



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-18622
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

October 30, 2008

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions (e-QIP), on February 28, 2007. On June 30 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F 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 answered the SOR in writing on July 21, 2008, and requested a hearing before an Administrative Judge. This Administrative Judge was assigned the matter on August 27, 2008. A notice of hearing was issued on September 12, 2008, scheduling the hearing on October 7, 2008. The Government offered five exhibits,

referred to as Government Exhibits 1 through 5, which were received without objection. Applicant offered seven exhibits, referred to as Applicant's Exhibits A through G, without objection and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on October 16, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 53 years old and has a Bachelor's Degree in Business Management. He is employed by a defense contractor as a General Maintenance Person, and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant was arrested on or about August 16, 2006, and was charged with (1) Battery and (2) Criminal Threats. The Applicant explained that he learned from his excessive telephone bills that his wife had been text messaging a man who lived out of state. One evening while she was filing some papers or arranging something on the floor, he asked her about it. She refused to answer so he bent down and grabbed her earlobe between his thumb and forefinger. She screamed and he let go. Law enforcement arrived and the Applicant was arrested. He was held in jail for 12 hours and was served with a Temporary Restraining Order prohibiting him from going near his wife. Applicant stayed at a friends house. The charges were ultimately rejected by the District Attorney. The Applicant believes that his wife dropped the charges.

Shortly after this incident, the Applicant learned that his wife had taken \$15,000.00 out of their home equity line of credit without telling him. (Tr. p. 40). She told him that she loaned \$9,000.00 to a friend to buy a car and she spent the other \$6,000.00 on miscellaneous items. The Applicant's wife was not employed outside of the home. He tried to encourage her to look for work because he was feeling the financial strain of working seven days a week with no social life to support the family and his wife's lifestyle, but she did not want to work. He stated that she pretended to look for work but never found anything suitable. (Tr. p. 58). She wanted only certain positions that paid a certain amount and nothing less. (Tr. p. 59).

On or about April 28, 2007, the Applicant was arrested again, this time he was charged with (1) Assault with a Deadly Weapon/Instrument, and (2) Exhibit Deadly Weapon other than Firearm. (Government Exhibit 2). The Applicant explained that he had returned from a trip to visit his sister whose family was more functional. He arrived at his home and became very depressed. He saw that the house and the yard were a complete mess, the pool was dirty, there was dog mess in the yard, the house was cluttered with trash. He became so frustrated that he had a melt down. Anything that was his had to be placed in the garage, so he went to get his things out and brought

them into the house. He started yelling profanities and admits that he may have said that he was going to kill them. He also admits going to the kitchen, picking up two knives and making a slashing motion across his throat with them. He was found guilty of Count (1), and was sentenced to 48 months in jail, with all except two days suspended, (with the remainder of his term to be served on probation), to perform 20 days of community service, pay fines/fee of approximately \$530.00, and was ordered to stay away from the victim, and to complete a 52 week Domestic Violence Counseling Program. Count 2 was dismissed. Presently, the Applicant has completed the community service requirement and paid the fine imposed by the court. (Applicant's Exhibit E). He has completed 31 of the 52 weeks of the Domestic Violence counseling program and his probationary period will be complete in 2012. (Applicant's Exhibit A).

The Applicant states that his attorney who represented him in April 2007 indicated that through his investigation, he has learned that the Applicant's wife was sending resumes to Massachusetts in 2007 looking for employment. (Tr. p. 62).

The Applicant subsequently filed for divorce from his wife. (Tr. p. 51). He is scheduled to pay child and spousal support in the amount of \$480.00 per week. (Tr. p. 55). He has not seen his daughter for a year and a half because she does not want to see him. (Tr. pp. 56-57).

A letter of recommendation from the Applicant's Plant Senior Manager indicates that the Applicant's work ethic, output and work product is excellent. He has worked hard to consistently improve himself, and he is considered to be a valuable asset to the company. (Applicant's Exhibit B).

Excerpts from the Applicant's military records indicate that he was an asset to the United States Navy. Among other commendations, he received the Humanitarian Service Medal with one bronze star and was honorable discharged. (Applicant's Exhibits C and D).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a 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.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept.

Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination.” The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct that demonstrates poor judgment or unreliability.

It is the Government’s responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant’s conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government’s case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with him security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guideline J of the SOR.

The evidence shows that the Applicant was arrested in August 2006, for Battery and Criminal Threats, and in April 2007, for Assault with a Deadly Weapon other than a Firearm. Both arrests are recent, as they occurred within the last two years. Sufficient rehabilitation has not been shown. Under Guideline J, Criminal Conduct, Disqualifying Conditions, *31.(a) a single serious crime or multiple offenses* and *31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. None of the Mitigation Conditions are applicable. The Applicant is still in the process of completing the sentencing

requirements imposed by the court as a result of his most recent conviction. He will remain on probation until 2012.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. It is noted that the Applicant has worked for the same defense contractor for over 17 years, and he has never received a security violation. However, he allowed himself to stay in an abusive relationship that ultimately caused him to become explosive, and he did some things that he should not have. Whatever the case, his criminal conduct is not justified. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of poor judgement, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

This Applicant has not demonstrated that he is trustworthy, and he does meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline J (Criminal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

- Paragraph 1: Against the Applicant.
- Subpara. 1.a.: Against the Applicant.
- Subpara. 1.b.: Against the Applicant.

DECISION

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 a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge

