



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-00281
)
 Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

October 11, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on May 17, 2010. On May 25, 2011, the Defense Office of Hearings and Appeals (DOHA) sent her a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guidelines J and E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on June 9, 2011; answered it on June 13, 2011; and requested a hearing before an administrative judge. DOHA received the request on

June 16, 2011. Department Counsel was ready to proceed on July 20, 2011, and the case was assigned to me on July 25, 2011. Department Counsel amended the SOR on July 27, 2011, and Applicant responded to the amendment on August 10, 2011. DOHA issued a notice of hearing on August 17, 2011, scheduling it for September 8, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on September 16, 2011.

Findings of Fact

In her answers to the SOR, Applicant admitted all the allegations, including those in the amendment. Her admissions in her answers and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old employee of a federal contractor. She has worked for her current employer since January 2010. She joined the U.S. Air Force after graduating from high school, and she served on active duty from October 1999 until September 2008. She obtained an associate's degree while in the Air Force. She held a security clearance during most of her service in the Air Force, and she continued to hold a clearance while employed by a federal contractor. (Tr. 9.)

Applicant received the Air Force Achievement Medal in 2002 and again in 2003. (AX B at 1-2.) She was selected as Airman of the Month in August 2002 and Airman of the Quarter in July 2003. (AX B at 7-8.)

In November 2003, Applicant received a letter of reprimand for violating a regulation prohibiting pellet guns and for insubordination to a security policeman. The incident arose when she and several friends were in costumes for a party, and she carried the pellet gun as part of her costume. She claimed she did not know that possession of pellet guns was prohibited. She and the security policeman were both senior airmen (pay grade E-4). She testified that she did not understand that he was in a position of superior authority even though they both held the same military rank. According to Applicant, the alleged insubordination was based on a remark she made to one of her friends, describing what was happening in profane terms. (Tr. 50-51.) She testified that "by nature" she will argue if she believes she is right. She admitted arguing with the security policeman, saying, "I don't understand why you are in my face about it," telling him he was wrong, and accusing him of lying. (Tr. 76-78.)

Notwithstanding the incident involving the pellet gun, Applicant was later promoted to staff sergeant. She received her third Air Force Achievement Medal in March 2006, and she was selected as Noncommissioned Officer of the Quarter for the period from July 1 through September 30, 2006. (AX B at 3-5.)

Applicant never married, but while in the Air Force she became involved with another airman in the same squadron. Applicant became pregnant, and she decided to

try to establish a family life for their child. They had a daughter in December 2006. They bought a home and lived together for about a year and a half. Applicant's cohabitant was physically and emotionally abusive, and their relationship was tumultuous. (Tr. 35.) The police were summoned to their home four times prior to August 2007. (Tr. 64.) On one occasion during this time, a noncommissioned officer observed Applicant with a large bruise on the side of her face. She reported her observation to Applicant's first sergeant, who brushed it off, saying that Applicant and her cohabitant were just a young couple trying to work out their problems. (Tr. 56.)

On August 11, 2007, Applicant went to a club, leaving her daughter with her cohabitant. When she returned home, they were both gone. She contacted her cohabitant, who would not tell her who had their daughter. Her cohabitant came home briefly and left again. Applicant followed him in her car, but her cohabitant blocked her with his truck. During the ensuing argument, Applicant was punched several times and she bumped her cohabitant with her car but did not injure him. (Tr. 37-38, 66-68; GX 2 at 12.)

Applicant returned home, called her first sergeant, and asked him to come to the house, because she believed her cohabitant had a firearm with him. She waited outside for her first sergeant, holding two kitchen knives. When her cohabitant returned before the first sergeant arrived, she brandished the knives and told her cohabitant to stay away. He attempted to punch her, and he kicked her in the abdomen. While he was kicking at her, she slashed at him and stabbed him in the leg. She was charged with felonious assault and released on her own recognizance. (Tr. 35-37; GX 2 at 7, 12-13.)

Applicant's cohabitant was on crutches after the stabbing, and he told coworkers in the unit that Applicant was crazy and had tried to kill him. According to a senior noncommissioned officer, the relationship between Applicant and her cohabitant was a "big joke" among the airmen in the building where they both worked. (Tr. 88.)

On September 18, 2007, Applicant's cohabitant obtained a civilian protective order against her. At about the same time, Applicant was ordered by her military superior to have no contact with her cohabitant. (Tr. 39-40; GX 2 at 13.)

In late October 2007, Applicant's cohabitant invited her to return to their home, telling her that the protective order had been lifted. About two weeks later, they had another argument, Applicant left the house, and her cohabitant reported to the police that she had violated the protective order. (Tr. 40; GX 2 at 13.) On the following day, her cohabitant threatened to kill her, and she decided to terminate the relationship. (Tr. 41.)

On November 30, 2007, Applicant attempted to attend a farewell party for one of her subordinate airmen. Her cohabitant was at the party. She was stopped by a senior noncommissioned officer and a captain from the squadron, who informed her that she was not permitted to attend the party. She testified that she was emotionally distraught and "felt like everything was kind of falling down and crumbling down on [her]," and she felt "literally backed into a corner." (Tr. 43.) She responded by directing vulgar and

profane language at the captain. On December 21, 2007, she received nonjudicial punishment from her squadron commander for disobeying the no-contact order on multiple occasions and disrespect to a superior commissioned officer. She was reduced from staff sergeant to senior airman and reprimanded. She appealed the punishment, and her appeal was denied. (GX 7.)

In March 2008, Applicant was tried in a civilian court for the stabbing incident in August 2007. The charge was reduced to assault and battery, a misdemeanor. She pleaded not guilty; but she was convicted and given a suspended sentence to 12 months in jail, fined \$250, and placed on unsupervised probation for two years. (GX 5.) Her security clearance was suspended but later reinstated. (Tr. 96-100)

In July 2008, Applicant was tried in a civilian court for violating the protective order. She pleaded not guilty; but she was convicted, sentenced to ten days in jail with nine days suspended, and placed on unsupervised probation for one year. (GX 4.)

In September 2008, Applicant was discharged from the Air Force with a general discharge under honorable conditions. (GX 1 at 32-33.) She petitioned the Air Force Discharge Review Board to review her case, and her discharge was upgraded to an honorable discharge in September 2010. (AX A.)

Based on a complaint from her former cohabitant, Applicant was charged with forgery of a public document in April 2009. Her former cohabitant alleged that she forged the signature on a custody visitation order involving their daughter. She denied forging any documents. The charges were disposed of by *nolle prosequi* in June 2009 after her cohabitant failed to appear in court. (Tr. 78; GX 3.)

Applicant's cohabitant initially had sole custody of their daughter, now four years old. Applicant recently obtained joint custody. Each parent picks up the child at her school on the day they transfer custody. Applicant testified her former cohabitant comes to the school before Applicant picks up her daughter and tries to provoke her. She recently obtained a protection order against her former cohabitant after he grabbed their daughter and shoved Applicant out of the way while they were exchanging custody. (Tr. 59-63.)

An Air Force noncommissioned officer, who knew Applicant on active duty and who still associates with her, testified that Applicant's daughter told her that her father said that Applicant tried to kill him, that Applicant hates her, and that her father is the only person who loves her and will take care of her. (Tr. 92.) Applicant testified that she has obtained counseling for her daughter to overcome the effects of her cohabitant's comments. (Tr. 106-07.)

Applicant was unemployed for about a month after her discharge from the Air Force. She was recruited by a former military colleague for a position with a federal contractor, and she was hired in October 2008. (Tr. 46-47.) Her former colleague and

she became coworkers, and he submitted a statement describing her as “fast learning, ambitious, trustworthy, and dedicated.” (AX C.)

Applicant was fired in August 2009 because of disparities between the hours she recorded on her timecard and the hours she actually worked. (GX 6). The disparities were discovered during an audit of all timecards, triggered by widespread irregularities in reporting time and attendance. All employees with discrepancies on their timecards were fired. Applicant testified that the discrepancy occurred when she decided to take a day off but neglected to reflect on her time card that she had taken one day of vacation time. (Tr. 47.)

Applicant found a new job shortly after being fired, and she worked for two other federal contractors until she began her current job. Her current supervisor submitted a statement on her behalf, stating that he has been impressed with her work ethic, her professionalism, and her ability to solve problems. Her supervisor has received compliments from numerous customers about her performance. She has been dependable and punctual, and she participates in volunteer activities as well as company functions. (AX D.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition 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 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. Sep. 22, 2005).

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).

Analysis

Guideline J, Criminal Conduct

The SOR alleges that Applicant was charged with forgery, a felony, in April 2009, and the charge was disposed of by *nolle prosequi* (SOR ¶ 1.a). It also alleges that she was charged with violating a protective order, a misdemeanor, in June 2008; was convicted; and was sentenced to 10 days in jail (with 9 days suspended), fined, and placed on unsupervised probation for 12 months (SOR ¶ 1.b). Finally, it alleges that she was charged with felonious assault in August 2007; convicted of assault and battery, a misdemeanor; and sentenced to 12 months in jail (suspended), fined, and placed on unsupervised probation for two years. The allegations are established by Applicant’s admissions, which are corroborated by the documentary evidence presented by Department Counsel.

The concern under this guideline is set out in AG ¶ 30: “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.” Disqualifying conditions under this guideline include “a single serious crime

or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Both disqualifying conditions are established by Applicant’s criminal record.

Three mitigating conditions under this guideline are relevant:

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;

AG ¶ 32(c): evidence that the person did not commit the offense; 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.

The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* In this regard, the first prong of AG ¶ 32(a) overlaps AG ¶ 32(d).

Applicant’s last arrest was in April 2009 for a forgery of a public document, alleged in SOR ¶ 1.a to have occurred in January 2009. The evidence regarding this incident is sparse, and it appears to have been an unfounded charge based on a vindictive act by her former cohabitant. Accordingly, I have resolved SOR ¶ 1.a for Applicant. For the purposes of my analysis, I will treat Applicant’s violation of a protective order in October 2007 as her last criminal arrest by civilian authorities.

Applicant’s disobedience and disrespect to a superior commissioned officer in November 2007 was not alleged under Guideline J, even though it involved criminal conduct under the Uniform Code of Military Justice. I have considered it for the limited purpose of determining whether she has demonstrated successful rehabilitation under AG ¶ 32(d). See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)

Almost four years have elapsed since Applicant’s disobedience and disrespectful conduct. While she was in the Air Force, she probably did not receive the command support she deserved regarding the abusive behavior of her cohabitant, but she went back to him after the stabbing incident and repeatedly violated a no-contact order. She has since terminated her relationship with her former cohabitant, who was a contributing

cause to much of her misconduct, but he still influences her behavior. He has joint custody of their daughter, and he repeatedly contrives opportunities for face-to-face meetings with her.

Applicant's first civilian employment after leaving the Air Force ended with her termination for cause two years ago. Her current supervisor has high regard for her, but she has been under pressure to retain her clearance for most of the time she has worked for him.

Although Applicant is intelligent, capable, and has learned from her past experience, she has a long record of insubordination and rules violations. She admitted at the hearing that she still is a person who "by nature" does not avoid confrontation if she believes she is right.

After considering all the above circumstances, I am not satisfied that the first prong of AG ¶ 32(a) is established. The second prong of AG ¶ 32(a) also is not established, because her former cohabitant still influences her behavior. I conclude that neither AG ¶ 32(a) nor AG ¶ 32(d) are established.

The evidence concerning the alleged forgery of a public document is sparse. I am satisfied that the charge was unfounded. Thus, I conclude that AG ¶ 32(c) is established for the forgery alleged in SOR ¶ 1.a.

Guideline E, Personal Conduct

The SOR cross-alleges the Guideline J conduct in SOR ¶ 2.a. In addition, it alleges that Applicant was fired in August 2009 for improper use of a timecard (SOR ¶ 2.b); involuntarily discharged from the U.S. Air Force in September 2008 for misconduct and given a general discharge under honorable conditions (SOR ¶ 2.c); reprimanded in November 2008 for illegally possessing a pellet gun and insubordination (SOR ¶ 2.d); and given nonjudicial punishment in December 2007 for disrespect to a superior commissioned officer and failure to obey an order (SOR ¶ 2.e). These allegations are established by Applicant's admissions, which are corroborated by the documentary evidence presented by Department Counsel.

The concern under this guideline 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. . . ." The relevant disqualifying conditions under this guideline are:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and

regulations, or other characteristics indicating that the person may not properly safeguard protected information;

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 supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; 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 . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's two instances of insubordination, her violation of the no-contact order, her conviction of assault and battery, her conviction for violating a protective order, and her termination from employment for failing to report her absence from work on her time card are sufficient to establish AG ¶ 16(c) and (d). Her insubordination, disobedience, and civilian convictions also adversely affected her professional standing in the Air Force community, but they did not create vulnerability to exploitation, manipulation, or duress because they were matters of public record. Her termination from civilian employment was well-known to her former coworkers, but the reason for her termination made her vulnerable in subsequent civilian employment. Thus, I conclude that AG ¶ 16(e) also is established.

SOR ¶ 2.c alleges the consequences of Applicant's arrest for felonious assault and conviction of assault and battery, but it does not allege any conduct having independent security significance. As such, it duplicates SOR ¶¶ 1.c and 2.a. I will resolve it in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice).

Security concerns raised by personal conduct may be mitigated if "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(c). For the reasons set out in the above discussion of AG ¶¶ 32(a) and (d), I conclude that this mitigating condition is not established.

Security concerns under this guideline also may be mitigated if "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.” AG ¶ 17(d). Applicant has acknowledged most of her behavior and expressed remorse, but there is no evidence of counseling, and she is still subject to the influence of her former cohabitant, the contributing cause of most of the security concerns based on personal conduct. She admitted that she did not reflect her time off on her timecard, but she attempted to minimize her culpability by testifying that she only did it once and that she was swept up with others who had done it repeatedly. I conclude that AG ¶ 17(d) is not established.

Finally, security concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). For the reasons set out in the above discussion of AG ¶¶ 17(c) and (d), I conclude that this mitigating condition is not established.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is an intelligent, talented, articulate young adult. She was candid, sincere, and remorseful at the hearing. She entered the Air Force after high school. Her ability was recognized early in the Air Force, and she received awards and decorations for her service. She stumbled in November 2008, but she appeared to have recovered when she was promoted and received her third decoration for outstanding performance of duty. She held a security clearance for most of her Air Force service, even after her most recent civilian convictions.

Applicant’s life and her career deteriorated after she began her toxic relationship with her cohabitant and the father of her daughter. Because she and her former

cohabitant share custody of their daughter, she continues to be affected by her former cohabitant's behavior. At the hearing, she reacted emotionally and tearfully when she talked about her former cohabitant, demonstrating the emotional impact her former cohabitant continues to have on her. (Tr. 39.)

Applicant's problem with the timecards can be explained in part by her inexperience in the civilian world and the apparently lax atmosphere at her workplace, but her long military service should have prepared her to accurately and honestly account for absences from work. She was soft-spoken, controlled, and respectful at the hearing; but her track record reflects an aspect of her personality that can be volatile, irrational, and combative. Her successful appeal to the Air Force Discharge Review Board recognized her accomplishments while on active duty, but it did not overturn any of her criminal convictions or military disciplinary actions.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, evaluating all the evidence in the context of the whole person, and mindful of my obligation to decide close cases in favor of national security, I conclude Applicant has not mitigated the security concerns based on criminal conduct and personal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.c:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge