



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 08-11949
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro Se*

November 30, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On May 13, 2008, Applicant submitted a Questionnaire for Sensitive Positions (SF-86) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance. On June 10, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

concerns addressed in the revised Adjudicative Guidelines (AG)² under Guideline J (criminal conduct) and Guideline E (personal conduct).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on July 24, 2009. I convened a hearing on August 26, 2009, at which the parties appeared as scheduled. The government presented four exhibits (Gx. 1 - 4), which were admitted without objection. Applicant testified on his own behalf and proffered three exhibits (Ax. A - C), of which only Ax. B and C were admitted.³ Further, as to Ax. C, I sustained Department Counsel's objection to the admissibility of parts of that exhibit.⁴ DOHA received the transcript of hearing (Tr.) on September 3, 2009.

Findings of Fact

Under Guideline J, the government alleged in SOR ¶ 1.a that Applicant was arrested in August 2001 and charged with (1) first degree assault, a felony; (2) risk of injury to a child, a felony; and (3) cruelty to persons, a misdemeanor. It was further alleged that, in July 2002, he pleaded *nolo contendere* to risk of injury to a child, for which he was sentenced to 10 years in jail, "suspended after six years, and probation for five years." He also pleaded *nolo contendere* to cruelty to persons, and was sentenced to one year in jail. The government also alleged under Guideline J that Applicant was arrested in August 1999 and charged with assault and battery of a family member, which was dismissed (SOR ¶ 1.c); and that Applicant was arrested in October 1999 for failure to appear, which was also dismissed (SOR ¶ 1.b).

Under Guideline E, the government alleged that, as a result of his arrest and conviction for the conduct alleged in SOR ¶ 1.a, in August 2001, Applicant was discharged from the U.S. Navy under other than honorable conditions (SOR ¶ 2.a); and that, in about October 1997, while in the U.S. Navy, he was counseled for violating proper procedures for the handling and storage of classified materials (SOR ¶ 2.b). The government also cross-alleged the criminal conduct cited in SOR ¶¶ 1.a - 1.c (SOR ¶ 2.c)

Applicant admitted all of the SOR allegations. In addition to the facts established through his admissions, and after reviewing the pleadings, the transcript, and exhibits, I have made the following findings of relevant fact.

Applicant is a 41-year-old electronics test technician, who has been employed by a defense contractor since October 2007. Applicant served in the United States Navy submarine service from February 1988 until August 2001. He was a Petty Officer First Class when he was discharged. Before enlisting in the Navy, Applicant studied

² The revised Adjudicative Guidelines were approved by the President on December 29, 2005, and were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they supercede the guidelines listed in Enclosure 2 to the Directive.

³ I sustained Department Counsel's objection to Ax. A and excluded it from the record. (Tr. 34, 40 - 46)

⁴ Tr. 47 - 52.

computer engineering in college for two years. He is currently enrolled in a bachelor of science business degree program, in which he has made the Dean's List each semester. Applicant also enjoys an excellent reputation at work for his expertise and reliability. (Ax. B; Ax. C)

Applicant and his current wife have been married since November 2005. A previous marriage began in October 1997 and ended in divorce in October 2003. In 1993, Applicant fathered a son with a third woman to whom he has never been married. That child was diagnosed as suffering from a form of autism. Applicant characterized the child as intellectually high functioning, but also testified the child is mildly retarded with some delayed speech development. Applicant also stated the child suffers from anxiety attacks and occasional hallucinations. (Tr. 69 - 71)

Prior to August 2001, Applicant's only extended visitation with his son was in the summer of 1999. In the summer of 2001, before Applicant returned from an overseas deployment, his ex-wife and the boy's mother arranged for the boy to visit Applicant and his ex-wife for about eight weeks. About half way through the visit, Applicant, his ex-wife, and the boy traveled to visit Applicant's wife's family. (Gx. 3; Tr. 66 - 69)

On August 3, 2001, Applicant brought the boy to a local emergency room because the boy had been burned by hot water over 30% of his body. Medical personnel also determined that the boy had been burned by cigarettes, had been beaten, had two black eyes, was emaciated, and was missing part of an ear. Local police and the Naval Investigative Service were advised of these facts, and Applicant was eventually charged with the two felonies and a misdemeanor, as alleged in SOR ¶ 1.a. In July 2002, after pleading *nolo contendere* to one felony and the misdemeanor, Applicant was sentenced to 10 years in jail.⁵ He served six years in prison, was released in August 2007, and is on supervised probation until 2012. Part of Applicant's sentence included an evaluation of his need for anger management counseling. He testified that he was not referred for such counseling. Applicant further claimed that he is being considered for early release from his probation. (Gx. 1; Gx. 2; Gx. 3; Gx. 4; Tr. 79 - 82)

Applicant's Navy career was generally outstanding. His performance evaluations, his numerous personal awards, and other citations reflect hard work and dedication superior to his peers at each paygrade. However, as a result of the charges against him,⁶ Applicant was discharged from the Navy under other than honorable conditions.

Applicant insisted that he was wrongfully accused and convicted. He averred that, if he had held his son under hot water long enough to be severely burned, his own hands would have also been burned. Applicant admitted that he had, on occasion,

⁵ A one-year sentence for the misdemeanor was served concurrently with the 10-year sentence for the felonies.

⁶ SOR ¶ 2.a alleged that the discharge occurred after Applicant was convicted; however, his conviction did not occur until July 2002. Nonetheless, it is clear that Applicant was discharged as a result of the August 2001 incident in which his son was injured. (Tr. 63)

disciplined his son by hitting him with a belt, and that his wife also used corporal punishment on the boy. (Tr. 71 - 73) Applicant did not, however, directly address or explain the bruises, cigarette burns, and other damage inflicted on his son. He further claimed that his attorney did not have Applicant's best interests at heart. Applicant collaterally attacked his conviction for ineffective assistance of counsel, but his habeas corpus petition was apparently unsuccessful. (Tr. 54 - 58)

In August 1999, Applicant and his first wife had an argument during which she called the police and had him charged with assault and battery. In October 1999, Applicant was also charged with failure to appear in court to answer the charge. However, the failure to appear charge was dismissed because Applicant had been at sea the day of his hearing. The assault charge was also dismissed. (Gx.4; Tr. 59 - 61)

In October 1997, while a student at a Navy training facility, Applicant was counseled for violating procedures for the proper handling and storage of classified information. Applicant knowingly removed classified study materials from the secure classroom area so that he could study them without restriction as to time or location. (Tr. 62)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁸ and consideration of the pertinent criteria and adjudication policies in the revised Adjudicative Guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ Directive. 6.3.

presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 15 (Guideline E - Personal Conduct) and AG ¶ 30 (Guideline J - Criminal Conduct).

The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁹ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.¹⁰

Analysis

Criminal Conduct

The government's information is sufficient to support the allegation in SOR ¶ 1.a that, in 2001, Applicant was convicted of two charges stemming from physical abuse of his son, an autistic 8-year-old child with special needs. Available information further showed that he spent six years in jail, was released in 2007, and will be on supervised probation until 2012. However, as to SOR ¶¶ 1.b and 1.c, other than the fact that Applicant was charged on two other occasions with unrelated criminal conduct and those charges were dismissed, available information does not show that he actually engaged in criminal conduct on those occasions.

Nonetheless, available information is sufficient to establish disqualifying security concerns about Applicant's criminal conduct. As stated in AG ¶ 30, "[c]riminal 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." The established facts pertaining to Applicant's criminal conduct require application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*), and AG ¶ 31(d) (*individual is currently on parole or probation*).

I have also considered the potential applicability to these facts of the mitigating conditions listed under AG ¶ 32. Applicant points to his excellent military record, his excellent reputation and record at work, and his academic accomplishments as

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

evidence of his current good judgment and rehabilitation. He also points to the absence of any adverse or improper conduct since 2001. However, Applicant was incarcerated from 2001 until 2007, and he will be on supervised probation until 2012. Despite being a model prisoner, any claim of good behavior or rehabilitation is devalued by the fact that Applicant's behavior has been closely controlled for the past eight years by a state prison system. Notwithstanding the positive information about Applicant's educational pursuits since his release, I conclude that the record does not support application of the mitigating conditions at AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) or AG ¶ 32(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*).

As to application of the mitigating condition at AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;*), Applicant did not address his current circumstances relative to any contact with his son. He has not received any anger management counseling or taken other steps to address the reasons he mistreated his son. Applicant also claimed that he did not commit the offenses of which he was convicted. However, the information he presented was insufficient to outweigh the fact that a state court had enough information to warrant a severe prison and probation sentence. Accordingly, the mitigating condition at AG ¶ 32(c) (*evidence that the person did not commit the offense*) does not apply. Based on all of the foregoing, I conclude the Applicant has not mitigated the security concerns about his criminal conduct.

Personal Conduct

The government's information is also sufficient to support allegations in SOR ¶¶ 2.a and 2.b. As to SOR ¶ 2.c, the government's information supports only that portion of the allegation that refers to Applicant's arrest and conviction alleged in SOR ¶ 1.a. Applicant's conduct was severe enough to end his military career. As with one's suitability to hold a security clearance, suitability for military service is grounded, in large measure, by reliability, character, and judgment. The conduct that resulted in Applicant's conviction and prison sentence (the deliberate beating and neglect of a child with special needs) reflected a severe flaw in his character and judgment that cannot be overcome by a record of good behavior while in prison or on probation. Although dated, his 1997 security violation is part of the whole record that must be considered when assessing whether Applicant's conduct falls within the security concern expressed at AG ¶ 15, as follows:

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.

More specifically, available information about his security clearance supports consideration of the disqualifying condition at AG ¶ 16(c) (*credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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*). By itself, the violation is dated and isolated; however, taken in context with all of the other information about Applicant's criminal conduct and his apparent lack of remorse or acceptance of responsibility for his conduct, AG ¶ 16(c) applies.

Of the relevant mitigating conditions listed at AG ¶ 17 – AG ¶ 17(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*) and AG ¶ 17(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*) – none apply. The behavior in question was cruel, violent, and, perhaps most important, a breach of trust and care between a father and his child. It was not minor. These facts speak to a fatal flaw in Applicant's judgment and trustworthiness that preclude mitigation, at least while he is still on probation.

Whole Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 41 years old and presumed to be a mature adult. He served his country honorably for most of his adult life, and he has been working hard since his release from prison. Further, his work record was very good and he is establishing an excellent academic record through his college studies. However, in response to the adverse information about his criminal conduct, he has not accepted responsibility or acknowledged the seriousness of the events that resulted in a six-year prison stay and his current probationary status. A fair and commonsense assessment¹¹ of all available information bearing on Applicant's past conduct and current circumstances shows he has failed to address satisfactorily the government's doubts about his ability or willingness to protect the government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.¹²

¹¹ See footnote 8, *supra*.

¹² See footnote 10, *supra*.

Formal Findings

Formal findings 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
Subparagraphs 1.b - 1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge