



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-09904

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: Kenneth M. Roberts, Esquire

November 12, 2009

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On March 24, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR on April 21, 2009, and requested a hearing. The case was assigned to me on June 23, 2009, and was scheduled for hearing on August 18, 2009. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of three exhibits (ex.); Applicant relied on four witnesses (including himself)

and 12 exhibits. The transcript (Tr.) was received on August 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access classified information is granted.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been arrested in September 2005 and charged with felony battery with substantial abuse of victim over 60. He is alleged to have pleaded guilty to the charge in October 2006, and was sentenced to between 2 to 5 years in prison, plus an additional consecutive term of 2 to 5 years due to the victim's age (suspended), placed on probation for five years and house arrest for one year, and ordered to attend anger management and pay \$15,000 in restitution.

In his answer to the SOR, Applicant admitted the allegation. He provided no explanations.

Findings of Fact

Applicant is a 44-year-old quality assurance inspector for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant enjoyed a normal childhood while growing up in a neighboring state. He earned good grades in primary and secondary schools and was active in Boy Scouts (see ex. A; Tr. 57). He has two older sisters.

After completing his high school education, Applicant worked as a cashier for a local company for several years. In 1984, he enlisted in the Air Force (Tr. 89). He received technician training early in his Air Force career and served as an aircraft technician for the first five plus years of his enlistment-1985 to 1990 (Tr. 59-60).

In 1996, Applicant volunteered to work on a classified aircraft program at another Air Force base facility (Tr.60). He worked on this program before transferring to an aircraft surveillance position in another command at the same base facility (Tr. 60-61). He describes himself as one of several non-commissioned officers (NCOs) who served as quality assurance evaluators and liaison between the Government and the facility contractor (Tr. 61-62).

Applicant received his first security clearance in 1984 and has held a clearance continuously since that time (Tr. 63). He never had an adverse incident during his 22 years of active duty in the Air Force. His credibility is excellent, and his assurances are accepted. His consistent practice during his years of active duty was to report any security violation he found or observed to his command (Tr. 63-64).

Following his retirement from the Air Force in November 2005, Applicant came to work for his current employer as a quality assurance inspector. His current duties include technical dispatching of aircraft readiness inspectors (Tr. 64-65).

Applicant married in 1993. His spouse had one young son who resided with them after their marriage. His mother-in-law also came to live with them following their marriage (Tr. 67). Applicant has four children from his marriage: two sons (ages 15 and 7) and two daughters (ages 13 and 12).

Applicant and his spouse frequently argued after their first year of marriage and divorced in 1997 due to irreconcilable differences (Tr. 67, 90-93). Before their divorce, his wife obtained a temporary protective order (TPO), citing physical violence (throwing a chair at her that she avoided). Applicant denied the charge (Tr. 92, 105), but did not challenge her claims in court (Tr. 109-10). During the six months or so that the TPO was enforced, Applicant was permitted to see his children (Tr. 108). This was the only physical incident claimed by his wife during their first marriage.

In 2001, Applicant's ex-wife approached him about reconciling. Applicant agreed and moved into her house; they remarried that same year (Tr. 93).

During their marriage, Applicant's stepson was always hard to control, and occasionally became disruptive. He was often in trouble in school and in the neighborhood, and was never very close to Applicant (see ex. A). Applicant recalled several arguments with his mother-in-law over disciplining his stepson. He described his mother-in-law as a very bitter and angry person, who was abused in the past by her husband (see ex. A; Tr. 106). Between 2001 and September 2005, Applicant never engaged in any type of abusive behavior (either physical or mental) around anyone in his household (Tr. 94). Nor were there any allegations of abuse that Applicant is aware of (Tr. 94).

September 2005 assault incident

On or about September 26, 2005, Applicant was called to school to discuss the re-enrollment of his stepson (age 13 at the time) with school officials (Tr. 68). The meeting with school officials did not end very well: the stepson remained expelled from school (tr. 68-69). When Applicant arrived home following his meeting with school officials, he tried to tell his wife what transpired at the meeting (Tr. 69). His stepson intervened and forcefully disputed Applicant's account (Tr. 96). After the stepson became increasingly contentious, Applicant told the stepson to go to his room (Tr. 96). When the stepson verbally refused, Applicant grabbed him by his shirt, repeated his demands, and pushed him (albeit, not very hard) towards his room (Tr. 69, 97-99).

At this point, Applicant's mother-in-law took exception to Applicant's demands of his stepson and aggressively moved inches from his face to confront him (Tr. 69-70; 97-99). Instead of retreating, he grabbed her with both hands and pushed her away from him, but not to the ground (Tr. 70, 86, 98). His mother-in-law, who suffered from

advanced osteoporosis (a condition known to Applicant), stumbled over an object as she was pushed, fell backwards, and dropped to the floor, breaking her shoulder and elbow in the fall (Tr. 70, 86-87). The stepson then ran next door and called the police, who arrived at the scene a short time later. When the police arrived, they took statements from the participants (see ex. 2; Tr.71). Upon completing their investigation at the scene, the police arrested Applicant and escorted him to the local police station for holding (Tr. 71). After he was booked and released (September 28, 2005). At his wife's invitation, he returned home to their residence (see ex. 2; Tr.71).

The following day, Applicant appeared in court to face assault charges, and was told by the presiding judge that the charges had been dropped (Tr. 72). He continued to receive calls, however, from his sister-in-law threatening him with additional charges (see ex. 2). He was concerned enough about these calls that in November 2005 he contacted an attorney to represent him in the matter.

Applicant's retained attorney initially told him the assault charges were still being pursued by prosecutors, but only as misdemeanors (ex. 2; Tr. 72). Shortly thereafter, though, the court clerk advised Applicant by letter that prosecutors determined to pursue the charges as a felony, once they learned of the victim's age (Tr. 72). When his attorney appeared in court (sometime in November 2005), prosecutors confirmed that the misdemeanor charges had been dropped and replaced with felony charges (see ex. 2).

Appearing at his trial-setting hearing in February 2006, Applicant pleaded not guilty to the felony charge and received a scheduled trial date in October 2006. When he appeared for trial, he changed his plea (based on the advice of his attorney) to guilty (see ex. 2). At a subsequently convened sentencing hearing in October 2006, the court accepted his guilty plea, and sentenced him to 2 to 5 years of incarceration (suspended), plus an additional term of 2 to 5 years because the victim was over 65 years of age (see exs. 2 and 3).

At his sentencing hearing, the court suspended Applicant's sentence and placed him under five years of probation, and one year of house arrest with a monitoring device to control his movements (see ex. 2; Tr. 101-02). The court also ordered Applicant to have no contact with his mother-in-law, pay restitution in the amount of \$15,000, and complete an anger management course (ex. 2).

Under a court-approved five-year plan, Applicant has been making his restitution payments at the rate of \$257 a month (Tr. 74-75). To date, he has reduced his restitution balance to just over \$6,000 (Tr. 74-75). He is current with his monthly payments and hopes to satisfy the remaining balance within the next 12 months (Tr. 75).

Applicant has satisfactorily completed each of the Court's imposed conditions, including his anger management class, and has been informed by his probation officer that his probation would likely end in November 2009 (Tr. 74,100-03). He maintains

contact with his probation officer once a month (Tr. 81). He has undertaken no psychological counseling since completing his anger management course.

Post-assault relationship with his family

Applicant lived with his wife for approximately three months following the September 2005 incident while the mother-in-law was in the hospital recuperating (Tr. 110-11). Shortly after his mother-in-law returned from the hospital (some three months later), Applicant received in close succession his letter from the clerk (indicating he was going to be charged with a felony) and service of a TPO obtained by his wife (Tr. 95, 111-12). He tried talking to his wife after receiving the TPO papers, but she declined to address him (Tr. 113-14). Once he vacated the premises, he was not permitted to talk with his wife or children. Later, after Applicant had vacated his home, the presiding court dissolved this TPO (Tr. 94-95).

Applicant and his wife divorced for the second time in Spring 2006 (see exs. 2 and A). The terms of the divorce decree require Applicant to pay child support to his four children in the amount of \$1,400 a month. He has visitation rights three times a week, and is required to keep health insurance on the children (see ex. 2). Applicant and his wife finalized their divorce in late May 2006.

Under the terms of their divorce, his wife has exclusive physical custody over their four children. Albeit, Applicant has joint legal custody with his ex-wife of his children (Tr. 117). Their home remains under joint ownership; his wife continues to reside in the residence with their children and pays the monthly mortgage. Applicant's unsupervised visitation privileges entitle him to see his children twice a week, on alternate weekends, and on holidays (Tr. 77-78). He is authorized to address the children about any problems that might emerge in their visits with Applicant (Tr. 78-79).

Since their divorce, Applicant's wife has not remarried. He remains on good civil terms with his ex-wife. His stepson is currently being home schooled; he uses an on-line program (Tr. 105).

Applicant expresses considerable remorse for his actions that caused injury to his mother-in-law. He realizes that he must do better in controlling his emotions and avoid any escalation of a dispute, should one arise in the future (Tr. 84-85). He thinks about the incident with his mother-in-law every day and recognizes he took the wrong course of action when he pushed her away from him (Tr. 84).

Endorsements and performance evaluations

Applicant has excellent performance evaluations to his credit. He documents praiseworthy performance credits and promotions in the Air Force over the course of his 20-year career (see ex. D). Applicant's program chief in his Air Force flight squadron characterized him as an outstanding employee who has never let his 2005 incident and

subsequent divorce affect his work in any way (see ex. V; Tr. 37-38). He considers the incident to be out of character for Applicant and an isolated event (Tr. 41-44).

Applicant's current supervisor who interfaced with Applicant while he was still an Air Force liaison, considers him a very professional and valued employee (see ex. S; Tr. 44-47). He expressed familiarity with Applicant's 2005 incident and marital status with his ex-wife (Tr. 50-52). Pressed for his understanding of the incident, he indicated the incident arose out of a heated domestic dispute that got out of hand and prompted Applicant to push his mother-in-law (Tr. 50). He recollects Applicant's being remorseful over the incident (Tr. 51), and has never observed any violent outburst from Applicant in the years he has known him (Tr. 51). He credited Applicant with having an even temperament and the ability to maintain his composure (Tr. 51).

One of Applicant's coworkers, who has known him for many years and is familiar with his 2005 arrest, described him as very knowledgeable of Air Force guidelines and sensitive to security issues (see ex. Q; Tr. 26-29). He knows Applicant to be very conscientious and trustworthy, and a devoted technician who has never permitted his 2005 incident with his mother-in-law and continued probation to adversely affect his work (Tr. 30).

Applicant's parents and sister express high regards for Applicant's reliability and trustworthiness (see exs. O and P). His sister characterizes Applicant as a good man and very worthy of being awarded a security clearance. She credits him with considerable remorse for his actions and the abiding support he shows for his children (ex. O). His parents (both military veterans) stress his Boy Scout and military service, and assure he could never be a security risk (ex. P).

Since April 2008, Applicant has dated a colleague he has known for over a year. She describes him as honest, trustworthy, responsible, and kind (see ex. U). She credits him with being a devoted father to his four children, who not only supports them financially, but spends a good deal of quality time with them. She respects him for the commitments he has made to his children and his work (ex. U).

Applicant documents numerous meritorious medals and certificates commemorating his outstanding Air Force achievements (see exs. E through M). He provides strong character references from his colleagues and close family members who credit Applicant with being a devoted father to his four children and a very trustworthy and conscientious professional in his work (see exs. A, O through R, S, and T).

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a

security concern and may be disqualifying” (disqualifying conditions), if any, and many of the “[c]onditions that could mitigate security concerns.” These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Criminal Conduct

The Concern: 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, ¶ 30.

Burden of Proof

Under the Directive, a decision to grant or continue an Applicant’s request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant’s eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and

logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant presents as a conscientious quality assurance inspector with four minor children to support following his divorce from his wife in 2006.

Principal security issues raised in this case center on Applicant's felony assault conviction arising out of a domestic assault incident involving his mother-in-law and sentencing order which included probation that is not scheduled to expire before November 2009.

By itself, Applicant's 2005 felony domestic violence conviction is serious enough to be security-significant. Because his mother-in-law was over 60 years of age when he pushed her, prosecutors pursued the charges as a felony. Applicant was placed on probation, though, plus one year of house arrest. Other imposed court conditions comprised anger management classes and payment of \$15,000 in restitution. By all accounts, Applicant has met all of the non-financial conditions and has paid most of the required restitution with his monthly payments.

Applicable disqualifying conditions under the criminal conduct guideline include DC ¶ 31(a), "a single serious crime or multiple lesser offenses," and DC ¶ 31(d), "individual is currently on parole or probation." While there is some evidence that Applicant threw a chair at his wife during a heated argument in 1993, the Government never alleged any criminal conduct in the SOR relative to this somewhat aged allegation, and the issue was never developed in the produced evidence in this record. Based on the limited evidence available, there is not enough to warrant the application of DC ¶

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

Before January 2008, certain types of conduct were subject to mandatory prohibitions against the granting of security clearances under the Smith Amendment (10 U.S.C. § 986), and could not be extenuated nor mitigated. Conduct subject to the Smith Amendment’s prohibition included convictions resulting in sentences of more than a year. However, this section of the U.S. code, which applied only to clearances granted by DoD, was repealed on January 28, 2008, when the President signed the National Defense Authorization Act for Fiscal Year 2008 into law. It was replaced by adding Sec. 3002 to 50 U.S.C. §435b (the Bond Amendment), which applies throughout the Federal government. Section 3002(c) continues the requirement of *per se* disqualification for certain convictions and sentences. Applicant’s conviction does not involve any of these defined offenses, and does not fall under the Bond Amendment, as it is currently constituted.

Applicant’s felony conviction, while serious, resulted in a suspended sentence for the most part and was replaced with five years of probation and one year of house arrest, plus added anger management education and restitution to his mother-in-law for the hurt and medical expenses he caused her. The probation conditions ordered by the court appear clearly to reflect the court’s appreciation of Applicant’s emotional reaction to his stepson’s defiant resistance, and perhaps his mother-in-law’s inappropriate confrontation with Applicant over his exerted attempts to discipline his stepson.

Without any evidence to challenge Applicant’s explanations of the underlying events and circumstances surrounding his 2005 domestic conviction, the criminal conduct concerns that are based on this single episode of his physical push of his mother-in-law are entitled to some crediting of extenuating circumstances.

Applicant may rely on MC ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Applicant’s 2005 conviction is isolated and outweighed by his substantial showing of good judgment and trust demonstrated throughout his military and civilian career. Applicant also established himself to be a responsible parent who monitored the educational pursuits of all of his children, including the stepson who often became defiant with him when he tried to exert discipline in the presence of his mother-in-law.

In the face of Applicant’s persuasive showing of extenuating circumstances surrounding his 2005 arrest, his responsible parenting efforts, and his impressive professional achievements in the Air Force, and in his civilian job assignments, his lone 2005 arrest/conviction (although serious at the time the charges were filed) is not enough to warrant continuing security concerns about his judgment, reliability, and trustworthiness.

Based on his own rehabilitative efforts to date (which include anger management classes, permanent changes in his family environment, and almost four years of demonstrated responsibility and trust with his children and with his colleagues in the workplace), the chances of any recurrent domestic actions like the ones that produced his 2005 conviction are highly unlikely. Applicant may take advantage of MC ¶ 32(d) of the criminal conduct guideline, “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.”

Both from a consideration of the applicable guidelines, and from a whole person perspective, Applicant demonstrates he possesses the strength of overall character and rehabilitation to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Applicant has a long history of devoted, reliable public service.

Influenced by the early lessons he acquired in the Boy Scouts, he contributed over 20 years of meritorious service to the Air Force. And he has continued to provide trusted and honored service to his civilian employer, since his Air Force retirement in 2005.

Applicant maintains the confidence and trust of past and present supervisors and program managers familiar with his work and behavior within and without the work place. He has completed most of his probation conditions and has less than two months remaining on his court-ordered probation. He has excellent performance evaluations, awards, and certificates that attest to his good judgment and trustworthiness during and after the completion of his military career.

Applicant’s many credits in his life should not be taken to minimize in any way the seriousness of his actions that resulted in his 2005 guilty plea. Although stressed at the time by the defiant behavior of his stepson and the aggressive reactions of his mother-in-law, the circumstances clearly did not warrant his pushing his mother-in-law and causing her to stumble and seriously injure herself. For his actions, Applicant accepted responsibility and is very remorseful. Based on the confluence of corrective steps he has taken to date, he persuasively demonstrates that he has learned important lessons from his unfortunate lapses in judgment and familial responsibilities and will work earnestly to avoid any recurrence.

Applicant’s sister, parents, and current girlfriend bestow their high praise on him in recognition of his demonstrated strong support for his children and his long and devoted public service. Taking into account all of the facts and circumstances developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraph 1.a of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the ¶ 2(a) factors enumerated in the AGs.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Subpara. 1.a: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge