



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



In the matter of:)
)
) ISCR Case No. 19-01911
)
Applicant for Security Clearance)

Appearances

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

July 23, 2020

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline E (personal conduct).
Clearance is granted.

Statement of the Case

On August 22, 2018, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 31, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 28, 2019, Applicant submitted his Answer to the SOR.

On November 18, 2019, the Defense Office of Hearings and Appeals (DOHA) assigned the case to an administrative judge; on December 11, 2019, DOHA reassigned the case to a second administrative judge; and on January 6, 2020, the case was reassigned to me. On January 27, 2020, DOHA issued a notice of hearing

scheduling the hearing for February 27, 2020. The hearing was convened as scheduled. Department Counsel called one witness and submitted Government Exhibits (GE) 1 through 10, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. On March 6, 2020, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted the sole SOR allegation (SOR ¶ 1.a), with explanations. Additional findings of fact follow.

Background Information

Applicant is a 30-year-old artillery gunner employed by a defense contractor since October 2009. He was granted a secret clearance in 2010 shortly after he began working for his current employer. (GE 1; Tr.54-55, 67-68) He seeks to reinstate his secret security clearance, which is a requirement of his continued employment.

Applicant received his high school diploma in May 2008. After high school, he attended two semesters of college, but did not finish his degree. (GE 1; Tr. 57) Applicant married in October 2016, and has a one-year-old daughter. He also has a five-year-old daughter from a previous relationship. Applicant has full custody of his five-year-old, and she resides with him. At the time of the hearing, Applicant's wife was living in a nearby city with their one-year-old daughter. He and his wife had separated, but have reconciled. Applicant's wife is employed as a receptionist and scheduler for a medical doctor. He plans to move to the city where his wife resides and reunite the family. (GE 1; Tr. 59-62, 65-66)

On July 5, 2019, Applicant's clearance was suspended. He was placed on a leave of absence, and administratively debriefed on July 8, 2019. After Applicant was placed on a leave of absence, his Facility Security Officer (FSO) formally requested that he be granted a security clearance waiver and allowed to return to work performing duties not requiring a clearance. The chain of command favorably endorsed the FSO's request, and on July 24, 2019, the base commander approved her request. Since then, Applicant was allowed to return to work performing duties not requiring a clearance. (Tr. 55-57, 94; AE C, AE D)

Personal Conduct

The sole SOR allegation under this concern states that Applicant was a member of motorcycle club A (Club A) from December 2016 to June 2019. As such, he is alleged to have associated with persons involved in criminal activity, including motorcycle club B (Club B), a larger motorcycle club considered to be an "outlaw motorcycle gang" (OMG) as defined by state law. The Federal Government identified Club A as the official support club of Club B, and Club A has been defined as a criminal street gang by the state in which they are located. (SOR ¶ 1.a)

In June 2018, local law enforcement (LE) reported to Applicant's FSO that he was a member of Club A. LE further reported that Club A was designated as an OMG per state statute. LE added that Club A is the only support club of motorcycle Club B, and it is their association with Club B that classifies Club A as an OMG. (GE 2; Tr. 77-78) Per state statute, members of Club A are designated criminal street gang members. Under state statute, a criminal street gang member is defined as an individual who meets certain criteria that Applicant purportedly met, which include self-proclamation, witness testimony or official statement, paraphernalia or photographs, clothing or colors, and any other indicia of street gang membership. (GE 2) At his hearing, Applicant described club A's patch. (Tr. 70-71)

Acting on the information she received from local law enforcement, Applicant's FSO interviewed him in June 2018 regarding this matter. Applicant acknowledged being a member of Club A, but denied engaging in any criminal activity with Club A. The FSO advised Applicant to disassociate himself from Club A, as his continued involvement with Club A may have an adverse effect on his current security eligibility. (GE 2; Tr. 78) On June 29, 2018, the FSO submitted a Joint Personnel Adjudication System (JPAS) report to the DOD CAF reporting the information above. When the FSO submitted her report, she noted that there were no criminal charges pending against Applicant nor has he been involved in any criminal activity. (GE 2) After his FSO counseled him to terminate his affiliation with Club A, he did not do so immediately because he "sought more answers." At the time, he did not see himself as a potential threat to national security or unqualified to hold a clearance. (Tr. 64-65, 68-69, 78-81)

Applicant affiliated with Club A because he enjoyed riding motorcycles and fraternizing with individuals with the same interests. Applicant and several of his friends formed the local chapter of Club A after exploring various options. When Applicant was active with Club A, it had "[a]bout four members." Originally, there were five members. Applicant was not an officer in Club A. When the idea of forming a club was presented to Applicant, he saw it as a form of brotherhood that was not to do "criminal tasks" or "bad stuff." Spouses and children of Club A members were welcome to attend many of their events such as birthday parties and barbeques. (Tr. 86-93)

Applicant credibly testified that at no time while he was a member of local Club A did it engage in any criminal activity. Nor did anyone in Clubs A or B ever solicit him to participate in any criminal activity. His primary activity with Club A was riding motorcycles, or what he referred to as "wind or throttle therapy." At the time he joined Club A, he was not aware that they were considered an OMG by law enforcement authorities. He was further unaware that he or Club A would be "guilty by their association" with Club B. Applicant's initiation to become a member of Club A consisted of associating with fellow members, which earned him his Club A patch. (Tr. 64, 69-73; GE 2) There is no record evidence that Applicant or any members of his local Club A chapter engaged in any criminal activity.

On May 14, 2019, as part of his security clearance background investigation, Applicant had an Office of Personnel Management Personal Subject Interview (OPM PSI). (GE 3; Tr. 79) After that interview, Applicant stated that he had a better

understanding of the Government's concerns regarding his continued association with Club A. It was during his meeting with the investigator that he was informed that Club A was an OMG because they were a support club of Club B. At that point, Applicant informed the investigator that he needed to resign from Club A, and he did so. (SOR Answer; GE 3; Tr. 64, 70, 75, 78-80) On June 18, 2019, Applicant emailed his FSO and advised her that he had disassociated from Club A. He did this before his clearance was suspended on July 5, 2019. He advised in that email that he no longer had regular contact with members of Clubs A and B. (SOR Answer; Tr. 65, 80; AE A, AE B)

Applicant realizes that he could have avoided his current problems had he resigned from Club A when his FSO first raised this issue with him in June 2018. He explained that he did not want to make a "knee-jerk reaction" and base his decision to resign from Club A on what appeared to be "rumor-like" information. However, after taking into account the information he learned during his OPM PSI, and the adverse effect his continued membership in Club A would have on his job, as well as on his marriage and family, he decided it was time to disassociate from Club A. (Tr. 81-86)

In the Government's case in chief, Department Counsel called an intelligence operations specialist (IOS) with the Bureau of Alcohol, Tobacco, and Firearms (ATF). She called IOS as an expert witness on OMGs. IOS submitted an extensive resume and elaborated on his background and qualifications. Department Counsel moved to accept IOS "as an expert witness in the area of outlaw motorcycle gangs." Without objection from Applicant, I accepted IOS as an expert as such. IOS provided extensive testimony about Clubs A and B and motorcycle clubs in general. IOS did not have any knowledge of criminal activity of Club A in the state where Applicant lived nor did he have any knowledge of Applicant personally being involved in any criminal activity. (GE 10; Tr. 16-53)

Department Counsel also offered criminal state statute definitions of various criminal activity and secondary source material that provided extensive background information on OMGs, to include articles authored by subject matter experts on OMGs and a 2018 indictment that describes criminal behavior of Clubs A and B members in other states. (GE 5 – GE 9) None of the material referred to Applicant or his local Club A chapter.

Character Evidence

Applicant submitted five character letters: (1) coworker/friend; (2) coworker/friend; (3) coworker/friend; (4) cousin; and (5) wife. His three coworkers are long-time employees at Applicant's place of employment and all hold security clearances. They spoke highly of his work ethic, dependability, dedication to his family, and good character. Applicant's cousin has known him most of his life, and is a retired Naval Intelligence officer familiar with security clearance requirements. All four of these individuals are familiar with Applicant's situation, assert that he is not a security risk, and recommend that his clearance be reinstated. Lastly, Applicant's wife wrote a compelling letter describing his dedication as a husband and father. She described him as an "incredible, loving, patriotic, and loyal man." (Tr. 94-96; AE F(1) – AE F(5))

Policies

This case is adjudicated 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 (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct may be a security concern, stating:

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.

AG ¶ 16 includes two disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(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 or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ; and

(g) association with persons involved in criminal activity.

Applicant is a motorcycle enthusiast. From December 2016 to June 2019, he was a member of his local chapter of motorcycle club A in his state of residence. In June 2018, Applicant’s FSO advised him that his continuing membership in Club A was a security concern. Applicant’s membership continued until June 2019, when he resigned from the group after his OPM background interview.

State law enforcement authorities consider Club A to be an OMG due to its relationship with and support of Club B, a larger motorcycle club. Club B is also considered by State and Federal authorities to be an OMG that engages in criminal activity. Club A is the only support club for Club A and has been defined as a criminal street gang under state statute.

Applicant testified that he joined Club A due to his interests in motorcycles and in associating with those with similar interests. The Club A chapter he joined had only four or five members. Applicant was not aware that they engaged in criminal activity. The

expert witness presented by the Government was not aware of Club A's activities locally, nor was he aware of Applicant's activities with the club.

Nevertheless, the record establishes that Club A is regarded by State and Federal law enforcement authorities as an OMG, chiefly through Club A's status as a support club for Club B, a larger motorcycle club regarded by law enforcement authorities as an OMG or criminal street gang engaging in criminal activity. AG ¶ 16(g) is therefore applicable.

Applicant testified credibly that he was not aware that Club A was regarded as an OMG or one engaged in criminal activity. However, he was also on notice as of June 2018 that his ongoing membership in Club A was a security concern, yet, at least for the time being, his membership continued. His continuing membership in Club A, once he was so advised by company security personal, was an act of poor judgment. AG ¶ 16(d) applies as does the general concern of AG ¶ 15. Further review is necessary.

AG ¶¶ 17 lists four potentially mitigating conditions under these facts:

(c) the offense was so minor, or so much time has passed, or the behavior 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;

(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;

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

(g) association with person involved in criminal activities was unwilling, 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.

AG ¶¶ 17(c), 17(d), 17(e), and 17(g) are fully applicable. Applicant's explanation of how he came to be a member of Club A is credible and accepted. His motivation to be associated with Club A was his affinity for riding motorcycles and fellowship. The size of his local chapter averaged about four members. Typical activities that Applicant's local Club A engaged in, in addition to riding motorcycles, were family social events and barbeques.

The largest hurdle Applicant had to overcome was his continued association with Club A after his FSO counseled him, in June 2018, to disassociate from Club A. Applicant stated that he did not appreciate the adverse effects his continued

membership in Club A would have on his clearance and career. He explained that he wanted to investigate whether his continued association with Club A was as bad as suggested. It was not until his May 14, 2019 OPM PSI, and his discussion with the investigator, that he came to the full realization that his association with Club A could cost him his clearance and his job. During his interview, the investigator informed him that Club A was an OMG because they were a support group of Club B. At that point, Applicant informed the investigator that he needed to resign from Club A and did so on June 18, 2019.

There is record evidence that Clubs A and B have participated in criminal activity in other states. However, there is no evidence that Applicant or any members of his local Club A chapter engaged in any such activity. That said, there is enough evidence to suggest that membership in Club A, being the official support group of Club B, is a security concern for Applicant since he was a member.

As he acknowledged, Applicant, could in all likelihood, have avoided his current situation had he disassociated from Club A when his FSO first brought this matter to his attention in June 2018. Although it took him some time before he resigned in June 2019, he did so after it became clearer to him that his continued involvement with Club could have an adverse effect on his security eligibility. Convinced that would be the case after his OPM PSI, he resigned from Club A shortly thereafter to avoid being compromised.

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 ¶ 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.

The ultimate determination whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion in the Analysis section under Guideline E is incorporated in this whole-person section. However, further comments are warranted.

Applicant is a 30-year-old artillery gunner employed by a defense contractor since October 2009. He successfully held a secret clearance for ten years and established a record of accomplishment as a valued and trusted employee. It is quite

noteworthy that, after his clearance was suspended on July 5, 2019, and he was placed on a leave of absence and administratively debriefed on July 8, 2019, his FSO requested that he be granted a security clearance waiver and allowed to return to work performing duties not requiring a clearance. Applicant's chain of command favorably endorsed the FSO's request, and on July 24, 2019, the base commander approved her request and Applicant returned to work performing duties not requiring a clearance.

It is also noteworthy that there is no evidence that Applicant engaged in or was charged with any criminal activity while a member of Club A. Cumulatively, Applicant's character letters strongly support reinstatement of his clearance and deserve considerable weight. These individuals know Applicant well and are familiar with his work ethic and character. His wife provided a heartfelt account of his good character and devotion to his family. Applicant was open and forthright during his hearing and recognized, albeit after some time, that his continued association with Club A could adversely affect his career and family. He made the wise choice to disassociate from Club A on June 18, 2019, shortly after his May 14, 2019 OPM PSI.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

Formal Findings

The formal findings on the allegations set forth in the SOR are as follows:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is granted.

Robert Tuidier
Administrative Judge