



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----, -----)
) ISCR Case No. 08-08606
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Randi B. Walker, Esquire

September 14, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant committed a series of domestic violence offenses between 1994 and 2007, and Negligent Driving with a blood alcohol level over the legal limit in 2002. He remains on probation for his most recent domestic violence conviction. Security concerns were insufficiently mitigated. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on May 25, 2008. On April 1, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. 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 April 13, 2009. He answered the SOR in writing on April 17, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 27, 2009, and the case was assigned to a different administrative judge on the following day. DOHA reassigned the case to me on June 8, 2009. DOHA issued a Notice of Hearing on June 11, 2009, and I convened the hearing as scheduled on June 22, 2009. Applicant and his counsel waived the right to 15-days notice on the record (Tr. at 7-8), and said they had adequate time to prepare for the hearing. The Government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant offered exhibits (AE) A through Y, which were also admitted without objection, and testified on his own behalf. Four other witnesses also testified for him. I granted Applicant's request to leave the record open until June 29, 2009, to permit him to submit additional evidence. On that date, Applicant submitted the additional evidence to Department Counsel, who forwarded it the following day without objection to its consideration. This evidence was admitted, marked AE Z, and the record was closed. DOHA received the transcript of the hearing (Tr.) on June 30, 2009.

Findings of Fact

In his answer to the SOR, Applicant denied all of the factual allegations concerning his criminal conduct. Applicant is a 46-year-old employee of a defense contractor. He has worked for his present employer since January 1990, except for two years in the mid-1990s when he attended community college and obtained an associate's degree while laid off. He served in the military, with a security clearance, from 1984 until December 1989, when he was honorably discharged for medical reasons. He is twice divorced with no children. (GE 1 at 7, 11-20, 26-27; AE P at 2; AE X; Tr. at 91-93.)

In May 1994, Applicant was involved in an argument with his second wife that resulted in their neighbors calling the police to report that they saw him hit or shove her. Applicant told different versions of events during the hearing and during his July 16, 2008 interview with an Office of Personnel Management (OPM) investigator. During the hearing, he said he left the house and went for a drive to defuse the argument, and his wife explained to the police that her face was reddened due to some medication she was taking, not because he hit her. He told the OPM investigator that while his wife was standing in the open doorway to their back patio during a particularly insulting part of the argument, he raised his hand as if to hit her and said, "you deserve to be smacked for that comment." He said that she realized how mad she had made him and moved back, catching her heel on the door jamb. She lost her balance and stumbled out the door backwards, he said. Applicant was arrested and charged with Assault 4th Degree. He contested the charge at trial, and was found not guilty after the neighbors admitted they had not actually seen Applicant assault his wife because a fence obstructed their view, and his wife testified that he had not actually touched her. (GE 3 at 8; Tr. at 120-123.)

In November 1995, Applicant was involved in a minor traffic accident when he tried to merge into the right lane when a two-lane road was narrowed to one lane by

traffic-control barrels. The person to his right was forced partially off the road, and side-swiped his car forcing Applicant to hit several of the barrels. The other driver pulled over, but Applicant kept going to avoid a confrontation. He later stopped and called the police, who told him to return to the scene. Responding police took statements from both drivers and two witnesses who stopped to help. Applicant received a reckless driving ticket in the mail. He brought the witnesses to court to testify that the accident was not his fault, and the charge was dropped. (Tr. at 100, 123-125.)

Applicant and his second wife separated in 1998 and divorced in December 2000. In 2001, he began dating and living with a woman and her two children in the home he had purchased in 1990 and retained after the divorce. She was an alcoholic and they argued frequently. She could not hold a job, and depended on him for most living expenses. In 2003, she inherited some money from her father and temporarily moved out on her own while attending school. Sometime in 2004, she moved back and remained there until late 2007, when he convinced her to leave again. All of Applicant's subsequent criminal conduct involved incidents with this woman. (GE 3 at 4-8; Tr. at 114, 132-138, 154-156, 167-171.)

During the early morning hours of June 16, 2002, Applicant's girlfriend and a neighbor with whom she had gone out drinking called him for a ride home. He had gone to bed earlier because he had to get up at 4:00 a.m. for work. When he arrived at the bar, they were not ready to leave. He wound up drinking two premium beers over the next 45 to 60 minutes, after which they left at closing time. They stopped at a grocery store on the way home to buy breakfast items and more beer. After leaving the store, Applicant failed to use his turn signal while accelerating to merge ahead of a vehicle already on the interstate. A state patrol trooper pulled him over and asked if he had been drinking. He said "no." He then failed a field sobriety test, for reasons he continues to blame on the trooper rather than his level of intoxication. He was arrested and taken to the station, where his blood alcohol content was tested twice at .091 (or .094) and .076 (or .074). The legal limit is .08, so he was charged with Driving Under the Influence (DUI) and Negligent Driving 1st Degree. Under a plea agreement, the DUI charge was amended to Negligent Driving 1st Degree, to which Applicant pled guilty. He was sentenced to 90 days in jail (89 days suspended), a fine of \$1,000 (\$235 suspended), and \$150 in other costs. He was also ordered to attend a DUI victim's panel, alcohol information school, and to serve two years of monitored unsupervised probation. He underwent a chemical dependency assessment that found "insufficient evidence to support a diagnosis of substance abuse or dependence." He received a new moving violation on April 1, 2003, resulting in the imposition of the suspended \$235 fine for violating terms of probation. (AE N; AE P; GE3 at 7-8; Tr. at 101-102, 126-132.)

During August 2004, Applicant and his girlfriend attended a baseball game with two other friends. They both drank beer at the game. On the way out of the stadium, the girlfriend became temporarily separated from the others, panicked, and became very upset with Applicant. She continued drinking after they got home, and they eventually argued again. Applicant's descriptions of this incident and the later domestic assault charge were somewhat confused during the hearing. He claimed during his OPM

interview that she slapped him once and tried to do so again, at which point he physically restrained her. When she would not calm down, he tried to leave. She jumped on his back and wrapped her arms and legs around his neck and waist. After unsuccessfully telling her to stop choking him, he went back into the living room, bent over, and dumped her on her head on the floor. She left the house and he locked her out and went to bed. He refused to talk to the police when they called on the telephone, and later knocked on the door and asked to speak with him. After he went back to bed, the police had to kick in the front door and arrested him because his girlfriend had visible bruising and he had no visible injury. He spent two nights in jail before a friend bailed him out. He was issued a no-contact order that remained in effect until his girlfriend petitioned the court to have it lifted and to have the charges dismissed; requests which the court granted. (GE 3 at 6-7; Tr. at 102-103, 142-149.)

During mid-December 2006, Applicant and his girlfriend went to the bar where she was working to get her paycheck around noon. It was not ready, so they stayed and began to drink. Applicant had lunch and watched several football games. Her check arrived around 3:00 p.m., but they remained at the bar. Applicant continued drinking "a couple beers while watching the game. Maybe more than a couple, I really don't know." (Tr. at 140.) He stopped drinking around 8:00 p.m. and had dinner. At about 10:00 p.m., he went to the restaurant next door where his girlfriend had gone to get her to go home. She was drunk, had a fresh beer, and refused to leave. Applicant gave her keys to the bartender and told him to be sure she took a cab home. He then went home and went to bed. Sometime after 2:00 a.m., his girlfriend burst into their bedroom and started yelling at him to give her money for the cab. After she paid the cab driver, she returned to the bedroom and continued yelling at him. He told her to be quiet or get her daughter and pack up and move out. When he closed his eyes and tried to ignore her, she punched him in the face and ran out of the room. He followed her out and told her again to leave. When she continued to confront him, he grabbed the hood of her jacket and pulled her out the front door. They continued struggling as he tried to close the door and she tried to come back into the house. At some point, she "stumbled back, tripped off a step and fell down as he tried to close the door," although he claimed he did not push or shove her. He said he tried to help her up, but "she kept kicking and screaming so he let go of her jacket and she again fell back onto the porch/lawn." (GE 3 at 4.) He then locked her out and went to bed, as she continued to pound on the door. Eventually the door was broken in by the police who arrested him and took him to jail where he remained for almost three days before posting bail. He was charged with Assault-Domestic Violence 4th Degree and Disorderly Conduct, and was issued another court order requiring him to remain 500 feet away from, and have no contact with his girlfriend for one year. He moved into a friend's house and she remained in his house. (GE 3 at 4-5; Tr. at 138-144.)

Applicant received a telephone call from his neighbors in March 2007, telling him that his girlfriend appeared to be out of town and had not been around the house for several days. He went to the house to see if she had moved out. His restraining order did not forbid him to go to the house, to his understanding, unless she was present. When he arrived, the yard was badly untended, with foot-long grass and weeds choking

out the flower beds. He testified that he spent the weekend there, from Friday noon to Sunday night cleaning up. While he was sleeping in his house, his girlfriend returned from a night of partying with friends around 2:00 or 3:00 a.m. and discovered him in the bedroom. She then left and called the police. She returned to tell him the police were there. He ran outside to the back patio area and hid in the doghouse, where he was arrested. He told the police his order permitted him to be there when she was absent, but could not produce a copy of it, so he was charged with violating the no-contact order and removed. He again spent three days in jail before posting bail. This arrest occurred on March 16, 2007, which was a Friday. (GE 2 at 2; GE 3 at 5-6; Tr. at 105, 150-153.)

After a series of continuances, Applicant finally went to trial in November 2007 and pled guilty to Disorderly Conduct for the December 2006 domestic violence charge. The domestic violence court order violation charge was dismissed and the no-contact order was lifted. He was sentenced to 90 days in jail (all suspended), a \$1,000 fine (\$650 suspended), and two years of probation that is due to expire on November 26, 2009. (GE 2; GE 3 at 6; GE 4 at 2; Tr. at 103-104,154.)

Also in late November 2007, Applicant and his father began serious efforts to get his girlfriend to move out of his house. Applicant agreed to give her the car he had purchased for her, and his father gave her \$3,000. Her mother and step-father agreed that she could live with them if Applicant would pay for six months of storage for her belongings, which he did and she moved out. After six months, the storage company notified Applicant that she would not pay them and they would confiscate her stored items. He called her to warn her about that and she convinced him to store her items in a spare bedroom in his house. Her parents eventually kicked her out and she lived out of her car, occasionally stopping by to ask Applicant for money. When it got very cold during late 2008, he let her live in his tent camper under a carport for about a month. Then he locked the camper up and put it away one day when she was gone. In December 2008 or January 2009, he began dating another woman who he continues to see full time. His former girlfriend continues to call him and leave messages, but he has refused further contact with her recently. (GE 4 at 1; AE H; Tr. at 154-158.) He continues to have a close father-daughter-like relationship with her daughter, who is now twelve years old. (AE H at 2; Tr. at 113, 134, 166.)

Applicant successfully completed eight-hour anger management skills classes on April 7, 2007, and May 30, 2009. (AE O.) He submitted numerous letters of recommendation from his friends and coworkers attesting to his good character, integrity, and generosity. (AE B through H; AE Z.) Four of them testified to the same effect during the hearing. (Tr. at 33 to 89.) He has earned numerous performance awards and certificates of achievement for his work performance. (AE Q; AE R.) He also performed significant community service involving youth activities, charitable fund raising, and the Special Olympics during the 1990s. (AE W; AE Y; Tr. at 114-115.) He was also highly successful while attending community college. (AE S; AE T; AE U.) His performance appraisals show him predominantly exceeding expectations from 2004 through 2006, and meeting expectations during 2007 and 2008. (AE I through M.) He

exhibited little remorse about the various incidents of misconduct during his testimony, blaming police and others for his arrests.

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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. 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, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "[a]ny determination under this order adverse to an applicant 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."

A person applying for access to classified information seeks to enter 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.

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 (DCs). The three DCs asserted by the Government were, “(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;” and “(d) the individual is currently on parole or probation.” (Tr. at 175-176.)

As alleged in the SOR, Applicant was arrested on four separate occasions for domestic-violence-related incidents involving two different women he lived with between 1994 and 2007. All resulted from confrontations and arguments that Applicant admitted took place. The other charges were ultimately dismissed, but the December 2006 incident resulted in his conviction of Disorderly Conduct for which he remains on probation until November 26, 2009. He was involved in 1995 in an apparent road-rage traffic accident for which his citation for reckless driving was ultimately dismissed. He was convicted of Negligent Driving 1st Degree after his June 2002 DUI arrest while driving home from a bar where he admitted he was drinking. The evidence fully supports security concerns under the DCs set forth in AG ¶¶ 31(a), (c), and (d).

AG ¶ 32 provides conditions that could mitigate security concerns (MCs). These are:

- (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.

For mitigation analysis, Applicant’s SOR-listed criminal conduct and criminal history must be evaluated as a whole. His pattern of multiple arrests after domestic confrontations with women is indicative of poor judgment and a lack of self-control. His

DUI conviction and violation of a no-contact order by remaining in his house after his girlfriend returned demonstrate a willingness to flaunt rules and regulations. Given the lengthy and repetitive nature of his criminal history, Applicant did not establish persuasive mitigation of the concerns arising therefrom. His domestic violence arrests after physical arguments with multiple women over 12 years, for the most recent of which he remains on probation, preclude substantial mitigation under MC 32(a). He made no showing that he was pressured or coerced into any of his criminal acts to support application of MC 32(b).

Although he formally denied all the SOR allegations, he admitted during his OPM interview and the hearing that he committed the crimes for which he was arrested as alleged in SOR ¶¶ 1.a, 1.b., 1.c, 1.d, and 1.f. He violated the no-contact order by failing to leave when his girlfriend returned home and evidenced his consciousness of guilt by hiding from the responding police in the doghouse. He pled guilty to Disorderly Conduct, and was convicted thereof, for the fight with his girlfriend in December 2006. He admitted fighting with her in August 2004 after the baseball game, and dumping her on her head on their livingroom floor. He pled guilty to Negligent Driving 1st Degree and was convicted after being arrested for DUI and testing over the legal blood alcohol limit. He admitted angrily threatening to strike his wife in 1994, causing her to fall backward out their back door. This is an offer-type assault without regard to whether actual physical contact occurred between their persons. The record evidence shows that the 1995 reckless driving charge was dismissed after independent witnesses stated that the accident was not Applicant's fault, so MC 32(c) applies to mitigate only this offense among those listed on the SOR.

Applicant's good employment and education records, and his constructive community involvement are evidence that support potential rehabilitation, although the community involvement primarily occurred during his second marriage and predates most of his offenses. The recency and repetitive nature of his criminal activity, however, leads to the conclusion that on balance it is still too soon to be confident that such behavior is unlikely to recur, and no longer casts doubt on his reliability, trustworthiness, and judgment. His lack of remorse, evidenced by his attitude toward these offenses and explanations blaming his victims and the police as the primary causes of his problems, further precludes a finding of substantial mitigation under MC 32(d).

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 relevant circumstances established by the record evidence. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of security concern involved multiple domestic violence offenses and a 2002 DUI. All occurred while he was in his 30s and 40s, fully mature and accountable for his actions. No single incident, in and of itself, was particularly serious, but together they demonstrate a pattern reflecting poor judgment and inadequate self-control. He knowingly and voluntarily participated in every incident of security concern, and failed to take necessary steps to change the circumstances under which his problems recurred until very recently. It has been only a few months since he purportedly broke off communications with his former girlfriend, he remains close with her daughter, and he still stores her personal possessions in his home. While some evidence of rehabilitation was presented, including anger management classes as recently as May 30, 2009, he remains on probation for his most recent conviction; hence, it is too soon to confidently conclude that continuation or recurrence of his criminal conduct is unlikely. His evident lack of remorse indicates insufficient insight into his responsibility for his misconduct and necessary behavioral changes. He has not yet established a track record to demonstrate reduced potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence generates substantial doubts concerning Applicant's present eligibility and suitability for a security clearance. He has not met his burden to mitigate the security concerns arising from his 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:	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:	For Applicant
Subparagraph 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 interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge