



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 08-11701

Appearances

For Government: Kathryn D. McKinnon, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

06/19/2013

Decision

Harvey, Mark, Administrative Judge:

Allegations from Applicant’s contentious child-custody litigation, two minor criminal offenses, and his failure to provide accurate and complete information on his May 21, 2008 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) among other conduct-related issues raised personal conduct security concerns. However, personal conduct concerns are mitigated because they are not substantiated or are not recent. Eligibility for access to classified information is granted.

Statement of the Case

On May 21, 2008, Applicant submitted his SF 86. (GE 1) On January 28, 2013, 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guideline E (personal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to continue 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 March 19, 2013, the DOD Office of Hearings and Appeals (DOHA) received Applicant's SOR response, and Applicant requested a hearing. (HE 3) On April 16, 2013, Department Counsel indicated she was ready to proceed on Applicant's case. On April 23, 2013, the case was assigned to me. On May 1, 2013, DOHA issued a hearing notice, setting the hearing for May 30, 2013. (HE 1) Applicant's hearing was held as scheduled. Department Counsel offered six exhibits, and Applicant offered four exhibits. (Tr. 22, 50; GE 1-6; AE A-D) There were no objections, and I admitted GE 1-6 and AE A-D. (Tr. 22-23, 51-53) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On June 10, 2013, I received the transcript of the hearing.

Findings of Fact

Applicant's SOR response admitted with explanations the underlying factual predicate for all of the SOR allegations. (HE 3) He denied that he intended or attempted to conceal anything from the Government. (HE 3) He also provided extenuating and mitigating information. (HE 3) He denied that the allegations raised or established security concerns. His admissions are accepted as findings of fact.

Applicant is a 30-year-old welder employed by a defense contractor. (Tr. 7; GE 1) His income is \$60,000 to \$80,000 per year. (Tr. 111) In 2001, he graduated from high school, and he has about three semesters of college. His courses focused on engineering. (Tr. 7-9) He served in the Marine Corps from 2001 to 2004 for a total of 39 months. (Tr. 9) He served one full tour and one partial tour in Iraq.

In 2003, Applicant received nonjudicial punishment for failure to obey an order concerning wearing earrings while on leave; and for being late for work after he returned from leave. (Tr. 79-83; SOR ¶ 1.f)

Applicant's specialty in the Marine Corps was metal working or welding. In March 2004, Applicant was on his second tour in Iraq. (Tr. 98) He was working 17 to 18 hours a day. (Tr. 99) He was exhausted from excessive work and attempting to meet his responsibilities. (Tr. 98) Someone told a lie to the first sergeant about him, and he was placed on extra duty. (Tr. 99) He was also going through a divorce. (Tr. 100) He went to a psychiatrist in Iraq because he was cracking or decompensating under the strain. (Tr. 100) He was medically evacuated from Iraq back to his home base in the United States. (Tr. 100-102) He received some anger management and alcohol abuse counseling. (GE 3 at 4) Shortly thereafter, Applicant was honorably discharged from the Marine Corps for personality disorder or unsuitability. (Tr. 9, 102-106)¹ He believed he was diagnosed with post traumatic stress disorder (PTSD). (GE 3 at 4) He did not apply for a disability

¹ Applicant thought a meeting with the chain of command to discuss his discharge was actually a court-martial. (Tr. 102-106) His evident lack of understanding of legal matters contributed to his failure to provide complete and accurate information on his May 21, 2008 SF 86.

rating from the Department of Veterans Affairs because he did not want a “crutch.” (Tr. 106) He did not receive any post-service mental health counseling or psychiatric or anxiety medication. (Tr. 106-107)

In 2007, Applicant and his first spouse were arguing. (Tr. 72) His spouse started swinging at Applicant, and he grabbed and held her. (Tr. 72) Later, Applicant and his spouse reconciled. (Tr. 72-75) Several months later, Applicant became upset that she was running around on him, and he took their son and left. (Tr. 75) She made a claim of domestic violence based on the incident several months previously where he grabbed her, and she obtained a restraining order. (Tr. 74-75; SOR ¶ 1.d) The police took Applicant’s son away from Applicant and gave his son to his spouse. (Tr. 74-75) His spouse was a stripper. Applicant asked her to leave that employment, and she refused. (Tr. 75-76) Gradually, Applicant received greater custody rights from the court until he received sole custody of his son. (Tr. 76-77) His relationship with his former spouse is currently amicable, and he allows her to visit her son. (Tr. 78)

In 2007, Applicant was charged with disorderly conduct for public urination. (Tr. 79) The charge was dismissed. (Tr. 79)

Applicant and his spouse have been living together for four years and married for two years. (Tr. 56) His current spouse has two children from a prior marriage. (Tr. 56) Applicant has one child from a prior marriage, and one child with his current spouse. (Tr. 56) All four children live with Applicant and his spouse. (Tr. 57)

SOR ¶¶ 1.a to 1.c allege that Applicant was charged in November 2008 and December 2008 with trespassing on private property and in August 2010, he was charged with electronic mail harassment. Applicant’s spouse’s former husband was attempting to re-establish his relationship with Applicant’s spouse. (Tr. 58) Applicant’s spouse’s former husband’s mother (M) harassed Applicant and his spouse because Applicant’s spouse would not leave Applicant. (Tr. 58-59) Applicant filed charges of harassment against M, and M retaliated with false charges and allegations against Applicant. (Tr. 54-71) He went to court a dozen times to address M’s allegations. (Tr. 60) Ultimately, all charges were dismissed. (Tr. 61-62)

Applicant and his spouse received sole custody of their four children. (Tr. 62-63) Currently, there are contempt of court papers filed by Applicant and his spouse pending against M because she kept her grandchildren and would not bring them back to Applicant and his spouse on time. (Tr. 63-64) Applicant does not communicate with his spouse’s former husband and M except in family court. (Tr. 67)

SOR ¶ 1.k alleges that Applicant failed to tell his facility security officer (FSO) about court orders in November 2008 and December 2008 alleging Applicant trespassed on private property, and in August 2010, he was charged with electronic mail harassment. (Tr. 32; GE 5) Applicant’s FSO said Applicant told his FSO about going to court for disputes involving his spouse. (Tr. 32-33) Applicant did not necessarily provide documentation from the court or the specifics of particular court hearings. (Tr. 32-33) Applicant’s FSO did not ask for documentation, and after Applicant came back

from court, Applicant would describe the status of this case. (Tr. 34) His FSO did not believe that Applicant ever withheld requested information or was deceptive about his situation with his former spouse. (Tr. 34-35) Applicant was in court six weeks before his hearing on custody issues, and Applicant expects to be back in court in another month. (Tr. 108) Applicant represents himself in family court. (Tr. 109)

On his May 21, 2008 SF 86, Applicant disclosed the following information of possible security concern: (1) he received mental health treatment from a Navy specialist from 2001 to 2004; (2) he left employment three times under allegations of unsatisfactory performance or under unfavorable conditions; (3) he received nonjudicial punishment in 2003; (4) he used marijuana weekly from September 2004 to June 2006; (5) he had delinquent debts; and (6) he was immersed in child custody litigation with his former spouse. (GE 1)

When Applicant completed his May 21, 2008 SF 86, he denied that he had been charged with any offense in the last seven years. (Tr. 87; GE 1; SOR ¶ 1.g) For the May 2007 disorderly conduct, Applicant believed he did not have to disclose it because it was *nolle prossed*—dismissal of the charges to him meant there were no charges. (Tr. 89-90) Applicant conceded he was wrong for not reporting the disorderly conduct charge on his SF 86. (Tr. 90) In regard to the September 2007 civil domestic violence order, Applicant was never charged. (Tr. 88)

When Applicant responded to the illegal drug use question on his May 21, 2008 SF 86, he disclosed his extensive marijuana use, but failed to disclose his three-time use of ecstasy. (Tr. 90; GE 1; SOR ¶ 1.h) He volunteered to an Office of Personnel Management (OPM) investigator that he used ecstasy on three occasions from October 2005 to January 2006 in his July 29, 2008 OPM personal subject interview (PSI). (GE 3 at 6-7) During the same OPM PSI, he admitted that he associated with drug users; however, at his hearing, he said he no longer does so. (Tr. 87; SOR ¶ 1.j)

In his July 29, 2008 OPM PSI, Applicant described very heavy involvement with marijuana for several years, including distribution of marijuana. (GE 3 at 5-6) His OPM PSI thoroughly describes multiple areas of security concern. (GE 3)

When Applicant completed his May 21, 2008 SF 86, he disclosed he was involved in a child custody lawsuit; however, he did not disclose the September 2007 civil domestic violence order. (Tr. 91; GE 1; SOR ¶ 1.i) Applicant was unsure of his rationale for not disclosing the domestic violence order at the time he completed his SF 86; however, he thought he did not disclose it because it was dismissed. (Tr. 92) He may also have failed to disclose the order because he believed it was without merit. (Tr. 92)

Applicant said he respected the Government's right to ask for personal information as part of a security investigation. (Tr. 93-94) He promised to carefully and fully answer all questions. (Tr. 93-94)

After 2007, Applicant changed. (Tr. 85) He accepted responsibility for his family, and he improved his work habits. (Tr. 85, 96) He stopped using marijuana. His ongoing struggle with M and his former spouse regarding custody issues have been a huge drain on Applicant's morale and wellbeing. (Tr. 85-86) He loves his work and is optimistic about his future. (Tr. 96-97) He wants to support his family and his employer.

Character Evidence

Applicant's FSO retired from the Army after 30 years of service as a sergeant major. (Tr. 39, 42-47) His FSO has had daily contact with Applicant for three years. (Tr. 24-25, 39-41) Applicant performs a variety of tasks as a fabricator and welder with layouts, computers, and blueprints. (Tr. 25, 28, 30) Applicant has a commercial driver's license. (Tr. 110) He has an excellent reputation with customers; he is a fine union steward; and he works well with colleagues. (Tr. 28, 30-31) Applicant's "work ethic is outstanding." (Tr. 25) He has improved his abilities through training; he shows initiative; and he is reliable, diligent, trustworthy, honest, and responsible. (Tr. 26-27, 37-38) Applicant would have been promoted to foreman, if he had a security clearance. (Tr. 29)

Applicant's friend of eight years describes Applicant as honest and generous. (AE A) Applicant is more mature and responsible now. (AE A) He recommends reinstatement of Applicant's security clearance. (AE A) Two neighbors, who have known Applicant for thirty years, depict Applicant as a respectful, diligent, and loyal family man. (AE B-C) He received an April 28, 2013 letter of appreciation for his contributions to his employer supporting troops with better more survivable equipment. (AE D)

During his Marine Corps service, Applicant was awarded the Combat Action Ribbon, Global War on Terrorism Expeditionary Medal, Sea Service Deployment Ribbon, National Defense Service Medal, Presidential Unit Citation, Letter of Appreciation, and Good Conduct Medal. (GE 6)

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 that, "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 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 and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to 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 [his or 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

Personal Conduct

AG ¶ 15 expresses the security concern ¶ pertaining to personal conduct:

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.

Five personal conduct disqualifying conditions under AG ¶ 16 are potentially applicable. Those five disqualifying conditions provide:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . [to] determine security clearance eligibility or trustworthiness;

(b) deliberately providing false or misleading information concerning relevant facts to [a] . . . security official, or other official government representative;²

(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;

(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: . . . (3) a pattern of . . . or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

²The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

AG ¶¶ 16(a) and 16(b) apply. The Government produced sufficient evidence to meet the substantial evidence threshold that Applicant failed to provide required information on his May 21, 2008 SF 86. He failed to disclose: the restraining orders and charges arising from his custody litigation; his ecstasy use on three occasions; and his arrest or charge for disorderly conduct. His FSO provided a letter stating that Applicant failed to fully disclose information about his custody litigation.

The Government presented substantial evidence of court orders and charges arising from his custody litigation, his nonjudicial punishment in January 2003, and his association with drug users, and he failed to keep his FSO fully informed of the status of his family court litigation. AG ¶ 16(d) applies. AG ¶ 16(c) does not apply because there is sufficient credible adverse information under the other cited disqualifying conditions for an adverse determination.

AG ¶ 16(e) applies. There is substantial evidence that Applicant engaged in conduct which adversely affects his personal, professional, and community standing. Further analysis concerning applicability of mitigating conditions is required.

Five mitigating conditions under AG ¶ 17 are potentially applicable:

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

(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; and

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

AG ¶ 17(f) applies to the restraining orders and charges arising from Applicant's child custody litigation. The family court has been working with Applicant, his family, and his former spouse and her family for five years. The family court resolved the charges and counter charges and awarded Applicant and his spouse full custody of the two children from Applicant's former spouse's marriage.

AG ¶ 17(f) applies to the allegations that Applicant did not provide full and complete information on his May 21, 2008 SF 86. Applicant disclosed that he: (1) received mental health treatment from a Navy specialist from 2001 to 2004; (2) left employment three times under allegations of unsatisfactory performance or under unfavorable conditions; (3) received nonjudicial punishment in 2003; (4) used marijuana weekly from September 2004 to June 2006; (5) had delinquent debts; and (6) was immersed in child custody litigation with his former spouse. His disclosure of the custody litigation was sufficient to place the Government on notice of this area for further inquiry and investigation. He is unsophisticated about legal matters, and he did not understand the necessity or requirements for disclosure of his disorderly conduct because the charge was dismissed and specific information about the custody related litigation. Compared to hundreds of uses of marijuana, his three-time ecstasy use was apparently overlooked.

AG ¶ 17(a) applies to Applicant's failure to disclose his ecstasy use on his SF 86. During his July 29, 2008 OPM PSI, he described his extensive marijuana involvement and later during the interview mentioned his three-time ecstasy use. The only evidence of Applicant's ecstasy use was Applicant's admission during his OPM PSI.

AG 17(f) applies to Applicant's failure to fully disclose information to his FSO and his association with drug users that he described in his OPM PSI. Applicant's FSO explained that Applicant told him when he was going to court for custody issues and he was aware of the charges and counter charges. Applicant provided documentation upon request about the litigation. Applicant ended his association with drug users.

AG ¶ 17(e) mitigates the security concern raised under AG ¶ 16(e). I do not believe Applicant could be coerced or pressured into release of classified information by threats of public disclosure of his history of involvement with the family court, allegations of falsification of his SF 86, history of illegal drug use, or disorderly conduct charge.

AG ¶ 17(d) applies. Applicant acknowledged all of his misbehavior in his OPM PSI and at his hearing. The most recent conduct in the SOR, aside from the complaints and counter complaints arising from the child custody litigation, is in 2008, more than four years ago. Applicant has changed and matured. He is a responsible employee and family man. He has taken "positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." Personal conduct concerns are mitigated.

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

Applicant provided sufficient information to refute most of the SOR allegations. He did not intentionally attempt to deceive the Government about matters of security concern. He credibly promised to be very careful and thorough when completing future SF 86. The allegations of M are not substantiated. The family court did not credit her allegations, and Applicant and his spouse have sole custody of Applicant spouse's children from her previous marriage. His 2007 charge of disorderly conduct was dismissed and is stale. Applicant sees his FSO every workday, and he has a good relationship with his FSO. He will keep his FSO informed of matters of possible security concern. Applicant ended his marijuana involvement several years ago, and he no longer associates with drug users.

Applicant served honorably in the Marine Corps, including combat service in Iraq. After leaving the Marine Corps, he abused marijuana and was irresponsible for a time. He married his current spouse and is now a responsible family man, who is dedicated to the welfare of his children. He is a diligent and trustworthy employee, who contributes to his employer and the national defense. He has alleviated all personal conduct concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct concerns are mitigated, and he is eligible for access to classified information.

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 E: FOR APPLICANT

Subparagraphs 1.a to 1.l: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant or reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge