



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 11-04778
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard A. Stevens, Esq.
For Applicant: *Pro se*

03/19/2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns under Guideline J (criminal conduct). Clearance granted.

Statement of the Case

On January 6, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On July 12, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on July 27, 2011, and DOHA received his answer on July 28, 2011. Department Counsel was ready to proceed on September 15, 2011. The case was originally assigned to another administrative judge on October 30, 2011, and was reassigned to me on November 29, 2011. DOHA issued a notice of hearing on

December 2, 2011, scheduling the hearing for December 14, 2011. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified and did not offer any exhibits into evidence.

I held the record open until December 23, 2011, to afford the Applicant the opportunity to submit additional documents. Applicant timely submitted Applicant Exhibits (AE) A through F, which were received into evidence without objection. DOHA received the hearing transcript (Tr.) on December 27, 2011.

Findings of Fact¹

Applicant admitted the sole SOR allegation with an explanation. His admissions and explanation are accepted as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 46-year-old port engineer employed by a defense contractor since March 2004. He is a first-time applicant for a security clearance, and a clearance is required for his current position. (Tr. 17-20.)

Applicant graduated from high school in June 1983. He attended a prestigious maritime academy and graduated in June 1987 with a Bachelor of Science degree in marine engineering. After graduating from college, Applicant worked in the maritime industry primarily on sea-based assignments until he began working for his current employer. He completed the requirements for chief engineer officer. (Tr. 20-23.)

Applicant was married from August 1990 to April 2005. That marriage ended by divorce. Two children were born during that marriage – a 21-year-old son and an 18-year-old daughter. After divorcing his wife, Applicant was awarded custody of his son, and his former wife was awarded custody of their daughter. Several years after the divorce, Applicant's daughter chose to live with him. Applicant's son is independent and lives on his own. His daughter is a freshman in college and dependent on him for support. (GE, Tr. 23-25.)

Criminal Conduct

On June 17, 2010, Applicant was convicted pursuant to his plea of one count of misdemeanor assault. The assault took place on April 2, 2010, in a remote and sparsely populated part of the United States. Before this incident, Applicant had no prior criminal record. He was sentenced to 180 days in jail with 150 days suspended, fined \$1,500

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

with \$1,000 suspended, ordered to pay for police training and initial jail surcharges totaling \$100 which were suspended, ordered to attend an anger management course and pay costs, ordered to pay \$450 in restitution, and placed on three years probation. Applicant was released from jail for good behavior after serving 14 days. He is also free to travel and is not required to check in with a probation officer. (Tr. 32-34, 37-39, GE 5.)

At the time of the assault, Applicant had been dating a woman for approximately five years, who he considered to be his girlfriend (GF). GF was employed as a business manager by the local school district. They shared a duplex – she owned one-half and Applicant owned the other half. At the time of this incident, Applicant's two children were living with him in the duplex. He had been away on business for approximately three months and upon his return, he discovered one of his male friends (F) in GF's duplex in a compromising position. (Tr. 27-31.)

When Applicant arrived at GF's duplex and discovered F in her duplex, he became very angry. Words were exchanged and Applicant punched F in the face approximately four or five times and ripped his shirt off. F had abrasions on his forehead and on the front and back of his neck, his left ear was red, and he had a scratch on his left shoulder. F did not require medical attention. (Tr. 36-37, GE 4.)

Applicant's employer has full knowledge of this incident. (Tr. 35-36.) Applicant expressed sincere remorse for having been involved in an incident of this nature and stated that such behavior was not part of his character or an indicator of who he is. (Tr. 48.)

Character Evidence

Applicant submitted four employee performance evaluations covering 2007 to 2010. It is clear that Applicant's employer views him as a valued employee with significant potential for future service. His employer recently transferred Applicant to a new location in a position of increased responsibility. (AE A – D.)

Applicant's manager also submitted a reference letter. He has known Applicant for nearly ten years. Applicant's manager described him as "extremely conscientious, adaptive, and motivated." His manager reemphasized everything contained in Applicant's performance evaluations and added his strong personal recommendation that Applicant's security clearance be granted. (AE E.)

Applicant's former wife is not involved in the lives of their children. His children are solely dependent on him for emotional support, and his daughter, who is in college, is dependent on him for financial support. (Tr. 48.) Applicant spends a "lot of time" tutoring his daughter by telephone in math. (Tr. 44.)

Lastly, Applicant's GF submitted a reference letter. She has known Applicant for over seven years. She is familiar with his work ethic and dedication as a parent. In both

areas, she had nothing but glowing praise for him. She stated that Applicant is trustworthy, respectful, considerate, and a person of high moral character. (AE F.)

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 in seeking 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 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

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 three conditions that could raise a security concern and may be disqualifying, ¶ 31(a), “a single serious crime or multiple lesser offenses,” ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” and ¶ 31(d) “individual is currently on parole or probation.”

Applicant admitted that he assaulted his male friend by punching him four or five times after finding him and his girlfriend in a compromising position. Applicant was subsequently convicted of misdemeanor assault pursuant to his guilty plea and is on probation. AG ¶¶ 31(a), 31(c), and 31(d) are established.

AG ¶ 32 provides four conditions that could potentially 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.

AG ¶ 32(a) applies. The circumstances under which Applicant assaulted his former friend were clearly unique and are not likely to occur again. At the time of this incident, Applicant was 44 years old with no criminal history. He was dedicated to his profession as well as his children. This incident was a deviation from Applicant's otherwise stellar behavior as a highly regarded professional and devoted father.

AG ¶¶ 32(b) and 32(c) do not apply. However, AG ¶ 31(d) fully applies. Applicant admitted the assault and accepted responsibility for his actions as evidenced by his guilty plea. He has fully complied with all sentencing requirements. He is on non-supervisory probation and was even allowed to leave the state where the offense

occurred. His company is aware of this incident and has since transferred him to a new location where he has assumed increased responsibility.

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 have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting denial of Applicant's clearance. He was a mature adult when he committed this assault. This assault shows a lack of judgment and a failure to abide by the law and as such, his conduct raises a security concern.

The evidence supporting granting Applicant's clearance is more substantial. He pled guilty to misdemeanor assault. Apart from this isolated incident, Applicant has no history of criminal conduct. He has fully complied with all sentencing requirements. Applicant is making a significant contribution holding a position of responsibility for his company. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show his responsibility, rehabilitation, and mitigation. Applicant's employer clearly supports him or he would not have been able to retain his employment after his security clearance was called into question. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has mitigated the security concerns pertaining to criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated and overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegation 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
Subparagraph 1a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

Robert J. Tuider
Administrative Judge