



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-01358

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

08/10/2018

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On September 29, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).¹ Applicant responded to the SOR on October 30, 2017. He answered all allegations, provided evidentiary materials, and requested a determination on the written record. The Government converted the action to a hearing. The case was originally assigned to another administrative judge on June 18, 2018. It was reassigned to me on July 17, 2018, due to caseload considerations. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 18, 2018, setting the hearing for July 24, 2018. The hearing was convened as scheduled.

The Government offered two documents, accepted without objection as exhibits (Exs.) 1-2. Applicant offered testimony and two certificates, accepted without objection

¹ The action was taken under Executive Order 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 or after June 8, 2017.

as Exs. A-B.² The transcript (Tr.) was received on August 1, 2018, and the record was closed. Based on the exhibits, testimony, and record as a whole, I find Applicant failed to mitigate security concerns under Guideline E.

Findings of Fact

Applicant is a 47-year-old director of operations for a small company. He has served in that capacity for the last two of the five years he has worked there. Applicant has earned a bachelor's degree in information technology. He met his wife in 1992 while they were in college. Married in 1999, they have two children, now aged 15 and 13.

Fourteen years ago, in 2004, Applicant and his wife were first-time parents. Their daughter was a colicky child, continuously crying throughout the night. (SOR Response) As a result, Applicant and his wife were constantly exhausted. At one point, when the child had an illness compounding her crying fit, Applicant let his wife stay in bed while he went to comfort the infant with a bottle. Neither the bottle nor holding the baby quelled her cries and screams. (Tr. 16) Ultimately, he had a lapse in judgment due to being sleep deprived. Trying to muffle the child's crying, he applied pressure to a pillow placed over the child's face. He did not know he was using too much force. (Tr. 16) When he realized the baby had passed out, he feared the worst. He successfully administered "a little bit of CPR, and she was fine." (Tr. 16) While he subsequently tried to muffle the baby's crying three or four more times by covering her mouth, he never again applied pressure to her face that limited her ability to breathe. (SOR Response)

In 2005, Applicant and his wife had many arguments while she was pregnant with their next child. (Tr. 16-17) One argument accelerated and turned to character attacks beyond the initial focus of the spat. She would not let him remove himself from the fracas, so he "pushed her back and [his] hand ended up around her neck," although he applied no pressure. (SOR Response) He released her immediately. At some point, the couple ended up on the floor. No other incidents have occurred between the two reflecting verbal or physical abuse. (SOR Response; see also Tr. 17-18) His wife was suffering from depression during that pregnancy, which she now realizes helped push their "argument over the line." (SOR Response; see also Tr. 16-17) Applicant noted that they "always reconcile their differences and this was no exception. We still love each other deeply and we are still happily married today." (SOR Response)

Between 2006 and 2007, Applicant's youngest child was crying inconsolably. Applicant went to attend to the baby. When nothing worked, he covered this child's mouth to muffle her crying with his hand so as not to disturb her sibling or Applicant's spouse. (SOR Response; Tr. 18-19) In so doing, he did not limit her breathing in any manner. (SOR Response) She had air the whole time. (Tr. 18)

In 2010 or 2011, Applicant was reported as having tried to choke his eldest child. (Ex. 2) He admitted, then later recanted part of the related details. Also in that period,

² Applicant's SOR answer and evidentiary materials were incorporated into the record for consideration.

he was driving his two children in the family van when his eldest child had a “meltdown.” (Tr. 19) When he decided to return home, she began kicking him from behind his seat “really hard.” (Tr. 19) He grabbed one of her legs and tried to hold it.” (Tr. 19) This did not settle the matter, so he pulled over and waited for the child to calm down.

Later, apparently based on the choking attempt, child protective services (CPS) interviewed the girls in 2013 without the knowledge of either Applicant or his wife. They were asked “about a punishment, spanking, and abuse which they alluded to [sic] choking specifically, to find a pattern of any abuse from any parent. Both girls denied any such violence.” (SOR Response) CPS found no corroboration regarding abuse. CPS closed the case as unsubstantiated. (SOR Response, attachment; Tr. 24)

After facts concerning the 2010-2011 choking attempt had emerged, Applicant started taking corrective action. He completed an active parenting skills course and an anger management class in 2013. (SOR Response, Ex. A) Most recently, he successfully completed an on-line anger management course. (Ex. B) He was visibly contrite over his past judgment lapses. The family is now more harmonious, and he does not foresee having more children. (Tr. 24)

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. 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 the AG, 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. The AG requires that any 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 the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, 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 seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question an applicant's loyalty.

Analysis

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Here, Applicant admits he covered a child's mouth on a few occasions in about 2004 and between 2006 and 2007. There is evidence he choked his eldest child at some point between 2010 and 2011. He also admits that he got into a physical altercation including grabbing the neck of his pregnant wife with his hand in 2005. These factors are sufficient to raise disqualifying condition:

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

This guideline provides seven potential mitigating conditions under AG ¶ 17. Three are potentially applicable under these facts:

AG ¶ 17(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;

AG ¶ 17(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; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

With regard to AG ¶ 17(c), seven years have passed since the last incident at issue. While that is a considerable amount of time, the acts cannot be said to be of the sort not to cast doubt on the Applicant's reliability, trustworthiness, or good judgment. This is particularly true given the victims at issue were infants or youngsters and a pregnant spouse. While there are no plans for future children, the fact negative familial interaction appears to have recurred with one child in 2004 and then again in 2010-2011 – with a gap of approximately seven years – is particularly worrisome. Indeed, it is similarly worrisome that Applicant employed choking as a mechanism for control on vulnerable family members about 10 times between 2004 and 2010-2011. Given Applicant's past period of restraint with his eldest child lasted seven years (2004 – 2010/2011), the same period of time that has passed since the last incident at issue (2010/2011 – 2018), more time is needed to demonstrate rehabilitation. AG ¶ 17(c) does not apply.

To his credit, Applicant has adapted to fatherhood and worked on his marriage. He has taken responsibility for his past displays of weakness, expressed remorse, and successfully completed coursework in anger management and parenting. His children are now teens, and there are no plans for additional children. In 2013, a CPS unit found no evidence indicating present abuse in the home. Applicant was contrite and honest at the hearing. While insufficient time has passed to demonstrate a recurrence is unlikely, the facts are sufficient to raise AG ¶ 17(d) in part and AG ¶ 17(e) in full.

Guideline J, Criminal Conduct

The concern raised by criminal conduct is set out in AG ¶ 30:

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.

Given Applicant's admission to the assault-like instances set forth in SOR allegations 1.a-1.d, which occurred between 2004 and 2010-2011, both of the following disqualifying conditions apply:

AG ¶ 31(a): a pattern of minor offenses, any 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.

The following mitigating conditions are potentially relevant:

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;

AG ¶ 32(c): no reliable evidence that the individual committed the offense; and

AG ¶ 32(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.

As noted above, insufficient time has passed to demonstrate similar acts by Applicant are unlikely to recur. While the incidents involving infant children are unlikely to happen again, familial tensions do not constitute unusual circumstances. While Applicant may have recanted part of his concession regarding the 2010 or 2011 incident, reliable evidence (ie. Ex. 2) exists that the incident occurred. AG ¶ 32(a) and AG ¶ 32(c) do not apply.

With regard to AG ¶ 32(d), however, I find Applicant provided sufficient evidence to raise this mitigating condition. In the seven years since the last incident at issue, he has completed anger management courses and a class on parenting skills. He has worked on his marriage and on parenting. He has been elevated at work to a senior operations position. A 2013 CPS investigation found no recent incidents of abuse. Such factors weigh in his favor toward raising this condition.

Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(a). The final determination must be an overall commonsense judgment based on 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, and conducted a whole-person analysis based on the record. In addition to the conduct at issue, I considered his present life, candor and behavior at the hearing, and credible explanations.

The assault-like acts attributed to Applicant are particularly worrisome, especially with regard to the incidents involving infant children. Applicant is more than aware of the seriousness of his behavior, expressed appropriate contrition, and acknowledged

responsibility for his actions. Applicant has successfully completed relevant coursework, and worked on both his marriage and parenting.

What remains troublesome is the pattern of violence Applicant perpetrated, intentionally or unintentionally, against his children and wife between 2004 and 2010-2011. With regard to his eldest child, specifically, a seven-year period transpired between the first and last incident. Consequently, it is not unreasonable to conclude, under these particular circumstances, that a period of more than seven years without recurrence pass in order to mitigate the grave personal conduct security concerns raised. While I find Applicant has mitigated criminal conduct security concerns, I find that he failed to mitigate personal conduct security concerns.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a-1d:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For 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.

Arthur E. Marshall, Jr.
Administrative Judge