



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



In the matter of:)	
)	
)	ISCR Case No. 07-03307
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i, Esquire, Department Counsel
For Applicant: Pro Se

May 30, 2008

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted his Security Clearance Application (SF 86) on September 18, 2006. On December 20, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. The action was taken under Executive Order 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 acknowledged receipt of the SOR on January 4, 2008. He answered the SOR in writing on January 7, 2008. The Department Counsel requested a hearing

before an Administrative Judge on January 15, 2008. Department Counsel was prepared to proceed on February 27, 2008, and I received the case assignment on February 28, 2008. DOHA issued a notice of hearing on March 24, 2008, and I convened the hearing as scheduled on April 30, 2008. The government offered seven exhibits (GE) 1 through 7, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on May 9, 2008. The record closed on April 30, 2008.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by adding ¶ 2.c, alleging Applicant falsified his response to question 23 on his Security Clearance Application (SF-86) by failing to list his felony arrest in 1998. (Tr. 8-9.) Applicant objected to the motion, arguing that he had explained everything previously. (Tr. 12-13.) I granted the motion to amend and added a third allegation of falsification to ¶ 2 of the SOR. (Tr. 13.)

Findings of Fact

In his Answer to the SOR, dated December 20, 2007, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 2.a, and 2.b of the SOR, with explanations. At the hearing, he objected to the addition of ¶ 2.c. His objection is taken as a denial of the allegation.

Applicant is a 46 year old electronics laboratory technician, who works for a Department of Defense contractor. He began working in the electronics industry following his honorable discharge from the United States Marine Corps 24 years ago. He has worked for his current employer for seven years.¹

Applicant married his first wife in early 1986. They divorced 18 months later in 1987. He has one daughter, K, from his marriage. She is 21 years old. Under the terms of their divorce settlement, his wife received custody of their infant daughter and he had visitation rights every other weekend. He also paid monthly child support until K was 19 years old. His visitation with K ended in November 1998.²

Applicant married his present wife in 1989. They have two children, a son, who is 18, and a daughter, who is 17. Both children are honor students in school.³

¹GE 1 (Applicant's Security Clearance Application, dated September 18, 2006) at 2, 7-8, 14-17; Tr. 27.

²GE 2 (Interrogatories to Applicant, including a copy of a summary of his investigative interview and his answer) at 3-4; Tr. 28-30, 54, 79.

³GE 1, *supra* note 1, at 10-11; Tr. 27-28.

The police arrested and charged Applicant with driving while intoxicated (DUI) in 1986. In November 1998, Applicant's daughter, K, came for a scheduled weekend visit. The entire visit was problematic. He denied K's request to have a friend visit for the weekend. He believes his denial upset her. When she visited, K shared a bedroom with her step-sister, who is four years younger. Applicant states that K and his two other children got along with each other, but that K and his wife did not. In addition, his wife and ex-wife did not get along. His first wife resented his remarriage and often created problems for the family.⁴

Applicant's memory of the events of November 1998 is not completely clear. Based on his best recollection and the evidence of record, I make the following factual findings. K returned home at the end of her visit. Shortly after, she called Applicant and told him she knew what he had done - that he touched her in the wrong places. He denied any wrongdoing and told he was sorry she was upset. The police report indicates that K told the police about this alleged conduct and that Applicant also improperly touched his other daughter at the same time. It also shows that, at around 1:30 a.m., with the police on the telephone line, K called Applicant. (He was asleep when this call occurred). The report states that Applicant denied improperly touching his younger daughter and that he admitted his conduct with K. Applicant, however, denies that this conduct occurred with K.⁵

The police arrested Applicant on November 16, 1998 and charged him with sexual assault on a child by a person in a position of trust, a class three felony. The police interrogated Applicant for a number of hours after reciting his *Miranda* rights. He did not request an attorney for the interrogation. At the end of the interrogation, he acknowledged the conduct after he was told he lied on a polygraph examination. A polygraph exam is not admissible into court.⁶

The State did not allow Applicant to return to his family home. For the next six months or more, Applicant lived with his parents while the State investigated. The State Department of Social Services convened a panel to determine if Applicant could return home. He appeared at this proceeding with his attorney and his wife. The panel determined that he could not return home. Under State law, Applicant requested a civil jury trial on the issue of his return home. After a three day trial where Applicant, his wife, his daughter K, his character witnesses, and others testified, the jury determined that he

⁴GE 2, *supra* note 2, at 3-5; GE 4 (Applicant's statement, dated August 9, 2007) at 1-3; GE 5 (Federal Bureau of Investigation, criminal records); Tr. 29-35, 38.

⁵GE 2, *supra* note 2, at 3-5; GE 4, *supra* note 4, at 1-3; GE 6 (Police affidavit, dated November 16, 1998); Tr. 35, 37.

⁶GE 5, *supra* note 4; Tr. 36-38, 64-68.

should return home. He immediately returned to his family, where he continues to live. His younger daughter has not alleged any sexual misconduct by him.⁷

Following the civil trial, Applicant's attorney entered into discussions with the State prosecutor regarding a plea agreement. His attorney had explained to him that if he was found guilty, he could spend 10 years in jail. Because he had exhausted his financial resources and did not want to put his family through another trial, he decided to accept a plea agreement. He entered an *Alford* plea to third degree assault, a misdemeanor. The court sentenced him to two years probation, fined him, directed a psychological examination be administered, and issued a permanent restraining order requiring him to stay away from K. Applicant complied with the terms of his sentence. The record contains no evidence that the psychological evaluation indicated a problem with any kind of deviance. Applicant has not been arrested for any misconduct since November 1998.⁸

Applicant's former wife filed for a permanent restraining order, which the court issued in April 2000. Applicant received no papers from the court. He did not learn about the restraining order until recently. He has not had any contact with his ex-wife and K since November 1998.⁹

When he completed his security clearance application, Applicant answered the questions as follows:

Section 13/15: Your Spouse

Former Spouse(s) (not Applicable:(x)). He provided no entry.

Section 14/15: Your Relatives

He listed his parents and siblings, but he did not list any of his children.

Section 23: Your Police Record

Applicant answered no to all questions including:

a. Have you ever been charged with or convicted of any felony offense?
(Include those Under Uniform Code of Military Justice)

⁷GE 2, *supra* note 2, at 3-5; GE 3 (Applicant's statement, dated August 29, 2007); GE 4, *supra* note 4, at 1-3; Tr. 38-41, 55-59, 63.

⁸GE 2, *supra* note 2, at 3-5; GE 4, *supra* note 4, at 1-3; Tr. 42-45; 59-62.

⁹Tr. 44-47.

and two subsequent questions in this segment which limit the time to the last seven years. Several prior segments limited the time necessary for a response to seven years.¹⁰

Applicant acknowledges that he decided not to list his first marriage when he completed his SF-86 because it was a long time ago, his first wife is not a part of his life and he is trying to put his contacts with her behind him. He did not list his 1998 arrest because he thought he needed to list any arrests which occurred in the seven years before September 2006 and his arrest was more than seven years old. He knew his arrest would be discovered during the investigative process. He doesn't know why he did not list any of his children, but acknowledged that he disowned his oldest daughter after his arrest. In explaining his reason for not listing his former wife and oldest daughter, he said "[he] did not consider those two people part of my life anymore." He acknowledges that he did not take the security clearance process seriously and was not thorough when completing his SF-86.¹¹

Applicant's wife and family are fully aware of his arrest and the circumstances surrounding the events in 1998 with his daughter, K. His boss also knows about his arrest and plea. Applicant describes his life now as the best it has ever been.¹²

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.

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

¹⁰GE 1, *supra* note 1, at 9-14, 18.

¹¹Tr. 46-52.

¹²*Id.* at 27, 80.

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 applicant or proven by Department Counsel. . . .” The 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 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

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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.”

Under AG ¶ 31, the following disqualifying conditions could raise a security concern and may apply:

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

As a result of K's allegations, the police charged Applicant with sexual assault on a child by a person in a position of trust, a class three felony. After many months of court proceedings, the Applicant reached a plea agreement with the prosecutor. He

entered an *Alford* plea to third degree assault, a misdemeanor. The court sentenced him to two years of probation and issued a permanent restraining order directing him to remain away from his daughter. Consequently, the above disqualifying conditions apply.

AG ¶ 32 provides conditions that could mitigate the security concerns raised:

(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;

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

(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,

The 1998 sexual assault allegation by his oldest daughter is the only criminal charge against Applicant in the last 20 years. Despite his acknowledgment of the sexual misconduct to the police after several hours of interrogation and lack of legal counsel, Applicant has consistently denied the conduct. He entered an *Alford* plea, which under state law is a plea of guilty that permits a defendant to assert innocence as to one or more elements of the crime, but consent to the imposition of the conviction and penalty. Applicant pled guilty to a misdemeanor assault charge, but not to felony sexual assault. His plea reflects his contention that he did not sexually assault K. Applicant was unaware of the April 2000 restraining order, but knew that the court had ordered him to stay away from his oldest daughter at the time of his plea and sentence. He has stayed away from his daughter and has no intent to ever contact her again.¹³

When the State refused to allow Applicant to return to live with his family, he requested a civil jury trial on this issue. After three days of trial and testimony from all parties involved, including his oldest daughter, the jury concluded that he could return as he was not a threat to his younger daughter. Since his arrest in 1998, Applicant has not been arrested by the police for anything. He works steadily and has a very good family relationship. The above mitigating conditions apply. Applicant has mitigated the government's security concerns under Guideline J.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an

¹³985 P.2d 1123 (1998).

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Under AG ¶ 16, the following disqualifying condition that could raise a security concern and may be disqualifying:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

The government argues that by not listing his former wife and oldest daughter in his answers to Section 13 to 15 of the SF-86, Applicant was deliberately trying to hide information which would reveal his arrest for sexually assaulting his oldest daughter. I must first determine whether the omission of these facts is material. Under normal circumstances, the omission of prior spouses and children is not necessarily relevant to a determination of security worthiness. In this case, the omission is relevant. The government has established that Applicant omitted material facts from his SF-86 when he answered "no" to Question 23 and failed to acknowledge his first marriage and his oldest daughter. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty because, in this case, this information concerns the allegation of serious criminal conduct.

For this guideline to apply, Applicant's omission must be deliberate. He denies, however, that he deliberately falsified his answer to these questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission

occurred.¹⁴ For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

Applicant's omission of his oldest daughter's name is not deliberate. He failed to list any of his children as relatives when completing his SF-86. He acknowledged that he realized that he thought about his first wife, but decided that the information was not necessary. His decision not to acknowledge his first marriage was deliberate. The government has not established its case as to allegation 2.b of the SOR, but it has established its case as to allegation 2.a of the SOR.

Concerning his failure to list his 1998 arrest, Applicant has credibly testified to his carelessness when completing the SF-86. While the question clearly asks "ever", many of the questions proceeding it do request information for the last seven years. Applicant's failure to be careful in answering Section 23 is insufficient to establish intentional misconduct. The government has not established its case under allegation 2.c of the SOR.

I have reviewed the potential mitigating conditions under AG ¶ 17 and conclude that only the following conditions may be applicable:

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

Applicant wants to put his life and relationship with his first wife and oldest daughter behind him, particularly after his arrest in 1998. His failure to acknowledge his first marriage is not significant because the usual criminal background investigation in the security clearance process would and did reveal his first marriage and the arrest. His 1998 arrest is his only criminal arrest. There are no other allegations of sexual misconduct involving his younger daughter. Since he has no contact with K or her mother, there is little likelihood of a reoccurrence. His failure to acknowledge his first marriage does not cast doubt on his reliability, trustworthiness, and good judgment. Applicant has mitigated the government's security concerns under Guideline E.

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

¹⁴ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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 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. The allegation of sexual misconduct against Applicant is very serious, and arose out of a problematic family situation and one particular weekend. In this case, the allegation arose after a difficult weekend visitation with his oldest daughter. A jury of his peers, however, concluded that he should return to his home to live with his family after hearing days of testimony from all persons involved. The jury considered balanced testimony and ultimately overruled a negative determination by a social services panel. Moreover, the jury found him not a threat to his younger daughter. I infer from the decision of the jury that the evidence failed to establish sexual misconduct by Applicant. Indeed, the jury decision also seriously impacted the prosecution’s criminal case and ultimately lead to a plea agreement in which Applicant maintained his innocence regarding the sexual assault charge.

Outside of this arrest, Applicant has not been involved with the justice system for any other serious crime. As a young person, he had one DUI which occurred more than 20 years ago. He provides for his family. He works regularly and has been employed by his current employer for seven years. He paid his child support to his ex-wife for eight years after his arrest even though he purposely avoided contact with K. He recognizes his responsibilities and accepts them. There is no apparent link between an alleged incident of sexual assault in 1998 and Applicant’s ability to protect classified information. Thus, the 1998 incident and matters related to that incident cannot be a source of improper pressure or duress.

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal and personal conduct.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge