



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



In the matter of:

ISCR Case No. 06-25528

Applicant for Security Clearance

**Appearances**

For Government: Robert E. Coacher, Esq., Department Counsel  
For Applicant: *Pro Se*

August 28, 2009

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Criminal Conduct security concerns. Eligibility for access to classified information is denied.

On April 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 answered the SOR on April 23, 2009, and requested a hearing before an administrative judge. The case was assigned to me on May 13, 2009. DOHA issued a notice of hearing on June 9, 2009, scheduling the hearing for July 9, 2009. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 9, which were received without objection. Applicant testified on his own behalf, called

five witnesses, and submitted Exhibits (AE) A-1 through A-28, B, C, and D, which were received without objection. DOHA received the transcript of the hearing (Tr.) on July 16, 2009.

### **Findings of Fact**

Applicant is a 44-year-old employee of a defense contractor. He served in the U.S. Army from 1984 to 2004, and retired as a sergeant first class (E-7). He is currently attending college in pursuit of a Bachelor of Science degree. He has been married since 1984. He has four children, ages 23, 19, 9, and 8.<sup>1</sup>

The security concerns were based on a series of domestic violence detentions, arrests, and charges over a course of almost 20 years. Applicant and his wife described a series of tragic and stressful events during their marriage. Their first child was stillborn in 1984. The loss of the child had a very traumatic effect on his wife. Because of genetic abnormalities, all her pregnancies were complicated with risk of severe birth defects. She suffered from many emotional and psychological issues throughout their marriage. She stated that she was diagnosed with severe panic attack disorder, anxiety disorder, major depressive disorder, agoraphobia, schizophrenia, and bipolar disorder. Applicant's many deployments, unaccompanied tours, service schools, field training exercises, and other travels added to her stress. He deployed in support of Operation Desert Shield/Desert Storm, Operation Iraqi Freedom, and other humanitarian and peacekeeping operations. She has been under the care of psychologists and psychiatrists and on medication for many years. She was hospitalized for psychiatric reasons on several occasions, including in 1986 and 2006. She also admitted to some drinking problems. She had an ongoing affair with her psychologist and other extramarital affairs. One of their children was severely burned in 1999, and almost died. The child required a long period of hospitalization, numerous surgeries, and extensive physical therapy. They had to move to where the child could be treated and live in difficult conditions. Applicant's step-father passed away in 1993, while they were in Germany and his wife's father died in 2003. His wife indicated that she is now doing much better. She recently obtained a job with a federal agency and indicated that she now understands the importance of a security clearance, because she received a clearance through her job.<sup>2</sup>

Applicant was serving in Germany with the U.S. Army in 1988. In the early morning hours of July 9, 1988, Applicant and his wife argued on the highway. The argument turned violent when he hit, pushed, kicked, and shoved her, causing her to fall to the ground. He then grabbed her jacket and dragged her along the side of the road. His wife was holding on to their two-year-old child during the assault and she was eight-weeks pregnant at the time. The incident was observed by two local women who pulled to the side of the road to assist. Applicant fled the scene. The two women bought Applicant's wife and child to the hospital and told the doctor what happened. The doctor

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<sup>1</sup> Tr. at 66, 153; GE 1, 4.

<sup>2</sup> Tr. at 68-114, 126-127; Applicant's response to SOR; AE A-15 to A-24.

noted that she was “very bewildered, crying, the clothing is dirty, in particular the back and buttock area.” He noted that “[t]he child is totally bewildered and states constantly that he was hit by his daddy.” The Military Police (MP) were notified and Applicant was apprehended and transported to the MP station. The MP report noted that he was advised of his rights, waived them, and made a sworn statement. He attributed his wife’s injuries to her having “a fit.” Applicant was referred to Family Counseling and successfully completed all sessions. No further disciplinary action was taken. Both Applicant and his wife completely denied any memory of this incident.<sup>3</sup>

Applicant was serving on a post in the United States in 1994. A 911 call was received from Applicant’s home at about 5:30 in the afternoon on November 27, 1994. The MPs went to the home and found that Applicant and his wife were involved in a verbal altercation that turned physical when they began pushing each other. He was transported to the MP station. The MP report noted that he was advised of his rights, waived them, and made a sworn statement, admitting to the incident. He attended and completed a family advocacy program. No disciplinary action was taken. Applicant and his wife both testified that they did not remember this incident.<sup>4</sup>

Applicant was serving on a different post in the United States in 1999. At around 10:30 in the morning on December 23, 1999, the MPs were notified of a domestic disturbance at Applicant’s home. Their investigation revealed that Applicant and his wife were involved in an argument when he grabbed her on both sides of her face and shook her head. She was pregnant at the time. They were escorted to the MP station. The MP report noted that he was advised of his rights, waived them, and made a sworn statement, admitting to the incident. No disciplinary action was taken. Applicant admitted that he grabbed his wife on both sides of her face and shook her head. He stated that he did it because she “was having a severe panic attack and nervous breakdown in the emergency room of [the] Army Medical Center.”<sup>5</sup>

In 2002, Applicant was serving on another post in the United States. At around 10:00 in the evening on March 15, 2002, the MPs were dispatched to Applicant’s home. His wife told the MPs that they were having an argument when Applicant struck her behind the head with an open hand. He was transported to the MP station. The MP report noted that he was advised of his rights, waived them, but did not make a statement. He was referred to family advocacy. He attended and completed the Senior NCO/Officer’s Group Parent Awareness Education Class. The Chief of the Department of Social Work noted that Applicant “demonstrated active participation, completed all assignments for the time he attended group.” No disciplinary action was taken. Applicant testified that this incident was the culmination of several days of arguments. He was about to be away for several months for training prior to deploying to Iraq, and his wife was very upset. He stated that she threw things at him and “literally chased one

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<sup>3</sup> Tr. at 74-79, 128-130, 141; Applicant’s response to SOR; GE 9.

<sup>4</sup> Tr. at 130-132, 142-143; Applicant’s response to SOR; GE 8; AE A-1.

<sup>5</sup> Tr. at 143-144; Applicant’s response to SOR; GE 7.

of [the] children around with a frying pan.” He testified “I don’t recall striking my wife. I recall pushing my wife. I’ve never once, can never remember physically doubling up my fist or slapping my wife, for that fact.” His wife testified that she shoved him into a door in the kitchen and “[h]e became angry and shoved [her] back into the kitchen cabinet,” causing her to hit her head on the wall.<sup>6</sup>

A police officer contacted Applicant’s wife on May 3, 2005, for a delayed domestic violence call. She told the officer that on May 1, 2005, she and her husband were arguing when he threw her down on the ground and up against the house. The officer asked her how long the abuse had been going on and she stated “the last 23 years.” She was hesitant to provide a signed statement. She told the officer that Applicant was the primary income earner and they would lose everything if he lost his job. The officer provided her a written statement form and asked her to fill it out and drop it off at the station. He contacted her later when she did not provide a written statement and offered her the opportunity to provide a tape recorded statement. She refused. There is no evidence that she ever provided a written or tape recorded statement. Applicant was never arrested or charged for this incident. Both Applicant and his wife denied any memory of this incident.<sup>7</sup> Applicant testified:

I never once drug my wife across my driveway in front of my house, ever. I don’t recall this. I don’t remember this ever even happening. If it did happen, I wasn’t even present when the police were there or when my wife was taking anybody to the hospital or anything else. I am completely oblivious to this.<sup>8</sup>

The police report did not state that Applicant dragged his wife across their driveway in front of their house. It only stated that “[Applicant] threw her down on the ground and up against the house (which is made of brick).”<sup>9</sup>

Applicant was arrested on September 16, 2007, and charged with assault-domestic violence and interference with communication. His wife told the police officer that she and Applicant had been arguing for about two hours. He hit her arm with a pillow. She got tired of his shouting so she was looking for the home phone. He got up and broke the home phone. She went into the bedroom and called the police on her cell phone. The officer summarized what occurred in the police report:

On 09/16/07 at 2353 I was dispatched to [address] in reference to a domestic violence incident. Upon arrival I contacted [Applicant] who explained to myself that on today’s date him and his wife [wife’s name] were involved in an argument which began when [Applicant] woke up on

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<sup>6</sup> Tr. at 134-135, 144-147; Applicant’s response to SOR; GE 6; AE A-2, A-3.

<sup>7</sup> Tr. at 125-126, 132-133, 147-148; Applicant’s response to SOR; GE 5.

<sup>8</sup> Tr. at 147-148.

<sup>9</sup> GE 5.

today's date and decided he was going to steam clean his carpet and then clean up the rest of his house. He explained to me in detail in a very irate manner how hard he had worked today cleaning his residence. After [Applicant] was finished explaining to myself about how hard he had worked to clean his residence, he further explained how he and his wife were laying in bed at the end of this day and he wanted to spend time with his wife, but she kept falling asleep because she was tired from working long hours. [Applicant] became so irate that he hit his wife on her face with a pillow. At this time [wife] stated that she wished to dial 911, but her husband had dismantled the telephone and threw it in the trash. [Applicant] was very difficult to have a conversation with because he was so irate and belligerent about the fact that he had cleaned his residence and his wife was tired and could not stay awake to spend quality time with him. At this time I placed [Applicant] under arrest for the listed charges. He continued to be very belligerent with me the entire time. He was transported to [detention center] without further incident.<sup>10</sup>

Applicant's wife wrote a letter to the district attorney stating that she did not want to press charges against her husband. Charges were dismissed in February 2008.<sup>11</sup>

Applicant testified that he was sleeping on the couch and his wife woke him up. He admitted that he struck his wife with a pillow after she had struck him with a pillow. He stated that he wanted to call the police but his wife would not let him, so he broke the phone. His wife provided similar testimony and that he hit her in the face with the pillow. Applicant commented at one point in the hearing that he "didn't know pillow fighting was illegal."<sup>12</sup> He was asked if he struck his wife with the pillow in anger, and he answered:

It was in retaliation for being struck with a pillow. I don't recall being angry, and if I was angry, I don't recall at what level I was angry. I had just been woken off the couch by a woman that had been antagonizing me all day long.<sup>13</sup>

Applicant was interviewed for his background investigation in September 2008. A signed statement was not provided but the interview was memorialized in a report of investigation (ROI). DOHA sent Applicant a copy of the ROI in an interrogatory and asked him if the ROI accurately reflected the information he provided to the investigator on the day he was interviewed. He was provided the opportunity to explain why the ROI was inaccurate and to add additional information regarding the matters discussed during the interview. He answered that the ROI was accurate and submitted additional

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<sup>10</sup> GE 4.

<sup>11</sup> Applicant's response to SOR; GE 2-4; AE A-5, A-6.

<sup>12</sup> Tr. at 118-124; 148-149.

<sup>13</sup> Tr. at 149.

information. The ROI indicates that Applicant gave the investigator a somewhat different version of events. He and his wife were arguing for about three to four hours before he was arrested. He tried to avoid the argument by going into different rooms of the house but she pursued him. When he attempted to leave the house, she got in front of him and started yelling in his face. At that point he picked up a pillow off the couch and used it to push her from in front of him. This made her even angrier and she called the police. He realized he could not leave with the police coming, but she continued to follow him throughout the house yelling at him. He decided to call the police himself but she kept grabbing the phone out of his hand. He then became angry and ripped the phone cord out of the wall. He also told the investigator that this was an isolated incident and he had never hit his wife.<sup>14</sup>

Applicant's wife accepted responsibility for most of Applicant's contacts with law enforcement. She stated that she was difficult when she did not take her medication. She frequently called his command to complain about him being gone. She was angry about their situation and frequently initiated fights. He would try and avoid fights. She described him as a good man and a good father. She stated that Applicant has never struck her with a closed fist or an open hand, and that when their fights turned physical they "mostly pushed and shoved each other." She admitted on one occasion he pushed her and she fell and hit her head. She denied that he kicked her but stated that he has used his foot to move her out of the way when he was trying to get away from her. She stated that she would sometimes lie to the police officers in order to get Applicant in trouble.<sup>15</sup>

I did not find either Applicant or his wife to be credible witnesses. Applicant's testimony was evasive and inconsistent at times. I further find that some of his testimony was intentionally false. Of particular note was the testimony of Applicant and his wife that they had no memory of the 1988 incident in Germany. That was the one incident that was witnessed by someone other than Applicant and his wife. It is not believable that neither party could remember him striking his pregnant wife while she was holding their two-year-old child, causing her to fall to ground, and dragging her along the side of the road. To the extent that Applicant or his wife's testimony varied from the account of events in the police reports, I find the facts to be as detailed in the police reports. I further find that Applicant provided intentionally false or misleading information to the OPM investigator when he told the investigator that he had never hit his wife.<sup>16</sup>

Applicant estimated that he has been through four or five anger management classes while in the Army. Some of the classes were unrelated to his domestic violence issues but were connected with his dealings with other soldiers. He denied having any

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<sup>14</sup> GE 2.

<sup>15</sup> Tr. at 84-85, 89, 99, 110, 115-116, 123, 134-137.

<sup>16</sup> It was not alleged in the SOR that falsified the OPM interview. Applicant's statements will not be used for disqualification purposes. They will be considered in assessing Applicant's credibility; in the application of mitigating conditions; and in evaluating the "whole person."

difficulty in controlling his anger. He and his wife have seen marriage counselors and he has received counseling for his Post Traumatic Stress Disorder (PTSD) related to his combat experiences. Applicant has not consumed alcohol since he was about 20 years old.<sup>17</sup>

Applicant earned many awards, decorations, and accolades while he was in the Army, including the Meritorious Service Medal, two Army Commendation Medals, four Army Achievement Medals, six Good Conduct Medals, and the Bronze Star Medal for exceptionally meritorious achievement during combat operations in Operation Iraqi Freedom. His Army evaluation reports reflect excellent service. Four witnesses testified on Applicant's behalf. His former first sergeant testified about Applicant's outstanding service in Iraq. Three witnesses testified about Applicant's hard work and professionalism in his post-Army career.<sup>18</sup>

### **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 to be 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, administrative judges apply the guidelines 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The

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<sup>17</sup> Tr. at 112-113, 117, 149-153.

<sup>18</sup> AE A-8 to A-14, A-24.

applicant has the ultimate burden of persuasion as to obtaining 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 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 adverse 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).

## **Analysis**

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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 are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant’s multiple instances of domestic violence, as established by the police reports, are sufficient to raise the above disqualifying conditions.

Four Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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;



(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

Applicant was involved in six documented domestic violence incidents over the course of almost 20 years. The most recent incident was in September 2007. The behavior was not infrequent and, under the circumstances, I find it to be recent. His criminal acts cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 32(a) is not applicable. His counseling, education, military record, and good work record are positive signs of rehabilitation. However, his behavior has been recurrent over many years. He gave false or misleading information to the OPM investigator in September 2008, and he knowingly provided false testimony at his hearing. That is not evidence of successful rehabilitation. No mitigating conditions are applicable.

### **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) 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 common-sense 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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. I considered Applicant's 20 years service in the Army, including multiple combat tours, and his very favorable character evidence. I also considered the stressful and tragic events in his and his wife's life. His wife is obviously very troubled, with emotional and psychological

problems. I believe their testimony that she was the initiator of much of the arguments that preceded the violence in their marriage. I also believe that she was an active participant in many of the events. That does not mean that Applicant is free from blame. Nothing his pregnant wife did in 1988 could justify striking her while she was holding their two-year-old child, causing her to fall to ground, and dragging her along the side of the road. That event was witnessed by two German women who took Applicant's wife and child to the hospital. The doctor noted that her clothing was dirty, in particular the back and buttock area, and that the two-year-old child kept stating that he was hit by his daddy. Even though it occurred more than 20 years ago, it is simply not believable that neither Applicant nor his wife could remember such a traumatic event. Without complete candor, it is impossible to find that Applicant is rehabilitated, and that such events are unlikely to recur. Serious doubts remain about Applicant's judgment, honesty, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Criminal 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 J:                      AGAINST APPLICANT

Subparagraphs 1.a-1.f:                      Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge