



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



In the matter of:)	
)	
)	ISCR Case No. 07-01498
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

February 14, 2008

Decision

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

Applicant submitted a Security Clearance Application, Standard Form SF-86, dated February 12, 2002. On July 10, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct) regarding Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on July 23, 2007. He answered the SOR allegations in writing with brief narrative comments through a letter dated August 5, 2007. In a supplement to that answer, notarized on August 6, 2007, Applicant explicitly admitted the first allegation and denied the second allegation raised in the SOR. No written indication was given as to whether Applicant wished to have a hearing

on the record or whether he desired to have the matter resolved through administrative determination.¹

In response to Applicant's answer, Department Counsel prepared a File of Relevant Material (FORM), which included a Motion to Amend the SOR to include three allegations arising under a second guideline, Guideline E (Personal Conduct). That FORM, dated October 24, 2007, advised Applicant of his opportunity to respond to the FORM within 30 days after receipt of the FORM. Further information as to how Applicant could respond to the FORM, its argument and contents, was included in a cover letter to the FORM, dated October 25, 2007, from a DOHA legal assistant. It also stated in its opening paragraph: "You requested that a determination be made in your case without a hearing."

Applicant received a copy of the FORM on October 31, 2007. Applicant did not submit any information or materials in response to the FORM within 30 days of its receipt. Applicant similarly declined to address the motion to amend the SOR.

DOHA received the case for assignment to an Administrative Judge for administrative determination on January 31, 2008. I was assigned the case that same day. I reviewed the entire case file upon assignment and noted inconsistencies as to whether Applicant actually waived his opportunity to have the matter decided administratively. Specifically, I noted the lack of written indication that Applicant waived his right to a hearing in his response to the SOR conflicted with DOHA representations that Applicant had requested a determination without a hearing.² On February 4, 2008, Department Counsel was contacted to ascertain the basis for the conclusion that Applicant had waived the opportunity for a hearing in favor of an administrative determination. Department Counsel acted expeditiously and, on that same date, a DOHA legal assistant delivered a copy of an August 8, 2007, facsimile transmission cover sheet which had accompanied Applicant's August 6, 2007, answer to the SOR. That cover sheet states, in part: "I do not wish to have a hearing. . . ." I accept that sheet into the record as part of the FORM and the case file is now closed.

Finally, I have reviewed Department Counsel's motion to amend the SOR with three allegations under a new guideline, Guideline E (Personal Conduct). That motion was part of Department Counsel's FORM. I note that Applicant was given adequate notice of the government's concerns. I also note that he had 30 days to respond to both the FORM and the motion, and had the opportunity to proffer evidence in response to the issues raised in the motion, but declined to do so.³ I further note that the facts cited

¹ See File of Relevant Material (FORM) Item 2 (Applicant's Response to the SOR, notarized on August 6, 2007, and supplementary letter of explanation, dated August 5, 2007).

² See FORM Item 2, *supra* footnote 1; DOHA legal assistant's cover letter of October 25, 2007, and DOHA management's letter of case assignment, dated January 31, 2008.

³ DOHA's letter of October 25, 2007, advised Applicant of his opportunity to review the FORM and "submit any material" for the administrative judge's consideration or "make any objections" as to the information set forth in the FORM.

in the amended SOR concern facts noted in the allegations arising under Guideline J. Inasmuch as Applicant has declined to object to Department Counsel's motion, I grant that motion and include the new guideline and allegations in my consideration of the SOR subject to the deletion of one sub-allegation, which the record does not adequately substantiate.⁴ Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

Applicant is a 47-year-old employee of a defense contractor. He has been a technical writer/engineer with the same company since January 2002. In his Answer to the SOR, Applicant admitted the factual allegation in ¶ 1.a regarding a 1999 altercation, but denied the allegation set forth in ¶ 1.b of the SOR regarding an arrest and guilty plea to a charge of Assault & Battery-Family Member. The scant narration he provided indicates, however, that while Applicant denies the substance of the charge, he concedes that he was arrested and pled guilty to the charge raised. Other than brief narratives regarding the two incidents, Applicant has declined to add additional information or submit exhibits supplementing the limited facts of record.

Applicant served in the U.S. Navy from 1982 through 2002. In the Navy, he served as a Chief Petty Officer [E-7]. He served on five nuclear powered submarines during his service and has maintained a security clearance for over 30 years.

In October 1991, he remarried a former spouse, to whom he had been married from 1982 through 1987. In 1992, he attended college for a semester. By early 1999, his marriage was facing difficulties and he was estranged from his wife. On April 16, 1999, he was informed by a neighbor that his wife was seeing another man.⁵ He became upset as more details about the affair were revealed. He confronted his wife by telephone, then later when she arrived at his residence. The argument continued, the two fought physically, and Applicant was arrested and charged with Assault in the 3rd degree. His wife incurred a concussion in the fracas. Applicant was eventually ordered to attend an eight-week Family Violence course in lieu of prosecution. Applicant concedes he "lost [his] cool" and apologizes for the incident.⁶

On March 12, 2002, Applicant was interviewed by the Defense Security Service (DSS). During the interview, Applicant stated that no one was injured during the April 16, 1999, altercation and that this was the first altercation involving his first wife.

On December 24, 2004, Applicant and his next wife had been bickering and the two were drinking alcohol. At one point she fell and hit her head. Applicant helped her

⁴ Regarding the 2004 incident, Applicant's wife and her daughter told police officers that Applicant had exposed himself in a lewd manner. There is no indication, however, if these statements were ever repeated, established, or known to Applicant in such a way that he had a duty to disclose them.

⁵ U.S. Naval Criminal Investigative Report, dated April 26, 1999.

⁶ Response to the SOR, dated August 5, 2007.

to bed, but she eventually reemerged from her bedroom to join Applicant and her children from a prior marriage. Tensions remained high and alcohol flowed through December 25, 2004, and into December 26, 2004, during which time the bickering continued. On December 26, 2007, an altercation took place between the spouses. The police were called and Applicant was arrested.⁷ He was intoxicated at the time.⁸ The altercation took place in the presence of Applicant's wife's children, including a 20 year old daughter. Applicant's wife and children were interviewed by the police. Although Applicant's wife stated she had received a head injury at the hands of Applicant, the police noted that no injuries were observed.⁹

A magistrate issued a protective order and both husband and wife were served. Applicant was given a domestic violence brochure which also gave him a number for his case. In court, he pled guilty to the charge(s) of Assault & Battery-Family Member because he did not have the funds to hire a defense attorney. Consequently, the various allegations and accusations were not adjudicated. Applicant was directed to complete a domestic violence course. Upon completion of the course and a two year sentence in suspension period, the charges were scheduled to be dismissed. A few months after the incident, Applicant transferred to an office in another state.

On January 5, 2005, in response to question from his security officer, Applicant did not disclose he was intoxicated, as observed by the police, at the time of his 2004 arrest. He did not discuss how or if he threatened his wife. Applicant signed his explanation as to the events of December 24 through December 26, 2004. As of January 2005, Applicant was preparing to divorce his wife after a state imposed mandatory separation period.

During an October 28, 2006, interview with an Office of Personnel Management (OPM) investigator, Applicant said he never became physical during the 2004 altercation with his wife. He also stated he had never previously had adverse involvement with the police. He failed to disclose he was intoxicated when he was arrested in 2004. He did not discuss how or if he threatened his wife during the altercation in 2004.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

⁷ *Id.*

⁸ Item 5 (County Police Narrative Information, dated December 27, 2004).

⁹ Item 5, *supra*, note 6.

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 over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." ¹⁰ The burden of proof is something less than a preponderance of evidence. ¹¹ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant. ¹²

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 protect or 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 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). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹³ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive

¹⁰ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹¹ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹² ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹³ *Id.*

information.¹⁴ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁵ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines to be the most pertinent to the evaluation of the facts in this case:

Guideline J – Criminal Conduct. *The Concern:* 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.

Guideline E - Personal Conduct. *The 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.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

Analysis

Guideline C, Criminal Conduct

With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits that he “lost his cool,” was arrested in April 1999, charged with Assault in the 3rd degree, and ordered to attend an eight-week Family Violence class. Applicant concedes he was arrested in December 2004 following an argument with his wife and admits to pleading guilty to the charge of Assault & Battery-Family Member.¹⁶ Such conduct and admissions are sufficient to raise security concerns, and invoke Criminal Conduct Disqualifying Conditions (CC DC) 1, AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), and CC DC 3, AG ¶31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*), and initiate inquiry.

¹⁴ *Id.*

¹⁵ Executive Order 10865 § 7.

¹⁶ For the purposes of the disqualifying factors noted below, the allegation is sufficient to raise security concerns. Consequently, it is immaterial whether Applicant pled guilty for financial reasons.

Because so few facts have been presented by Applicant, and because he chose to have a determination on the record, the available facts lack context. What is clear is that he was charged with assault in a marital context in April 1999. It is also clear that, five and a half years later, a similar domestic incident occurred. Rather than seek a public defender or otherwise fight the charge(s) pending, he pled guilty without defending himself against a serious charge and scandalous accusations. This second incident occurred a little over three years ago. Consequently, it echoes an allegation from the past, and his reluctance to clear his name, if not from the actual charge, than from the accusation of exposing himself in front of a minor, demonstrates poor judgment. Therefore, Criminal Conduct Mitigating Condition (CC MC) 1, 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*) does not apply.

Although Applicant was intending to divorce his wife as of 2005, potentially ending any further marital conflicts, there are insufficient facts as to the circumstances surrounding their disagreement and the altercation that occurred in 1999 to discern whether CC MC 2, AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) applies. Applicant admits to the 1999 allegation, concedes a spousal altercation transpired in 2004, and admits he pled guilty to the resulting 2004 charge. Therefore, CC MC 3, AG ¶ 32(c) (*evidence that the person did not commit the offense*) does not apply.

Applicant expressed his remorse for the 1999 incident and the incident is nearly a decade old. He pled guilty, however to a similar charge in December 2004. The passage of three years since that most recent incident does not establish successful rehabilitation. This is particularly true when he introduced no facts which might otherwise give rise to CC MC 4, AG ¶ 32(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*) and there is no assertion of meritorious circumstances of governmental waiver. As a result, the scant facts of record do not tend to mitigate the criminal conduct security concerns raised.

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an one's reliability, trustworthiness and ability to protect classified information. Special attention must be given to any failure to provide truthful and candid answers during the security clearance process or other failure to cooperate with the security clearance process.

Applicant chose not to oppose the amendments to the SOR proposed by Department Counsel and which were ultimately accepted into the record in the absence of opposition to their inclusion. The record supports the facts that in mid-March 2002, Applicant was interviewed by the DSS. During the interview Applicant stated that no one was injured during the April 16, 1999, altercation and further stated that this was the

first altercation involving his first wife. On January 5, 2005, Applicant did not inform his security officer that he was intoxicated, as observed by the police at the time of his 2004 arrest. He also did not elaborate on any specific threats waged against his wife. In 2006, Applicant failed to inform an OPM investigator that he had been physical with his second wife on December 26, 2004, that he was intoxicated at the time of his 2004 arrest, and that he had made a threat against his wife during their fracas. Such facts give rise to Personal Conduct Disqualifying Condition (PC DC) 1, AG ¶ 16(b) (*deliberately providing false or misleading information regarding relevant facts to an employer, investigator, security official, competent medical authority, or other government representative*)

The facts show that those allegations are correct. While allegations waged between spouses in a domestic violence context often amount to “he said, she said” incidents, the cited incidents have a sound base in the record and Applicant has chosen not to refute them. Consequently, Personal Conduct Mitigating Condition (PC MC) 6 (*the information was unsubstantiated or from a source of questionable reliability*) does not apply. Although PC MC 3, 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*) could, in some respects, apply, Applicant has provided too few facts upon which a favorable application might be drawn. None of the other mitigating conditions apply. Consequently, Applicant has failed to mitigate personal conduct security concerns.

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) 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 public trust position 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, as well as the “whole person” factors noted above. Here, little is known about the Applicant because he has declined to expand the record beyond the documents contained in the FORM and he chosen to only address the Guideline J allegations. This is particularly troublesome given the “he said, she said” nature of incidents like those described in the FORM which have not

been prosecuted and judicially reviewed.¹⁷ What is known is that he is a mature man with 20 years of service to the U.S. Navy. He has considerable military and life experience, and has been with his current employer for several years. The circumstances surrounding the 1999 and 2004 incidents have been described outside the context of Applicant's entire life and, indeed, of his marriage. The facts, however, show that Applicant was a mature man when the first incident occurred, and that he was then ordered to counseling about family violence. In 2004, he was a mature man who had received family violence counseling when the second incident occurred. Even had he been faultless in the second instance, that counseling should have apprised him of ways to extricate himself from a situation which could be misconstrued, just as common sense should have advised him to clear his name regarding the second instance if the allegations made by his wife and daughter were untrue. As it now stands, on the few facts provided, Applicant has a judicially unrebutted record for domestic violence which extends to as recently as December 2004. Absent additional facts or evidence, criminal conduct security concerns remain unmitigated.

The facts also show that Applicant was less than forthcoming in his statements to the DSS and his security officer. While the unmentioned facts may have seemed minor to him in light of the bigger issues at hand (the altercations), security concerns arise when there has been a lack of candor. Declining to address the Guideline E allegations, Applicant failed to raise facts which might tend to mitigate such security concerns. Inasmuch as Applicant has failed to meet his burden and mitigate criminal conduct and personal conduct security concerns, I conclude that it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

¹⁷ The facts of record include statements from his wives and his second wife's children, conflicting statements and narrative from Applicant, and the more concise, abbreviated notes of attending officers.

Subparagraph 2.c:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge