



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 09-01976 |
| SSN: |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: James H. White, Jr., Esquire

August 7, 2009

Decision

HOGAN, Erin C., Administrative Judge:

On May 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Conduct, for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On May 30, 2009, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on June 17, 2009. The case was assigned to me on June 18, 2009. DOHA issued a notice of hearing on June 23, 2008, and I convened the hearing as scheduled on July 13, 2009. The government called no witnesses and offered Exhibits (Gov Ex) 1 through 3, which were admitted without objection. Applicant's counsel called five witnesses, including Applicant, and submitted 26 documents which were marked as Applicant Exhibits (AE) A – Z and admitted without objection. DOHA received the

transcript of the hearing (Tr) on July 30, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegation but denies a security concern remains under criminal conduct.

Applicant is a 35-year-old employee of a Department of Defense contractor seeking to maintain her security clearance. She has held a security clearance since November 1991. She is a high school graduate and is close to completing her bachelor's degree. From July 1998 to December 2001, she served on active duty in the United States Navy. She separated as an E-5 with an honorable discharge. She is divorced and has no children. (Tr at 55-57; Gov 1; AE Z)

In January 2000, Applicant married a man who had two sons from a previous marriage. Her husband had primary physical custody of the children. He told Applicant to physically discipline the children with a leather belt whenever they lied. Every time one of the children lied, they were to be punished with five strikes from a belt. Applicant followed her husband's wishes. She admits to hitting her two stepsons with a belt on at least 40 – 50 occasions over a five year period. Her husband also disciplined the children in this manner. (Tr at 57, 111-114; Gov 2)

On May 2, 2004, Applicant disciplined the youngest son for lying by striking his buttocks with a leather belt. The next day, school officials noticed bruises on the boy's back, buttocks and hip area and reported what they observed to Child Protective Services. On May 7, 2004, which was a Friday, Applicant received a voice mail from a detective telling her there was a warrant out for her arrest. She contacted the detective and told him that she would turn herself in the following Monday. She spent the weekend with a friend and turned herself in on Monday. (Tr at 107-108, 116-120; Gov 2)

Applicant was charged with Injury to a Child (2 counts), a third degree felony. On October 11, 2004, Applicant pled guilty to the charges. She was found guilty and sentenced to a five-year suspended prison sentence, ten years of probation, a \$1,500 fine and \$228 court costs. The court outlined numerous conditions for probation. The conditions included avoiding further criminal arrests, staying away from controlled substances, not associating with persons with felony criminal records, keep gainfully employed, monthly reporting to a probation officer, not leaving the state without permission, completing 300 hours of community service, attending an outpatient aggression control and therapy treatment program, abstaining from alcohol consumption, having no contact with the victims, taking a parenting class and attending an outpatient psychotherapy treatment program. (Tr at 60-64, 115; Gov 2 at 9-15)

Applicant and her husband separated in May 2004. Their divorce was final in April 2005. She has not seen her stepsons since May 2004. (Tr at 71-72) She suffered from post-traumatic stress disorder after her arrest. She loved her stepsons and had difficulty dealing with the loss of her husband and two stepsons. (Tr at 64; Gov 2)

In November 2007, Applicant moved to another state to accept a new job. As required under the terms of her probation, she requested the court's permission before moving to another state. Her probation case was transferred to the state where she moved. She sees her probation officer at least once a month. Her job requires travel. She requests permission from her probation officer in advance every time she travels out of state. Her probation officer wrote a letter on her behalf indicating that Applicant has complied with all the conditions of supervision. She has recommended Applicant for early release from probation. (Tr at 66; AE A) Action on the request is pending.

When she was arrested in May 2004, Applicant promptly reported her arrest to the security office of her company. She was aware that the arrest could affect her security clearance. (Tr at 68-69) She listed the charge and conviction on her security clearance application as well as on subsequent employment applications. (Tr at 72-73; AE S; AE V; AE Z)

Applicant has not been arrested or formally charged with criminal offenses since the May 2004 arrest. Since the conviction, Applicant has worked to better herself as a person. She cannot take away the conviction. She can only learn from it and move on. She has benefited from the counseling and the classes she took as required by her sentence. She attended anger management counseling. She took a parenting class. She saw a counselor for post-traumatic stress disorder. She loves her job and takes her job seriously. (Tr at 98-101)

Several witnesses testified on Applicant's behalf. The operations manager of Applicant's office has known her for two years. He speaks with her about two to four times a week. He describes her as "serious, capable, and informed." The clients rely heavily on Applicant. She is reliable and demonstrates good judgment. He was initially reluctant to hire her because of her felony conviction but decided to do so because she was highly recommended. He recommends her for a security clearance. (Tr at 14-27)

Applicant's immediate supervisor testified over the phone. She hired Applicant in November 2007. Applicant fully disclosed her criminal conviction during the interview process. She works with Applicant daily when she is not on travel. She describes Applicant as an outstanding employee. When Applicant began to work for the company they were six months behind. Applicant reduced the backlog within three months. She is very reliable and very aware of the rules pertaining to the collection of classified information. She is honest and has a lot of integrity. She recommends Applicant for a security clearance. (Tr at 42-51)

A program analyst with Applicant's company has known her for five years. They work together on projects. They see each other approximately twice a week. She and Applicant are also good friends outside of work. Applicant told her about her arrest and conviction because of their friendship. She describes Applicant as very reliable and trustworthy. She and Applicant attend the same church. The program analyst's husband is the pastor of the church. He also testified on Applicant's behalf. He has known Applicant for two years. He sees Applicant every week when she is not traveling. She visits with them in their home and takes part in church activities. (Tr at 30-39)

The branch chief of one of Applicant's military customers states he has known Applicant for over 10 years. He notes Applicant is very honest. She has been a valuable employee to him and others he supports. She is very trustworthy and dependable in her work habits. Prior to starting with her current company, she told him that she was on probation for an abuse case but it would not affect her performance. (AE V)

Applicant has received numerous accolades and awards for her duty performance. (AE B - AE D; AE G – AE Q; AE X; AE Y) Her performance reports are superior. (AE T; AE U; AE W) She is an outstanding employee and people think highly of her.

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.

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.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant’s case. CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply with respect to Applicant’s May 2004 arrest for two counts of injury to a child, a third degree felony. She pled guilty to the charges and was still on probation as of the date of the hearing. As such, CC DC ¶ 31(d) (individual is currently on parole or probation) is also applicable to Applicant’s case.

The Government produced substantial evidence to raise the CC DC ¶¶ 31(a), 31(c), and 31(d). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns (Directive ¶E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never

shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005).)

The following Criminal Conduct Mitigating Conditions (CC MC) potentially apply to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) applies. It has been over five years since Applicant's arrest. She has not been arrested since that time. While Applicant's conduct was serious, it is unlikely that she will repeat similar conduct in the future. Consideration is given to the fact that she disciplined her stepsons at the express wishes of her husband. They are now divorced and she has had no contact with her husband and two stepsons for years. She now lives in another part of the country. She has complied with all of the terms of her probation and is highly regarded by her superiors and co-workers. She has been forthcoming with her employers about the arrest and conviction. Applicant's criminal conviction does not cast doubt on her current reliability, trustworthiness and judgment.

CC MC ¶ 33(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) applies. Applicant's arrest in May 2004 was the first and only time that she has been arrested. She has followed the terms of her probation. Her probation officer has recommended her for early release from probation. She has a good employment record and volunteers with her church in her spare time. Applicant has learned a painful lesson. Since that time, she has moved on with her life in a positive manner. She is not a security risk.

Applicant has mitigated the criminal conduct concern.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's favorable work history and her record of no subsequent criminal conduct over a period of five years. I considered the fact that this was the only time Applicant was ever arrested. I considered that while Applicant admits to striking her two stepsons with a belt on numerous occasions, she believed she was carrying out her husband's wishes with regard to disciplining the children. She and her husband are now divorced and she is not involved in her stepsons' lives. She has moved to another part of the country and continues to excel in her career path. She has been truthful and forthcoming with her security office, her employers, and friends about her arrest and conviction. She has treated the arrest and conviction as a painful learning experience. She has successfully complied with the terms of her probation. Her probation officer has recommended her for early release from probation. Applicant demonstrated that she is not a security concern. She mitigated the concerns raised under 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:

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| Paragraph 1, Guideline J: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ERIN C. HOGAN
Administrative Judge