



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-03871
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

August 31, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J 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 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 October 26, 2009, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on December 1, 2009. DOHA first issued a notice of hearing on March 2, 2010, and the hearing was scheduled to be heard April 12, 2010. We went on the record on that day, but because Applicant was scheduled to have a criminal hearing to resolve the underlying criminal conduct that is the subject of this security clearance decision, he requested a continuance, which was not objected to, and the security clearance hearing was continued. DOHA issued a second notice of hearing on April 12, 2010, and I convened the hearing as scheduled on June 14, 2010. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified

on his own behalf and submitted Exhibits A through C, which were also admitted without objection. At the request of Applicant, the record remained open until June 28, 2010, to allow Applicant to offer post hearing documents. Applicant submitted a number of additional documents, which have been marked collectively as Exhibit D, and entered into evidence without objection. DOHA received the transcript of the hearing (Tr) on June 29, 2010. Based upon a review of the case file, pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 27 years old. He is not currently married, but he was married from 2001 to 2004, and he has two children. Applicant served in the United States Navy from 2002 to 2006, and he received an Honorable Discharge. He received an Associates Degree in Aeronautics in 2007. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline J - Criminal Conduct)

The Government alleges that Applicant is ineligible for clearance because he has engaged in criminal conduct. The SOR lists two allegations under Adjudicative Guideline H, and they will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges that on October 12, 2008, Applicant was arrested and "charged with (1) Domestic Violence Inflict Injury Spouse/Cohab, Felony, (2) Assault with Deadly Weapon other than Firearm, Felony, (3) Battery with Serious Bodily Injury, (4) Cruelty to Child/Child Endangerment, Felony, (5) False Imprisonment, with Violence, a felony." In his RSOR, Applicant admitted that he was arrested on October 12, 2008, but he denied that he committed any of the conduct that is the subject of the arrest. At the hearing, Applicant testified that this incident occurred at his roommate's house with his ex-wife. He contended that she had been consuming alcohol, and they were having an altercation, because she was upset that he was communicating on the phone with another woman, who was the mother of his other child (Woman 2), even though his ex-wife was no longer married to Applicant.

Applicant testified that his ex-wife was yelling at him, and he told her to be quiet. He stated that he never struck her, but she did strike him and he had bruises on his face from her blows. He conceded that his wife had some bruises on her, but he argued that they occurred in self defense as he pushed her away from him when she was attacking him. Applicant also averred that two weeks before this incident, on September 26 or 27, she had also struck him, and at that time she was arrested for striking him. He did not have any of the records from this incident. (Tr at 35-40.)

When the police arrived they questioned him, his wife and his son, and he was arrested for striking his ex-wife. The police created a police report (Exhibit 4), which indicates that when the police arrived at the site of the incident they found the victim (his ex-wife) with several severe injuries, and she ultimately told them that Applicant had repeatedly struck her in the face and stomach with his hands and feet. She also claimed she was bitten by Applicant, and the police officers identified bite marks on her. The report also indicted that their son, who was approximately five years old at the time of this incident, had stated that his father had struck and kicked his mother. When confronted with the allegations in the police report, Applicant continued to testify without equivocation that he did not hit or strike his ex-wife in any manner. (Tr at 74-75.)

Applicant testified that his ex-wife had harassed Woman 2, in order to establish that his ex-wife was not beyond reproach. Exhibit A includes the court records of the Superior Court, in which a restraining Order was granted to stop Applicant's ex-wife from continuing to harass Woman 2.

Exhibit A includes a signed, notarized letter from Applicant's ex-wife, dated October 5, 2009. In the letter she writes, " I [Applicant's ex-wife] am writing this letter to vouch for [Applicant] that on October 12, 2008 he in no way tried to harm our son or me, that day I had a couple of drinks and he never hit me or my son. The day of the occurrence the cops had made their own speculations and charged him for it. At this point in time I was not in my five senses. I have known [Applicant] for over 12 years and he has never put us in any harms way. On August 22, 2008 I and [Applicant] were involved in a dispute but he did not inflict any injury toward me."

Applicant's ex-wife also wrote an additional letter, dated June 18, 2009. (Exhibit D.) In this letter she states, ". . . [Applicant] is a good man. He is a great father to his kids, and a good son. . . I don't doubt his honesty and integrity. He was saying the truth of me being the one caused this problem for him. I was going through a rough time dealing with the fact of him having another child with another woman."

Among the documents submitted post hearing in Exhibit D was a letter from Applicant's Public Defender (PD), dated June 21, 2010. The PD wrote, "Originally the case was filed as a felony domestic violence charge to wit a violation of the [state] Penal Code 273.5(a). The matter was set for trial. After reviewing the complaint the District Attorney offered [Applicant] a misdemeanor plea to a simple battery to wit: a violation of [state] Penal Code 24 (a) . . . This type of plea is recognized as a 'simple battery.' There was no domestic charges [sic] imposed upon [Applicant]." Exhibit C, a Charges and Dispositions document, confirms Applicant plead Nolo Contendere to the charge of Battery on Person, a Misdemeanor.

1.b. The SOR alleges that Applicant was involved in an incident which resulted in a Felony Police Report being filed on August 22, 2008, for Inflicting Corporal Injury Spouse/Cohab. Again, in his RSOR and during his testimony, Applicant admitted that there was an incident on August 22, 2008, but he claimed that he was never arrested or charged for this incident, and he denied that he committed any corporal injury to his ex-wife.

In the police report (Exhibit 4), there is an attachment referring to this incident. The police officer wrote that Applicant and his ex-wife had an argument, and that she told the officer that Applicant struck her three times. The officer wrote that when he spoke to Applicant, Applicant stated that his ex-wife began to pinch him and strike him on the arm, and that all he did was push her off of him and leave. Both parties had visible injuries. Ultimately the police officer wrote that, based on the conflicting stories and inconsistencies (between Applicant and his ex-wife), he was unable to determine the primary aggressor. This incident was not pursued in the court.

Mitigation

Applicant submitted two character letters from individuals who know Applicant in his professional capacity. One of the individuals wrote, “[Applicants’s] knowledge and experience is irreplaceable. He is human and makes mistakes, but as do us all. Not one of his flaws would cause me to second guess his nature as ordnanceman.” (Exhibit D.)

Applicant also submitted a copy of the good conduct medal that he received from the Navy in November 2005. (Exhibit D.)

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 over-arching adjudicative goal is a fair, impartial and common sense 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.

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

I have reviewed all of the evidence with regard to what criminal activity actually occurred under subparagraph 1.a. Applicant, by RSOR and testimony, and his ex-wife, by her two submitted letters, deny that Applicant committed battery on his ex-wife. The police report strongly indicates that Applicant did commit very serious battery on his ex-wife. While the facts of the incident are clearly in dispute, the one aspect of the case that is irrefutable, and that has been established, is that Applicant plead *Nolo Contendere* to the charge of Battery on Person, which is a Misdemeanor.

Since the conduct that is the basis for the incident under 1.b. has been disputed and was not prosecuted, I cannot find it can be considered adverse criminal conduct to Applicant .

In reviewing the disqualifying conditions, I do not find that ¶ 31(a), “a single serious crime or multiple lesser offenses,” applies in this case, since there was only one incident of criminal activity that occurred, the nature and extant of the actual criminal conduct is not clear, and it was resolved as a Misdemeanor. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is applicable to this case, but again the actual nature and seriousness of the criminal conduct is in dispute, and it was resolved legally as a Misdemeanor. I find mitigating condition ¶ 32(d) is applicable as “there is evidence of successful rehabilitation; including but not limited to the passage of time” without further incident. Guideline J is found for Applicant.

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. Based on the letters received from Applicant's ex-wife, his PD, and the people who work with him, and his military record, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

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., 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.

Martin H. Mogul
Administrative Judge