his girlfriend's daughter in the home one school night around 9:00 or 10:00 p.m., Applicant reminded the child of her curfew and asked the man to leave. The decision was made in tandem with the girl's mother. (Tr. 16) The girl got very upset and started a heated argument, yelling and screaming. (Tr. 16) The potential date demonstrated his "hot temper" joined the girl in yelling and shoved Applicant. (Tr. 17, 68-69) He then lunged at Applicant as he tried to phone the police. The girl's sister tried to stop the younger man and got between the two males, getting accidentally elbowed in the face in the process. Applicant tried to retreat to the bathroom to call the police, but the younger man pursued and got Applicant in a headlock. (Tr. 17)

A melee ensued. The mother entered the room and became upset after seeing one daughter had received a bloody nose from being elbowed. (Tr. 22) The mother never saw the scuffle. After statements were taken, Applicant was arrested and charged with second degree assault of the females. (Tr. 70) This was due in part to the mother's statement that she thought Applicant had hit the girl and the younger daughter's statement that he struck her mother. (Tr. 18-19, 70-71) In court, the girl recanted her statement that Applicant had struck her mother in the skirmish and the man pled the 5th Amendment. (Tr. 70-71) Applicant was found not guilty of assault against the teen.

Despite the youngest daughter's recantation, Applicant was found guilty of assaulting his girlfriend. Applicant appealed the matter, discrepancies in the witnesses testimonies were stressed, and the case was ultimately dropped. (Tr. 71, 91-92)

Thus began an end of the romantic relationship between Applicant and his girlfriend, but time has healed any wounds and all parties have moved on. (Tr. 94) Today, Applicant is close to his ex-girlfriend's daughters and grandchild. The former girlfriend and the elder daughter now live in different states, but both wrote recommendations for Applicant. (Exs. B-C) Applicant and the two daughters text, visit when in the same town, and otherwise maintain varying degrees of contact. Applicant has provided nominal financial assistance to the younger women when needed, but none of the women is financially dependent on him.

The girlfriend's younger daughter has matured since 2015. She flew in to appear at the hearing and testified on Applicant's behalf at the hearing, noting that she loves and completely trusts him as a father figure and as a man, around whom she has never felt unsafe or at risk. (Tr. 12-21, 26) The two speak by telephone about every other day. (Tr. 26) The daughters' natural father is appreciative of Applicant's help with the young women. (Tr. 72-73; Ex. G)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. They are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to the AG, the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person in making a decision.

The protection of the national security is the paramount consideration. The AG requires that any doubt concerning personnel being considered for access to classified

information will be resolved in favor of national security. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline J – Criminal Conduct

The concern raised by criminal conduct is set out in AG ¶ 30:

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.

Applicant's series of multiple arrests and charges are sufficient to establish the following 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 6 combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

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.

The security concerns raised under this guideline may be mitigated by the following applicable factors:

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; and

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.

Applicant abused alcohol and drove a vehicle twice, well over 20 years ago. Since that time, he has been mindful of his alcohol use, does not drink and drive, and has become used to using Uber, if he needs it. Before, during, and after his contentious marriage, Applicant was seemingly trapped in a situation where legal process was used by his ex-wife to gain some form of advantage over him, most often with regard to their children. Despite her using multiple restraining orders and various allegations as weapons, it was Applicant who almost invariably maintained physical custody over their children. It was also Applicant whose bond with those children has seemingly endured. Indeed, since the divorce and the children coming of age, she has apparently lost interest in the family and moved on. Free of her and her machinations, Applicant's life has been comparatively drama-free and crime-free, giving him time to concentrate on work and on volunteering within his community.

Only one subsequent incident of criminal conduct has occurred since Applicant's ex-wife left the scene. In trying to enforce a curfew for his girlfriend's teenage daughter when a man came to call, Applicant found himself in the middle of a ruckus involving a hysterical teen, a surly "hot head" suitor, a confused and dramatic mother, and the mother's elder daughter trying to calm tensions all around. Despite later statements to the contrary, Applicant was ultimately found guilty of a second degree assault against the mother, his now ex-girlfriend. Today, however that girlfriend and her two daughters speak in favor of Applicant and recommend him for a security clearance. The hysterical teen is now a mature young lady who speaks highly of Applicant, who she now loves and respects as a father figure. Even the girl's natural father appreciates Applicant's efforts to help raise the girls. Despite the 2015 incident helping end his relationship with his ex-girlfriend, there is no apparent rancor by any of the individuals, each enjoying varying degrees of closeness and physical proximity with each other.

Given where Applicant is today with regard to both his ex-wife, his ex-girlfriend, and their respective children, it is highly unlikely such family dramas will be repeated, particularly given Applicant subsequent maturation and personal resolve. He has learned anger management skills, excelled at work, and gained the genuine and credibly expressed love and appreciation of a young lady he helped raise. He has moved from the responsibilities of being a father figure to minors to being a grandfather figure to their children. I find AG ¶ 32(a) and AG ¶ 32(d) apply.

Guideline E, Personal Conduct

The security concern 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 or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Here, the SOR repeats in its entirety allegations raised under the preceding guideline, and also references one suit and multiple restraining orders issued against him by or at the request of his ex-wife. Such conduct could raise the following disqualifying conditions:

AG ¶ 16(d) credible adverse information that is not explicitly covered under any other guideline and many 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, considerations of: . . . (2) any disruptive, violent, or other inappropriate behavior; (3) a pattern of dishonesty or rule violations. . . ; and

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, 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 persona, professional, or community standing.

This guideline provides seven potential mitigating conditions under AG ¶ 17. Four are potentially applicable under these facts:

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; 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.

As a threshold issue, my findings under the preceding guideline are incorporated under this guideline, thus substantially giving rise to AG ¶ 17(c). In addition, the current guideline offers four allegations related to Applicant's ex-wife's use of legal process during and after their marriage. Taken in isolation, each incident indicates that there may be more than meets the eye. Taken as a pattern, however, the facts tend to substantiate Applicant's assertion that his ex-wife's attempt to harass or gain advantage over him was the motivating factor behind most of her claims and attempts to secure restraining orders. I am also moved by the fact that he successfully maintained custody of their children throughout most of this period despite her multiple derogatory assertions.

Moreover, Applicant was candid in his testimony. His current recollections may not match 100% with previously documented versions of facts. It is noted, however, that the timeline at issue extends over a period in excess of 35 years, involves highly personal incidents one may not choose to remember vividly, entails several similar allegations based on varying facts, and yet contains no extraordinary deviations. He has completed anger management coursework and had no other incidents in over four years. He has no contact with his ex-wife and cordial, albeit limited, contact with his ex-girlfriend, while maintaining positive relationships with his children and his ex-girlfriend's children. With the exception of Applicant's ex-wife, he has the support of all individuals involved, including his ex-girlfriend's former husband. Applicant has moved on with his life and is past the child rearing stage. It is highly unlikely he will again be caught in such domestic dramas again. I find Applicant raised mitigating concerns AG ¶¶ 17(d), (e), and (g).

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d). 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under the two applicable guidelines in my whole-person analysis. I also considered

Applicant's highly credible testimony, his education, family dynamics. divorce, behavioral changes, maturation, and current lifestyle.

Applicant is a 53-year-old systems engineer who has served in the same position for the past 15 years and maintained a security clearance without incident for 13 years. Successful at work, he has a high school diploma and completed some college courses. He is the divorced father of two grown children, and helped raised to girls who were the daughters of a long-term girlfriend.

Between 1983 and 2015, Applicant was cited for multiple criminal and personal conduct issues. With the exception of two DUI charges, a matter addressed when he changed his drinking and driving patterns in 1996, the issues are related to either his ex-wife or his relationship with a subsequent girlfriend and her two daughters. Given the number and timing of the ex-wife's charges and complaints, the ultimate disposition in those matters, and her apparent abandonment of the children since they reached their majority, it appears that issues regarding personal conduct are more appropriately pinned on her.

As for the 2015 family brouhaha, Applicant was clearly acting in a fatherly capacity and also backing up his girlfriend when he tried to stop her teenage daughter from going out with a man in his 20s. A fight ensued, with each party entering at different points, with only Applicant, the teen who wanted to go on the date, and the suitor being there throughout. The teen agrees Applicant was the victim, not the aggressor in the incident. Regardless, any wounds have healed, and Applicant presently gets on well with his ex-girlfriend's two daughters. The incidents in this case are unique and involve equally unique family dynamics. As previously noted, Applicant is no longer in the child-rearing stage of his life. The roots of his problems in the two relationships at issue have either moved on, gone away, or been healed. In light of all this, and given the passage of over four years without any further incidents, I find Applicant mitigated criminal conduct and personal conduct security concerns.

Formal Findings

Formal findings for or against 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:	FOR APPLICANT
Subparagraphs 1.a-1.g:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a-2.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Arthur E. Marshall, Jr.
Administrative Judge