



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 14-00800
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

01/30/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has failed to mitigate security concerns pertaining to Guidelines J (criminal conduct) and E (personal conduct). Clearance is denied.

Statement of the Case

On July 5, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SF 86). On May 13, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) as revised by the Under Secretary of Defense for Intelligence on August 30, 2006, which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines J and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it

recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On July 2, 2014, Applicant responded to the SOR. On September 15, 2014, Department Counsel was ready to proceed on Applicant's case. On September 29, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On October 15, 2014, DOHA issued a hearing notice, setting the hearing for November 6, 2014. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A through X, which were received into evidence without objection. On November 18, 2014, DOHA received the hearing transcript (Tr.).

Findings of Fact

In his SOR answer, Applicant admitted all of the SOR allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 43-year-old senior software engineer, who has been employed by a defense contractor since June 2012. He seeks to retain his secret security clearance, which is a requirement of his continued employment. Applicant has successfully maintained a security clearance for 13 years. (GE 1; Tr. 12-13, 22-23.)

Applicant graduated from high school in June 1989. He was awarded an associate's degree in liberal arts in June 1991, and a bachelor of science degree in computer science in December 1993. (Tr. 13-15; AE N, AE O.) Applicant has been married two times; the first marriage was from November 1996 to December 1999 (W1) and the second marriage was from January 2008 to September 2013 (W2). Both marriages ended by divorce. Applicant has a 20-year-old son from his first marriage, who is attending college. (GE 1; AE J – AE M; Tr. 15-16, 32-33, 35.)

Applicant served in the U.S. Army Reserve and National Guard from September 1988 to July 1999, initially as an enlisted person and later as an officer. He was honorably separated from the service as a first lieutenant (pay grade O-2). (GE 1; Tr. 16-18.)

Criminal Conduct

Under this concern, Applicant's SOR contains four separate allegations: (1) a December 1997 arrest for domestic violence against W1 that was later dismissed; (2) a May 2011 failure to control vehicle charge. Applicant was convicted of the amended charge of driving an unsafe vehicle; (3) a December 2012 arrest for

domestic violence against W2. Applicant pled guilty to the amended charge of menacing and was placed on 12 months probation; and (4) a February 2013 five-year restraining order was issued to W2 against him. (SOR ¶¶ 1.a – 1.d.) At the onset of the hearing, Department Counsel moved to withdraw SOR ¶ 1.b (unsafe vehicle conviction). Without objection from Applicant's counsel, I granted Department Counsel's motion. (Tr. 8-9.)

The December 1997 charge of domestic violence against Applicant was dismissed, and W1 was charged with and pled guilty to falsification of filing a false domestic violence police report. She was sentenced to 30 days in jail, suspended for 30 days, and placed on 12 months probation. (SOR answer; Tr. 19-22, 24-26, 35-36; GE 2, AE H.) W1 submitted a statement dated October 13, 2014, advising that Applicant had been an exceptional father and role model for their 20-year-old son and her two daughters. (AE H.)

Applicant stated three months after Applicant married W2 in January 2008, she began having an affair with a coworker. That affair continued until he discovered it in February 2010. While W2 was having this affair, Applicant paid off her pre-marital debt and W2 convinced him to borrow against his 401k and the equity in their home to finance her desire to become a photographer. The marriage continued to deteriorate, and in early December 2012, Applicant informed W2 that he desired to separate. Later that month, Applicant and W2 got into an argument and Applicant was arrested and charged with domestic violence. (SOR answer; Tr. 36-40; GE 2, GE 3; AE I.)

In February 2013, W2 obtained a five-year restraining order against Applicant and shortly after that, Applicant pled guilty to the amended charge of menacing. He was sentenced to 30 days in jail suspended for a time uncertain, ordered to pay \$700 in fines and court costs, ordered to attend anger management, and placed on 12 months probation. Applicant testified that he does not recollect what happened the evening he was arrested. (Tr. 41-48; GE 2; Tr. 26.) Applicant attended and successfully completed a court-approved anger management program from February 2013 to April 2013. (AE F, AE G, AE U.)

Applicant stated in his SOR answer that his wife misrepresented the facts at the restraining order hearing and as a result of an adverse ruling, he "had no confidence in having a fair trial." He regretted not "sticking to my core values and fighting the charge, but I accepted the deal." Applicant does not "even remotely" agree with the five-year restraining order. (SOR answer; Tr. 54-55; GE 2.) Applicant testified that his attorney did not properly represent him at his criminal trial in advising him to plead guilty to the lesser charge. (GE 2; Tr. 26-27.)

As a result of a company transfer, Applicant now "lives a thousand miles away" from W2. (Tr. 28, 33-34.) Applicant completed probation in February 2014 for his menacing conviction; however, his five-year restraining order remains in effect and is applicable in his new location. (Tr. 42-43; AE E.)

Personal Conduct

Under this concern, Applicant's SOR contains three separate allegations: (1) the criminal conduct allegations, *supra*, were cross-alleged; (2) that he used W2's prescription medication, Percocet, from August 2007 to January 2012; and (3) in December 2012, he attempted to commit suicide by overdosing on prescription medication. (SOR ¶¶ 2.a -2.c.)

In Applicant's July 2012 e-QIP, he self-reported that over a seven-year period he had taken his wife's Percocet for back pain "probably less than 5" times. (GE 1.) He explained that he has had chronic back pain since 2001 and had been prescribed prescription drugs such as Vicodin, Percocet, and Soma. Applicant used his wife's prescription to avoid a doctor visit fee. (SOR answer.)

Within one day of his December 2012 arrest for domestic violence, and after retrieving his personal belongings from his family home under police escort, Applicant proceeded to his parents' home. It was there that he viewed W2's Facebook's post that Applicant had tried to pour gasoline on her and light her on fire. Applicant believed that he would be charged with attempted murder and go to jail for a crime he did not commit. He wrote a suicide note and took an overdose of prescription medication consisting of "about 60 Soma muscle relaxants, dosage size not recalled, and 250 Clozapam (sic)¹ sleep aids, dosage size not recalled because he wanted to kill himself." (SOR answer; GE 2; Tr. 31, 48.)

Applicant's parents discovered him the next morning in a coma and were unable to revive him. He was hospitalized and remained in a coma for three days. (GE 2; Tr. 27.) After Applicant was released from the hospital in January 2013, he notified his security managers about what had transpired. His employer suspended his security clearance and employment and placed him in the employee assistance program (EAP). After successfully completing five-to-six months of mental health treatment, his employer reinstated his security clearance and employment in June 2013. (GE 2; AE A, AE B; Tr. 28-29, 48-50, 54.)

In anticipation of his hearing, Applicant completed a substance abuse assessment and a mental health evaluation in November 2014, both with favorable results and prognoses. He is not taking any psychotropic drugs. (AE V-X; Tr. 30-31.) Applicant testified that a further suicide attempt will not occur because he maintains a close relationship with his family members and has not had any contact with W2 for the last two years outside of divorce court. (Tr. 34.) Applicant submitted October 2014 negative drug tests results, and a signed statement of intent with automatic revocation of clearance for any drug violation. (Tr. 50-52; AE C, AE D.)

¹ The correct spelling for this drug is Clonazepam. <http://www.drugs.com/clonazepam.html>

Character Evidence

Applicant submitted favorable work performance evaluations for 2012 to 2013; three reference letters; and his biography. His performance evaluations indicate that he is valued employee and his reference letters attest to his good character and work ethic. Among other things, Applicant's biography discussed his upbringing, education, marriages, and family. (AE P – AE R.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the

applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Criminal Conduct

AG ¶ 30 articulates the security concern concerning 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.

The Government established its case under Guideline J through Applicant’s admissions and the evidence presented.

A review of the evidence supports application of two 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” apply.

Four criminal conduct mitigating conditions under AG ¶¶ 32 are potentially applicable:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

AG ¶ 32(c) is fully applicable to SOR ¶ 1.a. Applicant provided sufficient evidence to demonstrate that he did not commit the December 1997 domestic violence charge. This charge was dismissed, and W1 was convicted of falsification for filing a false police report. And, as noted *supra*, the driving unsafe vehicle charge alleged under SOR ¶ 1.b was withdrawn by Department Counsel.

Partial credit is warranted under AGs ¶¶ 32(a) and (d) with regard to SOR ¶¶ 1.c and 1.d. As of the hearing date, almost two years had transpired since Applicant was convicted pursuant to his guilty plea of menacing, a charge that stemmed from a domestic violence charge. He has complied with all court-ordered requirements and successfully completed his probation. Of note, Applicant's conduct was serious enough for the judge, who heard all of the evidence, to issue a five-year restraining order against him in favor of W2. The serious nature of the underlying charge and ongoing and valid five-year restraining order raise doubts regarding Applicant's suitability to hold a security clearance.²

Personal Conduct

The security concern relation to the Guideline 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 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.

The Government established its case under Guideline E through Applicant's admissions and the evidence presented. A review of the evidence supports application of AG ¶ 16 as a disqualifying condition that could raise a security concern:

² Applicant made reference to the fairness of the process surrounding his January 2013 restraining order hearing and quality of representation he received following his February 2013 menacing guilty plea. I note that Applicant was represented by counsel at both proceedings and expressed dissatisfaction with the respective outcomes. "The Board has held that the doctrine of collateral estoppel applies in [industrial security clearance] proceedings and precludes applicants from contending they did not engage in the criminal acts for which they were convicted." ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997) (citing ISCR Case No. 94-1213 at 4 (App. Bd. June 7, 1996); DISCR Case No. 88-2271 at 5 (App. Bd. Oct. 16, 1991). Applicant's statements that contradict the findings of his criminal proceedings are accepted as evidence of extenuation and mitigation.

(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, support 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 ¶ 17 provides seven potential conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity 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.

Full credit under AG ¶ 17(f) is applicable to that portion of SOR ¶ 2.a that pertains to SOR ¶ 1.a for reasons discussed under criminal conduct, *supra*. The

December 1997 domestic violence charge was not substantiated. And, also noted *supra*, SOR ¶ 1.b was withdrawn. Full credit under AG ¶ 17(c) is applicable to SOR ¶ 2.b. Applicant self-reported an approximate five-time use of Percocet over a five-year period. He signed a statement of intent with automatic revocation of clearance for any drug violation, provided negative drug test results, and a favorable substance abuse assessment. Applicant recognizes using his wife's Percocet to self-medicate for back pain was improper.

Applicant's domestic violence arrest followed by a suicide attempt raise serious concerns regarding his suitability for a security clearance. His suicide attempt was more than a gesture. Applicant wrote a suicide note and took over 300 pills after reading adverse comments on Facebook that W2 had posted about him. While W2's comments were no doubt troubling and upsetting, they did not justify Applicant's decision to attempt to end his life. Were it not for his parents discovering him the next morning, Applicant might have perished. Applicant has completed significant psychological treatment following his suicide attempt and is continuing an aftercare warranting partial application of AG ¶¶ 17(d) and 17(e). He no longer lives near W2. However, given the serious nature and relative recency of Applicant's December 2012 suicide attempt, further time is required to preclude doubts about a relapse or another episode.

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(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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guidelines J and E is incorporated in this whole-person section. However, further comments are warranted.

Applicant's employment as a Government contractor weighs in his favor. He is a law-abiding citizen and contributes to the national defense. Applicant has honorably completed military service and has proven to be a conscientious and caring parent.

Security clearance adjudications are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Applicant's December 2012 domestic violence arrest immediately followed by a five-year restraining order in favor of W2 does not reflect favorably on Applicant. More troubling is his December 2012 suicide attempt. Recognizing marital strife and divorce can be very stressful, it is important to maintain perspective during adversity. At the time Applicant attempted suicide in his parents' home; he had a teenage son who depended on him. I recognize and applaud the efforts Applicant has made in the recovery process and encourage him to continue with his aftercare. However, further time is required to put the fallout from his second divorce and suicide attempt behind him. I find for Applicant on SOR ¶¶ 1.a and 2.b, and I find against him on SOR ¶¶ 1.c, 1.d, and 2.c. SOR ¶ 1.b was withdrawn.

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

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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Subparagraphs 1.c – 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
That portion of subparagraph 2.a pertaining to subparagraph 1.a:	For Applicant
That portion of subparagraph 2.a pertaining to subparagraph 1.b:	Withdrawn
That portion of subparagraph 2.a pertaining to subparagraphs 1.c and 1.d:	Against Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Clearance is denied.

Robert J. Tuidor
Administrative Judge