



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 11-12615  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

September 9, 2013

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on May 12, 2011. (Government Exhibit 1.) On March 25, 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E (Personal Conduct) concerning Applicant. 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 in writing on April 22, 2013, and requested a decision without a hearing before an administrative judge. (Answer.) Department Counsel subsequently requested that the case be converted to a hearing, pursuant to Paragraph E3.1.7, Additional Procedural Guidance, Enclosure 3 of the Directive. (Transcript (Tr.) 9.)

Department Counsel was prepared to proceed on June 13, 2013. This case was assigned to me on June 25, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 28, 2013. I convened the hearing as scheduled on July 24, 2013. Department Counsel offered Government Exhibits 1 through 10, which were received without objection. Applicant testified on his own behalf, called one additional witness, and submitted Applicant Exhibits A through E, which were also admitted without objection. DOHA received the transcript of the hearing on August 6, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 38 and married. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

#### **Paragraph 1 (Guideline E, Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that involves questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules and regulations. Applicant admitted all of the allegations under this paragraph, except for 1.c. Those admissions are findings of fact.

Applicant has been married five times to four different women. He married his first wife twice (Wife 1-2). (Government Exhibit 1 at Item 17; Tr. 68-72.)

Applicant has filed for bankruptcy twice. The first occasion happened in 2001, during his marriage to Wife 1-2. (SOR 1.g.) According to Applicant, this bankruptcy occurred because he was a young Marine with a family and too many debts. (Government Exhibit 2 at 5; Tr. 65-66.)

Applicant served for over fifteen years in the Marine Corps, first as an enlisted Marine and later as an officer. He deployed twice in support of Operation Iraqi Freedom, first in 2003 and later from August 2006 through March 2007. (Government Exhibit 2 at 138.) He married Wife 3, who was also a member of the United States military, on April 7, 2007. (Government Exhibit 1 at Item 17.)

Three months later, on July 9, 2007, Applicant was involved in a physical altercation with his wife. What exactly happened that night is subject to some dispute. According to Applicant, after returning from Iraq and marrying Wife 3 he discovered compromising pictures of her with another man on their computer. He testified:

And upon the discovery of these photos, I questioned her about these. And, of course, presenting these to her, she was struck in a moment of shock, silence, awestruck, if you will, because of the fact that something, I'm assuming, that she didn't want to be, was discovered. And because of

that, I found myself getting into a very heated fight that started out as a verbal confrontation. However, that verbal confrontation escalated to a physical assault. **I struck her with a slap to her face and pushed her to the floor**, for which the local authorities were called. (Tr. 39.) (Emphasis supplied.)<sup>1</sup>

That incident resulted in a three-prong legal process for Applicant. They consisted of a state criminal court component, a divorce civil court component, and a military justice component. The progress of each of these proceedings had an effect on the others. In addition, since he had different private counsel for each civil case, there was also a financial aspect to this situation. (Applicant Exhibit A; Tr. 44-45.)

First, he was charged in state criminal court with Inflicting Corporal Injury on Spouse. (SOR 1.f.) In accordance with a plea agreement he plead guilty and was sentenced to 36 months of probation, ten days in jail and to participate in a domestic violence program. (Government Exhibit 2 at 45-46, 106-109, and Exhibit 4; Tr. 48.) Applicant submitted a progress report from the domestic violence program. (Applicant Exhibit B.) He did not have a certificate of completion of the program, but there is no evidence showing that he did not complete the program.

Second, Wife 3 filed for divorce from Applicant. They were divorced in January 2008. As part of the divorce settlement he had to pay his wife's legal bills. (Government Exhibit 2 at 82-105, 115-121; Tr. 46-49.)

Third, Applicant also entered the military justice system. (SOR 1.c, 1.d, and 1.e.) He was charged with several crimes, among which was Assault, under Article 128 of the Uniform Code of Military Justice (UCMJ). The specific charge is as follows:

In that [Applicant], U.S. Marine Corps, on active duty, did at or near [home of record], on or about 9 July 2007, unlawfully strike [Wife 3] by **punching her in the face, chest, and back with a closed fist**. (Government Exhibit 2 at 147.) (Emphasis supplied.)<sup>2</sup>

The Applicant's case was eventually referred to a general court-martial. (Government Exhibit 2 at 149.) On May 12, 2008, Applicant entered into a pre-trial agreement, wherein he agreed to "enter a voluntary plea of GUILTY [to the charge of assault set forth above], provided the convening authority agrees to withdraw these charges against me from the pending general court-martial and refers proceedings to Non-Judicial Punishment within a reasonable period of time." (Government Exhibit 2 at 146-148.)

Applicant subsequently received Commanding General's Non-Judicial Punishment, under Article 15 of the UCMJ (Article 15). The punishment consisted of a

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<sup>1</sup>See Tr. 39-42.

<sup>2</sup>See Government Exhibit 10.

punitive letter of reprimand. Applicant plead guilty to the charge of assault, set forth above, which consisted of Applicant hitting his wife in the face, chest, and back with a closed fist. (Government Exhibit 2 at 142-143.)

Subsequent to the imposition of non-judicial punishment by his commanding general, Applicant was subject to a board of inquiry to determine whether he should be administratively separated for cause from the Marine Corps. He submitted a signed "Voluntary Waiver of a Board of Inquiry." In that letter he states, "The basis for this waiver is my recent non-judicial punishment in which I was found guilty of Article 128. **I admit to committing the misconduct** and per my pre-trial agreement have agreed to waive a Board of Inquiry." (Government Exhibit 2 at 158.) (Emphasis supplied.)<sup>3</sup>

The board of inquiry resulted in Applicant being separated from the Marine Corps on October 20, 2008, with a discharge "Under Other Than Honorable Conditions," with the "Narrative Reason for Separation: Misconduct (Serious Offense)." (Government Exhibit 2 at 138-139.)

Applicant testified extensively concerning his conduct that night with his wife, as well as the situation surrounding his pre-trial agreement, Article 15 and separation. He repeatedly stated during the hearing that he did not hit his wife with a closed fist, as described in the charge, but slapped her as part of a mutual affray. In essence, he testified that he agreed to plead guilty to a charge that he did not believe was factually true in order to allow the deal to go through. This denial must be considered against the fact that at least three times in writing, and once in person before his commanding general, he had agreed that the narrative version of the charge of assault, which consisted of his striking Wife 3 in the face, chest and back with a closed fist, accurately set forth his conduct on that night. (Government Exhibit 2 at 11-12; Tr. 44-48, 85-94, 98-103.)

Almost immediately after his discharge from the Marine Corps Applicant began work with a defense contractor (Company One). In order to take the job he had to move across the country from State A to State B, leaving his children with Wife 1-2 in State A. (SOR 1.b.) He testified:

So, after a month, they issued a travel card to me. Initially, I knew - - from having a travel card with the Military - - that the purpose of these travel cards are to offset expenses that would be incurred by the employee, prior to travel claims being reconciled after the travel. So, realizing that I did not have enough money or credit on my own behalf, I made a choice to purchase an airline ticket to be with my children for Christmas. (Tr. 50.)<sup>4</sup>

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<sup>3</sup>See Government Exhibit 2 at 159-163.

<sup>4</sup>See Tr. 79-80, 104-105.

In January or February 2009 Applicant was called in by his supervisor and counseled “that the company had a policy that you can’t use it [company credit card] for personal use.” (Tr. 51.) Applicant further stated in his testimony:

I knew, as I was sitting there with [supervisor], as he was counseling me for using the credit card to buy that plane ticket, I knew, even then as I was sitting there, that I was in the hole and needed to use the card again for a cash advance in order to cover what was going on during that particular time. . . . But I knew that, if I was going to use that card again - - which I did use it a second time - - that it had to be within a relative amount of time close to when I was counseled, or it would look worse than what it really was. (Tr. 52-53.)<sup>5</sup>

Applicant’s additional use of Company One’s travel card was discovered, and he was terminated for cause in June 2009, after only nine months on the job. (Government Exhibit 3; Tr. 54-55.)

Because of his punitive discharge, transfer across the country, household expenses, and the effects of being discharged for cause from Company One, Applicant found himself in financial straits. In February 2010 he filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. He was discharged in bankruptcy in May 2010. (SOR 1.a.) (Government Exhibit 2 at 26; Tr. 55.) As part of the bankruptcy filing, Applicant took the required credit counseling course. (Applicant Exhibit C.) Applicant’s current financial situation appears to be healthy. (Government Exhibits 5, 7, 8, and 9; Applicant Exhibits D and E.)<sup>6</sup> Applicant was unemployed for nine months, then began work for another defense contractor (Company Two) in March 2010.

Finally, it was alleged that Applicant had received at least 12 motor vehicle violations between 2004 and March 2013. He admitted this allegation. He testified that these incidents occurred because he was careless and negligent about paying attention. The records indicate he has paid all of his fines. (Government Exhibit 2 at 28-37; Tr. 82-84.)

## **Mitigation**

Applicant stated that he knows he was emotionally unhealthy from about mid-2007, when the incident happened with Wife 3, through mid-2009, when he was discharged from Company One. Applicant further states that he is a changed man, that he has recommitted himself to his church and has moved forward with a clean slate. (Tr. 54-55, 106.)

The Facility Security Officer at Company Two testified on Applicant’s behalf. She stated that she believes him to be a leader, a man of integrity and trustworthiness. In

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<sup>5</sup>See Tr. 81-82, 105-109.

<sup>6</sup>See Government Exhibit 2 at 23-24, 41-42.

addition, she testified that Applicant had not engaged in any security violations and was up to date with company security requirements. The witness also stated that Applicant did not show her the SOR, but did explain its contents. She stated that he talked about the domestic violence incident, his discharge from the Marine Corps, his bankruptcy and his traffic violations. There was no testimony indicating that Applicant had discussed his discharge from Company One for misusing a company credit card with her. (Tr. 111-116.)

## **Policies**

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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.

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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by

necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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**

### **Paragraph 1 (Guideline E, Personal Conduct)**

The security concerns relating to Personal Conduct are set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

Applicant's conduct as set forth under Findings of Fact, above, raises security concerns under the following disqualifying conditions in AG ¶ 16:

(c) credible adverse information in several adjudicative 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;

(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:

(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 rules violations;

(4) evidence of significant misuse of Government or other employer's time or resources; and

(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. . . .

First of all, based on the record, I find that Applicant's 2001 and 2010 bankruptcies, and history of motor vehicle violations, have no current security significance. Accordingly, SOR 1.a, 1.g and 1.h are found for him.

Moving on to the allegations set forth in SOR 1.b through 1.f. It is true, as Applicant states, that his serious misconduct occurred several years ago. Accordingly, 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," may apply.

In addition, AG ¶ 17 (d) says it can be mitigating where, "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." Applicant states that he has changed his ways and will not engage in such misconduct again.

The ultimate question in this case is this: if Applicant were faced with a situation where he had to choose between what he believed was in his best interest, and what was in the national interest, which would he choose? Based on the record as it exists, I cannot answer that question with any certainty. Accordingly, I must deny Applicant's application for a security clearance.

There are several lingering concerns in this case, based on my consideration of the entire record, including Applicant's extensive testimony. First, Applicant has stated that he has changed his way and has moved on to a successful career with Company Two. However, his only support for this finding was the testimony of his Facility Security Officer, which primarily concerned her personal opinion of him, along with the fact that he apparently followed all security requirements. It did not address his current employment and how Applicant is viewed by co-workers. The weight of her testimony is severely damaged by the fact that it appears to be based on incomplete knowledge of the allegations in the SOR. Applicant also chose not submit any statements from his supervisors or other co-workers, or any documentation concerning his current job.



Second, Applicant was less than persuasive when discussing the situation regarding his misuse of Company One's travel credit card. While he acknowledged that he should not have engaged in the conduct, I am not convinced that he no longer has the mind-frame, which to him justified this seriously unethical conduct because he felt that his "survival" required it. (Tr. 106.)

Third, Applicant's credibility is seriously undermined by the situation regarding the true facts surrounding his assault on his wife. There was extensive testimony on this point, including vigorous cross-examination by Department Counsel. Slapping a woman in the face and pushing her down on the ground is a far step from punching her in the face, chest and back with a closed fist. Applicant did one or the other, and based on the evidence, the latter is more likely. He lied to me, or he lied to his commanding general, there is no in between.

Once again, I have carefully considered the time since Applicant engaged in this serious misconduct. However, there simply is insufficient evidence that Applicant currently shows consistent good judgment or is reliable. It is his burden to show that he is eligible for security clearance. He has not met it.

### **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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. The discussion under Guideline E, above, applies here as well. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also cannot find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); or that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant has not mitigated the security concerns arising from his personal conduct. Accordingly, the evidence supports denying his request for a security clearance.

### **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 E: | AGAINST APPLICANT |
|---------------------------|-------------------|
| Subparagraph 1.a:         | For Applicant     |
| Subparagraph 1.b:         | Against Applicant |
| Subparagraph 1.c:         | Against Applicant |
| Subparagraph 1.d:         | Against Applicant |
| Subparagraph 1.e:         | Against Applicant |
| Subparagraph 1.f:         | Against Applicant |
| Subparagraph 1.g:         | For Applicant     |
| Subparagraph 1.h:         | For 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.

WILFORD H. ROSS  
Administrative Judge