



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 13-00784
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

01/17/2014

Decision

MALONE, Matthew E., Administrative Judge:

Circumstances underlying two domestic violence issues involving Applicant in 2003 and 2012 are no longer present and unlikely to recur. Also, Applicant neither permitted nor condoned illegal drug use by his estranged wife and her stepdaughter between 2009 and 2012. Changed circumstances and Applicant’s excellent record of work over the past 28 years show his judgment and reliability do not undermine his suitability for access to classified information. Clearance is granted.

Statement of the Case

On August 14, 2013, Department of Defense (DOD) adjudicators issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns

addressed in the adjudicative guidelines¹ for personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on October 23, 2013, and I convened a hearing on November 19, 2013. Department Counsel presented Government Exhibits (Gx.) 1 - 3, which were admitted without objection. Applicant testified and proffered Applicant's Exhibits (Ax.) A - D, which were admitted without objection. DOHA received the transcript of hearing (Tr.) on December 3, 2013.

Findings of Fact

Under Guideline E, the Government alleged that Applicant's second wife filed a domestic violence with children injunction against him in March 2003, and that it was dismissed in April 2003 (SOR 1.a); that in November 2012, Applicant was arrested and charged with felony aggravated assault and with battery-domestic violence, the former charge being dropped by the prosecutor, and the battery charge being dismissed later for failure by the complaining party (Applicant's third wife) to cooperate in the prosecution (SOR 1.b); and that between April 2009 and November 2012, Applicant lived with his third wife, who at times used marijuana, that Applicant held a security clearance at the time, and that as of February 2013, Applicant and his wife were attempting a reconciliation (SOR 1.c). Applicant admitted, with explanations, all of these allegations. In addition to his admissions, I make the following findings of fact.

Applicant is 51 years old. He has worked as an information technology contractor in support of the space program for about 28 years. After working for most of his career with large, nationally-known companies, he was hired in July 2002 by his current employer, a small business that formerly acted as a subcontractor to his previous employer. Applicant has held a security clearance throughout his career. His access has never before been revoked or suspended. (Answer; Gx. 1; Gx. 2; Tr. 70 - 72)

Applicant has been married three times. His first marriage, from November 1986 until an October 1993 divorce, produced two children, one by adoption, now age 24 and 28. Applicant's second marriage began in March 1996 and ended by divorce in February 2008. Applicant and his third wife have been married since April 2009, but they have been separated since November 2012. (Gx. 1; Gx. 2; Tr. 44 - 45)

Applicant did not have children with either his second or third wives. Both marriages, however, blended children from prior relationships. In both marriages, Applicant struggled with how or if he should discipline his stepchildren. He also felt his own children, then teenagers still living at home, were treated unfairly by his second wife. These factors caused friction in both marriages. On March 28, 2003, Applicant's second wife accused him of hitting her and obtained a temporary protective injunction

¹ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

against him. No criminal charges were ever filed, and the injunction was vacated and his wife's complaint dismissed after a hearing on April 8, 2003. Applicant averred that the case was dismissed because his second wife lied about what happened. (Answer; Gx. 2; Ax. D; Tr. 34 - 38, 53)

Applicant's third wife, whose avocation is performing as a karaoke singer several nights each week, has an adult daughter. She, her daughter, and her daughter's boyfriend lived with Applicant in Applicant's home.² From past experience in his second marriage, Applicant thought it best to rely on his wife to lay down rules and responsibilities for her daughter and the boyfriend. However, over time Applicant became frustrated because the unemployed stepdaughter and her unemployed boyfriend were freeloading at Applicant's expense, and that his wife was not doing anything about it. Applicant suspected his stepdaughter was using marijuana and may have been bringing it into his house. Applicant also became aware that his wife occasionally used marijuana, possibly to manage pain from a bad back that was recently corrected through surgery. More likely, she used marijuana if it was offered when she was out at bars performing as a karaoke singer. Available information did not establish that anyone used marijuana in the house or in Applicant's presence. Applicant has never used illegal drugs, and he testified that he had tried to make clear to his wife and stepdaughter that such conduct was not acceptable, particularly because it might impact his security clearance. (Answer; Gx. 2; Gx. 3; Tr. 35 - 42, 63)

On the evening of October 31, 2012, Applicant and his wife got into an argument that culminated in Applicant's arrest for aggravated domestic assault, a felony, and domestic battery. Applicant called the police as the argument escalated and after finding what he believed to be a tin in his stepdaughter used for holding her marijuana. The aggravated assault charge stemmed from his wife's assertion that Applicant had brandished a weapon at her and her daughter, causing Applicant's wife to spray him in the face with an aerosol substance. The weapon in question was a Daisy BB air rifle. The aggravated assault charge was not validated or pursued by the local prosecutor. Applicant's wife also claimed in a written statement that he slapped and pushed her. Applicant's statement to police that evening, as well his statement to investigators during his background investigation, his response to DOD interrogatories, and his answer to the SOR, all cast his wife as the aggressor in the incident. Eventually, the battery charge was also dismissed because Applicant's wife refused to cooperate in the prosecution. On July 13, 2013, Applicant, on his own initiative, successfully completed a 26-week domestic battery intervention course because he thought it would improve his ability to resolve marital conflict. (Answer; Gx. 2; Ax. C; Tr. 54 - 63)

Applicant and his wife have been separated since November 1, 2012. Their separation includes a court-issued no contact order. After a brief period to allow his wife and stepdaughter to relocate, he moved back into his house. In late November 2012,

² All three marriages used the house Applicant has owned since 1986 as the marital residence. Applicant still resides there, albeit, by himself.

Applicant's wife petitioned the court to modify the no-contact order so she and Applicant might reconcile. However, the petition was dismissed when his wife failed to appear in court. Applicant and his wife remain separated, and he has indicated he is willing to get back together, but only if she changes her behavior. (Answer; Tr. 64 - 70)

Applicant has an excellent reputation at work and in the community, the latter for his volunteer work in youth athletics. Professionally, former co-workers and other associates praise his professionalism, honesty, hard work, and integrity. He has held a security clearance without incident for the past 28 years. He understands the need to avoid improper conduct or circumstances that might reflect adversely on his reliability. He routinely has been re-investigated several times and has not been hesitant to disclose adverse information in his background so that the Government can accurately assess his continued suitability for a clearance. (Answer; Ax. A; Ax. B; Tr. 39 - 40, 70 - 72)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,³ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of

³ See Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁵

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁶

Analysis

Personal Conduct

Available information shows that Applicant was involved in two domestic disturbances, one in 2003 and another in 2012. Information that Applicant may have been associated with persons involved with illegal drugs between 2009 and 2012 also reasonably raised security concerns about his judgment and reliability. The concern raised by this record is addressed at AG ¶ 15 as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, available information requires consideration of the following pertinent AG ¶ 16 disqualifying conditions:

(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;

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

(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 person may not properly safeguard protected information. This includes but is not limited to consideration of (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources; and

(g) association with persons involved in criminal activity.

As to AG ¶¶ 16(c) and (d), the SOR 1.a and 1.b allegations fall short of actual criminal conduct by Applicant because no criminal or civil culpability was established. Nonetheless, these allegations suggest poor judgment by Applicant in his dealings with two of his wives under difficult domestic circumstances. But the record does not establish that Applicant actually struck his third wife in 2012, and it is silent about what may have precipitated the petition for a domestic injunction in 2003. In both cases, there was no criminal prosecution because there was no finding that Applicant acted as alleged.

This record does not provide any additional information to show that he acted improperly. To the contrary, as to SOR 1.b, aside from calling the police incident to the domestic disturbance occurring at his home, he called them to report his stepdaughter's drug involvement. Both domestic incidents likely stemmed from poor behavior by both husband and wife. There is no indication Applicant has lied about or tried to conceal anything adverse in his background, or that he has been unwilling to comply with rules or regulations. There is also no indication he has been violent or disruptive in the workplace, that he has misused Government resources, or that he is dishonest. The facts underlying these incidents do not support application of either AG ¶ 16(c) or AG ¶ 16(d).

As to AG ¶ 16(g), the allegation at SOR 1.c implies that Applicant knew about, was involved with, or condoned his third wife's drug use when they married in 2009. To the contrary, the record shows he came to that knowledge later in the marriage, and that he did what could reasonably be expected of him to correct the situation. However, he was dealing with poorly-behaved adults who likely were not inclined to care their conduct was placing his security clearance in jeopardy. It is perfectly understandable, given the experience of his second marriage, that he would defer to his wife in dealing

with his stepdaughter and the boyfriend. Her failure to act responsibly was not Applicant's fault.

Applicant's third wife and her daughter are no longer living with Applicant. As to the Government's concern that Applicant and his wife were attempting reconciliation, available information shows that Applicant's wife filed, but quickly abandoned a petition to modify a no-contact order shortly after they separated. Applicant has not attempted reconciliation, but he is amenable to it only if his wife changes her behavior. I have considered the AG ¶ 17 mitigating conditions and conclude that AG ¶ 17 (f) (*association with persons involved in criminal activities 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*) applies and is sufficient to mitigate the Government's concerns about Applicant's personal conduct.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline E. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 51 years old and presumed to be a mature, responsible adult. His uneventful access to classified information for 28 years, and his good reputation in the workplace and community support that presumption. The Government's concerns about his two domestic incidents, and about the possible presence of illegal activity in his household are reasonable. However, those incidents do not constitute a pattern of poor behavior. They occurred ten years apart and it has not been substantiated that he initiated any improper conduct either time. These were unfortunate incidents that sometimes occur in married life. Applicant remains estranged from his third wife, and it is unlikely they will reconcile if she does not alter her behavior regarding illegal drugs. A commonsense assessment of the entire record shows that the security concerns raised by this record are mitigated.

Formal Findings

Formal findings 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 E:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge