



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



In the matter of:)
)
) ISCR Case No. 15-06152
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Gabriel Pene, Esq.

03/08/2017

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On February 10, 2016, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. DoD acted under Executive Order (EO) 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) implemented by the DoD on September 1, 2006.

Applicant answered the SOR on March 11, 2016, and requested a hearing. The case was assigned to me on September 8, 2016. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on September 21, 2016, and the hearing was convened as scheduled on October 26, 2016. The Government offered exhibits (GE) 1 through 7, which were admitted into evidence without objection. Department Counsel's discovery letter and exhibit list were marked as hearing exhibits (HE I and II). Applicant testified, called three witness, and offered exhibits (AE) A through G. Applicant's exhibit index was marked as HE III. DOHA received the hearing transcript (Tr.) on November 2, 2016.

Procedural Ruling

Motion to Amend SOR

Upon motion by Department Counsel, and without objection, I amended the SOR by changing SOR ¶ 2.a to read: "The information as set forth in subparagraphs 1.a through 1.e, above."¹

Findings of Fact

In Applicant's answer, he admitted the allegations (with explanations) in the SOR, except SOR ¶ 1.c and 1.d. All criminal conduct allegations were cross-alleged as personal conduct allegations (¶ 2.a) with the same corresponding answers. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings, transcript, and exhibits submitted, I make the following additional findings of fact.

Applicant is 58 years old. He is thrice divorced and has two children. His fiancée is expecting a child. Since September 2016, he has worked for his current employer, a defense contractor. He has worked for other federal contractors in the past. He has a master's degree. In 1998, he retired from the Air Force as a captain after 21 years of honorable service.²

The SOR alleged:

- (1) In December 1997, Applicant was arrested and charged with third degree assault. He later received a letter of reprimand from his Air Force commander for striking his wife;
- (2) In September 2003, Applicant was charged with trespassing on private property and harassment. He completed a conflict resolution course and the charges were dismissed;
- (3) In January 2007, Applicant was arrested and charged with felony property damage, felony menacing (with a shotgun), harassment, and third degree assault;

¹ Tr. 9-10.

² Tr. 68, 70; GE 1.

- (4) In April 2007, Applicant was arrested for violation of a protective order and harassment; and
- (5) In July 2012, Applicant was arrested and charged with third degree assault, property damage, and harassment.

In 1997, Applicant was married to his second wife. He was in the Air Force at that time. He believed his wife was overly protective of their four-year-old daughter and had arguments with her about this and other subjects. In December 1997, Applicant got into an argument with his wife, which led to him striking her. He stated he was unable to control himself. His daughter was present when the incident happened. He testified that his wife also struck him. He was charged with third degree assault, but the State declined to prosecute. He was given a letter of reprimand by his Air Force commander for striking his wife. He and this wife divorced in 2001. In 1998, he began seeing a therapist for the treatment of depression. He has continued cognitive behavior counseling since then and has been taking prescribed medication.³

In 2003, Applicant experienced some conflict with one of his neighbors. According to Applicant, several teenagers associated with the neighbor engaged in harassing behavior, including vandalism, toward Applicant. Applicant tried talking to the neighbors (the parents) and calling the police on occasion to stop the harassment. In September 2003, another disagreement arose between Applicant and the neighbor's teenage children. Applicant admittedly walked into the neighbor's house without permission to confront the children's mother. A scuffle ensued and Applicant ended up pushing one of the teenagers. A girl alleged that Applicant struck her, but he denied doing so. The police were called and Applicant was cited for trespassing. He appeared in court and the charges were dropped on the condition he take an anger management course. The course consisted of taking classes over several weekends. He had no further disputes with this neighbor and he still lives in the same location.⁴

In January 2007, Applicant was married to his third wife, who lived with him at the time. While his wife was out of the house, Applicant was performing some computer maintenance on her computer and discovered some explicit photographs showing his wife and other men. When she returned to the house, an argument ensued over the photographs and Applicant admitted striking his wife. His wife alleged that during this time Applicant threatened her with a shotgun and that the guns were on a bed before she left the house. Applicant admitted slapping his wife and throwing her and her computer out of the house, but denied threatening her and stated that his guns were put away when the argument occurred. The police responded to Applicant's address and initially Applicant refused to cooperate with the police. After several hours, he exited the house and found that it was surrounded by a police SWAT team. He was arrested on felony charges of damaging property, menacing with a shotgun, harassment, and third

³ Tr. 53, 56, 58, 71, 75-76; GE 2-3.

⁴ Tr. 52-55, 77-78; GE 6.

degree assault. The charges were dropped when Applicant's wife refused to cooperate with the prosecution.⁵

After the incident in January 2007, Applicant's wife moved into a shelter. There is some evidence that a judge issued a protective order in favor of Applicant's wife restricting Applicant from having contact with her. Applicant was charged with violating the protective order when he delivered medicine to his wife at the shelter. He went there at his wife's request. Someone from the shelter reported him and several months later he was arrested. When he appeared in court, the judge dismissed the charges because Applicant was unaware of the protective order when he made contact with his wife.⁶

In July 2012, Applicant's girlfriend (G) was living with him. They had been dating for four to five years. Some months before, G moved in with Applicant when she quit her job. After several months in this arrangement and G not looking for a job, Applicant explored eviction options with the Sheriff's office because G would not move out. He served her with a 90-day notice to vacate the premises. In July 2012, shortly before the expiration of the 90-day notice, the two exchanged heated words. This led to Applicant throwing water on G, and G retaliating by throwing cold coffee on Applicant. At that point Applicant stated, "I tried to physically remove her from my house." G called the police and Applicant was arrested for assault, damage to property, and harassment. The responding officers documented that G had a small cut on her face, a swollen lip, and redness on her right cheek. G claims Applicant struck her, pulled her hair, broke her glasses, and drug her across the floor when she grabbed and scratched his ankles which stopped the dragging. Applicant had scratches on the back of his calf. Applicant admitted he badly handled this incident and acknowledged what he did was wrong. In January 2013, he pleaded guilty to harassment and the remaining charges were dropped. He received a deferred adjudication pending successful completion of a two-year probation period. He was required to attend a 36-hour domestic violence course. The following workday after the incident occurred he reported it to his security officer. Applicant has had no further incidents involving law enforcement.⁷

Applicant testified that he has not been in a relationship since breaking up with G. He stated he has not been on a date since then. He also admitted during his testimony that he has a tendency to be violent with his romantic partners.⁸

Applicant has continued counseling and presented a letter from his current counselor. The counselor states Applicant is diagnosed with "adjustment disorder with anxiety and depressed mood." He recommends that Applicant retain his clearance. His current physician also provided information stating that Applicant's major depression

⁵ Tr. 45-48, 79, 80, 82-84, 86-87, 90; GE 4, 7.

⁶ Tr. 50, 91; GE 4, 7.

⁷ Tr. 38-44, 94-99, 102; GE 4-5.

⁸ Tr. 73, 105-106.

was stable and his prognosis for continued stability is good. He also provided a list of his current prescriptions.⁹

Applicant presented the testimony of three witnesses including his former supervisor, his brother, and his daughter. His supervisor also provided a written letter of support. He attests to Applicant's trustworthiness and reliability. He recommends retention of his clearance. Another coworker, providing a letter of support, also finds Applicant trustworthy and recommends retention of his clearance. Applicant included his job performance appraisal from 2010-2011. Both Applicant's brother and daughter support him.¹⁰

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.

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 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

⁹ Tr. 62-65; AE A, G.

¹⁰ Tr. 21, 24-32, 117-118, 121,125, 132, 134; AE D-F.

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 that an applicant may deliberately or inadvertently fail to 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.

Section 7 of EO 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 J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested for domestic violence-type charges in 1997, 2007, and 2012. He was cited for assaulting a teenager in 2003. He admitted striking his second wife in 1997, pushing a teenager in a home where he was trespassing in 2003, striking his third wife in 2007, and pushing his girlfriend in 2012. I find that both disqualifying conditions apply, except concerning SOR ¶ 1.d, because it was not established that Applicant was aware of the protective order.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

- (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; 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.

Applicant's most recent offense was in 2012. He has shown a steady pattern of violence towards his companions since 1997. While many years may separate the incidents, the pattern of abuse is remarkably similar. Applicant lashes out physically when he is in a dispute with his partner. Even though he has been in therapy since 1997 and went through an anger management course in 2003, his actions in 2007 and 2012 demonstrate that he cannot control his anger or violent ways. His probation from his 2012 arrest ended in 2015. There has not been a sufficient amount of time to determine whether his rehabilitative efforts have been successful, given his long history of physical abuse. This is especially relevant because Applicant has not been in a relationship since 2012. His past criminal behavior casts doubt on his reliability, trustworthiness, and good judgment. Under these circumstances, his last criminal act that occurred in 2012 is not sufficiently attenuated considering his behavior in its totality. AG ¶ 32(a) does not apply. Applicant failed to present sufficient evidence of his rehabilitative efforts to justify full mitigation. AG ¶ 32(d) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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 in this case. The following disqualifying conditions are potentially applicable:

(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.

The same rationale that applied to the Guideline J concerns, also applies here. AG ¶ 16(c) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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; and

(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.

Applicant's assaultive behavior through the years was not minor. Even though he has participated in counseling over the years and taken anger management courses, those actions failed to dissuade him from committing similar acts. Only two years have passed since his probation ended for assaulting his girlfriend. His past criminal history since 1997 casts doubt on his reliability, trustworthiness, and good judgment. I cannot conclude that similar behavior will not recur. AG ¶¶ 17(c) and 17(d) do not 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 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 considered Applicant's military and civilian records. I also considered the favorable testimony offered by his coworkers, his therapist, his physician, and his family members. Applicant engaged in criminal conduct of a similar nature over an extended time. He failed to provide sufficient evidence of

rehabilitation and a track record of responsible behaviors to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the Guidelines.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge