



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



In the matter of:)	
)	
)	ISCR Case No. 12-05596
)	
Applicant for Security Clearance)	

Appearances

For Government: Phillip J. Katauskas, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

08/08/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Statement of the Case

On December 7, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. The Office of Personnel Management (OPM) interviewed Applicant on April 10, 2012. Applicant acknowledged the accuracy of the transcript of the interview on August 19, 2013. The Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On February 21, 2014, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E and criminal conduct under Guideline J. These actions were taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the

DOD on September 1, 2006. Applicant acknowledged receipt of the SOR on March 21, 2013.

Applicant answered the SOR on April 18, 2014. He admitted two allegations under criminal conduct (SOR 1.a, and 1.d) and denied three allegations (SOR 1.b, 1.c, and 1.e) He admitted four allegations under personal conduct (SOR 2.a, 2.b, 2.d, and 2.e), and denied one (SOR 2.c). He provided a detailed explanation for his responses which included 18 exhibits. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 7, 2014, and the case was assigned to me on May 9, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on May 27, 2014, for a hearing on June 18, 2014. I convened the hearing as scheduled. The Government offered nine exhibits, which I marked and admitted into the record without objection as Government exhibits (Gov. Ex.) 1 through 9. Applicant and two witnesses testified. Applicant submitted 21 exhibits which I marked and admitted into the record without objection as Applicant Exhibits App. Ex. A through U. DOHA received the transcript of the hearing (Tr.) on June 27, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. The SOR lists five actions by Applicant of personal conduct security concern. One of the actions (SOR 2.c) is cross-alleged as a criminal conduct security concern (SOR 1.c).

Applicant is a 45-year-old senior software engineer for a defense contractor. He has bachelor and master's degrees in systems engineering, and a master's degree in finance. He qualified for and received numerous computer-related certifications. He married in June 2008 and separated in June 2011. Applicant and his wife reached a marital settlement agreement and their divorce was final on December 4, 2012. He has no children. He served 11 years in the U.S. Marine Corps, six years on active duty and five years in the reserves. He also served 11 years in the Army National Guard. He received an honorable discharge. (Tr. 49-50, 62-65; Gov. Ex. 1, e-QIP, dated December 7, 2011; App. Ex. G, Divorce Decree, dated December 4, 2012; App. Ex. H, Settlement Agreement, dated December 4, 2012; App. Ex. L, DD 214; App. Ex. M, Degrees and certifications, various dates; App. Ex. N, College transcript, dated April 17, 2014; App. Ex. O, Academic record, dated August 2, 2010; App. Ex. P, Transcript, dated March 29, 2006; App. Ex. R, Applicant's Resume; App. Ex. S, Applicant's Biography, undated)

The criminal conduct and personal conduct security concerns arose from Applicant's contentious marriage and divorce. The SOR alleges under criminal conduct that Applicant was arrested at work on November 5, 2011, for violating a protective order on June 5, 2011. He was found guilty and sentenced to a fine and 180 days of incarceration, of which, 179 days were suspended until March 5, 2015 (SOR 1.a). It further alleges that a Capias was issued for his failure to appear on the charge of violating the protective order. The charge was dismissed in February 13, 2012, after he

appeared in court (SOR 1.b). A criminal conduct security concern was alleged for violation of a federal criminal statute by falsification of material facts on his December 2011 security clearance application (SOR 1.c). This falsification was also alleged as a personal conduct security concern (SOR 2.c). Criminal conduct security concerns were alleged for assault on a family member in December 2009 and October 2008. He was found not guilty of the December 2009 charge (SOR 1.d), and the October 2008 charge was dismissed (SOR 1.e). In addition to the falsification mentioned above, the SOR alleges protective orders for different individuals issued against Applicant on August 31, 2012 (SOR 2.a, and 2.b). It is also alleged that he was warned and reprimanded by his employer for failing to report an arrest for violation of a protective order (SOR 2.d). It was alleged as a personal conduct security concern that a protective order for his wife was issued on June 1, 2011, that was extended for two years on June 14, 2011, and extended again on March 5, 2012, until March 5, 2014.

There is confusion concerning the dates of the protective order and arrest for violation of the protective order as listed in the SOR. Applicant and his wife were involved in divorce proceedings in June 2011. A preliminary protective order was issued against Applicant on June 5, 2011. It prohibited Applicant from any contact with his wife. Applicant and his former wife both appeared with counsel at the protective order hearing, and both had the opportunity to offer evidence. The judge issued a protective order to be effective for two years. The judge also attempted to make arrangements for Applicant to enter the marital home to retrieve personal items but the wife would not agree. The judge ordered the attorneys to make the arrangements. There was an agreement for Applicant to retrieve the personal items on June 18, 2011. (App. Ex. D, Attorney Correspondence, dated June 16, 2014; App. Ex. K, Letter, dated April 14, 2014)

On June 18, 2011, Applicant contacted a friend who tried to contact Applicant's wife to make arrangements to retrieve the personal items. After numerous attempts, the friend was unable to make contact with Applicant's wife. Early on a Sunday morning, Applicant met his friend and provided him with a key to his house. He cleared the friend's entry with the security guards into the gated community where his house was located. The friend cautiously tried to contact someone at the house but initially there was no answer. Finally, a person came to the door. The friend identified himself, and informed the person that he wanted to retrieve Applicant's personal items. After futile attempts at negotiating an agreement, the occupants of the house, which included Applicant's wife, called the police. The occupants of the house told the police that they did not recognize Applicant's friend. However, Applicant's wife and the friend had met with Applicant for lunch a few months before the June 2011 incident. (App. Ex. C, e-mail) The police tried to negotiate an agreement with Applicant's wife for the friend to retrieve the personal items. The negotiations were unsuccessful, and the friend left without retrieving any of the personal items. (App. Ex. B, Statement, dated November 17, 2011) The former wife filed a complaint against Applicant for violation of the protective order. Applicant was initially arrested on June 18, 2011. (App. Ex. E, Arrest Warrant, dated June 18, 2011). He did not report the arrest for violation of the protective order to his company or his security officer.

Applicant's former wife filed a new complaint against Applicant for the June 18, 2011 violation of the protective order on October 25, 2011. Applicant was arrested at work on this warrant on November 18, 2011. (App. Ex. A, Arrest Warrant, date October 25, 2011) On March 12, 2012, Applicant pled guilty to violating the protective order on the advice of counsel to obtain a favorable outcome. Applicant was sentenced to a fine and to serve 180 days in jail, 179 days of which was suspended for three years until March 5, 2015. As is the practice in the jurisdiction, the protective order was extended until March 14, 2014. (Tr. 49-51; App. Ex. E, Court Documents, dated March 5, 2012)

Applicant was represented in his divorce proceedings by an attorney. He appeared at all hearings when advised by his attorney. He was never advised of a hearing in January 2012. A Capias was issued in late January 2012 for failing to appear at a hearing. He did appear in February 2012 and March 2012, after being notified by his attorney of the hearings. The charge of failing to appear was withdrawn. (Tr. 51-52)

Applicant completed his security clearance application on December 7, 2011. In response to a question asking if there was currently a domestic violence protective order or restraining order issued against him, Applicant replied "Yes", and noted on the application that the protective order was "successfully appealed and lifted on 11/19/2011."

The SOR allegation contents that the protective order was active until June 14, 2013. (SOR 1.c; SOR 2.c; SOR 2.e) Applicant appealed the initial protective order and his appeal was granted lifting the protective order effective December 19, 2011. (App. Ex. F, Order, dated November 29, 2011) The protective order was reinstated after the March 2012 hearing until March 2014. There was no protective order in effect against Applicant from December 2011 until March 2012. Department Counsel agreed that at the time Applicant completed his security clearance application, the information provided concerning the protective order was correct. (Tr. 75-77)

When Applicant was initially arrested for violating the protective order on June 18, 2011, he did not inform any of his supervisors or his security officer of this arrest. On November 16, 2011, Applicant was arrested at work on the same warrant for violating the protective order on June 18, 2011. He immediately informed all relevant personnel in his company of the arrest to include his security officer. His company reprimanded him for failing to report the June 18, 2011 arrest. Applicant stated that in June 2011, he was not sure how to proceed and if he needed to notify his company. He did not seek advice from his company security officer. By November 2011, he knew who to notify about an arrest. (Tr. 58-61; App. Ex. L, Reprimand, dated November 29, 2011)

Applicant's former wife filed charges against him for assault. Applicant admits that he was arrested and charged with assault on his wife on December 29, 2009. He was found not guilty of this offense. Applicant also admits that he was arrested and charged with assault on his wife on October 6, 2008. The charge was dismissed. He attributes the charges to the false and vindictive actions of his former wife. (Tr. 61-62)

After separating from his wife, Applicant had a relationship with another woman. He learned that she had a long-term boyfriend. Applicant e-mailed the boyfriend to tell him that he was involved in a relationship with the woman. His intent was to be honest with the boyfriend about his relationship with the woman. The woman took offense with Applicant's communication, so she sought a protective order for herself and her minor daughter against Applicant. The woman's boyfriend also sought a protective order against Applicant. These people did not want any contact with Applicant based on information provided to them by his former wife. Applicant wife testified against Applicant at the protective order hearing. The protective orders were granted and have now expired. Applicant is no longer in contact with his former wife, his former girlfriend, her boyfriend, or the minor child. (Tr. 55-58, 61-62)

An active duty colonel, serving as a branch chief for an Army staff division, testified that he has known Applicant for almost two years and works with him daily. He is Applicant's government supervisor and provides input for his contractor evaluation. Applicant's duty performance is excellent. The witness just needs to tell Applicant of a project and he takes it from there. Applicant tells it like it is and the witness considers Applicant to be honest and trustworthy. Applicant is straight forward and upfront. The witness has access to classified information and has seen the Statement of Reasons and is aware of all of the facts concerning the security concerns raised against Applicant. He has no reservation about Applicant being granted access to classified information. (Tr. 27-37; App. Ex. K, Letter, dated April 15, 2014)

Applicant's division deputy chief, a GS-15 civilian Army employee, testified that she has known Applicant for about three years, and has worked closely with him for about 18 months. Applicant's duty performance has been very good. The witness has access to classified information and is aware of the security concerns against Applicant. She has no reservations about granting Applicant eligibility for access to classified information. (Tr. 39-48; App. Ex. K, Letter, dated April 4, 2014)

Applicant presented letters of recommendation. His attorney noted that she represented Applicant in his divorce proceedings and found him to be honest and composed under trying circumstances. He was focused, cooperative, and an active party in the proceedings. One of Applicant's supervisors wrote that Applicant was a detailed-oriented hard worker with a reputation for getting the facts truthfully. Applicant is highly regarded and respected by Army leaders and his peers. A former Marine who served with Applicant noted that Applicant is a professional, honest, and positive Marine who led by example. The senior vice-president of Applicant's company noted that Applicant provided dedicated service for the company and the government. He noted that Applicant has unquestioned integrity, loyalty, and is candid, and professional. Applicant provided a number of other letters of recommendation from family members and friends. They attest to his contentious marriage and divorce, and Applicant's efforts to remain honest and truthful under the circumstances. They note his professionalism, hard work, and integrity. (App. Ex. K and Ap. Ex. U, Letters, various dates.) Applicant was also commended by the Army lieutenant general serving as the Chief Information

Officer for his perseverance and positive attitude to implement a strategic Army program. (App. Ex. Q, Letter, dated May 1, 2013)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 ¶ 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 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. 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, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion for 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 the Applicant may deliberately or inadvertently fail to protect or protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Criminal Conduct

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 (AG ¶ 30). Applicant received a protective order against him requested by his former wife. He pled guilty to violating the protective order. A charge that he failed to appear for a hearing was withdrawn when he did appear at a hearing. He was arrested and charged with assault on his wife twice but one charge was dismissed and he was found not guilty of the other charge. This information raises Criminal Conduct Disqualifying Conditions AG ¶ 31(a) (a single serious crime or multiple lesser offenses), and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). Applicant's criminal actions raise questions about Applicant's judgment, reliability, and trustworthiness and calls into question his ability and willingness to comply with laws, rules, and regulations.

It is also alleged that Applicant provided false and misleading information on his security clearance application concerning the protective order. It is a federal criminal offense to deliberately provide false and misleading information on a security clearance application. However, the information presented at the hearing establishes that the information provided by Applicant in response to a question on the security clearance application concerning domestic violence protective orders was completely correct and accurate. Since Applicant did not provide false or misleading information, I find for Applicant as to SOR 1.c.

As to the other SOR allegations for criminal conduct, I considered Mitigating Conditions 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(b) (the person was pressured or coerced into committing the act and those pressures are no longer presented in the person's life); AG ¶ 32(c) (evidence that he person did not commit 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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement).

Applicant presented sufficient information to mitigate the criminal conduct security concerns. The protective order was issued against Applicant as the result of a flawed marital relationship. Applicant is no longer married and does not have any contact with his former wife. The protective order was issued under the unusual circumstances of a marital discord and is unlikely to recur because of the cessation of the relationship. The order was violated under the unusual circumstances of Applicant using a friend to reclaim some of his property. Applicant was advised that he could have the friend reclaim the property for him. The former wife was very uncooperative with

both the friend and police. She was a leading cause of all of the issues. The protective order was issued under the pressure of a bad marriage, successfully appealed, but later reinstated. There is also sufficient evidence that he did not assault his wife since one of the charges was dismissed and he was found not guilty of the other charge. Applicant mitigated the criminal conduct security concerns. For the reasons stated above, the allegations of criminal conduct do not cast doubt on his reliability, trustworthiness, and good judgment, or his ability to comply with rules and regulations.

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Personal conduct is always a security concern because it asks the central question whether the person's past conduct justifies confidence the person can be entrusted to properly safeguard classified information. (AG ¶ 15)

As noted above, Applicant was issued a protective order to have no contact with his wife. He made arrangements through his attorney and his wife's attorney to have a friend retrieve his personal property. His wife complained that he violated the protective order and he was arrested. The protective order was extended until March 5, 2014. He did not immediately notify his security officer that he was arrested for violation of the protective order. He was reprimanded for the lack of immediate notification of the arrest. He immediately notified his company when he was later arrested for violating the same protective order. The Applicant was also issued protective orders requested by others that were aided and abetted in seeking the protective orders by his former wife.

A personal conduct security concern was also alleged because Applicant allegedly deliberately provided false and misleading information on his security clearance application. Applicant presented sufficient information to establish that the information he provided on his security clearance application concerning the protective order was correct and accurate at the time he completed his application. He noted that a protective order had been issued, that an appeal was granted, and the order was effective until a few days after the application was completed. It was months later that the protective order was extended. Therefore, Applicant did not provide false and misleading information on the application. SOR allegation 2.c is found for Applicant

These incidents raise Personal Conduct Disqualifying Condition AG ¶ 16(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 person may not properly safeguard protected information); AG ¶ 16(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 indicting that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (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, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing).

I considered Personal Conduct Mitigating Condition 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 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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur); and AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

Applicant had a flawed marriage and a contentious divorce. His wife sought a protective order against him. He appealed the order and it was initially revoked. When his wife appealed that order, it was extended until March 2014. He no longer has a relationship or contact with his former wife. The order was issued three years ago, successfully appealed, reinstated, and expired in the last few months. There was only one violation of the protective order and that violation is questionable. Two other people, with the assistance of his former wife, also requested protective orders against Applicant because he sought to convey information to them that they did not like. All of the protective orders involved some instigation by his former wife. While there was no need for Applicant to pass information concerning others, his actions of passing information were minor, infrequent, and unique. Since he has no further contact with the individuals, the issues are unlikely to recur.

Applicant did not inform his company of his initial arrest for violation of the protective order because he did not know and did not seek to know, the correct procedure. His company reprimanded him and counseled him on his security clearance responsibilities. When he was again arrested, he immediately told his company officials and security officer. Applicant acknowledged his initial failure, and he took the correct action when the issue was raised again. He showed that he learned from his earlier mistake and changed behavior, and that the earlier behavior is unlikely to recur. Applicant has taken positive steps to change his conduct to a positive action, so that his conduct does not create a vulnerability to exploitation, manipulation, or duress. Applicant mitigated security concerns for personal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 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 considered that Applicant served on active duty in the Marine Corps in the Marine Corps Reserve, and the Army National Guard. I considered the laudatory testimony of his leader and supervisor. I considered the testimony and letters of recommendations from friends and supervisors and their evaluation of Applicant's honesty, reliability, trustworthiness, and good judgment.

Applicant's criminal and personal conduct security concerns all revolved around a difficult marriage and divorce. The court proceedings concerning protective orders show that Applicant would have been better not to take certain actions requiring a judge to issue a protective order. But the actions he took leading to the security concerns were minor and done under unusual circumstances. He did not provide inaccurate and misleading information on his security clearance application but was accurate with his response to a security question. Applicant showed that he is stable, trustworthy, reliable, and a good employee. There is no indication that he has questionable judgment, is untrustworthy, lacks reliability, or is unwilling to comply with rules and regulations. Applicant mitigated the security concerns for personal and criminal conduct. Applicant's actions indicate he will properly handle, manage, and safeguard classified information. The record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the personal conduct and criminal 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.e: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 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 eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge