



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



In the matter of:)
)
) ISCR Case No. 09-07768
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on July 8, 2009. On August 12, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal 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) effective within the Department of Defense on September 1, 2006.

On August 20, 2010, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 4, 2010. The case was assigned to me on October 5, 2010. On October 6, 2010, a Notice of Hearing was issued scheduling the hearing for October 28, 2010. The hearing was held as scheduled. The Government offered seven exhibits, which were admitted as Government Exhibits (Gov) 1 - 7 without objection. Applicant testified during the hearing. The record was held open until November 12, 2010, to allow Applicant to submit additional documents. Applicant timely submitted a two-page document that was

admitted as AE A without objection. Department Counsel's response to AE A is marked as Hearing Exhibit (HE) I. The transcript was received on November 4, 2010. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, Applicant denied SOR ¶ 1.b and admitted SOR ¶¶ 1.a, 1.c, 1.d, 1.e, 1.f, 1.g, and 2.a.

Applicant is a 51-year-old employee of a Department of Defense contractor who seeks a security clearance. He has been employed in his current position since June 2009. This is his first time applying for a security clearance. The highest level of education he completed is high school. He is divorced and has an eight-year-old daughter. (Tr at 5-6, 74; Gov 1)

Between January 1985 and March 2009, Applicant was arrested on seven occasions. In January 1985, he was arrested and charged with Driving Under the Influence. He attended an alcohol education program. After he completed the program, the charges were dismissed. (Gov 3 at 6-7)

The SOR alleges that in October 1988, Applicant was charged with Breach of Peace, Reckless Driving, and Evading Responsibility. Applicant denies this arrest because he does not remember it. He admits that the arrest is listed in his court record. (Tr. 71; Gov 2 at 10)

In June 1990, Applicant was arrested and charged with Breach of Peace. He was found guilty and sentenced to six months in jail, suspended, and placed on one year probation. (Gov 5; Gov 6)

In January 1997, Applicant was arrested and charged with Speeding and Driving Under the Influence of Alcohol. He pled guilty to Driving Under the Influence of Alcohol and was sentenced to two days in jail, fined, and his driving privileges were suspended for one year. (Tr. 71; Gov 2 at 16; Gov 3 at 5-6)

In February 2003, Applicant was charged with Breach of Peace. The charge was nolle prossed. Applicant does not remember this incident, but acknowledges that it is listed in his court record. (Gov 2 at 2-3, 10, 14)

In March 2004, Applicant was arrested and charged with Assault, Threatening, and Unlawful Restraint. The charges were dismissed after Applicant completed a family violence program. Applicant got into an argument with his wife. He admits to slapping his wife in the face and holding her down on the bed out of frustration. After about 30-40 seconds, he let her go. His wife called the police and he was arrested. This was the only time that he hit his wife. He and his wife divorced in March 2008. They have a better relationship now that they are divorced. (Tr. 63-64, 74-75; Gov 2 at 3, 12; Gov 3 at 5)

On March 4, 2009, Applicant was arrested and charged with Breach of Peace, Second Degree, and Threatening. Applicant pled guilty to Breach of Peace, Second Degree. He was sentenced to six months in jail suspended, placed on one-year probation, and required to attend anger management classes. The Threatening charge was nolle prossed. (Gov 4; Gov 5; Gov 6; Gov 7)

Applicant was an employee of a local town in his previous job. For several weeks before the incident, there were rumors that the town was going to lay off several employees as a result of budget problems. Applicant and another employee were teased by their coworkers that they would be the first to be laid off since they had the least seniority in the department. Applicant jokingly told his coworkers that if he was laid off, he was going to go "postal" and come back with a machine gun and shoot everybody. Applicant testified that a lot of joking went on in his department. (Tr. 38-40; Gov 3 at 3)

A few weeks later, on the day of the incident, there was a story in the local newspaper discussing the town's budget situation. During break, several employees discussed the article in the break room, including Applicant. They also discussed upcoming union negotiations. The union was going to work hard to negotiate raises and prevent layoffs. Applicant interjected for them to remember what he said about going "postal" and that if he was laid off, he was going to come back to the facility and shoot everyone. While making this statement, he motioned like he was waving a firearm back and forth and making gun sounds. A female coworker who was not a party to the previous conversation told Applicant that he should not say things like that. Applicant continued to talk about being laid off and coming back and shooting everyone. The female coworker said that if he does to let her know what day, and she and her husband would stay home from work. Applicant responded that he knew where she lived and he would come to her house and shoot her family. (Tr. 41, 43-49; Gov 3 at 3-4; Gov 4)

Applicant claims that his remarks were all in jest. The female coworker did not believe that he was joking and told him that she was going to report him to the supervisor. Applicant recalls that she told him that she was going to get him fired. Things continued to deteriorate. Applicant called the female coworker and her husband a derogatory name and threw a glass of water in her face. The female coworker then reported the incident to the supervisor. Applicant was later arrested without incident. He was placed on administrative leave pending the investigation. In May 2009, Applicant was told that he had the choice to resign or he would be fired. Applicant voluntarily resigned from his position. (Tr. 43-49; Gov 3 at 4; Gov 4)

Applicant regrets the incident happened and realizes it was inappropriate to joke about workplace violence. He had no intentions of acting on his threats. He does not own guns. To him, it was a joke that went too far. He lost his temper when the female coworker threatened to have him fired. He felt he should have never made the comments because he lost a job that he enjoyed. (Tr. 48, 58; Gov 3 at 4)

On January 12, 2010, Applicant successfully completed anger management counseling. (AE A at 1) He attended ten sessions of individual counseling from September 29, 2009, to January 12, 2010. When asked what he learned from anger management counseling, Applicant replied:

Well, I learned that I got a big mouth and I need to think before I talk, and control my temper, which is – I think if I had stopped, before I threw the water, things could have been smoothed out or handled in a better way. But I crossed the line, when I threw the water, I admit that, and I deserved what I got. But, since counseling and since I've been through all of this, I think I've changed quite a bit. (Tr. 58-59)

Applicant successfully completed probation on July 14, 2010. (AE A at 2; Gov 2 at 9) He admits to having problems with his temper in the past. He now thinks before he speaks and acts. He testified that his actions resulted in a big loss for him. He lost a well-paying job. He had to sell his house for \$40,000 less than the market value. He cashed out his retirement to cover his daughter's child support for a year in advance. He has been through a lot and does not want a similar situation to happen again. (Tr. 59-60, 74)

After the incident, the court issued an order for Applicant to have no contact with any of his former employees. He was also barred from his former place of employment. He saw the former female coworker once from a distance, but avoided her because he did not want to violate the terms of his probation. He believes he owes both the female coworker and her husband an apology. He did not formally apologize because of the no-contact order and he did not know how the female coworker would react to his apology. He has no conflicts with his current coworkers. (Tr. 76-79)

Between 2004 and 2009, Applicant attended counseling sessions with a doctor to deal with grief and depression. In 1994, his younger brother died in a motorcycle accident. Applicant was behind him when it happened. He takes medication for depression. (Tr. 35, 72; Gov 1, section 21; Gov 3 at 8)

Applicant had one additional incident that is not alleged in the SOR. On June 18, 2009, he was cited and found guilty of "Roaming Dog." I consider this citation to be irrelevant because of the minor nature of the citation. (Gov 6)

Applicant disclosed his arrest history and his mental-health counseling on his security clearance questionnaire. He cooperated with the Government during his background investigation. (Gov 1; Gov 2; Gov 3)

Applicant's supervisor testified on his behalf. Applicant has worked for him for about 14 months. Applicant successfully completed his six-month probation period. He works well with the crew and the customers. He takes on more than his normal work load and assists other coworkers. No complaints have been made about Applicant. (Tr. 23-30)

Policies

When evaluating an applicant's suitability for a security clearance, the 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, which are used 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 to obtain 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 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the 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 several Criminal Conduct Disqualifying Conditions that apply to Applicant's case. AG ¶ 31(a) (a single serious crime or multiple lesser offenses) and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply. Applicant has been arrested seven times between 1988 and March 2009.

Since the Government established a disqualifying condition under Criminal Conduct by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002) "[S]ecurity clearance determinations should err, if they must, on the side of denials. *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The following Criminal Conduct Mitigating Conditions are relevant to Applicant's case:

AG ¶ 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); and

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's arrest history is troublesome, four of the offenses are over ten years old. The February 2003 arrest for Breach of Peace is over eight years old. Applicant's arrest for Assault in May 2004 is over six years old. While I do not condone domestic violence, the actions occurred when Applicant was arguing with his wife, and they have since divorced. The March 2009 arrest is more recent and there is no dispute that Applicant's actions on March 4, 2009, were deplorable, but there are some extenuating circumstances regarding this incident. Applicant was one of two employees

who had the least seniority in the department, making them the most vulnerable to being laid off. It is reasonable to assume this created a lot of stress for Applicant.

While Applicant testified that his actions on March 4, 2009 began as a joke, it was in extremely poor taste and was easily interpreted the wrong way. At some point, the joking stopped, and Applicant ended up threatening a coworker and her husband eventually throwing a glass of water in her face. He was subsequently arrested. While the incident should not be minimized, it should also not be over-hyped. After Applicant was arrested, he served the terms of his sentence. He attended anger management courses, and successfully completed probation in July 2010. He resigned his position in lieu of being fired. Applicant was extremely remorseful about his actions during the hearing. It has been over 21 months since the March 4, 2009, incident. Applicant has a good employment record with his current company. His supervisor testified that he is a good worker who receives no complaints. Applicant has a new understanding about the consequences of not thinking before he acts. I find ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶15:

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.

The allegation under personal conduct involves Applicant's voluntary resignation in lieu of termination from his employment as a result of the March 2009 incident. Applicant's conduct raises the following personal conduct disqualifying conditions:

AG ¶ 16(d) (credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, but which, when combined with all available supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent or other inappropriate behavior in the workplace;

- (3) a pattern of dishonesty or rule violations;
- (4) evidence of significant misuse of Government or other employer's time or resources); and

AG ¶ 16(e) (personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing...).

AG ¶ 16(d) applies because Applicant's personal conduct that resulted in his voluntary resignation in lieu of termination was disruptive and inappropriate behavior for the workplace and raised questions about his judgment and reliability. AG ¶ 16(e) applies because Applicant's conduct in March 2009 may affect his personal, professional, or community standing.

Several personal conduct mitigating conditions potentially apply. They include:

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);

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); and

AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

I find AG ¶ 17(c) applies because the March 2009 incident occurred as a result of unique circumstances. While Applicant's conduct on the day in question was inexcusable, the stress of being potentially laid off more than likely put Applicant on edge. Applicant learned a difficult lesson from this incident. He lost a well-paying job. He was forced to sell his house at a loss due to his reduction in income. He was truly remorseful at the hearing. Even though he lost his job, he took steps to ensure that his daughter's child support was covered by cashing out his retirement account.

I find AG ¶ 17(d) applies because Applicant acknowledged that his behavior was wrong. He admits that he got what he deserved. He learned from his anger management courses to think before he acts. His current supervisor testified that his duty performance is good and he helps out his coworkers and customers. It is unlikely that Applicant will repeat similar behavior in the future, based on all that he lost as a result of the March 2009 incident.

AG ¶ 17(e) applies because Applicant disclosed the incident on his security clearance application and cooperated during his background investigation, reducing his vulnerability to exploitation, manipulation, or duress.

Applicant admits that his past conduct raised concerns about his judgment, trustworthiness, and reliability. He has learned a lot and wants to move forward. He mitigated the personal conduct security concerns.

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 criminal arrest history. I considered the favorable comments of his current supervisor. I considered Applicant's grief after witnessing his younger brother die in a motorcycle accident in 1994. I considered that Applicant was concerned about being laid off during the March 2009 incident. What began as a joke went too far when a female coworker did not believe he was joking. While I do not condone Applicant's conduct on March 4, 2009, I note that he has paid his debt to society for the offense. He completed probation in July 2010. He completed anger-management counseling. He lost a job and was forced to sell his house at a loss. Applicant mitigated the security concerns raised under criminal conduct and personal 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-1.g:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.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