



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



In the matter of:)
)
) ISCR Case No. 18-00430
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: Shirin Asgari, Esq.
04/19/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated the security concerns under Guideline E, personal conduct. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 25, 2017. On August 10, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The DOD CAF acted under Executive Order (EO) 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 (AGs) implemented by DOD on June 8, 2017.

Applicant answered the SOR on July 13, 2018, with a detailed, eight-page answer, admitting in part, and denying in part, the SOR allegations. He provided explanations and several attachments to his answer including: five character reference letters; evaluation and counseling records; a letter from the county district attorney rejecting charges against Applicant; copies of numerous awards, certificates, and letters

of appreciation and commendation. These were marked as Applicant's Exhibits (AE) A – F and admitted without objection.

Applicant also requested a hearing before an administrative judge. The case was assigned to me on January 25, 2019. On February 7, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 1, 2019. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 6 were admitted into evidence without objection. At the hearing, Applicant testified and his counsel submitted an additional performance evaluation from his current employer, which was marked as AE G, and admitted without objection. DOHA received the transcript (Tr.) on March 11, 2019.

Findings of Fact¹

Applicant is 35 years old. He obtained a bachelor's degree in 2007. (Tr. 26) He married in 2010 and divorced in 2012. He remarried in 2014 and divorced in 2016. He enlisted in the U.S. Navy in 2014 and finished first in his class at culinary specialist school. He also received an accelerated promotion to petty officer, and awards including the Good Conduct Medal, National Defense Service Medal, and a Surface Warfare Pin. (Tr. 29-30) He attached documents to his answer to the SOR including excellent performance evaluations, letters of appreciation, and certificates of commendation for his service in the Navy. (Tr. 16) He reports no children. Applicant has been employed as a food runner at a hotel while awaiting the outcome of his application to be an Arabic speaking linguist for a major federal contractor, which is contingent on obtaining his security clearance. (Tr. 24-25)

Applicant admitted the allegations in SOR ¶¶ 1.a and 1.e. (Answer). He admitted in part, and denied in part, the allegations in SOR ¶¶ 1.b, 1.c, and 1.d, because he adamantly denies that he committed domestic assault or battery against his wife, and she later recanted her allegations. The county district attorney dropped all charges against Applicant and the restraining order was rescinded. (AE D, Tr. 38-39)

Applicant testified that he received a general discharge, under honorable conditions as alleged in SOR ¶ 1.e due to two events that occurred within 30 days of each other. (Tr. 22-23) The first incident, at the end of June 2016, occurred due to a miscommunication between Applicant and his senior chief. (Tr. 32) Applicant had submitted a request to take 4-5 days annual leave to go home to assist his sister after her back surgery. (Tr. 33) Applicant had approved leave papers in hand. A week before he departed the ship to go on leave, Applicant learned that his sister's surgery was postponed and he needed to request an additional day of leave. He did so, and received verbal authorization to simply extend his leave from his petty officer first class

¹ Unless stated otherwise, the source of the information in this section is Applicant's April 25, 2017 Security Clearance Application (SCA) and the summaries of his personal subject interviews (PSI) in May 2017. (GE 1-2)

(E-6) supervisor. (Tr. 34, 65) However, the first class failed to log this extension into the system.

Applicant testified credibly that he did not have sufficient time to submit a formal leave request in writing through his chain of command (COC) because several of his seniors were away on leave. (Tr. 47-48) Applicant accepts responsibility for this mistake, as he failed to follow up and ensure that the leave was formally recorded. (Tr. 50, answer) When he returned from leave, he was charged with various Uniform Code of Military Justice (UCMJ) violations as alleged in SOR ¶ 1.a. Applicant went to nonjudicial punishment (NJP) for these offenses and he was sentenced to 30 days restriction and extra duty and demoted in rank by one grade. (Tr. 35) In a statement on behalf of Applicant, submitted at his NJP, the first class corroborated that he verbally authorized the extension of leave, but he was overwhelmed with work, and forgot to log it. (Tr. 64)

Applicant denied in part the allegations at SOR ¶¶ 2.b, 2.c, and 2.d, which all arose out of the second incident in July 2016. While he was serving his NJP sentence of restriction to the ship, Applicant was enduring a very difficult time with his wife. One evening, he made repeated calls to his wife that went unanswered. (Tr. 35-36) His wife also stopped responding to text messages. Applicant became extremely worried because of earlier text messages from her where she said she was having a very bad day. (Tr. 54) Previously she had a miscarriage while he was at sea. (Tr. 36) Applicant left the ship without authorization, and he went to his nearby home to find his wife with an interloper. (Tr. 37-38) It was plain to see she was having an adulterous affair. Applicant was shocked and argued with his wife after the interloper departed. During the argument, she arose quickly from the couch, and he gently pushed her back with an open hand, fearing that she was about to do something rash. (Tr. 38) She was not injured. She called the police and he was arrested. (Tr. 38)

Applicant disclosed both of the afore mentioned incidents fully, as well as the resultant NJPs and General Discharge, in his April 2017 SCA. Following his arrest in July 2016, Applicant's wife became embarrassed and sorry for calling the police. (Tr. 39) She convinced the prosecutors to dismiss all charges against Applicant, and she withdrew the domestic violence restraining order alleged at SOR ¶ 1.d as frivolous. (AE D) He had a second NJP nonetheless, where he was sentenced to reduction in rank from E-4 (Petty Officer) to E-3 (Seaman), and 45 days restriction and extra duty. (Tr. 63) Applicant subsequently obtained an amicable divorce from his wife in December 2016. (Tr. 41)

Applicant testified that he lost substantial Department of Veterans Affairs (VA) educational and other benefits due to his General Discharge. (Tr. 74) He provided two excellent performance evaluations for each year from 2014 to 2016. (AE B) He also provided six favorable character reference letters from his supervisors and a colleague. One was from Applicant's senior chief (E-8), who was the supervisor of the first class who granted verbal authority to extend his leave. (AE A) They attest to Applicant's character, integrity, honesty and work ethic. He also provided several letters of

appreciation and certificates of commendation for his military service. I found his testimony was direct and candid.

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, 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. Instead, recognizing the complexities of human behavior, these guidelines 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 AG, Appendix A, ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG, Appendix A, ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 as to obtaining 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 and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

Analysis

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

The Concern. 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(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 information. This includes but is not limited to, considerations of:

(3) a pattern of dishonesty or rule violations

Applicant admits to wrongfully leaving his ship without authorization, while he was still on restriction, on the night when he discovered his wife cheating. He also takes responsibility for not confirming that his verbally authorized extension of leave was formally entered into the unit’s computer diary and properly approved. He was led to

believe it had been approved after a discussion with a supervisor. The Government provided substantial evidence of his rule violations on these occasions and his general discharge. AG ¶¶ 16(c) and 16(d)(3), are implicated and the focus shifts to a determination of which, if any, of the mitigating conditions apply.

AG ¶ 17. Conditions that could potentially mitigate security concerns
Include:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant testified credibly that he was under a great deal of stress related to his marriage when he left his ship without authority. He relied to his detriment on a colleague, a petty officer first class, to enter the verbal extension in the unit diary. He did not follow through and confirm that the extension had been properly granted. He pled guilty and accepted his NJP punishment although he appears to have had a valid defense. He has already been punished for both transgressions by the Navy. He received two NJP punishments including loss of a stripe, restriction, and extra duty. Additionally, because he had two disciplinary incidents so close in time in the summer of 2016, the Navy gave Applicant a General Discharge under honorable conditions. He lost substantial Post-911 GI Education Bill benefits and his chosen career as a result. I find that his transgressions were committed almost three years ago. They occurred under unique circumstances of his wife's infidelity and such misconduct is unlikely to recur. He has divorced his wife, left the Navy, volunteered to become a linguist, and taken other positive steps to alleviate stressors. AG ¶¶ 17 (c) and (d) apply.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG, Appendix A, ¶ 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, Appendix A, ¶ 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 Guideline E in my whole-person analysis. Some of the factors in AG, Appendix A, ¶ 2(d) were addressed under that guideline.

Applicant disclosed his disciplinary problems in the Navy in his SCA and concedes he made mistakes. He was already punished for those minor transgressions. He wants to continue to serve DOD as an Arabic linguist for a contractor. His judgment no longer remains a security concern. There is sufficient evidence to conclude that his personal relations are under control, and he will not repeat his previous misconduct. The record evidence leaves me with no questions or doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the personal conduct security concerns under Guideline E.

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 2, Guideline E:	FOR Applicant
Subparagraphs 1.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 interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Robert J. Kilmartin
Administrative Judge