



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



In the matter of:)
)
-----) ISCR Case No. 18-00146
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: Leon Schachter, Esquire

08/08/2019

Decision

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

Statement of the Case

On April 2, 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 June 15, 2018, Applicant timely submitted a response in which he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on November 8, 2018. DOHA issued a notice of hearing on February 26, 2019, setting the hearing for March 27, 2019. The hearing was convened as scheduled.

The Government offered nine documents as exhibits (Exs.). Applicant objected to the admission of the documents proposed as Exs. 8-9. With the Government in agreement, those two exhibits were noted as proffered but not accepted, and the others accepted without objection as Exs. 1-7. Applicant offered testimony and eight documents, which were accepted without objection as Exs. A-H. The transcript (Tr.) was

received on April 5, 2019, and 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 computer systems analyst who has worked in administration for the same defense contractor for nearly six years. He served for 14 years on active duty in the United States Air Force, reaching the rank of staff sergeant and receiving numerous awards and notable performance ratings, and is presently a reservist. Multiple positive letters of recommendation were accepted into the record from individuals aware of the allegations raised in the SOR. (Tr. 20; Ex. A)

At 39-years-old, Applicant supports and lives with his two children, as well as his female cousin and her two children. He is single. He volunteers within his community by assisting at sporting events. At issue in this matter are six allegations raised under Guideline J (1.a-1.f) and two allegations raised under Guideline E (2.a-b).

In March 2002, Applicant went out and ordered some take-out food. He and a delivery person, with whom he previously had a disagreement, exchanged words. The delivery person then cursed at Applicant. Applicant went indoors to complain to management. Soon, Applicant was confronted by seven individuals from the take-out and a fracas arose. Applicant was arrested and charged with simple assault, a misdemeanor, but the matter was dismissed. (Tr. 37-38) This was noted on his July 2011 e-QIP.

In April 2003, someone was arrested and charged with marijuana possession in a state near Applicant's state of residence. That individual was found guilty *in absentia* in July 2003. (see SOR allegation 1.e) Through some confusion, the named individual and Applicant have been assumed to be one and the same. Applicant was adamant he was not the individual named in the case. He sought out clarification on the matter, and after fingerprint verification, it was determined that Applicant was not the person arrested and tried. (Tr. 36; Ex. F-1) Because the charge was in error and subsequently resolved, Applicant did not note this incident on his e-QIP.

In around October 2004, Applicant and his now ex-wife had a "situation . . . where things got a little bit out of hand. We were arguing. She hit me in my nose. I grabbed her by her arms, left some marks on her arm. Police were called." (Tr. 33) The spouses were charged with domestic assault (battery). The matter was ultimately dismissed. Based on what he was told during these processes, Applicant was under the impression the matter would be deleted from his record and there would be no need to report the incident on his e-QIP. (Tr. 35)

In late 2007, Applicant and that same ex-wife were still married. He was fresh back from a deployment, the marriage was suffering, and he was relegated to sleeping on the couch. One day in July 2007, he was awakened to his child screaming. He discovered his spouse hurting the child. A fight ensued and Applicant shoved his

spouse hard. The police were called and Applicant was arrested for second degree domestic assault in November 2007. This matter was also dismissed. Although there was no conviction, Applicant reported the incident in his July 2011 e-QIP. (Tr. 33; Ex. 1 at 34 of 39) Today, the former spouses are “actually, like, best friends. . . .” (Tr. 34)

In January 2010, during a New Year’s Day party, Applicant was mildly intoxicated and punch was spilled on his clothes. Applicant borrowed a friend’s jacket to wear, not knowing there was a controlled substance (amphetamines) in the pocket. Applicant was later questioned about loitering, and the pills were found by the authorities. He was charged with possession of the drugs. He explained his situation. The possession charge was ultimately dropped in favor of the charge of loitering, a matter he disclosed in his 2011 e-QIP, at page 33 of 39, where he referenced the original charge for possession of a controlled substance. (Ex. 1 at 32 of 39; Tr. 29-30)

In May 2016, Applicant was with a female friend and his brother after driving to a social venue. Applicant left his cell phone in the car. As he went back to retrieve it, he saw his brother being attacked and his friend calling his name. (Tr. 23-24) Applicant interceded in the tussle and was eventually arrested for simple assault/robbery, felony criminal charges. He noted the related charges on his more recent 2016 e-QIP at Section 22. (Ex. 2 at 35 of 42; Tr. 23-24) The case was ultimately dismissed after his brother’s trial resulted in a not guilty determination. (Tr. 41)

On July 26, 2016, Applicant executed an e-QIP (Ex. 2). Although he disclosed the most recent event from May 2016 under e-QIP “Section 22 – Police Record,” he did not list any of the earlier incidents previously reported on his 2011 e-QIP. This is true regarding questions inquiring about whether, in the past seven years, he had been issued a summons; been arrested, charged, convicted, or sentenced to a crime; or been on probation. It is also true with regard to the questions inquiring whether, in his lifetime, he had ever been convicted in any U.S. court of a crime; charged with a felony; convicted of an offense involving domestic violence or crime of violence; or been charged with any offense involving firearms, drugs, or alcohol. Having disclosed all incidents in 2011, except for the mistaken charge from 2003 and the 2004 domestic dismissal he was led to believe would be expunged and not in need of reporting, Applicant limited his disclosures in 2016 to the newest incident from May 2016. He was under the impression that expunged or soon to be expunged charges need not be reported. (Tr. 35) Having listed the older incidents before, he had no intention of trying to mislead or obfuscate. (see Tr. 39)

Since the last incident, Applicant has successfully completed an anger management course. He takes the path of avoidance in the presence of potential conflict. He has never been disciplined at work, where he is a valued employee. He was pleased to receive a promotion two years ago. He has healed his relationship with his ex-wife, with whom multiple alleged criminal issues arose.

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 "[a]ny 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 have been 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;

AG ¶ 32(c): no reliable evidence to support that the individual committed the offense; 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.

With one exception, all of the criminal incidents alleged occurred about 10 years ago and beyond. All of these incidents at issue were ultimately dismissed, except for the 2003 drug possession charge which was shown to have been waged against him in error. Both spouses were equally engaged in the marital spats, and each related charge dismissed without a determination as to fault. As for those charges brought for domestic reasons, each appears to have found him in the wrong place at the wrong time or in otherwise exceptional situations.

Today, Applicant is older and wiser. Divorce has eliminated tensions between Applicant and his ex-wife; indeed, the two are close friends today. He has developed a good work record and garnered high praise from peers. He volunteers within his community with local sports. He is helping raise his cousin's children along with his own. The record as a whole reflects that Applicant has been sufficiently candid with regard to the incidents at issue, both in general and in response to inquiries (see below). In sum, I find Applicant has mitigated criminal conduct security concerns.

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, Applicant saw charges arising from the incidents noted in the SOR, described above, dismissed against him. In addition, he failed to disclose all of the incidents at issue in the SOR in his 2016 e-QIP which, if purposefully done to obfuscate or falsify, could raise the following disqualifying conditions:

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

AG ¶ 16(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, there is no indication Applicant intended to falsify, obfuscate, or mislead when he failed to disclose the dismissed charges noted at SOR allegation 1.a-1.e on his 2016 e-QIP. He had adequately disclosed those matters on his 2011 e-QIP, thus giving investigators sufficient knowledge of the instances to conduct an investigation, and limited his answers to the most recent incident from a couple of months earlier. He knew the earlier instances from 2002-2010 were known. Moreover, despite the wording of the questions, he did not see a reason to repeat their disclosure. During the hearing, he displayed a weak understanding of expungement and dismissal which also may have contributed to his failure to answer the question correctly. Regardless, while it is clear he failed to note some of the incidents on his 2016 e-QIP, there is insufficient evidence to conclude they were intentionally wrong. Lacking such evidence, disqualifying conditions are only raised under this guideline with regard to his past criminal charges and dismissals.

As for the actions by Applicant that give rise to both criminal and personal conduct security concerns, I add my thoughts from the preceding section to this guideline discussion. Those incidents not disclosed on the 2016 e-QIP are from 2002-2010 and, therefore, far from recent. Half the incidents transpired due to marital stress, while the other half is comprised of extraordinary incidents from his teens and twenties (*i.e.* pills in a borrowed jacket, misidentification by a court of being a defendant in case tried *in absentia*, a confrontation with a take-out staff, etc.). None of these types of incidents are likely to recur given Applicant's divorce, his behavior management counseling, and more mature personal focus on his career and activities. Given those factors, I find Applicant raised mitigating concerns AG ¶¶ 17(c), (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):

- (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.

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 past military service, divorce, behavioral changes, maturation, and current lifestyle.

Applicant is now on the cusp of 40 years of age. While charged with criminal conduct five times, a sixth charge having been brought incorrectly, Applicant has never been found guilty or pled either guilty or no contest. Each charge was dismissed. While he was obviously in the wrong place at the wrong time on multiple occasions, there is insufficient reason to conclude that his ill luck or dubious behavior will continue into his 40s, particularly given his maturation and recent personal accomplishments. Applicant is aware that another, similar brush with the law could prove fatal regarding any security clearance granted here. Given these considerations, I find Applicant has 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.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a-2.b:	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