



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



In the matter of:)
)
) ISCR Case No. 17-00884
)
Applicant for Security Clearance)

Appearances

For Government: Robert B. Blazewick, Esq., Department Counsel
For Applicant: Anthony J. Mazzeo, Esq.

04/17/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant was arrested once in 2003, and three times in 2014. All but one of the charges was for assault and battery of a family member, his wife. The other charge was for disturbing the peace, in a similar circumstance. Applicant successfully completed probation for one of the 2014 offenses. The remaining charges were dismissed or not prosecuted. He has had no subsequent offenses. He and his wife are working to improve their relationship and are making an effort to limit and control their arguments and confrontations. Applicant provided sufficient evidence to mitigate the criminal conduct security concerns. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 14 2015. On April 20, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct. The action was taken under Executive Order (Exec. Or.) 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 implemented by the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG). SEAD 4 became effective on June 8, 2017, for all decisions on or after that date, including this one.¹ Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Applicant answered the SOR on August 1, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on October 23, 2017. On October 26, 2017, DOHA issued a Notice of Hearing scheduling the case for November 16, 2017. The hearing was convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through GE 3, which were admitted without objection. Applicant and two other witnesses testified. He submitted Applicant's Exhibits (AE) A through AE C, which were admitted without objection. After the hearing, Applicant timely submitted AE D and AE E, which were marked and admitted without objection. The record closed on January 3, 2018. DOHA received the transcript on November 30, 2017.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-1.d, with one explanation. Applicant's admissions and the explanation are incorporated into the findings of fact. After a thorough and careful review of the pleadings, the exhibits submitted, and the hearing testimony, I make the following additional findings of fact.

Applicant is 43 years old. He served for 20 years in the United States Navy (1994-2014). He was on terminal leave from January 2014 until he retired in April 2014 as a petty officer first class, E-6. Applicant earned five Navy Achievement Medals and six Good Conduct Medals during his Navy career. He had no disciplinary issues. (AE C) After his retirement, Applicant was unemployed for about five months. Since August 2014, he has been employed in the defense industry. He has worked for his current employer since February 2015. He has held a security clearance since about 2002. His SCA is part of a periodic reinvestigation. (Tr. 62-68, 80-81, 98-99; GE 1; GE 2)

Applicant and his wife have been married since 2000. They have a daughter (age 16) and a son (age 8). Applicant and his wife met when they were both in the Navy. She served from 1997 to 2001. (Tr. 36-39, 79-80; GE 1)

When Applicant was in the Navy, he travelled often, so his wife raised their children alone. When he returned, he was often more focused on his job than on his

¹ Applicant's counsel confirmed that he was aware of the new AGs, which had been provided with the Notice of Hearing. (Tr. 12-13)

family. She also testified that his retirement from the Navy impacted their marriage, since he was not used to being at home so much. (Tr. 44-45, 49-50, 80) Applicant testified that he saw a psychiatrist or counselor for several months while on terminal leave from the Navy. He was dealing with frustration and mental stress. (Tr. 71)

Applicant's wife has been diagnosed with multiple mental illnesses, including bipolar disorder, borderline personality disorder, and post-traumatic stress disorder (PTSD). (AE B) Shortly after reporting to her first command in the Navy, she was robbed and gang-raped. She continues to experience flashbacks and PTSD as a result of this brutal attack. She also experiences periodic rage and aggression, as well as periods where she shuts down and becomes withdrawn. Treatment for her mental illnesses is ongoing, though she is allergic to many possible bipolar medications. This has created challenges in controlling her condition. She also testified that her condition has affected her marriage and relationship with her husband, because her condition is easily triggered and difficult to control. (Tr. 39-47)

Applicant testified that he became aware of his wife's issues with mental illness when they met. (Tr. 69) He testified that her conditions have impacted the marriage, but that "she is a wonderful wife, a wonderful woman." He does what he can to help her, but "sometimes I don't know what to do." (Tr. 69-70, 99)

In 2003,² Applicant and his wife had an argument. Applicant described it as a "fight" but said the physical confrontation concerned only "holding each other" rather than coming to blows. Applicant testified that his wife started throwing things at him, such as a stuffed toy, and he got a scratch on his face. She called the police. Applicant testified that both he and his wife were charged. He was charged with misdemeanor assault and battery of a family member. The case was not prosecuted or was dismissed. (SOR ¶ 1.a)(Tr. 71-72, 74, 82-83)

In February 2014, Applicant and his wife had another altercation shortly after Valentine's Day. He testified that "my wife started thinking that I'm not too attentive to her . . ." He said that "things started escalating . . . [and] things started getting close to physical, face to face fighting. And I called the police because, as I said, she was threatening, the thing was heated, it was a precaution." (Tr. 73) Applicant said he was "trying to get [some] space," and he pushed his wife. He also said it was his wife who called the police. He was arrested and charged with misdemeanor assault and battery on a family member. The case was *nolle prossed* in May 2014. (SOR ¶ 1.b) (Tr. 45, 73-74, 83-84; GE 3)

About three weeks after this arrest, in mid-March 2014, Applicant and his wife had an argument. He testified that it involved "yelling and screaming" but was "just words" and not a physical altercation. (Tr. 84-86) He was arrested and charged with

² Applicant testified that this offense occurred in August 2003, rather than in February 2003, as alleged. (SOR ¶ 1.a; Tr. 73) There are no police or court documents in the record to corroborate the specific date of this offense.

disturbing the peace. (SOR ¶ 1.c) (GE 1; GE 2) After his arrest, Applicant was held without bond because he had a pending charge. He remained in jail for about 24 days. He pled guilty to disturbing the peace. In April 2014, Applicant received a 90-day jail sentence, of which 45 days was suspended. He was also sentenced to unsupervised probation for three years. ((Tr. 45-46, 74-75, 86-87; GE 2)

In August 2014, while on unsupervised probation for the March 2014 offense, Applicant and his wife had another fight. They accused each other of infidelity. Applicant started looking through his wife's desk. He also acknowledged that he pushed her. She called the police and Applicant was arrested. (Tr. 74-75, 88)

As a result, Applicant was charged with misdemeanor assault and battery on a family member. (SOR ¶ 1.d) In November 2014, adjudication of the case was deferred for two years. He was placed on one year of supervised probation instead of a longer term of unsupervised probation. He was referred to parental counseling. He attended the program from December 2014 to June 2015, and completed it. Beginning in August 2014, Applicant also sought counseling with a licensed clinical social worker. The counselor was familiar with Applicant's family situation and has worked with Applicant's family since 2008. He saw the counselor for eight or nine months. He completed supervised probation early, in June 2015. The case was dismissed in November 2016. (Tr. 89-97; GE 1; GE 3; AE D; AE E)

All of Applicant's charges in 2014 occurred either while he was on terminal leave awaiting his retirement, or during his period of unemployment shortly thereafter. (Tr. 80-81; GE 1) Applicant has had no arrests since August 2014. (Tr. 47-48, 94; AE D) He understands the significance of his actions, and is committed to ensuring that he has no further charges or other domestic incidents. (Tr. 77-79)

Applicant's wife has seen a change in her husband's reaction to her medical episodes. She said he will attempt to calm down, "leave the space" and go to another part of the house. She will leave the house and go for a drive to defuse the situation. (Tr. 49) Applicant testifies that he tries to do this as well, "to try to get away from the situation. It takes two to fight, so remove one, [and] there is no fight." (Tr. 71, 76)

Applicant's wife testified that she loves her husband and considers him her best friend. She testified that Applicant loves her and will not give up on her, despite what she believes are the burdens her background brings. He has become "more engaged with our lives as husband and wife." He is more attentive. They continue to pursue marriage counseling, though it is often difficult to find a counselor. Their children are also in therapy. (Tr. 48-50)

Applicant and his wife both testified that they have seen marriage counselors for several years, though not regularly. They try to see a counselor yearly, but the counselors they see are often different people, so actual attendance is sporadic. They saw a licensed clinical social worker for 12 sessions of marriage counseling between March 2013 and January 2014. (AE E) They saw a marriage counselor some time in

2016. They saw one several months before the hearing. They had another appointment shortly before the hearing, and both expected to continue attending. (Tr. 50-60, 95-97) These more recent counseling sessions are undocumented. Counselors have recommended that Applicant leave his wife but he refuses to do so. "I cannot divorce her because she has a problem, a disease," he testified. (Tr. 77-78)

The owner of Applicant's employer testified. He is also the program manager for Applicant's contract. He retired in 2000 as a U.S. Navy limited duty officer, and he founded his company two years later. He has held a security clearance since 1979. He has worked directly with Applicant since May 2017. He described Applicant as affable, as well as a dedicated and competent worker. Applicant is "one of our best." The witness is aware of Applicant's domestic situation. He believes Applicant understands the security significance of his conduct. (Tr. 24-34; AE A) Applicant also testified that he loves his job, and the fact that he can continue serving his country out of uniform. (Tr. 99-100)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court noted in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials."³

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. (AG) 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(a), 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." 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.

³ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.

Analysis

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for 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. The following disqualifying conditions are potentially applicable:

(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 misdemeanor assault and battery against his wife in 2003 after a physical altercation. Between February and August 2014, he incurred two other such arrests, along with a charge of disturbing the peace, after similar arguments and altercations with his wife. Applicant admitted each allegation. AG ¶¶ 31(a) and 31(b) apply.

The following mitigating conditions for criminal conduct are potentially applicable, under AG ¶ 32:

(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;

(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 offenses are all similar in nature. They all involve instances in which arguments between Applicant and his wife got out of hand. All but one of them involved physical altercations. This led one or both of them to call the police, and as a result, Applicant was arrested on four occasions. With the exception of SOR ¶ 1.a (which occurred in 2003), all three of the more recent charges occurred in 2014, during a six-month period during which Applicant was either on terminal leave from the Navy, or was unemployed for a period thereafter. To some extent, then, these offenses are largely isolated to a period of particular stress and frustration brought on by his transition from military to civilian life. There also has been no evidence of recurrence for over three years.

The triggers for these incidents, however, are not entirely in the past. Applicant and his wife appear to have a volatile relationship. By his wife's own admission, this is due, at least in part, to her significant and ongoing mental health conditions, including PTSD and bipolar disorder. This leads her to have episodes of rage and aggression. She has struggled with controlling her conditions, and Applicant has struggled with how to react appropriately when issues arise.

This is an ongoing process for both Applicant and his wife. To their credit, they have resolved to work on their issues together, and to learn about, and to apply, coping mechanisms if issues arise in the future, as they may. They have a history of pursuing counseling, both together and separately. They are making a good-faith effort to continue that as best they can. This is not a case where I can find that there is "no risk" that Applicant and his wife will not find themselves in a similar situation again. But in weighing Applicant's suitability for a security clearance, I can consider whether he has taken significant steps to alleviate the problem. I find that Applicant has done so.

Applicant and his wife both testified credibly about their dedication to each other and to making their marriage succeed. Applicant has participated in counseling, both individually and with his wife. He successfully completed the requirements of probation for the disturbing the peace charge, and his most recent charge, in August 2014, was dismissed in November 2016. There have been no subsequent charges and there is no record evidence of similar domestic incidents. Applicant and his wife are working to improve their relationship and are making an effort to limit and control their arguments and confrontations. I find Applicant's testimony credible in this regard. While there are

no guarantees, Applicant's behavior is therefore unlikely to recur and it does not cast doubt on his current reliability, trustworthiness or good judgment. AG ¶ 32(a) therefore applies.

Applicant has provided evidence of successful rehabilitation. He has an excellent work record. His face "lit up" when he testified about how much he loves his job. He recognizes the negative impact future criminal issues would have on his employment, and has credibly resolved to continue improving his behavior. AG ¶ 32(d) also 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 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 in my whole-person analysis. The record evidence established criminal charges against Applicant once in 2003 and three times in 2014. On balance, and in consideration of the evidence as a whole, I conclude that Applicant has provided sufficient evidence to mitigate the resulting security concerns. Overall, the record evidence leaves me without questions and doubts as to Applicant's continued eligibility 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: FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to continue Applicant's access to classified information. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge