



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ISCR Case No. 11-09728
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2014

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On October 18, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On October 29, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J (criminal conduct) and E (personal 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on December 13, 2014. The Department of the Defense Central Adjudications Facility (DOD CAF) received his SOR answer on

January 3, 2013. Department Counsel was prepared to proceed on March 27, 2013. The case was originally assigned to another administrative judge on July 23, 2013; however, due to scheduling difficulties, the case was reassigned to me on October 24, 2013. DOHA issued a notice of hearing on October 31, 2013, scheduling the hearing for December 5, 2013. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant called two character witnesses and testified on his own behalf. He did not offer any exhibits at his hearing.

I held the record open until January 3, 2013, to afford the Applicant the opportunity to submit documents on his behalf. Applicant timely submitted AE A through M, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on December 11, 2013.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a. through 1.d., and denied SOR ¶ 2.a. His answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 52-year-old health, safety, and environmental supervisor, and an employee of a defense contractor since April 2010, at an overseas base. From December 2008 to April 2010 he was assigned to the same overseas base, but worked for a different defense contractor. Currently, Applicant does not have a security clearance. He previously was granted DOD security clearances in August 1981, August 1988, and August 1991. (Tr. 14, 19-22, 24-26, GE 1.)

Applicant graduated from high school in June 1979. He was awarded a bachelor of science degree in aeronautical science in "in the 90s," and was awarded a master of business administration degree in December 2007. (Tr. 22-24, GE 1.)

Applicant has been married three times; however, twice to the same woman. He was married to his first wife (W-1) from 1982 to 1983, and was married to her a second time from 1994 to 1995. Both marriages to W-1 ended by divorce. He was married a third time to a different woman (W-2) from 1998 to 2000, and that marriage ended by divorce. He had two children, a 27-year-old daughter, born in 1986 and a son, deceased and discussed *infra*, born in 1993. Applicant did not serve in the armed forces. (Tr. 15-16, 19, 26, GE 1, GE 2.)

Criminal Conduct

Applicant's SOR alleged four separate arrests that led to criminal charges. Discussed in chronological order, they are:

In November 1985, Applicant was arrested and charged with inflicting corporal injury on a spouse or cohabitant. He was sentenced to three days in jail and 24 months' probation. (SOR ¶ 1.a, GE 3.)

In June 1995, Applicant was arrested and charged with felony first degree murder and aggravated child abuse for causing the death of his three-year-old son in March 1995. In January 1997, a jury convicted him of the lesser included offense of manslaughter and child abuse. He was sentenced to prison for six years. At the time of his son's death, Applicant was a single parent who had custody of his eight-year-old daughter and three-year-old son. (SOR ¶ 1.b, GE 3, GE 4.) Applicant accepted responsibility for causing his son's death; however, he disputed the medical examiner's finding that his son died of blunt force trauma to his head. He acknowledged that his son had bruises and welts on his body and admitted he inflicted the bruises. Applicant also told his then girlfriend at the time not to take his son to daycare because of visible welts and bruises. He admitted to tossing his son on his bed after spanking him. (Tr. 32-36.) Applicant was not placed on parole or probation after he was released from prison. Upon his release from prison, he was awarded full custody of his daughter. (GE 2, GE 4.)

In November 2003, Applicant was arrested and charged with misdemeanor solicitation of a prostitute. Disposition was deferred and adjudication withheld. (SOR ¶ 1.c, GE 3.) During Applicant's June 2011 Office of Personnel (OPM) interview, he stated that he stopped on the street to talk to two women. According to the Applicant, one of the women asked him for bus fare and he asked them if they wanted to get some food. One of the women propositioned him for sex and he sarcastically responded by asking them much sex could he get for a dollar. After making that comment, Applicant was arrested, booked and placed in jail until he was bailed out by a friend. He appeared in court and paid a fine, but does not recall the amount of the fine or the date he appeared in court. (GE 2.)

In August 2005, Applicant was arrested and charged with touch or strike domestic violence. The case was not prosecuted and the charge was dropped or abandoned. (SOR ¶ 1.d, GE 3.) Applicant was involved in an altercation in which he struck his daughter after she lied to him. She called the police and he spent two days in jail before he was bailed out by a friend. His daughter dropped the charges. (GE 2.)

Personal Conduct

The SOR alleged that Applicant falsified his October 2010 e-QIP when asked whether he had ever been charged with any felony offense by answering the

question “no.” The Government’s evidence clearly establishes that in June 1995, Applicant was charged with felony first degree murder and aggravated child abuse, discussed *supra*. Applicant’s answer was clearly incorrect.

Applicant was familiar with the security clearance application process, having been granted security clearances on three previous occasions. (Tr. 26-29.) He testified that he was confused when answering the question. He stated, “But at that time when I answered this question my mind frame was basically have you ever been convicted of a felony within seven years.” And, “Well, my mind – my thought was basically the government knows everything about me already, right?” When pressed further during cross-examination, Applicant acknowledged the question read, have you **ever** been charged with a felony; however, maintained that he misread the question (emphasis added). Department Counsel reviewed with him the significance of an event involving the death of his child, his education background, and his certifying under penalty of perjury that his answers were truthful. Applicant adamantly denied that he intentionally falsified his e-QIP stating that he misread the question and became confused over the timeframe involved. He stated, “Anybody can go out and pull up my name and see it there for themselves if they want to. So why would I want to hide anything from the government?” (Tr. 29-32, 43-44.)

Character Evidence

Applicant called two character witnesses to testify on his behalf, a female friend (FF) and his adult daughter (AD). His FF is a realtor and has a 17-year-old daughter. After their second date, Applicant informed her that he had recently been released from jail and “what happened regarding his son.” FF stated that Applicant “has really been inspirational” around her daughter. She described Applicant as truthful and someone who is a “good person” and “very spiritual.” They go to church together on Sundays. (Tr. 46-49.)

AD is 27-years-old and employed as an emergency room registered nurse. At the time she testified, she was within one week of being awarded her bachelor’s degree. She was also scheduled to begin her master’s degree course work to become a family nurse practitioner in January 2014. AD testified that her father raised her as a single parent and served as a role model for her encouraging her to better herself. Her father encountered challenges when he came home from prison, but continued to work hard to provide for her. At the time of her father’s August 2005 arrest that involved her, she was 19 years old. AD’s testimony differed somewhat from the police report. She stated that she asked the police to accompany her to retrieve her belongings because she wanted to leave the house. AD is not afraid of her father and described him as calm and spiritual. (Tr. 50-57.)

Applicant submitted work performance evaluation from his current employment overseas covering the periods of March 2010 to March 2011 and March 2012 to March 2013. These evaluations reflect solid performance and document Applicant’s contribution to the national defense. (AE A – AE B.) He also

submitted eight favorable reference letters that addressed his professional and personal life. (AE C – AE M.)

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 expresses the security concern pertaining to 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.

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.

Considering the totality of the circumstances in this case, I am unable to fully apply any of the potential criminal conduct mitigating conditions. Applicant's case involves four separate arrests and charges that occurred in 1985, 1995, 2003, and 2005. Three of those incidents involved physical violence with the most serious resulting in the 1995 death of his three-year-old son. Recognizing that Applicant has made substantial strides to overcome his criminal past and overcome many obstacles since his release from prison, doubts regarding his suitability for a security clearance remain. His criminal behavior spanned a 20-year period. His credibility has also come into question not only with his attempt to coverup his involvement with his son's injuries, but also more recently while completing his October 2010 e-QIP. Once credibility became an issue, it is difficult to accept Applicant's rehabilitation as complete. As noted above, when there is doubt, security clearance determinations should err on the side of denials.

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 one condition that could raise a security concern and may be disqualifying in this case:

(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.

Applicant failed to disclose his 1995 felony arrest, claiming that he misread the question and adding that the Government had constructive knowledge of that arrest. AG ¶ 16(a) applies.¹

¹Deliberate and materially false answers on a security clearance application may violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995) as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance. His criminal offenses are sufficiently serious to potentially jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine). In light of my ultimate decision, and the absence of an alleged violation of 18 U.S.C. § 1001 in the SOR, it is unnecessary for me to decide whether or not Applicant actually violated 18 U.S.C. § 1001.

AG ¶ 17 provides seven 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.

None of the mitigating conditions fully apply. Applicant's explanation for his omission is that he misread the question and that his omission was not deliberate. I do not find his testimony or explanations credible regarding his state of mind when he completed his security clearance application. It is difficult to accept Applicant's explanation that an event as significant as the 1995 death of his son would not have triggered a heightened sense of awareness when completing his e-QIP. An event as significant as this, as well as Applicant's previous security clearance experience, education, age and experience, causes me to question his explanation.

Furthermore, I do not accept Applicant's contention that the Government has constructive knowledge of all events of his past. Granted the investigation process revealed Applicant's criminal past. However, the process begins with the notion that applicants provide truthful and accurate information at the onset of the process. In this

case, that did not happen. He knowingly and deliberately chose not to disclose full information about the extent of his criminal past or his indebtedness.

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 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.

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 Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's record of service as a defense-contract employee weighs in his favor. As noted by his references, Applicant is making a contribution to the national defense. His company supports him and recommends him for a security clearance. He overcame significant obstacles and made substantial progress in turning his life around since his release from prison. He maintains a positive relationship with his daughter and other people in his life.

However, I am unable to completely put aside the cumulative nature and seriousness of the criminal charges in this case, particularly the charge involving Applicant's culpability in the 1995 death of his son. This in conjunction with credibility issues raised leaves me with doubt about Applicant's eligibility for a security clearance. As noted, I specifically considered Applicant's employment record, the obstacles he overcame, and evidence presented at his hearing and post-hearing documents. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not fully mitigated the security concerns raised.

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. For the reasons stated, I conclude he is not 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 J: AGAINST APPLICANT

 Subparagraphs 1.a – 1.d: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

 Subparagraph 2.a: 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. Eligibility for a security clearance is denied.

Robert J. Tuidor
Administrative Judge