



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



In the matter of:)
)
) ISCR Case No. 15-01313
)
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

06/27/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns under Guidelines E (personal conduct) and J (criminal conduct). Eligibility for access to classified information is granted.

Statement of the Case

On April 25, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and J. On May 2, 2017, Applicant responded to the SOR. On May 24, 2017, Department Counsel was ready to proceed. On March 20, 2018, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

On April 2, 2018, DOHA issued a notice of hearing scheduling the hearing for May 8, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. However, I sustained Applicant's objections to GE 3 and 4, which were Office of Personnel Management Personal Subject Interviews, on the grounds of authenticity and lack of foundation. (Tr. 13-15) Applicant testified and submitted Applicant's Exhibits (AE) A(1) and B(1), which were admitted without objection. At the conclusion of the hearing, I held

the record open until May 25, 2018, to afford Applicant an opportunity to submit additional evidence. Applicant timely submitted AE A through F, which were admitted without objection. On May 16, 2018, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 50-year-old functional analyst employed by a defense contractor since August 2016. He seeks to regain his security clearance as a requirement of his continued employment. (Tr. 16-18)

Applicant graduated from high school in 1985. He estimates that he completed 60 college credit hours. (Tr. 18-19) Applicant served in the U.S. Marine Corps from 1987 to 2007, and retired honorably as a gunnery sergeant (pay grade E-7). He had multiple combat tours in Iraq and Afghanistan. Applicant receives an 80% Veterans Administration (VA) disability for post-traumatic stress disorder (PTSD) and combat-related injuries. (Tr. 11-20, 22-25, 37; AE A, AE C) He successfully held a security clearance for 16 of the 21 years he served in the Marine Corps. (Tr. 34) Applicant was married in 2003 and that marriage ended by divorce in 2009. (Tr. 19-20, 41; AE B) He has a six-year-old daughter and pays \$800 in monthly child support. (Tr. 20)

Personal Conduct/Criminal Conduct

The SOR lists 11 allegations under personal conduct and cross-alleges 10 of those 11 allegations under criminal conduct spanning a nine-year period (2006-2014). The first allegation alleged that Applicant deliberately failed to list the offenses that follow on his April 25, 2014 security clearance application (SF-86). (SOR ¶ 1.a)

With regard to the falsification allegation, Applicant did not answer his SF-86 accurately when he failed to list his alcohol-related convictions. In his SOR answer, he stated that his failure was inadvertent and unintentional adding, "I was hurrying thru [sic] this questionnaire to get it submitted." He testified credibly on this point and his explanation is corroborated by other mistakes when completing the same security clearance application that were not alleged as falsifications. Applicant acknowledged these mistakes adding that he promptly admitted his omission during his background investigation interview. (SOR answer; Tr. 46-50)

Summarized, the remaining allegations consist of being convicted of driving under the influence in 2005; being charged with driving without an operator's license and failure to wear a seat belt in 2006; being charged with driving with a revoked license and speeding in 2006; being convicted in 2009 of driving while impaired, driving left of center, and civil revocation of driver's license (charged in 2007); being convicted of driving with a revoked license and speeding in 2008; being convicted of

assault in 2010 (charged in 2009); being charged with driving with a suspended license in 2010; being convicted of operating a vehicle with no insurance and driving with a revoked driver's license in 2010; being convicted of driving with a revoked driver's license in 2013 (charged in 2012); and being charged with violation of probation in 2014. (SOR ¶¶ 1.b – 1.k)

When Applicant returned from his last combat tour in Iraq, he was withdrawn and according to his wife, he was a different person. His multiple combat tours had begun to weigh on him and he was haunted by what he had experienced. Several months after he returned from his last combat tour, his wife filed for divorce. He suffered from depression "about his physical state." (Tr. 25-26, 36-37) Applicant sought treatment from the VA for treatment for his PTSD and for his physical injuries. He takes medication daily to "take the edge off" the pain. (Tr. 27) The pattern of offenses documented in his SOR began shortly after his last combat tour in Afghanistan. His most serious offenses are his 2005 driving under the influence and his 2007 driving while impaired arrests. (Tr. 31-32, 39-43)

Applicant recognizes that his conduct has been unacceptable. He accepts full responsibility for his actions and has taken corrective action indicative of rehabilitation. (SOR answer; 43-44) Applicant stopped drinking completely three years ago in 2015 and does not intend to drink again. He does not keep any alcohol in his house nor does he frequent bars. Seeing a close friend go to jail for driving under the influence and unable to see his daughter motivated Applicant to quit drinking. He does not want to suffer a similar fate. (Tr. 32-35, 50-51, 53) Because of his 2007 driving while impaired arrest, he was not allowed to reenlist in the Marine Corps. This prompted his retirement. (Tr. 43)

Retiring from the Marine Corps and having a young daughter were life-changing experiences for Applicant. He stated, "...I need to be a role model for my daughter. The last thing I need for her to do is have to come visit me in jail for something that could have been avoided." (Tr. 33) Applicant no longer associates with the people with whom he drank. (Tr. 35-36) During visitation with his daughter, he typically engages in activities such as taking her to the pool, playing pool, playing video games, and doing homework with her. (Tr. 33)

After his 2005, alcohol-related arrest, Applicant was ordered to complete an alcohol assessment and to attend a substance abuse and alcohol class. He did not receive an alcohol dependent or adverse diagnosis. (Tr. 35, 51-52) Applicant no longer drives and depends on friends to get around. (Tr. 34, 44) He reapplies annually with the department of motor vehicles to have his driver's license reinstated and will continue to do so until his license is reinstated. (Tr. 45) Applicant is no longer on probation. (Tr. 54)

Character Evidence

As noted, Applicant is devoted to his six-year-old daughter. He submitted father-daughter photographs of himself spending time with her. (Tr. 28-29; AE(1),

AE B(2) He also submitted his Marine Corps fitness reports from 2004 and 2005 that document above average performance and a Navy Commendation Medal Citation for meritorious service as an instructor from 2005 to 2007. (AE D – AE F)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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 national security eligibility will be resolved in favor of the 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 the applicant or proven by Department Counsel." The applicant 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 EO 10865 provides that adverse 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

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.

Three personal conduct disqualifying conditions under AG ¶ 16 are potentially applicable. Those three disqualifying conditions provide:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . [to] determine security clearance eligibility or trustworthiness;¹

(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

¹The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

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

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

person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of . . . 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 in activities which, if known, may affect the person's personal, professional, or community standing. . . .

AG ¶ 16(a) is not established. Applicant's SOR alleges that he failed to disclose his 2005 and 2007 alcohol-related arrests on his April 24, 2014 SF-86. He credibly testified that he hurriedly completed his SF-86 and that any omissions he may have made were inadvertent and not deliberate. Adding credence to his explanation, he also made other mistakes on his SF-86 that were not cited as falsifications. Applicant promptly acknowledged his omissions during his background investigation interview.

AG ¶¶ 16(d) and (e) apply. Applicant's two alcohol-related arrests in 2005 and in 2007, and his eight mostly traffic-related offenses committed from 2006 to 2014 raise security concerns about his pattern of rule violations. There is substantial evidence that Applicant engaged in conduct that adversely affects his personal, professional, and community standing. Further analysis concerning applicability of mitigating conditions is required.

Five mitigating conditions under AG ¶ 17 are potentially applicable:

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

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

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

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

AG ¶ 17(e) mitigates the security concern raised under AG ¶ 16(e). I do not believe Applicant could be coerced or pressured into release of classified information by threats of public disclosure of his history of alcohol-related offenses and mostly traffic-related offenses. Those offenses are matters of public record and are documented in his security file.

With regard to the remaining alcohol and mostly traffic-related offenses, it is difficult to ignore what Applicant experienced as a result of his multiple combat tours in Iraq and Afghanistan. His post-deployment conduct cost him his marriage and his career in the Marine Corps. He found himself in a state of depression and “haunted” by his memories. He suffers from PTSD as well as from combat-related injuries and receives an 80% VA disability rating. Applicant realized his life was spiraling downward and sought professional help from the VA. He quit drinking completely three years ago. His primary focus is being a responsible father and setting a good example for his daughter. In short, Applicant has regained control of his life and has not had any similar missteps in the last four years. AG ¶ 17(c) applies in part and AG ¶¶ 17(d) and (e) fully apply.

Criminal Conduct

AG ¶ 30 articulates the security concern concerning 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.

The Government established its case under Guideline J through Applicant's admissions and the evidence presented. A review of the evidence supports application of two criminal conduct disqualifying conditions: AG ¶ 31(a) “a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;” and AG ¶ 31(b) “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.”

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 individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The discussion under personal conduct is incorporated in this section. For the same reasons, AG ¶ 32(a) is partially applicable and AG ¶ 32(d) fully applies.

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.

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 sections under Guidelines E and J are incorporated in this whole-person section. However, further comments are warranted.

Security clearance adjudications are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Applicant recognizes that his past behavior has been unacceptable and is determined to move forward in a positive way. In reaching my final decision, I gave considerable weight to Applicant's 20 years of honorable service in the Marine Corps and his multiple combat tours. He has paid a heavy price for his post-deployment conduct, but has demonstrated that he is moving forward in a positive way. I recognize and applaud the efforts Applicant has made and encourage him to continue with his current course of action.

Applicant has mitigated the personal conduct and criminal conduct security concerns. 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.

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:

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|---------------------------|---------------|
| Paragraph 1, Guideline E: | FOR APPLICANT |
| Subparagraphs 1.a – 1.j: | For Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Clearance is granted.

Robert Tuider
Administrative Judge