



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



In the matter of:)	
)	
)	ISCR Case No. 07-03635
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

March 12, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA), on December 1, 2005. On June 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline J). The action was taken pursuant to 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his notarized answer to the SOR on July 13, 2007. He elected to have his case decided administratively without a hearing. A copy of the government's File of Relevant Material (FORM, the government's evidence in support of the SOR) was sent to Applicant on November 1, 2007. Applicant received the FORM on November 7, 2007. Applicant's six-page response to the FORM was received by DOHA on December 11, 2007. On January 2, 2008, Department indicated he had no objection

to Applicant's post-hearing submission. The first four pages of Applicant's submission are received in the record as AE A, which consists of a personal statement by Applicant and three character statements. The two certificates of completion are received in evidence as AE B. AE C, the investigator's record of an interview (three pages in length) conducted with Applicant on July 24, 2006, has been admitted in evidence pursuant to E3.1.19. of the Directive "to permit the development of a full and complete record." The problem with AE C is that Applicant confused the arrest dates and/or the details of each arrest with the subsequent dates he was required to appear in court. Given Applicant's admissions to all allegations of the SOR, I will rely on the dates cited in the SOR, even though SOR 1.d. is not referenced in the Federal Bureau of Investigation (FBI) criminal record. (GX 5) Based upon a review of the FORM, and Applicant's response to the FORM, Applicant's eligibility for access to classified information is denied.

Findings of Fact

Applicant admitted all allegations under the criminal conduct guideline. He noted that if he did not receive a security clearance, the future would not be bright for him. Most of the projects of his employer (who he has worked for since December 1997) require a security clearance. Applicant is 30 years old and has been employed as an electronic technician since December 1997.

On August 2, 2002 (SOR 1.a.), Applicant was arrested and charged with inflicting corporal punishment to a spouse/cohabitant, a felony. He admitted the offense, and SOR 1.a. was disposed of in SOR 1.d.

Before he was arrested for inflicting corporal punishment to a spouse/cohabitant on August 28, 2002 (SOR 1.b.), Applicant was arguing with his girlfriend about money. Suddenly, she made a comment about Applicant and her daughter. He became angry and threw his girlfriend against a wall. After seeing a videotape of the incident, showing that his girlfriend started the argument, Applicant claims the district attorney declined to press charges. Though SOR 1.b. indicates in the allegation that the case was not prosecuted, I do not find Applicant's videotape explanation credible based on his admitted conduct in throwing his girlfriend against a wall.

On November 21, 2002 (SOR 1.c.), Applicant and his girlfriend pushed each other during an argument. Applicant left the apartment, and walked down the street. While walking, he saw a police officer, who coincidentally was in his squad car patrolling the neighborhood. Shortly after telling the officer what had happened, Applicant was arrested. He contends he was arrested for having admitted he had gotten into a fight with his girlfriend. Applicant surmised that the charges were dismissed after he was given a form indicating charges would not be pursued. SOR 1.c. indicates the charge was not pursued, but rather disposed of in SOR 1.d.

On or about September 2, 2003, Applicant was charged with infliction of corporal injury to a spouse/cohabitant. (SOR 1.d.) The offense occurred on August 28, 2003.

The charge was amended to include those offenses in SOR 1.a. and 1.c., along with an attempted murder charge that does not appear in the 1.d. allegation.

Before the arrest on September 2, 2003 (SOR 1.d.), Applicant had returned home at a time when his girlfriend should have been at work. Their ensuing verbal argument followed Applicant's questions to her about being at home and/or being nude. She responded she had been sleeping with other individuals. Even though he told her to shut her mouth, she continued to scream. Applicant placed a pillow against her face to stop her from screaming, and they both resumed fighting each other. He then left the home and called the domestic violence hot line for information about a place to stay. He provided his home address during the call. While deciding where to stay, Applicant returned home, where the police were waiting to arrest him.

SOR 1.d. indicates Applicant pled guilty to the first count of inflicting corporal injury to a spouse/cohabitant and count three (SOR 1.a.). The imposition of sentence (not disclosed) was suspended, and Applicant was put on probation for three years to expire February 18, 2007. There is no indication of the disposition of count 2. (SOR 1.c.) According to Applicant, the attempted murder charge was dismissed.

In addition to the unknown sentence that was suspended, other very important terms of Applicant's sentence¹ were not alleged. He was sentenced to 150 hours of community service, a \$200.00 fine, and participation in 52 weeks of a domestic violence program. (AE C) Applicant stated in his July 2006 interview that he was considered a valuable member of the domestic violence group. He completed all elements of his sentence, including voluntary participation in a 20-hour anger management program.

While on probation for pleading guilty to the SOR 1.d. offenses, Applicant was charged on June 8, 2004 for infliction of corporal punishment that occurred on June 1, 2004. (SOR 1.e.) The complainant was again his former girlfriend (same person referred to in SOR 1.a. through 1.d.) that he claimed he had recently broken up with. Before the arrest, Applicant saw his former girlfriend at a trolley stop, and she followed him home. She continued to call him on her cell phone, and he kept telling her the relationship was not working. When he arrived at his house, he called his probation officer, who told him to remain in his house. About an hour later, the police arrested Applicant after receiving a call from his former girlfriend. Though he stated he had no direct contact with her, Applicant's explanation for pleading guilty to the infliction of corporal injury offense was because "it was easier to just plead guilty." (AE C)

SOR 1.e. reveals that Applicant pled guilty to the offense of inflicting corporal injury to a spouse/cohabitant. The allegation notes the imposition of sentence² was suspended, and he was placed on three years probation to expire on February 9, 2008. Though not included in SOR 1.e. is the 114 hours of community service Applicant

¹ According to AE C, Applicant believed he was sentenced in February 2004.

² No additional details were provided regarding the actual sentence.

indicates he completed, and the \$1,600.00 fine he believes he paid in the spring of 2006. (AE C)

Applicant claims he filed a restraining order in July 2004 to stop his former girlfriend from trying to contact him. (AE C) According to Applicant, she violated the restraining order by sending photos to his cell phone. For unexplained reasons, he believes she was still trying to contact him at the time of his interview in July 2006 (AE C), although he had changed his phone number. He provided no documentation in support of his restraining order claim.

Applicant's character evidence comes from his general manager, his facility security officer (FSO), and a coworker. The general manager, who has known him for nine years and supervised him several times inside this nine year period, admires Applicant's professionalism and team player attitude. The FSO, who has known Applicant for 10 years, stated there is no adverse information in Applicant's file. Applicant's coworker lauded Applicant's exercise of good judgment over the last six years. AE B contains a certificate of completion awarded to Applicant in June 2005 for completing the year long domestic violence course. On January 28, 2006, Applicant received a certificate for completing 20 hours of an anger management course.

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/conditions are applied in conjunction with the nine general factors of the whole person concept. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. 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 interest is the paramount consideration. AG ¶ 2b. 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 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility. 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.

Criminal Conduct

Criminal behavior creates doubt about a person's judgment, reliability, trustworthiness, and willingness to comply with the rules.

Analysis

The SOR identifies five corporal injury offenses that occurred between August 2002 and June 2004. Applicant admitted the conduct on each occasion. The pattern of criminal conduct falls within the scope of two disqualifying conditions (DC) under the criminal conduct (CC) guideline. CC DC 31.a. (*a single serious crime or multiple lesser offenses*) and CC DC 31.d. (*individual is currently on probation*) apply due to the repeated violations of the law in a two year period, and Applicant's current probation status. The criminal conduct is aggravated by his egregious behavior on August 28, 2003 (SOR 1.d.), in putting a pillow over the victim's face to stop her from screaming. The fact that the attempted murder charge was dismissed does not eliminate the significance of Applicant's underlying conduct.

Equally disturbing is the fact that Applicant was under the jurisdiction of the SOR 1.d. court (or on probation by that court) when he was charged a fifth time (for the corporal punishment offense) on June 8, 2004 by the SOR 1.e. court.

There are two mitigating conditions (MC) that could dramatically reduce the security concerns related to Applicant's criminal conduct. CC MC 32.a. (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, and good judgment*) does not apply. Only four years have transpired since Applicant was convicted of infliction of corporal punishment. The criminal behavior was not an isolated offense, but a pattern of conduct that could have resulted in the death of his former girlfriend. Assuming he successfully completed all terms of probation, it has only been a month since his discharge from the jurisdiction of the court.

When an applicant shows evidence of convincing mitigation, then he can take advantage of CC MC 32.d. *(there is 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)* to meet his ultimate burden of persuasion. Applicant is entitled to limited mitigation under CC MC 32.d. because of the passage of time without recurrence of criminal activity. The mitigation must be weighed against the fact Applicant has been under the jurisdiction of the sentencing court for the entire period. He was well aware that a violation of one of the probation terms could mean incarceration pursuant to the terms of the original sentence.

Applicant has provided detailed information regarding the costs incurred as a result of the fines and other direct or indirect fees he has had to pay due his criminal activity. Payment of the fines and other costs weighs in his favor.

Applicant's successful completion of the year-long, court-ordered domestic violence program and the voluntary, 20-hour anger management course also count as favorable evidence for him. Missing from Applicant's case in mitigation, however, is evidence that demonstrates the benefit, if any, the courses had on Applicant. This evidence is critical to Applicant's case in mitigation. Clearly, the sentencing judge in SOR 1.d. recognized a problem and ordered Applicant to seek help through the domestic violence program. I cannot simply assume from Applicant's certificate of completion of both courses that he recognizes his domestic violence and anger management issues, unless he articulates what his completion of the courses have meant to him. In sum, the mitigating evidence, including favorable job performance compliments provided by his colleagues, is insufficient to overcome the pattern of criminal behavior Applicant engaged in between 2002 and June 2004. Subparagraphs 1.a. through 1.e. are resolved against Applicant.

Whole Person Concept (WPC)

My adverse findings under the CC guideline must still be evaluated in the context of whole person concept. Applicant's criminal conduct is aggravated by the fact it occurred five times in less than two years. Even though SOR 1.d. was not prosecuted, he admitted throwing his former girlfriend against a wall in 2002. In 2003, he put a pillow over his face. While he was under the jurisdiction of the Court (probation) in SOR 1.d., he committed the same offense in June 2004 (SOR 1.e.), and the judge extended his probation one year to February 2008. Though Applicant has not violated the law since 2004, and he has completed a year-long court-ordered program, and a voluntary anger management program, he has not provided any information about the content of either course, specifically what he learned about effectively dealing with domestic altercations and controlling his anger. Without this probative evidence, I cannot conclude with complete confidence this conduct will not recur. The CC guideline is found against Applicant.

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 (Criminal Conduct, Guideline J): AGAINST APPLICANT

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Applicant
Subparagraph 1.c.	Against Applicant
Subparagraph 1.d.	Against Applicant
Subparagraph 1.e.	Against Applicant

Conclusion

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

Paul J. Mason
Administrative Judge