



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 15-08183
)	
Applicant for Security Clearance)	

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

03/14/2019

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct). Applicant has mitigated the security concerns raised by his 2012 arrest for felony aggravated child abuse. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on May 21, 2013. On December 23, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline J. The DOD acted under Executive Order (Ex. 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 22, 2017, and the case was assigned to me on March 20, 2018. On May 21, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 6, 2018.

I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, submitted Applicant's Exhibits (AX) A through Q, which were admitted without objection, and called four witnesses. DOHA received the transcript (Tr.) on June 14, 2018.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017.

Findings of Fact

Applicant is a 52-year-old engineering manager currently employed by a defense contractor since October 2015, and employed in the defense industry since 1993. He has held a clearance since 1996. He earned a bachelor of science degree in mathematics in 1993. He and his current wife married in 2004. They have a blended family with three children ages 19, 18, and 11. (GX 1.)

The SOR alleges under Guideline J that Applicant was arrested in October 2012 and charged with felony aggravated child abuse. The arrest was based on accusations made by Applicant's oldest son and Applicant's ex-wife. Applicant admits that he was arrested, but denies that he committed any criminal act.

Applicant and his ex-wife married in 1996 and divorced in November 2004. At the time of the divorce, Applicant and his ex-wife had a 5-year-old son. Following the divorce, Applicant and his ex-wife have repeatedly returned to court over issues of custody and child support. Their relationship is contentious, at best. (AX A - AX E.)

In October 2012, Applicant and his ex-wife had joint custody of their 12-year-old son. At the request of his ex-wife, Applicant went to her house to discipline their son. Applicant's ex-wife met Applicant in the driveway and showed him marks on her wrists where their son had grabbed her while she was trying to punish him for failing math. Applicant entered the house and confronted his son. Applicant, in the presence of his ex-wife, removed his belt and hit his son three times with it for being disrespectful to his mother. Applicant further told his son that he would not be permitted to participate in any extracurricular activities until his math grade improved. (Tr. 28-31.)

The following week, Applicant had custody of his son. Applicant learned from a friend of his daughter's that Applicant's son had posted, "I hate my f-ing dad's guts" on a social media account. Applicant was distressed by the post, but was also distressed because he did not allow his children to have social media accounts. (Tr. 32-33.)

Applicant logged in to the site and pulled up his son's post. Applicant showed the post to his son and demanded that his son read the post aloud. His son was clearly afraid, and refused to read the post. Applicant "popped" his son in the back of the head and again demanded that his son read the post aloud. His son refused. Applicant grabbed his son by the front of the shirt and catching his son's leather necklace, a scuffle ensued, and

Applicant's son ended up on the kitchen floor, screaming and crying. Applicant told his son to calm down and go to bed. (Tr. 32-36.)

The next morning, Applicant's son wore a shirt buttoned to the neck to school. In the early afternoon, Applicant got a telephone call informing him that he needed to go to the county's child advocacy center for some issues with his son. When Applicant arrived, his ex-wife's car was already there. Applicant was met by county officers who wanted to discuss aggravated child abuse charges with Applicant. Applicant's ex-wife had told the officers about the incident the night before, as well as the spanking incident the previous week, which combined, rose to the level of felony aggravated child abuse. (Tr. 36-40.)

Applicant was shown photographs of his son's neck which had multiple red marks on it. Applicant did not see any marks on his son's neck following the scuffle or the next morning because of his son's fully buttoned shirt, but believes they were possibly caused in part by the leather necklace, but were primarily self-inflicted by his son. (Tr. 90-91; GX 2; Tr. 61-63.)

Applicant was indicted by a grand jury, arrested, and charged with felony aggravated child abuse. (GX 4.) He properly reported the arrest to his facility security officer who instructed Applicant to keep the security office informed. Applicant's ex-wife immediately filed for child support and sole custody of their son. Following the indictment, the contract on which Applicant was working went to another contractor and Applicant was laid off. Despite submitting hundreds of job applications, Applicant was unemployed for approximately 11 months. (Tr. 38-41.)

After approximately two years, in September 2014, on the advice of his attorney, Applicant pled guilty to third-degree assault, a misdemeanor. He was sentenced to one year in prison, which was suspended for two years; two years' supervised probation; a \$500 fine; \$250 restitution; and 40 hours community service. Applicant was also required to complete: a domestic violence program; a parenting program; an anger management program; and undergo an assessment for drug or alcohol abuse. A protective order in Applicant's son's favor was entered against Applicant which required him to have no contact with his son. (GX 4.) Applicant completed restitution in March 2016, all other court requirements between 2013 and 2015, and was released from probation without violation in October 2015. (AX F - AX J.) Applicant has not had any contact with his son since 2012. (Tr. 40-41.)

Applicant's wife, who was present during the incident with Applicant's son, recounted the events in accord with Applicant. The following day, she met Applicant at the child advocacy center, and was interviewed and gave a written statement to the police wherein she emphatically stated that Applicant had not abused his son. Applicant's wife was shown pictures of the marks on Applicant's son's neck, and was shocked. She testified that there were no markings or injuries on Applicant's son's neck when he went to bed after the incident. (Tr. 77-85.) She further testified to the strength of character of Applicant, and stated that Applicant is a devoted father to all of their children and would never abuse any of them. (Tr. 75-76.)

Applicant's mother testified that Applicant has never been an overly strict disciplinarian, and has been a very involved father for all of his children. (Tr. 100-102.) Applicant's friend, who is also a pastor, stated that Applicant discussed the situation with his son with him, and that Applicant was deeply affected by the situation. (Tr. 107.) Applicant's friend of over 13 years, who is a public school nurse and was previously an emergency room nurse, has witnessed victims of child abuse. She has observed Applicant and his wife around all of their children and has never witnessed any type or pattern of abuse in their household. (Tr. 112 – 113.)

Applicant's testimony was credible and remorseful. The summary of Applicant's personal subject interview (PSI) and his Answer are consistent with his testimony and his wife's testimony. Applicant has never been accused of any other abuse. Applicant wrote a letter to his son at the time of the incident stating "I'm here for you." He has maintained the same cell phone numbers and hopes and prays that someday his son will contact him. (Tr. 66.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's 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." See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

The concern under Guideline J (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.

The following disqualifying condition applies under this guideline:

AG ¶ 31(b) evidence (including, but not limited to, a credible allegation, admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The following mitigating conditions are potentially applicable:

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 was indicted for felony aggravated child abuse. He later pled guilty to third-degree assault, a misdemeanor. He has not had any contact with his son since 2012. He completed all court-ordered requirements and was released from probation without violation in 2015. Applicant admits that he spanked him on one occasion and that he smacked the back of his son's head and grabbed him up out of the chair by the front of his shirt on another occasion. There is no history of reported abuse prior to these two incidents that occurred in 2012, nor are there any more recent allegations of any type of abuse of Applicant's other two children. These two incidents with Applicant's son occurred more than six years ago under circumstances that are not likely to recur. The incidents do not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. Since 2012, Applicant paid restitution, successfully completed all requirements of probation, has regained employment with a defense contractor, and continues to be a youth-sports coach in his community. He regrets the loss of his relationship with his son and hopes he will contact him in the future. AG ¶¶ 32(a) and 32(d) apply.

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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a).

Applicant has held a security clearance since 1996. He properly reported his arrest to his employer. Applicant is remorseful for his past conduct.

After weighing the disqualifying and mitigating conditions under Guideline J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his arrest. Accordingly, I conclude he has 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct)

FOR APPLICANT

Subparagraph 1.a:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge