

KEYWORD: Criminal Conduct

DIGEST: While the government has established a case under the criminal conduct guideline, Applicant has mitigated those concerns. As Applicant terminated alcohol use in February 2000, I find in his favor with regard to the four traffic offenses that occurred between 1988 and February 2000. Applicant's successful completion of the 52-week batterer program, couple with 10 two-hour group parenting sessions, demonstrates Applicant will not engage in the same disrespectful behavior in the future. Clearance is granted.

CASENO: 06-25765.h1

DATE: 08/16/2007

DATE: August 16, 2007

In Re:	)	
	)	
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SSN: -----	)	ISCR Case No. 06-25765
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
PAUL J. MASON**

**APPEARANCES**

**FOR GOVERNMENT**

Jeff A. Nagel, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

\_\_\_\_\_ While the Government has established a case under the criminal conduct guideline, Applicant

has mitigated those concerns. As Applicant terminated alcohol use in February 2000, I find in his favor with regard to the four traffic offenses that occurred between 1988 and February 2000. Applicant's successful completion of the 52-week batterer program, coupled with 10 two-hour group parenting sessions, demonstrates Applicant will not engage in the same disrespectful and inappropriate behavior in the future. Clearance is granted.

### **STATEMENT OF CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On February 28, 2007, under Executive Order 10865 and Department of Defense Directive 5200.6, with revised Adjudicative Guidelines, effective September 1, 2006, DOHA issued a Statement of Reasons (SOR) detailing the reasons for its security concerns raised under the criminal conduct guideline (Guideline J) of the Directive. In his notarized answer dated April 11, 2007, Applicant submitted responses to each SOR allegation, and requested a decision be made on the record in lieu of a hearing.

A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the SOR) was sent to Applicant on April 26, 2007. He received the FORM on May 4, 2007. Applicant's response was submitted on May 30, 2007. The case was assigned to me for decision on June 19, 2007.

### **FINDINGS OF FACT**

Applicant is 46 years old and has been employed by a defense contractor since November 2001. He has held a security clearance since December 2003. He has been married since 1996, and has two children. He seeks a security clearance.

In defense of his misdemeanor battery conviction in February 2005 (subparagraph 1.a.), Applicant explained, "The case was the result of an October 2004 incident between my wife, [wife], and me. We had a brief argument regarding my oldest daughter [daughter] who was 8 years old at the time. Our argument escalated to the point where it became physical when she slapped me in the mouth and I pushed her back away from me. The entire incident lasted not more than 5 seconds." (Answer to SOR) According to Applicant, when his wife attempted to drop the charges, the prosecutor threatened to call his daughter though she did not witness the battery. Applicant contends he pled no contest so his daughter would not have to testify about the battery Applicant claims she did not see. Applicant satisfied all conditions of his sentence.

Two of the conditions of his SOR 1.a. sentence were completion of 52 weeks of a batterers program and 10 two hour parenting sessions (subparagraph 1.b.) at the county children and family organization. Applicant successfully completed both conditions. On October 25, 2005, he received a certificate indicating he had successfully completed 20 hours of active parenting skills. On March 27, 2007, Applicant received a statement from the program coordinator of the rehabilitation program chronicling his commitment to remedying the behavioral issues related to the battery of his wife. In the statement, the program coordinator stated, "In my 14 years of managing the program[,] I am hard

pressed to think of anyone who has demonstrated how to behave appropriately more than [Applicant].”

Applicant denied still being on probation as alleged subparagraph 1.c. of the SOR because he was discharged from probation on March 29, 2007. He stated that he included a copy of the court papers showing he is no longer on probation. No court documents were provided.

Between April 1988 and February 2005, Applicant was charged with four driving offenses and a domestic battery of his wife. In April 1988 (subparagraph 1.g.), Applicant was charged with driving while under the influence of alcohol (DUI). Applicant had been drinking before the arrest. He pled guilty to the charge and completed all sentence conditions. In 1995 (subparagraph 1.f.), Applicant pled guilty to the lesser included offense of reckless driving after being charged with DUI. He completed all sentence conditions.

In April 1999, Applicant was charged with a misdemeanor of hit and run (subparagraph 1.e.). Applicant avers that one of his car tires exploded on the highway, causing his car to spin uncontrollably. During the spin, he hit another car but could not recall that he had. Several months after the tire explosion, Applicant was charged with hit and run. He pled no contest to leaving the scene of an accident. He satisfied all court-conditions of his sentence.

In February 2000, Applicant was charged with DUI (subparagraph 1.d.). In April 2000, he was found guilty of the charge, and served 45 days in jail. In his answer, Applicant noted that his last use of alcohol occurred in February 2000.<sup>1</sup>

In his response to the government’s FORM, Applicant theorized that if he represented a danger to the national security, then his security clearance would have been revoked in October 2004 after the battery offense. He observed, “All other cases mentioned in the “File of Relevant Material” document, with the exception of the 2004 battery incident, has been investigated and clearance has been granted.”

Applicant provided no other character evidence from independent sources regarding his job performance, behavior away from the job, or current relations with his wife.

## **POLICIES**

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

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<sup>1</sup> Applicant indicated in his sworn statement dated May 9, 2003 (Item 7) that he last used alcohol in February 2000. On February 1, 2007, Applicant noted in his answers to interrogatories that February 4, 2000 was the last time he consumed alcohol.

## **Burden of Proof**

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) “[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant’s security suitability.” ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

## **Criminal Conduct**

The guideline addresses criminal activity that casts doubt on a person’s judgment, reliability and trustworthiness. A person who cannot comply with the law may not be a suitable candidate to safeguard classified information.

## **CONCLUSIONS**

Criminal conduct (CC) raises questions about a person’s judgment. If he has engaged in a pattern of violating the law, then he may be willing to transgress selective security rules and regulations he chooses not to comply with. Between April 1988 and February 2000, Applicant engaged in four serious traffic offenses. After a four-year hiatus, Applicant committed misdemeanor battery on his wife in October 2004.

In April 1988, Applicant was found guilty of DUI. In 1995, Applicant committed the same offense although he pled guilty to the lesser included offense of reckless driving. In April 1999, he was found guilty of misdemeanor hit and run driving. Applicant’s third DUI offense in February 2000 cost him 45 days in jail. Finally, Applicant’s battery of his wife in October 2004 required Applicant to complete a 52-week batterers program and 10 weeks of group parenting. Applicant’s criminal record between 1988 and February 2005 invokes CC disqualifying condition (DC) 31.a. (*a single serious crime or multiple lesser offenses*) Because three of the five offenses between April 1988 and February 2005 were alcohol-related, it is fair to conclude that alcohol contributed a large part to Applicant’s criminal behavior during the period between 1988 and February 2000. With Applicant’s alcohol-related driving record, he was fortunate not to have his driving privileges indefinitely suspended or permanently revoked. He was also fortunate to realize he could no longer consume alcohol. His statements declaring abstinence for seven years are credible. Therefore, CC mitigating condition (MC) 31. 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*) is partially applicable due to Applicant’s cessation of alcohol use in February 2000.

Applicant exercised good judgment in February 2000 by ending his association with alcohol. Yet, anger management issues apparently continued unattended until October 2004 when he hit his wife, and culminated in his conviction in February 2005 for misdemeanor battery. Though the 36-month sentence suggests Applicant may have done much more to his wife than just push her, there is insufficient evidence to infer that Applicant used more force than he claims. Moreover, the program coordinator's comments clearly show that the 52-week program inculcated positive adjustments in Applicant's overall behavior. As the coordinator stated, "In my 14 years of managing the program[,] I am hard pressed to think of anyone who has demonstrated how to behave appropriately more than [Applicant]." The partial mitigation Applicant receives under CC MC 32.d. for seven years of sobriety is augmented by the glowing report from Applicant's program coordinator in March 2007 based on his successful completion of the domestic battery program.

The favorable result Applicant receives under the CC guideline justifies the same result when the circumstances of this case are viewed in the context of the whole person model. Seven years of sobriety and the successful completion of 52 weeks of counseling, including 10 two-hour parenting sessions, persuasively demonstrates Applicant's past criminal conduct is unlikely to recur in the future.

An issue raised by Applicant in his response to the FORM warrants discussion. A person's security suitability is always at issue. Even though Applicant's earlier security investigation may have resulted in Applicant's favor, although it also may have lasted longer than he anticipated, the government always has the right to launch a security investigation into a person's past criminal history, particularly when the past history includes other more recent, adverse behavior. The government was entitled to investigate and review the security concerns of Applicant's traffic offenses in light of his recent misdemeanor battery offense in October 2004.

My overall commonsense decision gives Applicant credit for disengaging from alcohol use in February 2000, and also overcoming his anger issues through documented treatment for his anger issues and parenting deficiencies at the county rehabilitation center.

### **FORMAL FINDINGS**

Paragraph 1 (Criminal Conduct, Guideline J):

FOR THE APPLICANT

Subparagraph a.  
Subparagraph b.  
Subparagraph c.  
Subparagraph d.  
Subparagraph e.  
Subparagraph f.  
Subparagraph g.

For the Applicant.  
For the Applicant.

**DECISION**

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 a security clearance for Applicant. Clearance is granted.

Paul J. Mason  
Administrative Judge