



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-02063
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James Duffy, Esq.
For Applicant: Sheldon I. Cohen, Esq.

May 6, 2010

Decision

CURRY, Marc E., Administrative Judge:

Applicant’s falsification of his security clearance application and failure to provide candid information to an investigative agent during two interviews makes him an unacceptable candidate for a security clearance. Clearance is denied.

On August 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, Personal Conduct, and J, Criminal Conduct. The action was 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)

Applicant answered the SOR on September 22, 2009, admitting all of the allegations except SOR subparagraph 1.m. Also, he requested a hearing. On November 4, 2009, the Government amended the SOR, adding SOR subparagraphs 1.p - 1.q, and amending SOR subparagraph 2.a. On November 16, 2009, the case was assigned to

me. On November 17, 2009, Applicant answered the Amended SOR, denying all of the additional allegations.

On November 18, 2009, Applicant's attorney entered his appearance. On November 23, 2009, I held a scheduling conference, and at the parties' request, I scheduled the hearing for January 11, 2010. On November 30, 2009, counsel for Applicant requested a continuance because of the unexpected unavailability of a witness. Department Counsel did not object, and I rescheduled the hearing for January 13, 2010. On January 8, 2010, counsel for Applicant filed an amended answer changing Applicant's admission to SOR subparagraph 1.b to a denial.

The hearing was held on January 13, 2010, as rescheduled. I admitted 17 Government exhibits marked GE 1 through 16, and GE 20. Applicant's counsel objected to the admissibility of GE 17 through 19 arguing that as copies of relevant state and federal law, it was more appropriate for me to take administrative notice of them. I sustained the objection, and took administrative notice of the law set forth in GE 17 through 19. I admitted 23 Applicant exhibits marked AE A through W. I received the testimony of Applicant and five others on his behalf. The transcript was received on January 21, 2010.

Preliminary Ruling

Department Counsel conceded SOR subparagraphs 1.b and 1.m. I resolve them in Applicant's favor.

Findings of Fact

Applicant is a 33-year-old single man with four children, ages 15, 14, 5, and 4. The oldest two children are from his first marriage, the five-year-old child is from his second marriage, and the youngest is from a former girlfriend.

Applicant married his first wife in 1995. (AE H at 2) They separated in 1998. He married his second wife in 2001. (*Id.* at 1) Applicant's second wife filed for divorce in 2004. (AE G) In 2006, Applicant's wife filed for an annulment.

Applicant finished high school and has taken some college courses. (Tr. 275) He is a veteran of the United States (U.S.) Navy where he served from 1995 to 2002. (AE A) He received, among other things, the Joint Meritorious Unit Commendation in 1995, a Letter of Commendation from a vice admiral in 1996, and a Good Conduct Medal in 2000. (*Id.* at 2) He was honorably discharged. (*Id.* at 1)

Since 2007, Applicant has worked for a defense contractor as a systems administrator. (GE 1 at 2) During the same period, he worked part-time for another defense contractor as a help desk administrator. (Tr. 154) He works approximately 70 hours a week, in total. (Tr. 155) Applicant has maintained a security clearance since 1999. (Tr. 150)

According to Applicant's supervisor, a retired Army colonel, he is a highly-motivated employee whose maturity, dedication, and sense of responsibility "transcends what would normally be attributed to someone" of similar age. (Tr. 42-43) Also, Applicant "is tenacious, demonstrating unparalleled ability to work through layer upon layer of government bureaucracy, when required." (AE P)

Although Applicant's supervisor has limited social interaction with him, they frequently talk about their children. From these conversations, he concluded that Applicant is highly focused on educating his children and involving them in after-school programs. (Tr. 47) In sum, he concluded that Applicant's "priorities are in line with what . . . they should be if you are raising children," and his efforts at raising his family and taking care of his responsibilities are "beyond reproach." (Tr. 47-48)

In April 1996, Applicant was issued a citation during a routine stop by the U.S. Department Customs and Border Protection for having an open container of alcohol in his car. (Tr. 167) At the time, he was returning from Mexico. (Tr. 167) Applicant paid the fine. (Tr. 167)

In 1997, Applicant, while in the Navy executed a "duty swap" with another sailor with his command's approval, and switched duty assignments. (Tr. 169) After Applicant moved, he discovered that his new ship was "doing a home port move" and relocating. (Tr. 169) Applicant's request for two weeks leave to move his family to the new home port was rejected. Instead, his section officer allowed him five days. (Tr. 171)

Applicant took two weeks to report for duty in contravention of his section officer's order. Subsequently, he went to Captain's Mast, where he was awarded 45 days restriction, 45 days of extra duty, and the forfeiture of a portion of his pay for 45 days. (Tr. 171)

In 1998, Applicant confronted his first wife regarding a man with whom he suspected she was having an affair. When Applicant attempted to leave the home, she blocked the door. (Tr. 183) Furious, Applicant went upstairs and punched a window. (Tr. 183) The base police then arrived at the home, and Applicant told them what had happened. (Tr. 184) The next day, Applicant's command ordered him to attend anger management classes. (Tr. 184)

Applicant attended all of the anger management courses but did not receive a completion certificate because he refused to write a letter apologizing to his wife, "because she was cheating on me." (Tr. 184) At the hearing, Applicant's first wife acknowledged she was seeing another man during their marriage when this incident occurred. (Tr. 85)

By December 1998, Applicant and his first wife had separated, and Applicant had moved in with his grandparents. (Tr. 64, 68, 185) One evening, Applicant's first wife visited him at his grandparent's home, and an argument ensued. (Tr. 185) Applicant then went upstairs. Later, his grandmother told him that his estranged wife had taken

several of his personal belongings, including a camcorder, and run out of the house. (Tr. 186) Applicant then went to look for her. After Applicant spotted her on the street, she ran toward the neighborhood police station. (Tr. 186) When Applicant caught up with her, they began wrestling over the camcorder. The police then arrested both of them. (Tr. 187) The next day, the court dismissed the charges and released Applicant. (Tr. 187)

Applicant contends that he then filed for divorce. (Tr. 175) The record contains no copy of a divorce petition. However, the record does include a copy of a custody motion that Applicant's attorney filed in May 1999, which cross references a complaint and several motions filed previously. (AE D at ¶ 1) Also, Applicant's first wife testified that it was her understanding that Applicant had filed for a divorce. (Tr. 65) I find that some time in early 1999, Applicant, through an attorney, filed a petition for divorce.

At a hearing later in 1999, Applicant and his first wife signed some papers that were given to them by Applicant's attorney. (*compare* Tr. 66 (Testimony of Applicant's First Wife) with Tr. 176 (Applicant's Testimony)) Applicant's attorney then told them she would file the papers and the divorce would become final approximately 30 days later. (Tr. 176) Approximately two months later, Applicant's attorney informed him that the divorce was final. (Tr. 180) Unbeknownst to Applicant, his attorney never filed the paperwork, as promised.¹

On October 5, 2001, Applicant married his second wife in a civil proceeding. (AE H) Applicant and his second wife then organized a religious marriage ceremony, inviting between one and two hundred guests. (Tr. 189) During their marriage, both of Applicant's children from his first marriage lived with them. (Tr. 190)

By 2004, Applicant's marriage had begun to deteriorate. One night, during a heated argument in July 2004, Applicant attempted to leave the home, and his second wife blocked the door. (Tr. 192) He then locked himself in the bathroom, called his mother, and asked her to come to the home to mediate the dispute. (Tr. 193) After his mother arrived, Applicant's wife allowed him to leave. (Tr. 192) A few days later, on July 29, 2004, Applicant's second wife filed a civil complaint in family court alleging domestic violence. (GE 3) The court scheduled the hearing for August 5, 2004. Applicant's second wife did not appear at the hearing, and the complaint was dismissed. (*Id.* at 2)

Applicant and his second wife later reconciled, then separated approximately two months later in September 2004. (GE 2 at 8; Tr. 197) Shortly after separating, Applicant and his second wife got into an argument after she refused to allow him to visit their child. (Tr. 197) She then filed a domestic violence complaint in family court. The court

¹Approximately a year after Applicant's attorney represented him, the jurisdiction's office of bar counsel filed a disbarment claim against her for misappropriation of clients' funds. Her affirmative defense was, in part, that any misappropriation occurred, not intentionally, but because her office was confused and disorganized. (AE E at 8)

issued a protective order on September 7, 2004, which it vacated eight days later. (*Id.* at 2)

In October 2004, Applicant's second wife filed a divorce complaint. (AE G) While the divorce was pending, Applicant's second wife discovered that Applicant's first marriage had never been terminated. (AE H) On September 13, 2006, she then filed a complaint for annulment, which the court granted on March 29, 2007. (GE 2 at 19) At or about the time Applicant's wife filed the annulment complaint, she filed a criminal claim for bigamy. (GE 2 at 8) The prosecution later dropped the charge. (*Id.*)

In November 3, 2004, Applicant's wife filed another domestic violence complaint. That day, the court rejected her request for an interim protective order. (GE 5 at 1)

Applicant believed that his attorney had finalized his divorce from his first wife before he married his second wife. (Tr. 176) His first wife thought they were divorced, also. (Tr. 65) When Applicant informed her they were still legally married, she had been dating someone. (Tr. 85)

In April 2006, a woman whom Applicant had dated filed a paternity and child support claim against him. (GE 6 at 2) Applicant was served with the complaint on June 20, 2006. (*Id.*) The resulting DNA test revealed Applicant was the father of her child. In the fall of 2006, the court ordered Applicant to pay child support through direct wage deduction. (GE 2 at 11)

In June 2006, Applicant again filed for divorce from his first wife. (GE 2 at 19) The court granted the divorce in September 2006. (*Id.* at 10)

In December 2005, Applicant began dating another woman. By the end of 2006, their relationship had ended acrimoniously. (Tr. 207) In the fall of 2006, Applicant filed a kidnap charge against his estranged girlfriend after she picked up his son from his mother's home without his knowledge or permission. (Tr. 210) On November 30, 2006, Applicant's girlfriend then obtained a temporary restraining order against him. (GE 7) On December 5, 2006, the court dismissed the restraining order after the girlfriend failed to appear. (*Id.*) Applicant later withdrew the kidnap charge.

In July 2007, Applicant's first ex-wife filed a civil complaint accusing him of physically abusing their daughter. (GE 8) Applicant admitted spanking his daughter to reprimand her, but denied physically abusing her. The court granted a temporary no contact order, which it later dismissed, after considering the daughter's corroborating testimony. (Tr. 213)

Applicant currently has a girlfriend with whom he has lived for the past three years. She characterizes their relationship as "great." (Tr. 129) Although they occasionally argue, Applicant has neither physically abused nor threatened her. (Tr. 212)

Applicant has repaired his relationship with his ex-wives. (Tr. 130) Visitation with his children is coordinated smoothly. (Tr. 137)

In June 2008, Applicant was cited for driving his car with a suspended license. The charge was later *nolle prossed*. (see Answer)

In July 2004, Applicant completed a security clearance application. He failed to disclose his second wife, to whom he was married at the time. Instead, he listed his status as “separated” from his first wife. (GE 1 at 3)

In July 2006, Applicant met with an investigative agent from the U.S. Office of Personnel Management. (OPM) He did not disclose the paternity claim that was pending at the time of the interview. (GE 2 at 3) Also during the interview, he referred to his second wife as his girlfriend.

Applicant met with the OPM agent again in January 2007. When asked why he characterized his second wife as his girlfriend during his first interview, he did not respond. Also, he explained that he did not list the paternity claim because he did not understand what constituted a civil claim. (GE 2 at 10)

In April 2009, the Government propounded interrogatories to Applicant. (GE 2) In Applicant’s response, he wrote a brief statement reiterating that his omissions from his security clearance application were predicated on a “lack of understanding at the time.” (GE 2 at 15)

At the hearing, Applicant testified that he did not list his second wife on the security clearance application because he was “rushing,” and overlooked this information when copying it from a security clearance application completed in 1998. (Tr. 227-229)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied together with the factors listed in the adjudicative process. 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.”

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 as to obtaining a favorable security decision.

Analysis

Guideline E, Personal Conduct

Under this guideline, “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.” (AG ¶ 15)

The SOR alleges two traffic-related civil offenses (subparagraphs 1.a and 1.l), an adverse episode while in the Navy that generated a non-judicial punishment, (SOR subparagraph 1.c) eight domestic violence-related episodes, (SOR subparagraphs 1.d - 1.k) and several allegations involving deceit. (SOR subparagraphs 1.n - 1.q)

SOR subparagraphs 1.f through 1.h, and 1.k allege multiple arrests and charges for domestic violence. The record evidence, however, indicates that these allegations were not criminal. Rather, they were complaints filed by Applicant’s various ex-wives and girlfriends in civil court. (GE 3 - 10)

The record evidence indicates that the complaints filed by Applicant’s ex-spouses, as listed in SOR subparagraphs 1.f through 1.h, and 1.k were requests for protective orders. In the state where they filed these complaints, the alleged abusive spouse does not have to be present for the petitioner to obtain a protective order. (MD Code Ann. § 4-501 *et. seq.*) The record evidence does not establish that Applicant was present when his ex-spouses obtained protective orders in any of the aforementioned cases. In one instance, listed in SOR subparagraph 1.h, the petition for an interim protective order was denied the day it was filed. As for the others, all of the protective orders were vacated within 10 days, or dismissed after the respective ex-spouses failed to appear for hearings on the merits. I conclude that SOR subparagraphs 1.f through 1.h and 1.k do not constitute Personal Conduct security concerns.

Nevertheless, the remaining allegations of domestic violence (SOR subparagraphs 1.d, 1.e, 1.i, and 1.j), the traffic citations, and the 1997 episode of insubordination while in the Navy trigger the application of AG ¶ 16(c):

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 including that the person may not properly safeguard protected information [including but not limited to] (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress.

Moreover, the allegations that Applicant falsified his marital status when he applied for a marriage license in 2001, committed bigamy when he married his second wife later that year, omitted his second wife from his 2004 security clearance application, and failed to disclose a paternity claim during an interview with an OPM investigator raise the issue of whether AG ¶¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," and 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," apply.

The traffic citations were minor. One of them occurred nearly 15 years ago. Applicant's non-judicial punishment occurred 12 years ago. He received a good conduct medal after this incident, and was ultimately discharged honorably.

Conversely, Applicant's history of dysfunctional, volatile relationships with spouses and significant others is more serious and recent. He has been in a stable relationship for the past three years. He has repaired the relationships with his ex-wives, and is dedicated raising his children and maximizing their educational opportunities. 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 it is unlikely to recur, and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," applies to SOR subparagraphs 1.a, 1.c - 1.e, and 1.l.

According to state law where Applicant resides, no person may enter into a marriage ceremony with another "while lawfully married to a living person. (Md. Crim. Law Code Ann. § 10-502 (2002). At common law, bigamy was a specific intent crime. In Applicant's state, however, a defendant can overcome a bigamy charge if (s)he possessed a "bona fide and reasonable belief" that (s)he was divorced at the time of the remarriage. (*Brown v. State*, 230 Md. 82, 185 A.2d. 905, 908 (1962))

Applicant retained an attorney to file for divorce from his first wife. Although the record evidence contains no copy of a divorce complaint, it includes a subsequent custody pleading that references an earlier complaint. Applicant's attorney (who characterized her office as confused and disorganized in a later, unrelated disbarment proceeding) reassured him that the divorce was finalized nearly two years before he remarried. While married to his second wife, Applicant had custody of his children from his first marriage, and both children were living with him and his second wife in 2004 when she filed for divorce. I conclude Applicant had a *bona fide* and reasonable belief

that he was divorced from his first wife when he remarried his second wife. Consequently, I resolve SOR subparagraphs 1.n and 1.o in Applicant's favor.

In response to the allegation concerning the omission of his second wife from his security clearance application, Applicant, at the hearing, characterized it as an oversight committed as he was transcribing information to the current application from a security clearance application he had completed as part of an earlier investigation that had occurred before he met his second wife. During the investigative process, an OPM agent interviewed him twice. Later DOHA propounded interrogatories to him. He did not provide this explanation in response to either the interviews or the interrogatories. I conclude Applicant falsified his security clearance application, as alleged in SOR subparagraph 1.p. AG ¶ 16(a) applies without mitigation.

Applicant's falsification of his security clearance application undermines the credibility of his explanation for failing to disclose the paternity action to the OPM investigator during the July 2006 interview. AG ¶ 16(b) applies without mitigation.

Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness." Moreover, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." (AG ¶ 30) The government contends that all of the SOR allegations except subparagraphs 1.d and 1.j. constitute Criminal Conduct security concerns in addition to Personal Conduct security concerns.

The Government conceded SOR subparagraph 1.b, and I concluded that SOR subparagraphs 1.f through 1.h, 1.k, 1.n, and 1.o do not constitute Personal Conduct security concerns. These allegations do not constitute Criminal Conduct security concerns, either.

SOR subparagraphs 1.a and 1.l were minor traffic citations, not criminal offenses. Applicant's non-judicial punishment received while in the Navy was not a criminal offense, as cross -alleged in SOR subparagraph 2.a. The only Personal Conduct allegations that also constitute Criminal Conduct security concerns are SOR subparagraphs 1.e, 1.i, 1.p., and 1.q. They trigger the following 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 conduct stemmed from volatile relationships with his former wives and ex-girlfriends. He has been in a stable relationship for approximately three years.

Also, he has repaired his relationship with his former wives to facilitate visitation with his children. It is highly unlikely that such domestic-related criminal conduct will recur.

However, Applicant's falsification of his 2004 security clearance application and 2006 falsification to an OPM investigator constitute criminal conduct under 18 U.S.C. § 1001. Consequently, although the mitigating condition set forth in AG ¶ 35(b)² partially applies, it is too soon to conclude his criminal conduct no longer poses a security concern given the falsifications.

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.

Applicant works 70 hours per week, yet still takes the time to mentor youth on the weekends. Although his previous relationships with former wives and girlfriends were indicative of bad judgment and irresponsibility, he deserves credit for repairing these relationships for the sake of his children. I was particularly impressed that his first wife testified on his behalf. This significant evidence of rehabilitation cannot overcome the doubt about his security clearance worthiness created by his falsifications throughout the investigative process. Upon considering this case in the context of the whole-person concept, I conclude it is not clearly consistent with the national interest for Applicant to be granted 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:

AGAINST APPLICANT

²"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 ¶ 35(b))

Subparagraphs 1.a - 1.o:	For Applicant
Subparagraphs 1.p - 1.q:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
SOR Subparagraph 2.a:	Against Applicant

Conclusion

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

MARC E. CURRY
Administrative Judge