



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



In the matter of:)
)
) ISCR Case No. 16-03880
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

09/10/2018

Decision

BENSON, Pamela C., Administrative Judge:

Applicant mitigated Guideline F, financial considerations security concerns. He failed to mitigate the 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 December 31, 2015, Applicant submitted a security clearance application (SCA). On January 25, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Guideline F, and Guideline E. The action was taken 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) effective within the DOD on September 1, 2006. On June 8, 2017, new AGs were implemented and are effective for decisions issued after that date.¹

¹ I considered the previous AGs, effective September 1, 2006, as well as the new AGs, effective June 8, 2017. My decision would be the same if the case was considered under the previous AGs.

Applicant answered the SOR on March 1, 2017. He admitted the six SOR allegations alleged under Guideline J. He denied both SOR allegations alleged under Guideline F, and the single allegation alleged under Guideline E. He attached copies of his self-prepared 2014, 2015, and 2016 Federal and state income tax returns. All of Applicant's income tax returns were unsigned and undated, which I labeled as Applicant Exhibit (AE) A. Applicant requested that his case be decided by an administrative judge on the written record in lieu of a hearing.² On April 4, 2017, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing six Items, was mailed to Applicant on April 6, 2017. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did submit additional documentation, and he also filed an objection to the Government's misrepresentation of the facts in the brief. I labeled his additional documentation as AE B-G.³ Applicant did not object to Items 1 through 6, which I admitted into evidence, and Department Counsel did not object to AE A-G, which I also admitted into evidence. The Defense Office of Hearings and Appeals (DOHA) Office assigned the case to me on May 14, 2018.

Findings of Fact

Having thoroughly considered the evidence in the record, including Applicant's admissions, I make the following findings of fact: Applicant is 38 years old and employed by a DOD contractor as a project engineer since July 2007. He earned his bachelor's degree in 2002, and his master's degree in 2006. He listed that he was considered married by common law since approximately 2010. Applicant submitted documentation that showed that his common-law wife petitioned the court for divorce or dissolution of marriage in January 2017. There was no final disposition of this case provided. Applicant listed two sons, ages 7 and 8, and two step-children, ages 23 and 14, on the 2015 SCA. He is requesting national security eligibility.⁴

SOR allegation SOR ¶ 1.a alleges that Applicant was charged in 1997 for Disorderly Conduct. During his July 2016 background interview, Applicant stated he was charged with this offense after he was rear-ended in a fast food drive-thru. He and the other driver exchanged heated words resulting in the charge filed against him. He stated the charge was later dismissed.

The SOR alleges that Applicant was arrested in December 2008 for driving under the influence. (SOR ¶ 1.b) He drove home from a holiday party after consuming four alcoholic drinks. Applicant pleaded guilty to driving while ability impaired, and he was

² Item 2.

³ Applicant had labeled his documents as Item 7-12, but I relabeled them as AE B-G.

⁴ Item 3, 6; AE B.

ordered by the court to complete alcohol education, serve 15 months supervised probation, 12 months of monitored sobriety, and pay fine and court costs.⁵

In November 2009, Applicant was arrested for crime against person – harassment (strike, shove, kick) domestic violence, and harassing communication. (SOR ¶ 1.c) A compulsory protection order was issued on behalf of his common-law spouse and her daughter against Applicant. The charges were later dismissed.⁶

SOR ¶ 1.d alleges that Applicant was arrested in September 2012 for assault and battery (domestic violence). Applicant claimed that he and his common-law spouse argued and shoved each other. The charge against Applicant was subsequently dismissed.⁷

SOR ¶ 1.e alleges that in August 2013, Applicant was charged with disorderly conduct hazardous/physical. Applicant claimed that his common-law spouse was also charged with the same offense. Applicant claimed their behavior inside of their vehicle was more of an act of affection rather than aggression, but they both were charged with a criminal offense by the police. They hired an attorney to represent them at the out-of-state hearing. Applicant stated that the charges filed against them were subsequently dismissed.⁸

Applicant was arrested in June 2015 for domestic violence battery, domestic violence harassment (strike, shove, kick or touch), and domestic violence harassment - communicate in a manner intended to threaten (verbal). (SOR ¶ 1.f) Applicant pleaded guilty to domestic violence harassment -communicate in a manner intended to threaten (verbal), and the other charges were dismissed. He was fined \$570, ordered by the court to obtain a domestic violence evaluation and complete weekly group therapy sessions, and to obtain an alcohol evaluation and follow up with any recommended treatment. Applicant was placed on probation for one year. He provided documentation from the probation office showing Applicant successfully completed the terms of his probation.⁹

Applicant provided documentation that he participated in domestic violence treatment from August 2015 through May 2016.¹⁰ The program director, distinguished with a master of arts, and a certified addiction counselor, submitted a letter on Applicant's behalf. He noted that Applicant had been initially evaluated as a "Level C", which is a high

⁵ Items 3, 4, 5, 6.

⁶ *Id.*

⁷ Items 3, 4, 6. Note that this offense was not reported to the employer's security office (Item 5).

⁸ Items 3, 6. Note that this offense was not reported to the employer's security office (Item 5).

⁹ Items 3, 4, 5, 6.

¹⁰ AE C, AE D.

risk offender, but was later reduced to “Level B”, a medium risk offender, based on his progress in treatment.¹¹

Under Guideline F, the SOR alleges that Applicant failed to timely file his Federal and state income tax returns for 2014 and 2015. (SOR ¶¶ 2.a and 2.b) He provided unsigned and undated Federal and state income tax returns for tax years 2014-2016. In his May 2017 response, he listed, “Applicant admits to the very late filing of his 2014 and 2015 tax returns...” He did not fully understand the seriousness of his unfiled income tax returns in the evaluation of his security worthiness. He was unaware of any negative consequences for the late filing of income tax returns, especially in the case where the filer is due a refund. He asserted that this problem would never happen again.

Guideline E of the SOR cross-referenced the conduct listed under Guideline J, criminal conduct, and Guideline F, financial considerations. (SOR ¶ 3.a) No additional information was alleged under this paragraph.¹²

Applicant provided a character reference letter from an athletic supervisor, who has direct contact with Applicant as a volunteer youth sports coach for the past three years. He stated that Applicant has been a positive role model for his players. He is well liked by his players and the parents, and he considers Applicant a dedicated individual providing positive experiences for the youth in the community.

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 national security

¹¹ *Domestic Violence Offender Management Board, Standards For Treatment With Court Ordered Domestic Violence Offenders*, May 2016, Colorado Division of Criminal Justice, and Colorado Department of Public Safety, at page 5.

¹² Item 1.

eligibility will be resolved in favor of the 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 not drawn 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 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 J, 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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

(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.

Applicant was charged with six criminal offenses between 1997 and 2015. Four of these offenses involved domestic violence or disorderly physical conduct. He stated that in many instances he was not the aggressor, or that at least one of the offenses did not involve aggressive conduct. I find that his explanations are self-serving, especially noting the pattern of criminal charges filed against him over the years. Applicant failed to provide sufficient evidence to support his claims. He pled guilty to a 2015 domestic violence offense which resulted in fines, a domestic violence evaluation and domestic violence treatment, and he was ordered to complete one year of probation. AG §§ 31(a) and 31(b) are established.

I have considered all of the mitigating conditions 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal offenses establish a pattern of criminal conduct, especially in regards to his domestic violence charges. Applicant's pattern of domestic violence offenses shows he has a difficult time controlling his actions when involved in a confrontational setting. During his court-ordered 2015-2016 domestic violence treatment, Applicant was initially evaluated as a high-risk offender, but he was later classified as a medium-risk offender at the time he finished treatment in 2016. The classification shows that his behavior may recur. His continued criminal conduct despite adverse consequences casts doubt on Applicant's current reliability, trustworthiness, and good judgment. AG §§ 32(a) and 32(d) do not apply.

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG § 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The guideline notes several conditions that could raise security concerns. In assessing Applicant's case, I considered the following potentially disqualifying condition:

AG ¶ 19(f): failure to file...annual Federal, state, or local income tax returns
... as required.

Applicant failed to timely file Federal and state tax returns for at least two consecutive years. The above disqualifying condition applies.

The financial security concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. A person who fails repeatedly to fulfill his legal obligations, such as filing income tax returns when due, suggests that an applicant may likewise have a problem with complying with well-established government rules and procedures.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving counseling for the problem from a legitimate and credible source, such as a non-profit credit counselling service, and there are clear indications that the problem is being resolved or is under control; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is compliance with those arrangements.

AG ¶¶ 20(a) and (b) are established. Applicant listed his failure to file state and Federal tax returns for tax years 2014 and 2015 on his SCA. He expected Federal and state refunds for both years. Applicant did not timely file his tax returns due to serious marital stress and problems in his marriage, a situation beyond his control. Applicant has rectified the problem by filing these Federal and state tax returns. He did not realize the security significance when he failed to file his tax returns where he was expecting tax refunds. He is currently going through the divorce process, and he has given assurances

that he will file all of his tax returns in a timely manner. The circumstances of his failure to file his income tax returns are unlikely to recur, and no longer cast doubt on Applicant's reliability, trustworthiness, and good judgment.

There is no evidence Applicant received financial counseling, but it appears the problem is now under control. He has filed his 2014 and 2015 Federal and state income tax returns with the appropriate tax authorities. AG ¶¶ 20(c) applies in part, and (g) applies. Applicant mitigated the financial considerations security concerns.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. 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 individual may not properly safeguard classified or sensitive information;

(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . .

(3) a pattern of dishonesty or rule violations.

Guideline J allegations ¶¶ 1.a through 1.f are all cross-alleged under Guideline E at SOR ¶ 3.a. Each of them is established by the record evidence. AG ¶¶ 16(c) and 16(d)(3) apply to SOR ¶ 3.a, as does the general security concern of AG ¶ 15. Since I

held that Guideline F security concerns were mitigated, there is no need to further discuss the financial considerations security concerns that were also cross-alleged here.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

As to SOR ¶ 3.a, AG ¶¶ 17(c) and 17(d) do not apply for the same reasons as set forth in the analysis of the mitigating conditions under Guideline J, above.

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(d):

(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 J, Guideline F, and Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) was addressed under that guideline, but some warrant additional comment.

Applicant is 38 years old and employed by a DOD contractor as a project engineer since July 2007. He has a graduate degree. He is active in the youth sports league as a coach, and is well-liked by his players and parents. Applicant has a history of criminal conduct, but denies that his last four domestic violence offenses involved acts of physical aggression. He has failed to provide evidence to support his contention, such as the detailed police reports that were filed when he was charged with these domestic violence offenses. Applicant was evaluated as a high-risk offender, but he was later classified as a medium-risk offender by the time he finished his court-ordered domestic violence treatment in 2016. His repeated actions and the charges filed against him reveal a deficiency in his judgment, reliability and trustworthiness required of persons handling sensitive information.

Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude he failed to mitigate the security concerns arising under Guideline J, criminal conduct, and Guideline E, personal conduct. Security concerns alleged under Guideline F, financial considerations, have been mitigated.

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-f:	Against Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraphs 2.a-b:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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 a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge