



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-00463
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeffery Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

October 22, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On February 20, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on March 12, 2008 and requested a hearing. The case was assigned to me on July 10, 2008, and was scheduled for hearing on July 29, 2008. A hearing was convened on July 29, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At Applicant's request, the hearing was continued, and rescheduled for September 17, 2008. At hearing, the Government's case consisted of four exhibits; Applicant relied on two witnesses

(including himself) and seven exhibits. The transcript (R.T.) was received on August 7, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with endorsements. For good cause shown, Applicant was afforded 14 days to supplement the record. He did not file any supplemental materials.

Summary of Pleadings

Under Guideline E, Applicant is alleged to have (a) made false statements in a DoD interview in June 2006 about his never abusing his spouse, (b) made false statements to an authorized investigator in a signed, sworn statement of September 2007 concerning his choking of his spouse, using a knife on his spouse, and threatening to kill her, and (c) made false statements to an authorized DoD investigator in an initial October 2007 interview concerning his choking of his spouse, his threatening her with a knife, and his telling her he was going to kill her, (d) been restrained from making contact with his spouse by a protection order filed in January 2007, which was subsequently extended a year under March 1999 modification order, and (e) been issued a temporary order for protection against domestic violence in July 2000, which was extended to one year. Under Guideline J, Applicant's alleged misstatements covered by Guideline E are incorporated by reference.

For his answer to the SOR, Applicant admitted the substantive acts covered by Guidelines E and J, but denied any intention to provide false information in any of his covered DoD interviews in 2006 and 2007.

Findings of Fact

Applicant is a 52-year-old-employee of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant was born and raised in India to parents of Indian descent (see ex. 1; R.T., at 59). He married W (also of Indian descent) in December 1982 and has four children from this marriage (see exs. 1, 2 and 5; R.T., at 44). He immigrated to the U.S. in 1988 at the age of 35 (R.T., at 60). W joined him in 1990 (ex. 3). Applicant and W both became naturalized U.S. citizens in January 1995 (see exs. 1 and 2). They separated in March 1999, but are still married.

Applicant and W argued frequently during their marriage. Most of their arguments involved disputes over W's spending in consumer stores and outlets that W

enjoyed frequenting. Their arguments often turned physical . Between 1982 and 1988 (when they resided in India), Applicant sometimes slapped W in the face with his open hand (see ex. 3). When first questioned by an investigator from the Defense Investigative Service (DSS) in September 2003, he estimated he slapped her on four to five occasions during this period, but never physically assaulted her in any way (see ex. 3; R.T., at 69).

After W joined applicant in the U.S. in 1990, they continued to argue over more issues related to W's shopping habits. On several occasions (at least four to five), Applicant physically assaulted W (mostly by slapping her with an open hand).

Sometime in September 1998, Applicant and W had a particularly heated exchange in which W cursed him in her native Urdu language. W's strong words were uttered in the presence of Applicant's children, causing him considerable insult and embarrassment. Applicant responded by physically grabbing W by the throat and briefly choking her while placing his other hand over her mouth (see ex. 4).¹ Applicant's actions caused W's nose to bleed.

On another occasion (in January 1999), Applicant told W that he was going to kill her (see ex. 4). In still another cited argument, Applicant brandished a knife in front of W and threatened to kill her (see ex. 4). Applicant was in the kitchen at the time of this incident and held up the knife in a threatening gesture. As a result of these physical threats from Applicant, W sought and obtained an order for protection in January 1999 (see ex. 5; R.T., at 57-58). In March 1999, she obtained a modification of the protective order that covered reimbursement for medical expenses associated with her injuries sustained in her 1998 assault (see ex. 5).

Applicant's physical exchanges with W caused considerable strains in their marriage. They tried marriage counseling for awhile, but without any manifest success (R.T., at 50). Unable to repair the growing rifts in their marriage, they separated in March 1999. Applicant and W remain separated, while still married.

Applicant has expressed remorse for his actions and has been forgiven (see ex. A). W (in retrospect) acknowledges some responsibility over the handling of her disputes with Applicant and credits Applicant with "a lot of good things," high moral standards, and no intention, in hindsight, of trying to kill her (see ex. A). During her

¹ At hearing, Applicant trimmed his earlier acknowledgments, claiming his hand accidentally slipped on to W's mouth, and he did not mean to threaten W with a knife (R.T., at 55-56, 72-75). If true, this changes the whole tenor of Applicant's physical exchanges from physical assaults and threats to inadvertent actions and displays on his part. For the first time, he claimed confusion when asked about his post-polygraph admissions. He provided no plausible explanation, though, for why he did raise confusion when questioned about his earlier denials in his post-polygraph interview. Considering his earlier failure to admit any of the details of his physical encounters with his wife until he was confronted in a post-polygraph interview, his hearing claims cannot be accepted as credible corrections of his earlier accounts.

visits from Applicant and their daughters, W and Applicant “don’t fight much,” and generally get along (ex. A).

When first interviewed by an DSS agent in December 2006, Applicant was asked a number of questions about W’s abuse allegations. In this initial interview, Applicant denied any physical abuse of W. When the DSS agent expressly informed him of D1’s allegations of his physical attempts to kill W and his brandishing of knives, Applicant roundly rejected the allegations (see ex. 4). The same DSS agent interviewed Applicant a second time - this one in September 1977 (see exs. 3 and 4). In this interview, Applicant admitted to slapping W on numerous occasions between 1982 and 1998, and placing his hand over her mouth on one occasion (in 1998), which caused her nose to bleed. But he denied ever trying to choke W, or threatening to kill her with a knife in the presence of her children (see ex. 4).

Applicant’s denials of any physical exchanges and threats prompted the DSS agent to schedule a polygraph with Applicant in October 2007. During the pre-polygraph phase of the DSS polygrapher’s exchange with Applicant, Applicant repeated his denials of his ever choking W in an argument, or ever threatening her with a knife during any of their arguments (ex. 4).

Following his opening interview with the DSS agent, the agent polygraphed Applicant. After this testing phase, the agent conducted a post-polygraph interview. In this interview, Applicant for the first time admitted to (a) putting his hand over W’s throat in 1998 and briefly choking her and (b) placing his hand over her mouth, which caused her nose to bleed (ex. 4). Applicant admitted, too, to threatening to kill W in a heated argument, and brandishing a knife in a threatening manner in W’s presence (ex. 4). At hearing, though, Applicant trimmed his earlier admissions.

Applicant attributes his denials of his physical assaults of W to embarrassment. His omissions and misstatements were clearly made, though, in a knowing and wilful manner and were corrected only after a series of confrontations from the interviewing agent.

Applicant and W continue to see each other periodically, even though they remain separated (R.T., at 63). Neither spouse has filed for divorce, and Applicant remains interested in reconciling with W (see ex. A; R.T., at 63). He is characterized by his daughters as a good, supportive and reliable father (see exs. C and D). His landlord describes Applicant as patient, dependable, and ready to carry out his obligations (see ex. B).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may

be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG ¶ 18.

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. Adjudication Guidelines (AG) ¶ 18

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually

mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant physically assaulted his wife on a number of occasions over the course of their long marriage and on two occasions threatened to kill her and/or cause her serious bodily harm. When asked about his actions in DSS interviews he minimized and denied his actions. Not until confronted by a DSS investigator in a post-polygraph interview did he admit the extent of his physical actions and his underlying intent. Security concerns are raised over Applicant's physical exchanges with his wife and his ensuing omissions before submitting to a post-polygraph interview in 2003.

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's multiple omissions and misstatements over his physical assaults and threats on his wife, and in his withholding of abusive actions until he was confronted by a DSS polygrapher in a post-polygraph interview in October 2007. So much trust is imposed on persons cleared to see classified information that deviation tolerances for candor lapses are gauged very narrowly.

Mitigation of Applicant's omissions and misstatements are difficult to credit Applicant with, since he failed to promptly correct his omissions and misstatements until he was confronted in a post-polygraph interview. In the past, the Appeal Board has denied applicants availability of the predecessor mitigating condition of MC ¶ 27(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) where the applicant has waited many months to timely correct a known omission. Compare ISCR Case No. 97-0289 (Appeal Bd. January 1998) with DISCR Case No. 93-1390 (Appeal Bd. January 1995).

By contrast, the protection orders that W sought and obtained against Applicant, while necessary and appropriate at the time they were issued in 1999 and 2000, have not been renewed. Applicant and W have made concerted efforts to reconcile and maintain peace and harmony with their daughters, and have demonstrated considerable progress over the past eight years. MC ¶ 27(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," is applicable to these facts. Applicant and W convince that they have made significant strides in repairing the damage to their marriage and family unit. Applicant, for his part, has inspired trust and confidence from

both his wife and daughters and exhibits no likelihood of any recurrent familial breaches that prompted W to seek public intervention from the courts.

By willfully and knowingly failing to disclose his multiple acts of physical assaults and threats on his wife until confronted, Applicant concealed materially important background information needed for the government to properly process and evaluate his security clearance application. His probative reasons for his omitting his actions arrest/charges (embarrassment) are not sustainable grounds for averting inferences of falsification. Weighing all of the circumstances surrounding his multiple assault/threat omissions and misstatements, and lack of any prompt, good faith corrections, Applicant's claims lack the necessary probative showing to avert drawn conclusions that he knowingly and deliberately withheld material background information about his prior physical assaults and threats.

Knowing and wilful falsification is also covered by the criminal conduct guidelines. Mitigation of the criminal features of his omissions falls along a little bit different fault line than is the case with personal conduct considerations. To be sure, an applicant's positive work record and demonstrated family and community commitments can play a major role in mitigating criminal conduct coverage of his omissions. MC ¶ 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," has potential application to Applicant's situation. Employment of this guideline and the use of separate whole-person weighing of Applicant's actions and personal assessments of his family and landlord contributions weigh in his favor, but are not to mitigate the repeated nature of his omissions and misstatements to the DSS agent who interviewed him and eventually confronted him.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2 factors), unfavorable conclusions warrant with respect to subparagraphs 1.a through 1.g of Guideline E and subparagraph 2.a of Guideline 2.a. Favorable conclusions warrant, however, with respect to subparagraphs 1.h through 1.j of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E2 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E: (PERSONAL CONDUCT): **AGAINST APPLICANT**

Sub-para. 1.a: **AGAINST APPLICANT**

Sub-para. 1.b:	AGAINST APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d:	AGAINST APPLICANT
Sub-para. 1.e:	AGAINST APPLICANT
Sub-para. 1.f.:	AGAINST APPLICANT
Sub-para. 1.g:	AGAINST APPLICANT
Sub-para. 1.h:	FOR APPLICANT
Sub-para. 1.i:	FOR APPLICANT
Sub-para. 1.j:	FOR APPLICANT

GUIDELINE J: (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

