

DATE: December 11, 2007

_____)
In re:)
)
)
-----) ISCR Case No. 06-26386
SSN: -----)
)
Applicant for Security Clearance)
_____)

**DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD**

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

From about 1992 to 2005, Applicant engaged in domestic violence with two girlfriends and two spouses. His conduct included spitting on women on three occasions. None of these incidents resulted in arrests, charges, or convictions. Although he is making progress in addressing his childhood and anger-management issues, it is too soon to tell if this period of his life is a thing of the past or a firmly ingrained pattern of behavior that is likely to recur. Clearance is denied.

STATEMENT OF THE CASE

This is a security clearance case. Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on May 23, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline J for criminal conduct and Guideline E for personal conduct based on an alleged falsification of a security-clearance application.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

On June 29, 2007, Applicant replied to the SOR and requested a hearing. The hearing took place on November 13, 2007, and the transcript was received on November 21, 2007.

The record was left open until November 30th to allow Applicant to submit an additional item of documentary evidence. It was timely received and it is admitted as Exhibit F without objections.

RULINGS ON PROCEDURE

The SOR was amended in two ways without objections from either side. First, it was amended to reflect Applicant's correct social security account number (R. 4–5). Second, it was amended by moving the allegation in ¶ 2.a under Guideline E and placing it under Guideline J as ¶ 1.g, and then by renumbering the allegation in ¶ 2.b as ¶ 2.a (R. 9–12).

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.d, 1.e, and 1.f, and he admits, in part, the allegation in ¶ 1.c. He denies the allegations in ¶¶ 1.g and 2.a. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 37-year-old security analyst/engineer who is employed by a company engaged in defense contracting. He attended community college during 1993–1995, and he was awarded a general education degree in January 1995. He then attended a state university where he earned a

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

bachelor's degree in psychology in May 1999. He is twice divorced, and he is currently living with a woman he has been seeing since March 2007. He is the father of a 13-year-old son from a previous relationship. He started working for his current employer in July 2000. He obtained a secret-level security clearance from the Defense Department in 2003. His current application (Exhibit 1) was submitted to upgrade Applicant to a top-secret security clearance (R. 161–162).

Applicant was required to answer a series of questions about his background in his March 2004 security-clearance application (Exhibit 1). He is accused of providing a deliberately false answer to Question 19, which is a two-part question phrased as follows:

In the last 7 years, have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?

Did the mental health related consultation(s) involve only marital, family, or grief counseling not related to violence by you?

Applicant responded “yes” to both questions.

Having experienced a difficult childhood, Applicant left home at age 18 after completing high school. He worked for several years as a merchandise stocker and then a cashier for wholesale warehouse store. In about 1992, he met the woman with whom he would have a son. Their relationship was ongoing when their son was born in 1994. Sometime thereafter, with the assistance of counseling, they decided to not marry believing it would be better for their son due to the difficulties in their relationship. The difficulties included an incident where Applicant admits hitting, jabbing, or punching her in the side during an argument (Exhibit 2 at 3). Another incident is where Applicant displayed a loaded pistol in a threatening manner to the woman (Exhibit 2 at 3). The woman has no recollection of the firearm incident (Exhibit C2). Applicant recalls the incident and described it as follows:

I remember pointing the gun at her and acting like - - it was almost a playful but sexually charged - - this sounds really bad, obviously, - - but kind of playing and control in a relationship, the locust of control or something like that, and we didn't - - we didn't have intercourse. It wasn't a rape situation. But it was like, this is what you can do with a gun and look at this. It has power and all this. But, obviously, now I don't have any - - any bone in my body that I would ever disrespect another human being or mishandle a firearm in that manner (R. 100-101).

Applicant married his first wife in January 1997, and they divorced in February 1998 (Exhibit 1). There were two incidents with her. The first took place when they were mountain biking and had an argument. Applicant lost his temper and spit on her. The second took place when they were having an argument in the bedroom and he pushed her onto the bed.

In 1999, Applicant had sexual intercourse with a girl he met through a friend. Applicant described the incident in a written statement as follows:

In about 1999, when I was twenty nine years old, I had sex with an underaged girl. One of my good friends had a cousin that was attracted to me. The cousin was between age sixteen and eighteen at the time. I believe she may have been sixteen. We had consensual sexual intercourse one time. I was not married at the time and there were no allegations against me for sex with a minor (Exhibit 2 at 1).

Applicant acknowledges he used poor judgement in this situation (R. 109). He explains the incident as a period when he felt lonely and thought it might soothe his loneliness. This appears to be an isolated incident, as there is no other evidence of similar behavior.

Applicant completed his bachelor's degree in May 1999, and started work with his current employer in July 2000. He met his second wife through work, she worked at the same company, and he introduced himself to her while riding on a commuter train. They married sometime in 2004, but their marriage was short-lived. His spouse obtained a restraining order against Applicant in late 2004 concurrent with commencing divorce proceedings, which was final in January 2006. Applicant recalls three incidents during their relationship.

The first incident took place in early 2004 when Applicant was working on a clothes dryer with a screwdriver. An argument took place, and at one point Applicant stood up and said to her that he was so angry he could shove the screwdriver in her. Although he did not intend to threaten her, he saw that she was scared and felt threatened. He put the screwdriver on the counter and they settled the argument.

The second incident was in mid-2004 when Applicant and the woman were driving home from a social event. A back-and-forth argument was ongoing. Applicant told her that if they did not stop arguing he would kill her. He explained that he did not mean it, but was trying to stop the argument by showing how their bickering could only lead to a negative conclusion and used that statement as a negative example.

The third incident in 2004 took place during an argument over money. Applicant discovered that the woman had lied to him about money and that she had spent about \$10,000 without telling him. Applicant spit in the woman's face during the argument.

After separating from his second wife, but before the divorce was final in January 2006, Applicant became involved with another woman whom he referred to as his current girlfriend in his November 2006 written statement (Exhibit 2 at 3). They began cohabiting in August 2005. In his written statement, he admits spitting in her face during an argument in 2005. He also admits being aggressive with her four or five times during their relationship, and he admits being verbally abusive toward her.

After the 2005 spitting incident, Applicant began counseling on a weekly basis as his then girlfriend requested he obtain counseling due to his bad temper (Exhibit A1). Applicant did so and received a diagnosis of mild depression. Applicant was cooperative and improved during the counseling, which continued until he was informed that the healthcare insurer would not pay for the services.

Applicant found a counselor who would be covered by his insurance. He began counseling in September 2005 (Exhibit A2), and this counseling continues to date. Applicant has had nearly 70 sessions with the counselor, a licensed psychologist who limits her practice to adult psychology. The initial diagnosis of Applicant was adult adjustment relationship disorder/anxiety. He was not prescribed any medication and has been treated primarily with talk therapy. His diagnosis changed to post-traumatic stress disorder (PTSD) stemming from Applicant's childhood history of adoption, the death by suicide of his adopted mother, neglect by his adopted father, and abuse (physical and sexual) by two stepmothers. As a result, Applicant has problems with relationships with women, he has a lack of trust, and he feels abandoned. The psychologist confirmed at the hearing that Applicant's PTSD is a current diagnosis and that the prognosis is very good (R. 53–54). She opined that Applicant has shown willingness to work on his issues and he is proficient at using techniques to manage his anger. Also, she opined that they are approximately 80% to 85% complete in addressing Applicant's issues.

In addition to the counseling, Applicant recently completed an anger-management program. The six-session program started in September 2007 and Applicant completed it in November 2007 (Exhibits A3 and F). The crux of the program was to teach cognitive/behavioral strategies to cope with anger in daily life, and Applicant did well in the program (Exhibit A3).

Applicant began a new relationship with a woman he met in March 2007. They have developed a close relationship and began cohabiting recently. She believes Applicant has improved his communication skills during their relationship, and, as a result, they have improved their ability to handle and resolve conflicts in their relationship. There have been no incidents of domestic violence between them. She has not observed Applicant engage in any inappropriate behavior or language in the presence of her children. Likewise, she has seen him be a kind and loving father to his son. She believes he has been a positive influence in her life.

In addition to his current girlfriend, Applicant enjoys a friendship with the mother of his son (Exhibit C2). She believes that his best character trait is his honesty. When their son was about five years old, she and Applicant reached a voluntary agreement that Applicant would pay \$400 per month child support, and he has made those payments on a regular basis. He has become more active in parenting their son and often spends time with his son hunting, fishing, hiking, and sailing. Recently, the child support payment increased to \$600 per month (R. 130–131).

Applicant has enjoyed a good deal of success in his current employment as evidenced by performance reviews, bonuses, and pay raises over the years (Exhibit B). For example, his annual salary has increased from \$50,000 in 2000 to his current salary of \$86,000. A fellow employee describes Applicant as a responsible and ethical employee who is able to connect with his coworkers and has a sense of humor along with an even-keeled personality (Exhibit C3).

GENERAL PRINCIPLES OF LAW AND POLICIES

No one has a right to a security clearance.³ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.⁶ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court said that the burden of proof is less than the preponderance of the evidence.¹¹ The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as *Duane*’s.”).

⁴ *Egan*, 484 U.S. at 531.

⁵ Directive, Enclosure 3, ¶ 3.2.

⁶ Directive, Enclosure 3, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

of an applicant's loyalty.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

CONCLUSIONS

Personal conduct under Guideline E¹⁴ includes issues of false statements, credible adverse information that may not be enough to support action under any other guideline, and other personal conduct of concern. In particular, a security concern may arise due to “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. Of special concern 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.”¹⁵ For an answer, statement, or omission to be deliberately false, it must be done knowingly and willfully. It is not deliberately false if the person genuinely forgot about the information, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The SOR alleges in ¶ 2.a that Applicant gave a false answer to the second part of Question 19 of his security-clearance application by answering “yes,” which indicated the consultation he obtained was not related to violence by him. In particular, the allegation asserts that Applicant “deliberately failed to disclose that [Applicant] had mental health consultation for [his] abuse toward women, both emotionally and physically.” The allegation does not state the who, where, or when of the consultation.¹⁶ Obviously, the counseling that Applicant started in 2005 was not required to be disclosed in 2004 when the security-clearance application was completed. The government’s evidence does not affirmatively establish the specific mental health consultation that is alleged to have been omitted (Exhibits 1 and 2). Applicant’s recollection and testimony on this matter is also inconclusive, as he explained that he obtained counseling after his first divorce (R. 121–124). A deliberate falsification is not established given the vagueness of both the SOR allegation and the record evidence. Accordingly, Guideline E is decided for Applicant.

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at pp. 10–12 (setting forth the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at p. 10.

¹⁶ See Directive, Enclosure 1, ¶ 3(1) (an SOR is required to be as comprehensive and detailed as the national security permits).

Under Guideline J for criminal conduct,¹⁷ the security concern is that “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.”¹⁸

The allegation of intercourse with the minor in SOR ¶ 2.d is not of particular concern. First, the only evidence that the person was a “minor” is Applicant’s estimation of her age. Second, no evidence was introduced concerning the age of consent in the particular jurisdiction. Third, it happened in 1999, which is several years ago, and there is no indication of similar behavior. To sum up, it appears to be an isolated incident of situational behavior and it is mitigated based on passage of time without recurrence. Plainly, this incident is not the gravamen of the SOR, which is Applicant’s history of domestic violence based on his problematic relationships with women.

The evidence supports a conclusion that Applicant has a history of unadjudicated criminal conduct, as he has never been arrested, charged, or convicted. Nevertheless, the evidence supports a conclusion that Applicant has engaged in criminal conduct generally known in the law as assault, battery, and communication of a threat. These matters fall within the meaning of DC 3¹⁹ of the guideline.

Also, the evidence shows he has a history of personal relationships where he has demonstrated poor judgment. Of particular concern here are the firearm incident and the spitting incidents. Displaying a loaded firearm in a home is high-risk behavior in most circumstances. Given the circumstances here, Applicant’s use of the loaded firearm was a foolish and dangerous act. His spitting on women was despicable conduct. Spitting on another person is a provocative act intended to degrade. His conduct in spitting on women demonstrates an extreme lack of respect for women and provides some insight into his problematic relationships with women. His demonstrated lack of respect for the women in his life calls into question his willingness to respect the rules for handling and safeguarding classified information.

All of the MCs under the guideline have been considered and Applicant receives some credit in mitigation. The most pertinent matter in mitigation is MC 4,²⁰ which addresses evidence of successful rehabilitation. Applicant has produced substantial evidence of the following: (1) long-term and ongoing counseling that is addressing his childhood and relationship issues; (2) completing an anger-management program; (3) a good employment record; and (4) a stable relationship with a woman since March 2007. Taken together, these facts and circumstances are evidence of reform and rehabilitation. Applicant knows he has a serious problem and he is making efforts to address it.

¹⁷ Revised Guidelines at pp. 21–22 (setting forth the disqualifying and mitigating conditions).

¹⁸ Revised Guidelines at p. 21.

¹⁹ DC 3 is “allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

²⁰ MC 4 is “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 of higher education, good employment record, or constructive community involvement.”

To sum up under the whole-person concept, this case presents both disqualifying and mitigating information, which requires thoughtful balancing. Applicant is 37 years old and sufficiently mature to make prudent decisions about how he interacts with the women in his life. The diagnosis of PTSD helps to explain the source of his anger and somewhat extenuates his acting out on his anger. He has made progress in addressing his issues through counseling and he is commended for his efforts. But at this point Applicant is a work in progress. It is simply too soon to tell if Applicant has truly resolved this period of his life, or if this period is substantial evidence of a firmly ingrained pattern of behavior that is likely to occur again when Applicant hits the normal bumps in the road that one encounters with personal relationships. Based on this record, the likelihood of recurrence is more probable than not, and that assessment is contrary to the clearly-consistent standard applicable to this case.

After weighing the record evidence as a whole, Applicant has not explained, extenuated, or mitigated the criminal conduct security concern. And Applicant has not overcome the case against him and satisfied his ultimate burden of persuasion to obtain a favorable clearance decision. Accordingly, Guideline J is decided against Applicant.

FORMAL FINDINGS

_____ SOR ¶ 1–Guideline J:	Against Applicant
Subparagraphs a, b, c, e, f, g:	Against Applicant
Subparagraph d:	For Applicant
SOR ¶ 2–Guideline E:	For Applicant
Subparagraph a:	For Applicant

DECISION _____

_____ In light of all the circumstances, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Michael H. Leonard
Administrative Judge