



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



In the matter of:

ISCR Case No. 09-03059

Applicant for Security Clearance

Appearances

For Government: Braden Murphy, Esq., Department Counsel
Philip Katauskas, Esq. Department Counsel
For Applicant: Philip D. Cave, Esq.

February 28, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. The SOR was undated and Applicant received it on March 24, 2010. 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on April 27, 2010, and requested a hearing before an administrative judge. The case was assigned to me on December 14, 2010. DOHA issued a Notice of Hearing on January 14, 2011. I convened the hearing as scheduled on February 8, 2011. The Government offered Exhibits (GE) 1 through 13. Applicant did not object and they were admitted into evidence. Applicant and two witnesses testified on his behalf. Applicant offered Exhibits (AE) A through G, which were admitted into evidence without objections. DOHA received the hearing transcript (Tr.) on February 16, 2011.

Findings of Fact

Applicant admitted the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 51 years old. He has worked for his present employer since July 1, 2008. He joined the Army in 1979 and served until June 30, 2008, when he was honorably retired. Applicant earned an associate's degree, a bachelor's degree, three masters' degrees, and he is presently in a doctorate program working on his Ph.D. He has held a security clearance throughout his military career, and held a Top Secret security clearance since 1995. He also has had access to sensitive compartmented information (SCI) until it was suspended in April 2007. He presently holds a Secret security clearance. Applicant has been married since 1988, and has a daughter who was born in December 1999.¹

Applicant held the rank of Chief Warrant Officer 5 when he retired from the Army, but did not have enough time in grade to receive retirement pay at that grade. While serving in the Army, he held three different military occupational specialties. They were military police, explosive ordnance disposal, and counterintelligence. Applicant served in Operation Desert Shield and was deployed in combat operations in Operation Desert Storm. He was stationed overseas in 2002. He was deployed serving in combat operations during Operation Iraqi Freedom, for 15 months from April 2003 to July 2004. After his return, he was notified of new orders and that he and his family would transfer in June 2005. Two days before his transfer, his orders were rescinded, and he was ordered to a new unit at the same overseas location. He transferred to the new unit in June 2005. He deployed a week later for 30 days of training. He later deployed with his unit to Iraq for combat operations from September 2005 to September 2006.²

Applicant's deployments were difficult for his wife who was diagnosed with depression. His daughter was diagnosed with Attention Deficit Hyperactivity Disorder and was enrolled in the special education class at school. The doctors had difficulty determining the correct medication to help his daughter. His daughter had difficulty when he was deployed. His wife had difficulty handling their daughter when he was

¹ Tr. 27-28, 31-33, 68-70. Applicant stated he also held a Top Secret security clearance when he was working in explosive ordnance disposal.

² Tr. 26, 29, 34-46, 70-71.

deployed. Applicant's second Iraqi deployment exacerbated his wife's depression, and because his daughter was older, she was more aware of his absence and it increased the emotional turmoil for the family. During Applicant's second Iraqi deployment, his wife was diagnosed with clinical depression. At the time, he did not understand the complexity of the diagnosis or its impact on her and their family. His wife was the primary caregiver for their daughter.³

Applicant received new orders and he and his family returned to the United States in January 2007. Applicant was unaware at the time of his own emotional problems, which were the result of post-traumatic stress disorder (PTSD). In approximately February 2007, he and his family were assigned government quarters. They received their household goods shipment, which was delivered, but not unpacked. His wife did not want to unpack the goods. Applicant began organizing the unpacking after his work day.⁴

Applicant and his wife were having behavioral problems with their daughter while they were overseas and upon their return to the United States. Applicant and his wife took their daughter to school to register her, but they were refused until she completed the required school physical. They took her to the military hospital for a physical and were informed the first available appointment was in a month. Applicant was required to go on temporary duty for two weeks. When he returned he learned that his wife missed the appointment for their daughter because the taxi that was to take them was late. They were required to reschedule the appointment for her physical and wait another month before she could complete the requirements to attend school. Applicant's wife had assured him that she would register the child while he was gone. She did not follow through on registering their child.⁵

When Applicant returned from his temporary duty he discovered his house was in shambles. He had difficulty sleeping while he was on temporary duty and felt sleep deprived. He created a safe haven room in his house, and locked himself in the bathroom. When he returned the household goods boxes were in disarray and none had been unpacked by his wife. It appeared his daughter had attempted to take things out of some boxes. There were bags of unsanitary trash and the house was generally in an unhygienic situation. His wife did not want to do anything or take care of anything. Applicant described it as looking like a cyclone had gone through the house.⁶

On April 17, 2007, Applicant's daughter called the emergency telephone number 911 and hung up the telephone. She was concerned because her mother was not at home. Applicant was home at the time. The police responded to the call. Applicant

³ Tr. 37-46, 73-75.

⁴ Tr. 46-52, 71.

⁵ Tr. 49, 75-80, 89-92.

⁶ Tr. 49-53, 55-56, 82.

explained that when the police arrived he could not respond and his body went into shock and he froze. He was apprehended and later went to a Uniform Code of Military Justice (UCMJ) Article 15 nonjudicial punishment hearing for the offenses of child neglect, child endangerment, cruelty and maltreatment, conduct unbecoming an officer, and abuse and neglect of a child. As a result of the incident, Applicant's access to SCI was revoked on April 27, 2007. He did not appeal the action because he was unaware that he could appeal it. He continued to hold a Secret clearance.⁷

Applicant cooperated fully with military authorities and admitted his culpability in the unsafe and unhygienic quarters and the physical condition of his daughter. His child was taken into protective custody. He sought mental health counseling, as did his wife. In January 2008 Applicant was diagnosed with PTSD manifested with false guilt. It was learned that during Applicant's combat and training duty he had four incidents where people he was close to were killed. In Desert Shield, he was scheduled to go with his unit on a mission. He was pulled off of the mission at the last minute to interrogate a prisoner.⁸ He stated:

If I had been in the vehicle when it came across an Iraqi checkpoint, the AK47 round that hit my friend in the back of the head that would have been me instead because I would have been sitting behind him.⁹

Another time, he had volunteered for a mission and was removed shortly before they deployed, so he could attend training. Out of the six people on the mission, four were killed, and two were injured in an explosive ordnance accident. Another incident involved a well-liked young officer who Applicant had trained and had warned about the appropriate response to secondary improvised explosive devices (IED). The officer was killed shortly after responding to an IED incident when the secondary one exploded. During Applicant's last deployment, he trained a young female soldier who was the first female Filipino American soldier killed in battle. It occurred on Christmas Eve.¹⁰

Applicant successfully completed extensive counseling with psychologists and psychiatrists from January 2008 to May 2008. He continued with counseling and parenting classes after his nonjudicial punishment hearing. He has developed mechanisms and counter-measures for dealing with his PTSD, if symptoms recur. He has an understanding for when he should seek medical treatment in the future, if those measures are unsuccessful. He is not on medication and he has recovered. His wife continues to suffer from depression, but is being treated with counseling and medication. Applicant's daughter remained in foster care. After extensive counseling the county attempted to reunite her with her parents, and return her to her home in March

⁷ Tr. 56-58; GE 4, 11, 13.

⁸ Tr. 80-82.

⁹ Tr. 53.

¹⁰ Tr. 53-58.

2009. In June 2009, His wife had to call the police for assistance on two occasions. His wife and daughter could not get along. Applicant's wife admitted she could not care for her daughter. There were extensive discussions with the county authorities. Applicant and his wife were both represented by attorneys. They agreed to voluntarily terminate their parental rights to their daughter, believing it was in her best interest, and on the advice of counsel. They completed the voluntary termination of their rights in September 2009. Presently, they do not have any contact with their daughter, on the advice from county authorities that a period of separation would allow the daughter to stabilize. Applicant and his wife are not prohibited from seeing their daughter, but rather they are following the guidance from the authorities. Applicant hopes once his daughter's life is stabilized they will resume contact. Applicant admitted that this event has been very traumatic for him and his wife.¹¹

Applicant's UCMJ offenses were eventually adjudicated at the nonjudicial punishment hearing in May 2008. He pled guilty to the offenses and took full responsibility for his actions. Applicant never shifted or shirked responsibility for his failure to address the needs of his family, understanding he was ultimately responsible for their well-being. He was given a written reprimand. He retired in June 2008.¹²

Applicant usually handled all of the finances for the family, but while he was deployed his wife took care of them. She used their credit cards and accumulated approximately \$100,000 of credit card debts. Applicant used all of his personal savings, retirement accounts, and other assets to settle each debt he owed. After each debt was settled, he went back to the creditors and paid them the original amount claimed. He paid all of his creditors in seven months.¹³

A coworker of Applicant's testified on his behalf. He is a retired military member and has held a Top Secret security clearance with access to SCI for many years. He has contact with Applicant eight hours a day. Applicant disclosed to him the facts that are the subject of this security clearance hearing. He considers Applicant to be a good worker and person who has a good reputation within the company. He stated Applicant has a good reputation for truthfulness.¹⁴

Applicant's supervisor, who is also vice president of operations and the facilities security officer for the company testified on his behalf. He has held a Top Secret security clearance with access to SCI for many years. He is also a retired military officer. He has known Applicant since Applicant joined the company about three years ago. He values his unique skills and concluded his performance is exemplary in his job.

¹¹ Tr. 58-67, 83-86, 92-98.

¹² Tr. 82-84.

¹³ Tr. 36, 43-46.

¹⁴ Tr. 99-107; AE C.

He believes Applicant has a great reputation at the company. Applicant disclosed to him the circumstances from his past that are the subject of his security clearance hearing.¹⁵

I have considered all of the documentary evidence provided. The President and Chief Executive Officer of the company where Applicant is employed and the Chief Operating Officer provided character letters for him. They describe Applicant as a person of high character and honesty. They explained that Applicant disclosed the issues from his past, both legal and financial, and their impact. He has kept his chain of command informed all along the way. They do not believe Applicant presents a security risk.¹⁶

Applicant's regional supervisor also provided a statement. He considers Applicant's character and work ethic to be beyond reproach. Based on his personal knowledge and Applicant's reputation, he believes him to be truthful.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is

¹⁵ Tr. Tr. 107-114; AE E.

¹⁶ AE D, F.

¹⁷ AE G.

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable.

(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 dishonesty 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

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

Applicant received nonjudicial punishment in May 2008 for conduct associated with providing a safe and clean environment for his child in violation of the UCMJ. I find the above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant fully acknowledged that he was responsible for ensuring his living quarters were clean and habitable, and his obligations to provide care for his daughter, and to ensure she was enrolled in school. Unbeknownst to him at the time, he was suffering from PTSD. At the same time, his wife was suffering from clinical depression. Neither was providing proper care or supervision for their daughter. Other than this incident, Applicant had an unblemished military career. He sought counseling and he has recovered from his PTSD. His wife continues to suffer from clinical depression, but is on medication. They made the difficult decision that it was in their daughter's best interest to terminate their parental rights. The incident that is alleged in the SOR occurred in April 2007, almost four years ago. It appears the PTSD had a cumulative effect on Applicant because of four traumatic incidents. The offenses were not minor, but they did happen under unique circumstances. It is unlikely to recur because he has been treated for his PTSD, his wife is on medication, and his daughter no longer lives with them. I find this one time incident, does not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant completed the necessary counseling to change his behavior and has taken positive steps to alleviate the stressors. Applicant's employer and coworker are aware of the circumstances of the incident. Applicant has taken positive steps to reduce vulnerability to exploitation, manipulation, or duress. I find AG ¶¶ 17(c), 17(d), and 17(e) apply.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant honorably served in the Army for 29 years. He participated in combat operations during Desert Storm, and twice during Operation Iraqi Freedom. He has become an expert in his field and continues to serve the military as a civilian. As a result of his combat service, he suffered from PTSD and it affected his home life. He has rectified the problem by obtaining counseling and he has recovered. He is aware of mechanisms to help him if he feels PTSD symptoms. His wife suffers from clinical depression. She and Applicant could not provide the necessary care required for their child with special needs. Applicant has addressed the issues that affected his ability to provide the proper care for his family. The conduct alleged in the SOR allegation was directly related to his PTSD that has been treated. Applicant is not a security risk. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant successfully mitigated the security concerns arising under the guideline for Personal Conduct.

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-1.b: For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge