



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



In the matter of:)	
)	
)	ISCR Case No. 09-02668
)	
)	
Applicant for Security Clearance)	

Appearances

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

March 25, 2010

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted a Questionnaire for Sensitive Position (SF 86) for employment with a defense contractor on October 17, 2008. On November 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for criminal conduct under Guideline J, criminal conduct. 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 December 2, 2009.

Applicant answered the SOR in writing on December 10, 2009, admitting the two factual allegations but denying the allegations raised a security concern under Guideline J, criminal conduct. He provided a detailed explanation and documentation to mitigate the security concern. He requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on January 8, 2010, and the case was assigned to me on January 14, 2010. DOHA issued a Notice of Hearing on January 25, 2010, for a hearing on March 8, 2010. I convened the hearing as scheduled. The government offered five exhibits, marked government exhibits (Gov. Ex.) 1 through 5, which were received without objection. Applicant testified on his behalf and offered 11 exhibits admitted without objection as (App. Ex.) A through K. DOHA received the transcript of the hearing (Tr.) on March 16, 2010. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted the two factual allegations under criminal conduct.

Applicant is 47 years old and has worked for the defense contractor for almost five years as an operations range program manager. He previously served on active duty in the Air Force retiring in 2005 as a captain. Applicant served 11 years on active duty as an enlisted airman rising to the rank of master sergeant (E-7). Applicant was selected and promoted to master sergeant in 11 years of service. The normal promotion time to master sergeant is 15 to 16 years. Applicant pursued schooling while serving in the Air Force, and completed various schools in the Air Force. He also received a Bachelor of Science degree in computer science in 1992, and a Master of Business Administration degree in 2000 (App. Ex. D, Education Documents). Applicant had an excellent record of performance as an enlisted airman (App. Ex. A, enlisted evaluation reports, 1985-1995). Applicant was selected for and completed officer candidate school and was commissioned in 1995. He served ten years as an officer. Again his performance as an officer was excellent (App. Ex. B, officer evaluation reports, 1995-2005). Applicant retired from active duty in 2005 with a Honorable Discharge (Gov. Ex. 5, DD 214, November 30, 2005). He held a security clearance at the top secret/sensitive compartmented information level while serving as an officer.

After retiring from the Air Force, Appellant started working for a defense contractor doing the same type of work he did in the Air Force. His performance with the defense contractor has also been excellent (App. Ex. C, civilian evaluation reports, 2005-2009). Applicant has also been active in sports and fitness activities (App. Ex. E, Certificates, various dates), as well as community and coaching activities (App. Ex. F, Pictures and certificates, undated).

Applicant was born in a South American country and immigrated to the United States. After he finished high school, he entered the Air Force. He could not speak English well. In spite of language difficulties, he completed his Air Force training, being recognized in many courses as an Honor Graduate. He married his first wife in 1993, separated in 2001, and divorced in 2004. He had two sons from this marriage, now ages 14 and 11. He married again in April 2005, and separated in May 2008. Applicant

is still married to his second wife but they live separately. Applicant has a step-daughter now age 14 from his second marriage (Tr. 39-42).

The criminal charges against Applicant concern a domestic problem with his first wife in 2003 (SOR 1.a), and one with his second wife in 2008 (SOR 1.b). After Applicant and his first wife separated, Applicant had visitation privileges for his sons. He went to his former wife's residence to pick up his sons to take them to a birthday party he planned for his older son. His former wife sent the youngest son out to the car. Applicant waited for his oldest son but he did not come outside. He went into the house and his former wife indicated she would not let the oldest son out. He tried to take his son, and his wife pushed and shoved him. He reacted by pushing her back. Calm was restored and he and his sons left for the birthday party. His wife called police seeking a protection order. He was arrested the next day, and Applicant also sought a protection order against his wife (Gov. Ex. 3, Criminal Justice Information report). The charges against Applicant for domestic violence were dismissed (Gov. Ex. 4, Case Closure, dated March 17, 2003). When Applicant and his former wife divorced in 2004, the judge was aware of the incident. The divorce judge did not find any evidence of immoral behavior by Applicant or his former wife, and awarded primary residential care for the sons to Applicant (Tr. 36-39, Response to SOR, Final Judgment of Dissolution of Marriage, dated September 30, 2004).

Applicant married his second wife in 2005. His second wife's prior marriage involved domestic violence by both his second wife and her former husband. His second wife had made complaints of domestic violence against her former husband (Gov. Ex. 2, Answers to Interrogatories, dated June 5, 2009, at 4-8). His second wife never received counseling based on incidents from her first marriage. In 2007, Applicant and his second wife argued and his wife hit him. He tried to restrain her by pushing her into another room. He called the police to report the incident, but was arrested for domestic violence. He pled *nolo contendere* and was sentenced to 12 months probation. He successfully completed his probation (Gov. Ex. 2, Answers to Interrogatories, dated June 5, 2009, at 4-5; Gov. Ex. 3, Criminal Justice Information). Applicant decided that he needed domestic violence counseling. He entered counseling (App. Ex. H, Letter, dated February 22, 2010), and completed a 26-week domestic violence course (App. Ex. I, Letter, dated February 23, 2010).

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. 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, 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.

Analysis

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 ¶ 30). Applicant’s two arrests for domestic violence raise Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (a single serious crime or multiple lesser offenses), and CD DC AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted).

I have considered Criminal Conduct Mitigating Conditions (CC MC) 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 and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment). It applies to Applicant. The first incident happened over seven years ago, and was a mutual combative situation for

both Applicant and his wife. Applicant and his first wife are now divorced, and Applicant was awarded primary residential custody of their sons. Applicant has also completed counseling and a domestic violence course. The circumstances leading to the incident were not unusual, since it was a domestic incident between a feuding husband and wife. However, it is unlikely to recur because of Applicant's divorce, his completion of counseling and the domestic violence course, and since over seven years has transpired with no recurrence of an incident between Applicant and his first wife. This incident no longer casts doubt on Applicant's reliability, trustworthiness, and judgment. The incident with his second wife happened less than two years ago. However, the circumstances were unusual because his second wife started the incident. Applicant completed a domestic violence course and counseling. Applicant and his second wife are separated and more incidents of this nature are unlikely to recur.

I considered CC MC AG ¶ 32(b) (evidence that the person did not commit the offense). The charge of domestic violence for the 2003 incident was dismissed, since it was a mutual combative incident with Applicant and his first wife. The dismissal of the offense is evidence that Applicant did not commit the offense of domestic violence.

I considered CC MC 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). While Applicant was involved in two incidents of domestic violence, there is evidence to show that Applicant and both his wives contributed to the atmosphere that led to the domestic violence. Applicant completed counseling and a domestic violence course. He acknowledged that he did not manage the situation with his wives in a good manner. He and his first wife are divorced, and he is separated from his second wife. Applicant has an excellent record as an employee both in the Air Force and with his defense contractor. He is involved in community and church activities which also indicate successful rehabilitation. I find that Applicant has mitigated security concerns for criminal conduct.

Whole Person Analysis

Under the whole person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant came to this country as an immigrant from South America, and had a very successful career in the Air Force even though he did not speak English well. He was an enlisted airman rising to the rank of Master Sergeant, and earned bachelor and master degrees. He became an officer, retiring as a captain with an honorable discharge. His enlisted and officer performance evaluations were uniformly excellent. He has worked for a defense contractor for over five years, again with excellent ratings. He held a top level security clearance with no problems or issue. He is active in his community and church. The two incidents of domestic violence involved mutual inappropriate behavior by both Applicant and his wives. Applicant entered counseling for domestic violence and successfully completed a domestic violence course. Applicant's actions indicate that he is successfully rehabilitated and show that he now has good self-control, judgment, and a willingness to abide by rules and regulations. He has mitigated security concerns for criminal conduct while establishing he is reliable, trustworthy, and exercises good judgment. Overall, on balance the record evidence leaves me with no questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraphs 1.a and 1.b: 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.

THOMAS M. CREAN
Administrative Judge