



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-06171
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gregg A. Cervi, Esq., Department Counsel  
For Applicant: *Pro se*

October 27, 2010

**Decision**

LYNCH, Noreen, A. Administrative Judge:

On May 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising 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 Adjudicative Guidelines (AG).

On May 25, 2010, Applicant answered the SOR and requested a hearing. DOHA assigned the case to me on July 19, 2010. DOHA issued a Notice of Hearing on August 16, 2010, and I convened the hearing on September 16, 2010. Department Counsel offered six exhibits, which were admitted as Government Exhibits (GE) 1-6. Applicant testified and submitted eight exhibits marked Applicant Exhibits (AE) A-H. DOHA received the transcript on September 23, 2010. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## Findings of Fact

In his answer to the SOR, Applicant denied the factual allegations under Guideline J (Criminal conduct) with explanation. Applicant did not dispute the fact that he was arrested in August 2008.

Applicant is a 23-year-old employee of a defense contractor. He graduated from high school in 2005, and enlisted in the Army National Guard (ANG). Applicant attended college courses and trained in Emergency Medical Training (EMT) for which he received a diploma. (Tr. 39) He has worked for his current employer since May 2009.

Applicant served on active duty while in the ANG. In December 2006, Applicant married while home on leave from a deployment in Iraq. He was 19 years old. He and his wife had a son. Applicant was away on active duty for most of the marriage, which caused a great deal of stress in the marriage. He served in Iraq from August 2006 until August 2007. (GE 1)

Applicant worked a full-time and a part-time job to support his wife and son. In addition to his job as an instructor for the Army, he worked as an ambulance worker. His wife argued about not having sufficient money. She refused to look for a job outside the home. (Tr. 18) When any discussion would arise about money issues, Applicant's wife would verbally abuse him and accuse him of not "being worth anything." (Tr. 18)

In February 2008, Applicant and his wife argued about his treatment of the family dog. Applicant was outside giving the dog a bath. His wife believed that he was hurting the dog. They had previously been arguing for two days. Applicant stated that his wife struck him in the kidney and on the back of the head. Applicant's wife left the home for a few hours after the alleged incidents. She returned home and all returned to normal. (GE 2)

The following day, Applicant's wife called the police. She alleged that she was fearful of Applicant. She claimed she was also concerned about the safety of their baby. She did not allege that there had been any physical altercation. The police provided her with a domestic violence packet. (GE 3) Applicant had no idea that his wife had called the police. (Tr. 17)

When Applicant returned home from work that day, he found an empty house. His wife took all the furniture and their son and moved out of the home. He called the police and learned about the complaint of domestic violence. He also filed a complaint against his wife. (Tr.40) No criminal charges occurred as a result of the February 2008 incident.

During the marriage, Applicant learned that his wife lied to him about several things. She told him that her mother had given them a \$750 check to help with household expenses. Applicant later learned from his mother-in-law that Applicant's

wife had stolen the check. Applicant tried to get his wife to go to marriage counseling, but she would not go. Applicant also learned that his wife was not paying the household bills, but the money was missing from their account. (Tr. 20).

Applicant's wife moved back in with Applicant after the February incident. On August 25, 2008, Applicant's wife filed a criminal complaint against Applicant. (GE 4) She alleged that she and her husband were involved in a physical altercation in their home on August 17, 2008. She alleged that Applicant held her against a wall while she was holding their baby. She alleged violence in the past. (GE 5)

Applicant reported that his wife was verbally abusive to him. He was upset and asked her to leave the house. Applicant acknowledged that he was so upset that he stated "he could just kill himself." At that point, he remembered that he had his gun on the night stand in the bedroom. He put the gun away at that point. She returned to the home later that night. Applicant denies ever squeezing her neck. (GE 4) He acknowledged that he put a hand on her chest to push her away from him. He left the room at that point, but she followed him. She continued to yell at him.

The police report that was taken on August 25, 2008, was the first time that Applicant's wife called about the incident on August 17, 2008. She claimed that she was too scared to call. (Tr. 57) The police report notes that Applicant's wife had no physical marks on her or any bruises consistent with earlier marks.

Approximately two weeks later, Applicant was arrested and charged with aggravated battery against his wife, false imprisonment, and battery against his wife. He served five days in jail waiting for the arraignment. During that time his spouse dropped a request for a restraining order against him and recanted the allegations. The state pursued two charges and dropped two charges. The aggravated battery was not prosecuted. Applicant was given the Pre-Prosecution Diversion program. He completed the program in March 2010. His participation in the diversion program was voluntary. He reported twice a month, received counseling, and gave drug samples. (Tr. 82)

Applicant and his wife separated in August 2008. In September 2008, Applicant's wife recanted her story about the incident in August 2008. She affirmed that she was very upset with Applicant and exaggerated the facts. She did not want to testify under oath against her husband. Specifically, she stated that Applicant was not trying to hurt her. In fact, he wanted her to leave so he could cool down. She also stated that he did not harm her in any way and tried to get her to leave so that nothing would happen. She knew they needed marriage counseling. (AE A) Applicant agreed to marriage counseling. He wanted to reconcile, but his wife was now pregnant with someone else's child.

Applicant filed for divorce in June 2009. The divorce was finalized on June 24, 2009. Applicant has joint custody of his two-year-old son. He is living in a different state. He is on speaking terms with his ex-wife.

At the hearing, Applicant stated he understood that the pressure of the marriage caused the arguing and the domestic disputes to occur. He commented that he is used to pressure from the Army but he had a difficult time when his wife would call him names and belittle him as a father. He would "lose his cool." He knows how to handle himself properly now and realized that getting married while on deployment may not have been the best idea.

Applicant is a member in good standing of the State National Guard. He complies with his reserve commitment and is loyal, dedicated, enthusiastic, and a sincere professional. (AE G) He did some active duty in May 2008 until his current employment. (Tr. 32) He was an instructor in the Warrior Transition Program. (Tr. 32) He is in the inactive reserve and hopes to enter the military as a career.

Applicant received an Air Medal, Operation Iraqi Freedom Campaign Medal, Joint Service Achievement Medal, Army Achievement Medal (3), National Defense Ribbon, Global War on Terrorism Medal and two National Guard state awards. In total, he believes he has earned 15 medals. (Tr. 37)

Applicant's pastor counseled him and recommended him as a mature person. Applicant has learned to handle emotional issues in a healthy way. He has taken anger management classes with the VA. He voluntarily completed a six-week session. (Tr. 33). His pastor commends Applicant for the work he is doing in the church youth ministry. (AE D) His pastor reports that Applicant is a great father who is striving to provide a good life for his son. Applicant's pastor sees him regularly and describes him as steady, stable, responsible and trustworthy. He believes he has a bright future.

Applicant's supervisor describes him as well qualified and calm in his work environment. Applicant handles stress and has not lost his temper. He is reliable and is a valued instructor in the section. (AE E)

Applicant's friends describe him as a caring father. He is also a combat veteran who strives to be perfect. Applicant's wife is described as a manipulator who lies. (AE F) Applicant's close friend is aware of several times that Applicant's wife has not told all relevant facts about a situation.

He also achieved the status of Senior Instructor with the Army in July 2010. His performance and contributions are significant. (AE H) Applicant shows initiative, personal interest, and professional competence in his work.

## **Policies**

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative

judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The United States Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." <sup>1</sup> The burden of proof is something less than a preponderance of evidence. <sup>2</sup> The ultimate burden of persuasion is on the applicant. <sup>3</sup>

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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." <sup>4</sup> "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>5</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. <sup>6</sup> The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant's character. It is

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<sup>1</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>2</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>3</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>4</sup> See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

<sup>5</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>6</sup> *Id.*

merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

## **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 and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's involvement in domestic disputes in 2008, and the criminal charges filed in 2008 are sufficient to raise AG ¶¶ 31(a) and 31(c).

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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.

After reviewing the mitigating conditions, I find that Applicant has mitigated the security concerns. He is now divorced from his wife. He has joint custody of his young son. He has completed his diversion program. He attended anger management classes. He has character and employment references. The domestic violence was an isolated incident in 2008. His wife recanted the allegations in the August 2008 complaint. Applicant volunteers in his church. He has had pastoral counseling. He has shown insight into the past behavior.

### **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 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is 26. He is a combat veteran who has served in Iraq. He married at a very young age and had a difficult marriage. He is now divorced and lives in another state. He had counseling and anger management classes. He is a valued member of his team at work. He has matured and was very straightforward at the hearing. He presented well and appears to have his son's interests at heart. He acknowledges that he was young and probably should not have married when he did. He has learned from his past. He wants to provide a home and a stable life for his son. Applicant's charges were dismissed. The domestic dispute was an isolated event in his life. He is now

working in a stable employment. He appears motivated and sincere in his desire to serve his country and his family.

I find his reasons and explanations credible for the domestic disputes and the resulting behavior. Accordingly, Applicant has mitigated the security concerns under the above-referenced guideline. Clearance is granted.

### **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 through 1. b:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

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NOREEN A. LYNCH.  
Administrative Judge