



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



In the matter of:)	
)	
)	ISCR Case No. 11-03025
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

October 21, 2011

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the criminal conduct security concern generated by his history of domestic violence. Clearance is denied.

Statement of the Case

On July 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns 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).

Applicant answered the SOR on July 28, 2011, denying subparagraph 1.b and admitting the remainder. On August 16, 2011, the case was assigned to me. On September 1, 2011, a notice of hearing was issued scheduling the case for September 22, 2011. At the hearing, I received five Government exhibits (Government Exhibits

(GE) 1-5), five Applicant exhibits (Applicant's Exhibit (AE) A-E), Applicant's testimony, and the testimony of a witness. At the close of the hearing, I left the record open for Applicant to submit additional documents. Within the time allotted, he submitted nine additional documents that I received as AE F through N. The transcript was received on September 29, 2011.

Findings of Fact

Applicant is a 40-year-old married man with three children, ages 19, 6, and 4. The oldest child is from a previous marriage. Applicant is a veteran of the U.S. Marine Corps where he served from 1990 to 1993. He was discharged honorably. (Tr. 20) Applicant earned an associate's degree in 2009 in information technology and database administration, and is currently working toward a bachelor's degree in these fields. (Tr. 19)

Currently, Applicant works as a computer technician for a defense contractor. His duties including hardware and software maintenance. Applicant has worked in this field for the past 15 years. (Tr. 15) According to his supervisor, he is "an outstanding employee" who is "always willing to go out of his way to help." (Tr. 60)

Applicant and his wife have been married since 2001. For the majority of their marriage, they have had "a very troubled relationship." (Tr. 27) They have repeatedly separated and reconciled. Since 2006, they have been together only two months, collectively. Currently, they are estranged, but have not formally filed for a divorce. (Tr. 50) Applicant's wife has physical custody of the children. (Tr. 37)

In December 2005, Applicant was arrested and charged with second degree assault after a domestic dispute. The court dismissed the case in April 2006 after Applicant's wife declined to testify against him. (GE 3 at 2)

Applicant voluntarily attended individual counseling from 2006 to 2008 to help him deal with his marital issues. (Tr. 32) In approximately 2008, Applicant and his wife voluntarily began attending marriage counseling together. They stopped after three or four sessions. (Tr. 30)

In July 2010 while at work, Applicant received a call from his wife informing him that she was throwing all of his belongings into the street and kicking him out of the house. (Tr. 33) Applicant then obtained permission from his supervisor to leave work early. When he arrived home, he began to put his belongings, which were strewn over the front yard and driveway, into baskets and storage bins. (GE 2 at 10)

What happened next is inconclusive. Applicant contends that while carrying a basket to his car, he tripped over the curb and fell into his wife, whereupon they both hit the ground. However, he provided no corroborating evidence.

Applicant admits that his wife called the police, who then arrived to arrest and charge him with second degree assault. Also, he testified that she went to the local emergency room where an examination revealed that she had bleeding on the brain. She spent the next two days in the shock trauma unit of the hospital. (GE 2 at 11)

While Applicant's wife was incapacitated, her brother filed, on her behalf, a motion for a restraining order against Applicant. (GE 2 at 12) Approximately two weeks later, at a hearing, the court granted the restraining order, ordering Applicant to have no contact with his wife and not enter their home or her place of employment. (GE 4 at 3).

In November 2010, Applicant received probation before judgment. (*Id.* at 1) Applicant was ordered to pay his wife \$9,082 in restitution in \$500 monthly increments.¹ (*Id.*; Tr. 42-43) Also, he was assigned a probation officer with whom he was required to meet once weekly, and he was ordered to attend anger management classes once weekly for six months. (Tr. 41-42) Applicant's probation was set to end in November 2012, but ended early. (GE 4 at 1)

Applicant complied with the court's requirements that he attend anger management classes and meet with his probation officer. (AE H, N) As part of Applicant's anger management program, he took a test at the beginning of the program measuring, among other things, his truthfulness. (AE H) He then took the same test at the end of the program, and the program administrator compared the scores to gauge Applicant's potential for recurrence. (*Id.*) Based on the test results, the program administrator characterized Applicant as "being self-protective and guarded regarding self-disclosure," and concluded that he showed little improvement during the course of the program.

Applicant did not pay restitution as ordered, paying \$20 monthly instead of \$500 monthly. (Tr. 43) In April 2011, Applicant was arrested for failing to make the proper restitution payments. He was required to pay \$1,000 bail. At a subsequent hearing, the bail was applied to the balance of the restitution, and the court concluded Applicant had satisfied the restitution.² (Tr. 43-44) The court terminated the probation order on July 22, 2011. (AE N)

Applicant's wife is mentally unstable and has been hospitalized in an inpatient psychiatric hospital on at least two occasions. (AE I, K) Applicant contends her mental instability provoked the two domestic violence episodes listed in the SOR.

¹Restitution covered medical bills. (GE 2 at 11)

²Applicant submitted evidence post-hearing indicating that the balance due on his wife's hospital bill after their insurance co-pay was only \$927.00, not \$9,082, the amount the court had originally ordered him to repay. (AE L)

Policies

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.”

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 security clearance.

Analysis

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness.” Moreover, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations,” (AG ¶ 30) In the past six years, Applicant has been arrested twice for domestic violence-related criminal misconduct. Also, he was arrested for failing to comply with the most recent court order stemming from one of the domestic violence episodes. AG ¶¶ 31(a), “a single serious crime or multiple lesser offenses,” applies.

Applicant is a stellar employee who is balancing his job with his pursuit of an undergraduate degree. There is record evidence that Applicant’s wife may have initiated one, if not both, of the domestic violence-related episodes that led to his arrests. Regardless of whether they both share responsibility for their marital problems, Applicant’s most recent arrest was less than seven months ago. Also, Applicant is separated from his wife, but has not filed for divorce. Given their history of volatile breakups followed by reconciliations, I cannot conclude that the pressures that contributed to Applicant’s criminal conduct will not recur.

Applicant deserves credit for finishing the court-ordered anger management classes. However, I remain troubled by the ambiguous conclusion of the anger management class administrator regarding Applicant’s progress. This raises doubt as to whether Applicant is fully rehabilitated. I conclude that AG ¶ 32(f), “there is evidence of successful rehabilitation; including, but not limited to . . . job training or higher education,

[and] good employment record . . .” is partially applicable, but that none of the remaining mitigating conditions are applicable.

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.

Applicant’s most recent domestic violence-related episode resulted in a serious injury to his wife. Its recency and his subsequent failure to comply with the terms of probation render him an unacceptable security risk.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge