



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-05786
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: Pro Se

March 25, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86), on April 20, 2007. On November 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J 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 December 1, 2008 and answered it on the same day. He requested a hearing before an Administrative Judge. I received the case assignment on February 10, 2009. DOHA issued a notice of hearing on February 18, 2009, and I convened the hearing as scheduled on March 12, 2009. The government offered Exhibits (GE) 1 through 13, which were received without objection. Applicant testified on his own behalf. He submitted Exhibits (AE) A through E, without

objection. DOHA received the transcript of the (Tr.) on March 19, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated November 24, 2008, Applicant admitted the factual allegations in ¶¶ 1.a- 1.e. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 54-years-old. His first marriage ended in divorce in 1998. He has two grown children from that marriage. He remarried in August 2005 and he and his wife have an 11-year-old daughter.

After college in 1976, he joined the United States Navy. He served on active duty as a Naval Officer until November 1997 (AE A). He has been with his current employer for approximately eight years (Tr. 35). He has held a security clearance since 1977 (Tr. 37).

In 1992, Applicant had an altercation with an ex-girlfriend in her office (Tr. 51). While she was sitting in a roller chair, he pushed her and she fell (Tr. 67). Applicant was charged with (1) Battery and Serious Bodily Injury and (2) and (3) Battery. He pleaded no contest to Count (3) (GE 9). He was sentenced to one day in jail and two years probation. (GE 8). He received group counseling for six to eight weeks (Tr. 52). He also successfully completed his probation.

In September 2002, Applicant was at a softball game and consumed approximately eight beers (GE 4, Tr. 57). He was charged with Driving Attempting to Drive Vehicle Under the Influence Per Se. He was given Probation Before Judgment (PBJ) and required to attend alcohol counseling. He completed alcohol counseling in a group setting from February 3 until April 3, 2003.

In May 2003, Applicant was attending a Christmas party. He believed he had been drinking in a responsible manner based on the information he learned in his alcohol counseling classes. He was charged with Driving or Attempting to Drive Vehicle While Under the Influence. He was found guilty and sentenced to ten days in jail and a mandatory alcohol education program. He attended alcohol counseling for approximately six months. He does not drink and drive since that time. He is diabetic and does not drink much at all anymore (Tr. 59). If he has a glass of wine at home, he does not drive.

In September 2004, Applicant and his wife were at home. She had been drinking and was upset. He left the argument by leaving the house. She called the police. Applicant received a warrant for his arrest a few days later. He denied hitting her. He was charged with Assault-Second Degree (GE 2). The charge was Nolle Prosequi. He completed the anger management classes for six weeks in 2004 (Tr. 46).

In July 2006, Applicant and his wife were on the back porch of their home. He pushed her away in an argument. She was yelling and screaming and the police were called. He was charged with misdemeanor Assault-Second Degree. He pleaded guilty. He was sentenced to 90 days in jail, with 88 days suspended, 18 months probation, and enrollment in anger management. He attended abuser intervention classes for 20 weeks. This class was all male and focused on relating and communicating with a spouse. He was taught not to overreact to situations and how to defuse stressful situations with his spouse. His probation ended in April 2008 (GE 2, 3).

Applicant and his wife are still living together but are contemplating divorce. They do not want to separate now due to the current economy. They have educational expenses for their daughter. Applicant's wife is looking for a place to live at some point in the future. He explained they have a "working relationship" and still function as a family (Tr. 26).

In 2007, Applicant received a Letter of Appreciation for outstanding effort and accomplishments in developing and implementing an Information Assurance Program. He collaborated with a military agency to improve procedures for the program which resulted in better reporting and compliance (AE E).

Applicant's recent performance evaluation (2007-2008) rates him as Superior, which is the highest rating. He is an outstanding employee with a strong work ethic. He has a positive attitude and he produces quality work, which is technically accurate and thoroughly researched (AE B). He was also rated as Superior in his prior evaluations (AE C, and D).

Applicant is entitled to wear the following: National Defense Service Medal; Navy Battle "E" Ribbon; Navy Expeditionary Medal; Navy Commendation Medal (2nd Award); Navy Unit Commendation, Letter of Commendation, Southwest Asia Service Medal W/Bronze Star, and Kuwait Liberation (AE A).

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 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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, “(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 admitted that was arrested and charged on five separate occasions for a criminal offense. He received several convictions for these charges from 1992 until 2006. There are two alcohol-related offenses and three assault charges. This is sufficient to raise the above disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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;

© 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 has provided mitigation under this guideline. The alcohol incidents occurred in 2002 and 2003. Applicant has completed extensive alcohol counseling. He does not drink and drive. He moderates his alcohol consumption because of his diabetic condition. He has not had any other incidents. He has shown successful rehabilitation.

Applicant has had two incidents of domestic violence. In 1992, he pleaded No Contest to a battery charge. He admits the conduct was a mistake and bad judgment on his part. He and his second wife were having disputes about family matters and they argued. The police were called both times. Applicant denied the assault in 2004 and the charges were nolle prosequi. This provides evidence that he did not commit the offense. He pleaded guilty in 2006. He completed both anger management and abuser intervention programs for a total of 26 weeks. He learned in the second set of counseling classes that there are appropriate ways to handle arguments with a spouse. He acknowledged responsibility for his behavior in 2006. He completed his probation in April 2008. He and his wife were poised for divorce but are staying together for the present time for the sake of their daughter. Thus, AG ¶ 32(a) and 32(b) (d) apply in this case.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Under AG ¶ 2©, 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both good and bad. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is shown. A determination of an applicant’s eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has dedicated his service to the military and defense contracting world for more than 32 years. As an Officer, he earned many awards and medals. He has had a security clearance during that time. He has an excellent work record.

Applicant has acknowledged his responsibility for his past mistakes. He has completed counseling for alcohol, anger management, and abuser intervention classes. He has learned his lessons. He is working to provide for his daughter. He and his wife acknowledge their problems. Applicant has learned a new method for communicating with his spouse and has eschewed physical violence in their relationship. He has shown insight into the problems that arose with the domestic violence. He has paid for his mistakes. He successfully completed his probation in 2008.

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

Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	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.

NOREEN A. LYNCH
Administrative Judge