



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



In the matter of:)	
)	
)	ISCR Case No. 08-11083
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. Delaney, Esquire, Department Counsel
For Applicant: *Pro Se*

November 12, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on January 17, 2007. The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct) on June 3, 2009. 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 June 9, 2009. He submitted a notarized, written response to the SOR allegations on June 22, 2009, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on July 21, 2009. Applicant received the FORM on July 28, 2009. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response or additional evidence. DOHA assigned this case to me on October 8, 2009. The government submitted 29 exhibits, which have been marked as Item 1-29 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 4.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.j, and 1.l-1.q of the SOR, with explanations. He denied the factual allegations in ¶¶ 2.a-2.c of the SOR. Applicant neither admitted nor denied the allegation in ¶ 1.k. Thus, this allegation is deemed denied.¹

Applicant, who is 48 years old, works as a computer systems technician for a Department of Defense contractor. He has held this position for nearly three years. Prior to this job, he worked in other federal contractor positions.²

Applicant also serves in the Army National Guard. He deployed to Iraq for a year of active duty beginning in 2004. He has 27 years of military service, primarily as a reservist. He holds a clearance and the record contains no evidence which indicates he violated the rules and procedures for handling classified information.³

Applicant married in February 1991 and divorced in November 2006. He has one daughter from this relationship, who is 18 years old, and a stepdaughter, who is 25 years old. Applicant graduated from high school and received additional technical training through a higher learning institution.⁴

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted).

²Item 1.

³Item 1; Item 4; Item 6.

⁴Item 1.

In 1988, while in the military, the police arrested and charged Applicant with driving under the influence of alcohol (DUI) after he entered an intersection on a yellow light. The court found him guilty, fined him, and ordered him to perform community service. He complied with the court order.⁵

On July 15, 1994, the police stopped Applicant at an alcohol checkpoint. The police smelled alcohol on Applicant. He admitted that he had consumed alcohol. The police performed a field sobriety test and a breathalyzer test, then charged Applicant with DUI. Although the results of any court proceedings are not in the record, the SOR indicated the case was dismissed and Applicant stated in his response that this case was dismissed without prejudice.⁶

Applicant and his wife argued often during their marriage. On August 1, 1995, the police arrested and charged him with battery under a domestic violence statute after Applicant shoved his wife during an argument. Applicant pled guilty and the court found him guilty of this charge. The court fined him \$500, with \$400 suspended.⁷

The police arrived while Applicant and his wife argued on July 21, 1996. The police observed Applicant strike his wife and arrested him. The police charged him with domestic violence battery. At his hearing, the court approved him for a diversion program and required him to pay the diversion fee of \$150. He complied with the court order.⁸

In March 1997, Applicant and his wife argued again. The police arrested him for domestic violence battery following a complaint by his wife. The police observed evidence of violence, not described, on his wife. The police also observed small cuts and scratches on Applicant's neck. The police indicated he was cooperative, but not happy with the situation. Applicant pled not guilty and the court dismissed the case on the recommendation of the prosecutor.⁹

Applicant's former wife worked at a local bar. On the evening of April 17, 1997, his wife's daughter, who was Applicant's stepdaughter, called his former wife at work crying. A friend drove Applicant's former wife to their home. When they entered the home, a fight between Applicant, his wife and stepdaughter erupted. Applicant hit both women. His stepdaughter sustained a sprained arm sometime during the evening. When the police arrived, they determined that Applicant was drunk. The police arrested

⁵Item 6.

⁶Item 27.

⁷Item 25; Item 26.

⁸Item 23; Item 24.

⁹Item 21; Item 22.

and charged him with two counts of domestic violence battery and one count of child abuse. The results of any court proceedings are not of record.¹⁰

Applicant voluntarily entered the police station on February 2, 1999 after learning that two failure-to-appear warrants for him existed. Applicant paid the \$155 fine and left the police station.¹¹

The police stopped Applicant for a traffic violation on April 8, 2000. During the stop, the police determined that a NCIC warrant existed and arrested Applicant on this warrant for an incident on January 26, 2000. The record contains no additional evidence on the resolution of this incident.¹²

Applicant appeared in court on February 16, 2002 on a charge of no insurance. He plead guilty and the court found him guilty. The court fined him \$800. The record contains no evidence that failure to have insurance is criminal conduct.¹³

On May 26, 2002, the police arrested Applicant for driving with a suspended license. The police charged him under state law and the local code with a misdemeanor criminal offense. At the court proceeding on June 13, 2002, the local code charge was amended to a charge of no valid driver's license. Applicant did not contest the amended charge. The court found him guilty and fined him \$78.¹⁴

Applicant and his former wife argued again on September 29, 2002. During the argument, his wife threw a child safety gate at him, injuring him. The police arrested his wife and charged her with domestic violence battery. He broke a plant and the police charged him with criminal property damage. The prosecutor refused to file charges against Applicant or his wife.¹⁵

The police arrested Applicant and charged him with disorderly conduct in June 2003. Applicant admits this arrest. The court expunged this arrest in 2008.¹⁶

In December 2003, Applicant's former wife met her former husband at a local bar. They argued. Applicant later entered the bar, walked to his wife's former husband, grabbed the former husband by the neck, and dragged the former husband across two

¹⁰Item 20.

¹¹Item 19.

¹²Item 18.

¹³Item 17.

¹⁴Item 15; Item 16.

¹⁵Item 13; Item 14.

¹⁶Item 1; Item 4.

bar stools. The police charged Applicant with battery. At court on February 26, 2004, the prosecutor recommended dismissal of the case and the court dismissed the charges without prejudice. The prosecutor did not file the charges later.¹⁷

While home on leave in July 2004 from his deployment to Iraq, a family argument erupted among Applicant, his former wife, and his stepdaughter over the completion of police paperwork for a car accident. In an attempt to get the attention of his family members, Applicant threw a pot against the wall. The pot bounced off the wall and hit his stepdaughter in the back, leaving a small red mark. The police arrested Applicant and charged him with domestic violence battery. His stepdaughter did not need medical treatment. The results of any court proceedings are not in the record.¹⁸

While at a hospital, the police advised Applicant that an outstanding failure-to-appear warrant existed. The police arrested him on this warrant on April 9, 2005. The record contains no additional evidence on this arrest.¹⁹

Applicant appeared in court on May 11, 2006 for a disorderly conduct charge placed against him on February 19, 2006. Applicant pled not guilty and the court found him not guilty.²⁰

On October 2, 2006, Applicant arrived at a location where the police were investigating an allegation of theft by his former wife. Applicant approached his former wife, speaking in a loud voice and moving in an aggressive manner. The police smelled alcohol on Applicant and attempted to conduct field sobriety tests. Applicant became argumentative and uncooperative. The police arrested him. The police transported Applicant to the police station and conducted a breathalyzer. Applicant blew a .062. The police released him without any charges.²¹

Although Applicant and his former wife were in the process of a divorce, Applicant allowed his former wife to live with him temporarily when she needed housing. They argued again for much of the day on November 7, 2006. Near the end of the day, Applicant stated he threw his wife's bag out the door. His former wife and stepdaughter told the police he threw the bag at her and pushed her. The police arrested and charged

¹⁷Item 11; Item 12. A dismissal without prejudice means that the case can be filed at a future date unless the time to file the charges has expired.

¹⁸Item 10.

¹⁹Item 9.

²⁰Item 8.

²¹Item 28.

Applicant with domestic battery. The court found him guilty, a finding he appealed. While the appeal was pending, the prosecutor dismissed the case.²²

In his response to interrogatories, Applicant submitted four signed court orders of expungement. A review of these court orders indicates that the four separate court cases relate to an incident on December 18, 1999 and a conviction date of August 24, 2000. The SOR does not reference a criminal incident on this date and the court case numbers do not match any documents in this record.²³

Applicant met with an investigator from the Office of Personnel Management (OPM) on February 6, 2008. At the beginning of the interview summary, the investigator writes that Applicant “provided information as best as he could recall,” and that Applicant admitted pushing his wife away during arguments, but denied ever hitting her. The police report reflects that the investigating police officers observed Applicant striking his wife and arrested him for domestic battery in July 1996. Applicant denied he intentionally lied about striking his wife. He told the investigator information to the best of his memory on events which occurred many years earlier.²⁴

In his response, Applicant stated that he participated in an anger management program, but has not provided evidence that he did so. He also stated that he no longer associates with the wrong people, whether it is family or friends. His former wife died in August 2007.²⁵

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 overarching adjudicative goal is a fair, impartial, and commonsense 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.

²²Item 6; Item 7.

²³Item 6.

²⁴Item 4; Item 6.

²⁵Item 4.

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, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An 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 an 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. In this case, the following two disqualifying conditions are relevant:

- (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.

During his 15-year marriage, Applicant and his former wife fought regularly. He also fought with his stepdaughter. At times, these arguments resulted in calls to the police who came to investigate. The police arrested Applicant six times for domestic violence. During this same period of time, the police arrested Applicant once for DUI, once for criminal property damage, and once for battery. The police arrested him three times on failure-to-appear warrants and once for driving on a suspended license and once for not having insurance. Finally, the police arrested Applicant on one occasion for his argumentative and uncooperative conduct. The government has established its case under these disqualifying conditions.

Under AG ¶ 32, Applicant may mitigate the government's security concerns. The following mitigating conditions are relevant:

- (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.

Applicant's last arrest occurred three years ago. The majority of his arrests occurred as a result of arguments with his former wife, who is now deceased. Some arguments included his stepdaughter, with whom he does not associate. Because these individuals are no longer involved in his life, he is less likely to commit criminal acts by engaging in altercations with these individuals. AG ¶ 32(b) is partially applicable as his former wife is deceased and he does not have contact with his stepdaughter. However, AG ¶¶ 32(a) and 32(d) are not applicable in this case because Applicant's conduct did not occur under unusual circumstances which will not occur in the future and there is no evidence of successful rehabilitation. The concern here is how Applicant will behave in future relationships given his long history of conflict. Likewise, Applicant has not shown that any of his other arrests occurred under unusual circumstances.

Concerning his arrest on February 19, 2006, the court found him not guilty of disorderly conduct. The prosecutor failed to file criminal charges for throwing a plant and thus, this allegation of criminal conduct is not established. Finally, given the charge of driving while suspended was amended to no valid driver's license, the amended charge is not criminal, but a violation of the motor vehicle laws. Likewise, the finding of guilty because he did not have insurance is not criminal, but a violation of the motor

vehicle laws. Thus, Applicant has mitigated the security concerns raised in SOR allegations 1.b, 1.g, 1.h, and 1.i under AG ¶ 32(c).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern. In this case, the following disqualifying conditions are relevant:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations.

For AG ¶ 16(b) to apply, Applicant's omission must be deliberate. The government established that the July 1996 police report indicated the police observed Applicant striking his wife and that in his interview with the OPM investigator, Applicant denied ever striking his wife. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. He denies, however, that he intentionally lied to the investigator about striking his wife. When a falsification allegation is controverted, the government has the burden of proving the omission was deliberate. Proof of an omission, standing alone, does not establish or prove an Applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an Applicant's intent or state of mind at the time the omission occurred. For AG ¶ 16(b) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

At the beginning of the summary of the meeting with Applicant, the OPM investigator noted that Applicant provided information to the best of his recollection. Applicant's denial that he ever struck his former wife conflicts with the police report in July 1996. Applicant and his former wife fought many times during their 15-year marriage. His failure to remember the details of each argument over this long period of time is reasonable. From the beginning of his interview, Applicant made it clear he was giving his best recollection. His failure to recall this event does not equate to intentional conduct. The government has not established that Applicant intentionally lied in his interview with the OPM investigator. Allegation 2.a of the SOR is found in favor of Applicant.

The government has established a security concern under Guideline E for SOR allegations 2.b and 2.c. Applicant's argumentative conduct during his 15-year marriage and with the police raise a security concern about his ability to conduct himself and follow the rules of society. AG ¶16(d)(3) applies.

Under AG ¶ 17, Applicant may mitigate the security concerns of the government. the following mitigating conditions are relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's argumentative conduct is not minor nor was it infrequent. He and his former wife argued constantly and he argued with others. The arguments arose over simple matters and escalated. He did not walk away or step back from the situation when the arguments continued or increased in intensity. Rather, he continued to argue. He argued with the police and he fought with a man in a bar. Although the court dismissed most of the cases against him without making a finding of guilty, the court's dismissal of his cases does not negate Applicant's actual conduct. Applicant failed to provide evidence that he successfully completed an anger management program after his divorce. While his former wife is dead and they cannot argue, Applicant has not shown that he will act differently in the future in other relationships. He has numerous traffic offenses and two DUI arrests, which also violate society's rules. He has not provided evidence which would mitigate the government's security concern about his personal conduct. SOR allegation 2.c is found against Applicant. Arguing with a police

officer is not a violation of any rules of society; however, such conduct does show bad judgment. SOR allegation 2.b is not mitigated.

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 an applicant's conduct and all relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. 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 established and then whether it is mitigated. 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.

The evidence in support of denying a security clearance to Applicant under the whole person concept is more substantial than the evidence in support of granting a security clearance. In reaching this conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has served in the military on active duty and in the military reserves for 27 years. During much of this time, he has held a security clearance without violating the rules and procedures for handling classified information. He works regularly and there is no evidence that he has problems at work. This positive information, however, does not negate his long history of conflict with his former wife. He was unable to remove himself from arguments when they arose and before the disputes became physical. This failure resulted in numerous arrests for domestic violence and other criminal arrests over a 15-year period. Applicant has not been arrested in the last three years, which indicates a possible improvement in his behavior. His long history of repeated rules violations continues, however, to raise security concerns about his ability to conform his behavior to the rules of society in similar situations in the future.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal and personal 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:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	Against Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	Against Applicant
Subparagraph 1.p:	Against Applicant
Subparagraph 1.q:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge