KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was arrested for assault and battery on his spouse in 1992 and 1994 after he pushed her during arguments. Recurrence is unlikely since they are now divorced. In January 2003, Applicant checked onto an airline carrier a test bag containing simulated firearm and explosive devices without first disclosing the contents of the bag, and he interfered with the performance of a security screener. He was placed on pretrial probation on a criminal charge of possession of a hoax device and assessed civil fines for violating federal regulations. Criminal Conduct and Personal Conduct concerns are not mitigated. Clearance is denied.

CASENO: 04-07361.h1

DATE: 07/27/2007

DATE: July 27, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 04-07361
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT
John B. Glendon, Esq., Department Counsel

FOR APPLICANT
Michael Paris, Esq.

SYNOPSIS

Applicant was arrested for assault and battery on his spouse in 1992 and 1994 after he pushed her during arguments. Recurrence is unlikely since they are now divorced. In January 2003, Applicant checked onto an airline carrier a test bag containing simulated firearm and explosive devices without first disclosing the contents of the bag, and he interfered with the performance of a security screener. He was placed on pretrial probation on a criminal charge of possession of a hoax device and assessed civil fines for violating federal regulations. Criminal Conduct and Personal Conduct concerns are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a statement of reasons (SOR) on April 14, 2005, detailing the basis for its decision–security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG). Applicant answered the SOR on May 3, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on February 2, 2007.[1] On February 21, 2007, I scheduled a hearing for May 2, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

At the hearing, 36 (Ex. 1-8, 10-37) of the 37 exhibits offered by the government were admitted. Applicant objected to proposed exhibit 9 only, and the document was not admitted due to authentication problems. Ten Applicant exhibits (Ex. A-J) were admitted.[2] Testimony was taken from one government witness, a security manager of the Transportation Security Administration (TSA), and from Applicant and Applicant's supervisor on Applicant's behalf. At the government's request, I agreed to take administrative notice of two state statutes making punishable as a criminal offense possession of a hoax device and possession of an infernal machine; of three federal regulations concerning civil aviation security; and of 49 U.S.C. § 46301, which sets forth the civil penalties for violating aviation security regulations. A transcript of the hearing was received on May 11, 2007.

On June 5, 2007, Applicant submitted a court document to confirm that the criminal matter alleged in SOR ¶ 1.d had been dismissed at the recommendation of the probation department. There being no objection, the record was reopened and the document was marked and admitted as Applicant Exhibit K.

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[1]The government indicated the case was ready to proceed on January 30, 2007.

[2]Applicant exhibit J consists of 18 character reference letters, 16 of which were authored by civilian, military, or law enforcement personnel affiliated with federal departments or agencies (CIA, Army, Veterans Affairs, Marine Corps, Air Force (2), FDIC, U.S. Capitol Police, Defense Threat Reduction Agency, Health and Human Services, Office of the Marshall for the Supreme Court, Labor, Navy, FBI, Pentagon Force Protection Agency, TSA),who have known Applicant in a professional capacity.

FINDINGS OF FACT

DOHA alleged under Guideline J that Applicant was arrested for threatening to commit a crime and assault and battery in October 1992 (¶ 1.a), for assault and battery in January 1994 (¶ 1.b), and for domestic assault in about 1998 (¶ 1.c), all charges dismissed, and that Applicant was charged criminally on January 22, 2003, in state court and sentenced to pretrial probation on a charge of felony possession/transport of a hoax device (¶ 1.d). The underlying conduct that led to the felony charge was alleged separately under Guideline E, to wit: Applicant checked an x-ray test suitcase containing representative explosive devices and a simulated pistol silhouette into airport baggage on January 16, 2003, without declaring its contents to appropriate personnel (¶ 2.a). DOHA separately alleged under Guideline E (¶ 2.b) that he had been cited by the TSA for three violations of federal regulations of aviation security: attempting to circumvent or cause a person to tamper or interfere with a security system, transporting or offering for transport in checked baggage any unauthorized explosive or incendiary, and prohibition against interfering with screening personnel. Applicant was alleged to have settled the first two charges on payment of a $2,200 civil penalty, and to have been penalized $1,100 by the TSA for interfering with screening personnel at the airport.

In his Answer, Applicant admitted he had been arrested as alleged in ¶¶ 1.a, and 1.b, which arose out of marital disputes between him and his ex-wife. He denied any recall of the incident in ¶ 1.c, although indicated it was likely part of his ex-wife's pattern of calling the police when they had an argument. As for the incident involving the checked baggage at the airport in January 2003, Applicant admitted the felony criminal charge and pretrial probation as alleged in ¶ 1.a, that he presented luggage to be checked at an airline carrier's ticket counter on January 16, 2003, without declaring the contents, which were materials used for the certain testing of equipment manufactured by his employer (¶ 2.a), and that he entered into a settlement agreement with the TSA in July 2004 "to avoid costly and protracted litigation," but he believed he would have been found not responsible had he went to trial.

After consideration of the pleadings, exhibits, and hearing transcript, I make the following findings of fact:

Applicant is a 63-year-old vice president for a defense firm (company A) that manufactures detection equipment for military and civilian use. He started with the company in April 1981 as a medical salesman. About five years later, the company shifted its focus to security, and by the early 1990s, Applicant had been promoted to vice president in charge of business development. His primary duties are to consult with and educate primarily the government about detection technologies and systems developed to detect explosives as well as illegal drugs. The company's clients include the branches of the U.S. military, various defense and intelligence agencies, the protective services, and other federal departments, as well as private industry. Applicant's work has led to extensive foreign travel in South America and the Middle East as well as frequent travel to Washington, D.C. He has held a minimum of a secret-level clearance since September 1989. In April 2001, he was given a top-secret security clearance.

Applicant and his spouse divorced in August 2000 after 29 years of marriage. They experienced marital discord in the last decade of their relationship, and she filed assault and battery and threatening charges against Applicant on or about October 4, 1992, and assault and battery on January 2, 1994. Applicant pleaded not guilty, and she dropped her complaints in both instances.

On November 5, 2001, Applicant and company A's chief executive officer were interviewed on cable television about company A's technology that enables the detection of items that reflect rather than absorb x-rays and are not easily recognizable with conventional penetrating or transmission x-ray technology. To illustrate a potential vulnerability in airport screening, which employed conventional x-ray technology, Applicant presented a metallic suitcase, which he claimed had been "all over the world with [him]" without him being stopped, and contained "a real gun, a Glock 17, 9-mm weapon . . . three pipe bombs that are simulated, and it also has a small quantity of Semtex." (Ex. 6, Ex. 7, Ex. 35) At his hearing, Applicant admitted he had a gun on him for the demonstration on November 5, 2001, which was in company A's office, but denied he had ever taken it on travel with him as it was illegal to carry the weapon out of the state. (Tr. 300-01)

On January 13, 2003, Applicant contacted the Transportation Safety Administration (TSA) and asked if he could use TSA equipment to test a new x-ray test object that his employer had created. He told a TSA assistant security inspector that he wanted to see what image the test object projected on the screen. She informed him that the test could not be conducted in an operating environment, but that it could perhaps be done at the TSA training center in his area. She referred him to TSA's public affairs office.

By facsimile on January 13, 2003, Applicant sent a letter to TSA public affairs requesting that company A be permitted "to image, on one of [TSA's] new standard transmission X-ray inspection systems, a test object designed to assess the capabilities of X-ray system technology in general." (Ex. 29). Public affairs approved Applicant's request for training purposes only, not in an operational airport environment, and a TSA training coordinator was directed on January 14, 2003, to make arrangements for the testing with Applicant. The TSA training coordinator was unsuccessful in his efforts to speak directly with Applicant.

On January 16, 2003, Applicant was scheduled to met with federal protective services personnel in Washington, D.C. to test the functionality of x-ray equipment manufactured by company A that was deployed there. (*See* Ex. D) At around 0615 hours, he presented baggage for check-in at the airline ticket counter in the terminal where he was scheduled to depart at 0700 hours. Applicant checked into the cargo hold an aluminum case containing three test objects and some items needed for business travel (clothing, shoes, and a travel razor). The test objects were a piece of Lucite (thermoplastic acrylic resin) cut in the shape of a gun and taped to a radio; a piece of Lucite secreted inside a tape recorder designed to simulate pliable plastic explosives such as Semtex or C4; and two pipes made of polyvinyl chloride (PVC) filled with sugar, taped together, and attached to a third radio to simulate an explosive device such as a pipe bomb. The bag, secured by combination lock, was marked on the outside with company A's name and the identifier "X-Ray Test Bag." It was needed to assess the functionality of the x-ray inspection systems at his destination. Applicant did not inform the airline ticket agent of the bag's contents. Nor did he present a letter that he possessed from company A's vice president for operations. In his letter, dated January 15, 2003, the vice president identified Applicant, the nature of the company's business as a manufacturer of technically advanced backscatter x-ray detection systems for security and customs applications, and that Applicant was carrying an x-ray test suitcase, described as follows:

> The test suitcase contains a number of inert, harmless, non-functioning stimulants. The stimulants include two (2) PVC filled tubes containing sugar, a non-functioning plastic gun silhouette cut from a piece of PVC plastic, and a rectangular PVC plastic

block. All of the stimulants are concealed by electronic devices. In addition, the suitcase also contains a three-pound harmless sheet of PVC plastic, which has been molded into one wall of the suitcase. (Ex. 30)

Applicant also had a picture with him of what the image of the contents should reveal. (Ex. 31) He did not provide the picture to airline or security personnel when he checked in the test bag.

Applicant departed the airline ticket counter and went to the appropriate security checkpoint in the terminal. He placed his property onto the x-ray machine, and then stepped through the metal detector. Applicant was selected for secondary screening and asked to step aside. As the screener led Applicant to the area reserved for the screening, Applicant expressed his belief that the process was "a joke." The screener, who had maintained control of the property Applicant had submitted for screening, put Applicant's items down at a nearby table. Unable to locate his keys, Applicant picked up his coat to see if his keys were underneath. The screener asked Applicant to put the coat down. As the screener reached for the coat, Applicant grabbed the screener's wrist and pushed it away.[3] Applicant told a supervisor who was called to the scene that he wanted to know if his keys were inside his coat, and he was allowed to proceed to the gate area.

At about 0615 hours, the test bag set off alarms while going through an explosive detection system for checked baggage. No traces of explosive were detected during a sample of the bag, but indications were of a semi-automatic, clip-fed pistol and multiple improved explosive devices in the bag. A TSA screening manager was summoned to the check baggage room and the airline was contacted to obtain the combination to the locked bag.[4] Shortly after he provided the combination, Applicant was approached in the gate area by the TSA screening manager, a TSA checkpoint security supervisor, and the state police.[5] Applicant became agitated ("I'm sure there was some off color speech but I can't recall what it was." Tr. 293), and then confrontational when the police asked him about the contents of the bag. Applicant questioned why he should have had to disclose the contents of the bag when he checked it in. It was only after the bag was examined by the police that

[3]Applicant testified the screener grabbed his wrist when he reached for the keys that were under his coat in the bin in front of him (Tr. 276); that it was only then that he grabbed the screener's wrist "by reflex." (Tr. 231) The screener does not indicate that he ever grabbed Applicant's wrist ("I asked the passenger to put the jacket down and please have a seat at which point the passenger grabed [sic] my wrist." Ex. 25). Yet the screener substantiated Applicant's account that he was merely checking for his keys ("The passenger stated to me he wanted to know if his keys were in his coat.").

[4]Photographs of the front, back, one side, and top (including handle and lock) views of the bag were collectively admitted as Exhibit I. The metallic bag as pictured is marked on front and back sides with the company's name and identified as "X-Ray Test Bag." On the top above the lock it indicates "Lock 721." While this was apparently the combination, Applicant was unable to state with certainty that "Lock 721" was written on the bag as of January 16, 2003 (Tr. 214).

[5]The final report signed by the lead TSA inspector (Ex. 27) indicates that Applicant was uncooperative with the police. The assistant inspector testified that Applicant, who had been reported as uncooperative by TSA screening managers, was calm when he saw him interacting with the police. (Tr. 103, 121)

Applicant presented a letter from company A describing the contents.[6] Applicant was not arrested, but the bag was confiscated by the state police.

At approximately 0745 hours, Applicant was interviewed by two TSA inspectors.[7] Applicant, who was cooperative during this interview, began by denying that he had been conducting a test of any kind. He then handed them his business card and told them that he was in route to Washington, D.C. to meet with federal government personnel. Applicant pulled out x-ray images and proceeded to describe each image as it appeared in an x-ray by his company of the contents of the bag he had checked. Applicant admitted he had not told the airline of the contents of the checked bag, and stated that since no other passenger was required to reveal the contents of his baggage, neither was he. He averred he had traveled every month for several months with the same test suitcase and it had not been an issue previously. Applicant asked the inspectors whether there was any way to avoid such a situation in the future. It was suggested to him that he notify the air carrier the day before and at check-in for travel. Applicant expressed his belief that such coordination was too much to do and would probably have the same result. Concerning the report of a confrontation with the TSA screener at the security checkpoint, Applicant denied he had intimidated the screener or interrupted the screening process. Rather, uncertain of the location of his keys, he had lifted up the raincoat submitted for screening to look under it. When the screener reached out to retrieve the items from him, he attempted to stop the screener by holding his wrist.[8] Applicant was allowed to depart for Washington, D.C. at around 1000 hours.

On January 22, 2003, Applicant was charged in state district court with one count of possession of a hoax device or substance.[9] Applicant pleaded not guilty at his arraignment. With the

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[6]In the July 12, 2003 report of investigation (Ex. 27), the lead TSA inspector indicated that Applicant produced a copy of a letter dated June 24, 2002, signed by company A's vice president of operations that listed the contents of the test kit. The letter that the assistant inspector testified he was given (Ex. 30) is dated January 15, 2003, one day before the incident. Applicant's testimony was consistent with the assistant inspector's. The June 24, 2002, was an earlier version that Applicant had previously carried with him. (Tr. 226-27)

[7]The assistant inspector was an aviation security inspector technically employed by the Federal Aviation Administration at the time. (Tr. 100)

[8]The statement of the assistant inspector (Ex. 37) contains no mention of the incident at the checkpoint, although he testified that he and the lead inspector created the report of interview signed on July 15, 2003 (Ex. 21). That report of interview indicates Applicant denied he attempted to interfere with or intimidate an airport screener that morning.

[9]Mass. Gen. Laws ch. 266 §102A1/2 provides in pertinent part:

> (a) Whoever possesses, transports, uses or places or causes another to knowingly or unknowingly possess, transport, use or place any hoax device or hoax substance with the intent to cause anxiety, unrest, fear or personal discomfort to any person or group of persons shall be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than five years or by a fine of not more than $5,000, or by both such fine and imprisonment.
>
> (b) For purposes of this section, the term "hoax device" shall mean any device that would cause a person reasonably to believe that such device is an infernal machine. For the purposes of this section, the term "infernal machine" shall mean any device for endangering life or doing unusual damage to property, or both, by fire or explosion, whether or not contrived to ignite or explode automatically. For the purposes of this section, the words "hoax substance" shall mean any substance that would

agreement of the prosecution, on April 23, 2003, Applicant was placed on pretrial probation until April 22, 2004, with special conditions: that he not transport any x-ray test suitcase or test materials on any commercial carrier or other mode of transportation; that he ship any x-ray test suitcase or test materials separately in advance of his business travel; that he use only commercial mailing services that allow the shipment of simulated test materials; that he check with the commercial mail service before shipping to ensure the carrier's willingness to ship the simulated test materials; that he declare the items before shipping and the items must be clearly designated as test materials; and that he not violate any federal transportation security regulations. Applicant was also required to pay a probation supervision fee of $50 per month. The case was dismissed on April 22, 2004, on the recommendation of the probation department.

The TSA pursued civil penalties against Applicant and his employer. On January 17, 2003, a TSA security inspector, with the approval of the federal security director at the airport, recommended that Applicant be required to pay a civil penalty of $5,500. By letter of January 18, 2003, Applicant was notified by the TSA that it was investigating his failure to comply with Title 49 of the Code of Federal Regulations (CFR), Part 1540.105, which prohibits tampering or interfering with aviation security systems, and Part 1540.109, which prohibits interfering with security screening personnel in the performance of their duties. Company A was formally notified of the TSA investigation by letter of January 30, 2003.

On February 13, 2003, Applicant responded to the TSA. Citing his expertise and experience in x-ray detection security, Applicant indicated that the test suitcase he checked on January 16, 2003, was clearly marked in large red letters with company A's name and as a "X-ray Test Suitcase," that he and other company A personnel had used this test suitcase for more than 15 years, and that he regularly traveled with it and a letter explaining its purpose. Applicant explained that at the security checkpoint, he was surprised that he had been selected for secondary screening because he had passed through the metal detector without sounding the alarm. The items to be checked were on a table in front of him when he looked into his trousers for his car keys "completely forgetting that they were most likely in the bin in front of [him]." When he reached for the bin, the security screener grabbed his arm, and "as a reflex action," Applicant touched the screener's arm. Applicant went on that the screener reported to his supervisor that Applicant had "touched" him, whereupon Applicant responded to the supervisor and screener that was "ridiculous." Applicant denied that he intended to intimidate or interfere with the screener, or that he intended to cause disruption or inconvenience with respect to the test suitcase. He indicated that in the future all test bags would be shipped in advance by overnight courier. (*See* Ex. 4)

In its response to TSA of February 25, 2003, company A forwarded documentation confirming the purpose of Applicant's visit to Washington, D.C. on January 16, 2003, and the need for the x-ray test bag on that occasion.[10] Company A informed TSA that Applicant routinely traveled with the test bag, which was clearly marked on the outside as a company x-ray test bag, and that

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cause a person reasonably to believe that such substance is a harmful chemical or biological agent, a poison, a harmful radioactive substance, or any other substance for causing serious bodily injury, endangering life or doing unusual damage to property, or both.

[10]The assistant inspector who interviewed Applicant on January 16, 2003, did not follow up on Applicant's report that he was scheduled to meet with U.S. government protective services personnel. (Tr. 131)

neither Applicant nor the company was attempting to tamper or interfere with aviation security systems.

Following TSA's investigation, the lead TSA inspector concluded on July 12, 2003, that Applicant deliberately violated federal regulations prohibiting the tampering, interfering, or circumventing of any aviation security system (49 C.F.R. § 1540.105(a)(1)), the transporting or offering to transport in checked baggage any unauthorized explosive or incendiary (49 C.F.R. § 1540.111(c)(3)), and the interfering with screening personnel in the performance of their duties (49 C.F.R. § 1540.109).[11] Given Applicant's expertise in x-ray screening technology, and his familiarity with airport screening procedures, the TSA inspectors found no mitigating conditions and recommended Applicant be assessed a $5,500 civil penalty.

On August 27, 2003, TSA issued a notice of proposed civil penalty totaling $3,300 ($1,100 for each violation) to Applicant for attempting to circumvent, or tamper or interfere with a security system, for interfering with the airport screener, and for transporting or offering for transport in checked baggage an unauthorized explosive or incendiary. On August 28, 2003, TSA issued a notice of proposed civil penalty totaling $2,200 to company A for Applicant's violation of the federal regulations prohibiting tampering or interfering with an airport security system and for transporting or offering for transport an unauthorized explosive or incendiary while he was traveling on behalf of the company. On November 28, 2003, TSA filed formal complaints asking an administrative law judge to enter orders assessing the respective civil penalties. On December 30, 2003, Applicant and company A filed their responses, denying that Applicant checked baggage containing what was described in the complaints as a realistic replica of a firearm, a realistic simulated pipe bomb, and a realistic replica of Semtex, utilized as testing devices, and that Applicant did not inform TSA or the airline of the contents of the checked luggage. Applicant also denied that while undergoing the screening process on January 16, 2003, he had "objected to his having to undergo security screening, made loud demeaning remarks and grabbed the wrist of a TSA screener during the screening process."

On July 7, 2004, Applicant and company A entered into settlement agreements with the TSA. As to Applicant, TSA agreed to issue a compromise order settling the alleged violations of 49 C.F.R. §§ 1540.105(a)(1) and 1540.111(c)(3) on Applicant's payment of $2,200 within 30 days, and to issue an order assessing civil penalty of $1,100 against Applicant, with Applicant agreeing to pay it within 30 days, for interfering with screening personnel in violation of 49 C.F.R. § 1540.109. Applicant agreed to abide by all TSA regulations relating to transport of firearms, explosives, and incendiary devices, and to provide advance notice (at least 24 hours prior to scheduled departure) to TSA at the airport of departure and to the airline if he intended to travel with any or all of these items. Applicant entered into the settlement solely to avoid protracted litigation and did not admit the alleged violations of 49 C.F.R. §§ 1540.105(a)(1) or 1540.111(c)(3). On July 15, 2004, TSA issued an order

[11] In setting forth her analysis, the lead TSA inspector indicated that Applicant deliberately conducted a test within the operating airport environment ("His main focus was trying to get the test kit through the system without raising any flags."), which would prove that his company had a better x-ray system. (Ex. 27 p. 5) Yet in listing the factors and elements affecting Applicant's case, she indicated that by not presenting the letter from his company disclosing the contents of his suitcase, Applicant "deliberately introduced items into a system that he know [sic] would activate alarms" (Ex. 27, p. 2), contradicting herself on whether Applicant intended that the test bag be detected.

assessing the $1,100 civil penalty for violating the regulation prohibiting interference with screening personnel. Applicant paid the $3,300 under the terms of the settlement on July 15, 2004.

On July 15, 2004, TSA and company A entered into a settlement agreement under which TSA agreed to issue a compromise order dismissing the case on receipt of company A's payment of $2,200 to TSA within 30 days. Company A also agreed to abide by all TSA regulations relating to transport of firearms, explosives, and incendiary devices, and to provide advance notice (at least 24 hours prior to scheduled departure) to TSA at the airport of departure and to the airline if an employee intended to travel with any or all of these items. The settlement did not constitute an admission by the company of the truth of any of the allegations set forth in the notice of proposed civil penalty. The company paid the $2,200 on the date of settlement. On September 2, 2004, the cases against Applicant and company A were dismissed by TSA's administrative law judge as they had been settled.

On May 12, 2003, company A notified the Defense Industrial Security Office (DISCO) that Applicant had checked a test bag clearly marked and containing simulated test items that was needed on a visit to a government site on January 16, 2003, and that he had been stopped at an airport security checkpoint after checking the bag, at which time he produced a letter explaining the contents of the bag. He was nonetheless placed on one year pretrial probation on a charge of possessing/transporting a hoax device or substance, and TSA was investigating.

On March 11, 2004, Applicant was interviewed by a Defense Security Service (DSS) special agent about the incidents of January 16, 2003. He indicated he had no reason to believe that he was violating any laws or policies as he had made the trip several times before and one occasion, had the bag inspected by airport screeners after he had gone through screening and been allowed to proceed with the bag. He indicated the district attorney and his attorney had agreed to pretrial unsupervised probation with conditions, and he expected the matter to be dismissed on April 22, 2004, as he had been in compliance. Applicant maintained he had no reason to believe that his handling of the materials was illegal or inappropriate. He denied that he had attempted to test any airport security equipment. He disclosed the pending civil action by TSA and expressed his willingness to pay any civil fines leveled against him personally. Asked about any adverse contacts with police, Applicant related two occasions "around 1995 and 1998" where his former spouse complained to the police of domestic assault. He denied any physical assault on her with the intent of causing injury, but admitted there was "probably pushing" during the arguments.

On August 30, 2004, Applicant was interviewed by another DSS agent to update the status of the proposed civil penalties. Applicant indicated he and his employer had agreed to resolve the matter with the TSA, despite his continued denial of any wrongdoing, in lieu of proceeding with the expense and time consuming process of a formal administrative hearing.

As of early May 2007, Applicant's job title was vice president of government sales, although his duties were expanding to include commercial chemical companies and nuclear facilities in the U.S. Applicant presented several character references from his government and business clients, including a branch chief in the TSA, who have security/protective service responsibilities within

their respective governmental component or commercial company.[12] In their professional contacts with Applicant, which range from 2 to 13 years, Applicant has demonstrated strong judgment, dependability, and trustworthiness. Applicant's "knowledge, understanding, and strategic sales approach" provide significant assistance to his clients in the areas of security, purchasing, emergency preparedness, and in the case of the military, safeguarding forces in operating bases in the Middle East. All expressed no knowledge of any information that would lead to concerns that Applicant would not properly safeguard classified information.

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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President 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). 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).

The Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It 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.

CONCLUSIONS

Under Guideline J, *a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness*. Directive ¶ E2.A10.1.1 Applicant was twice charged with domestic assault offenses, in October 1992 (¶ 1.a) and January 1994 (¶ 1.b), after his spouse called the police during arguments. The charges were dismissed in each case, although Applicant admits that there was some pushing involved (Tr. 260). In the jurisdiction where Applicant was charged, a court has defined assault and battery as "the intentional and unjustified use of force upon the person of another, however slight."[13] DC ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged* applies. Yet this criminal conduct

[12]In light of the obvious similarities in the recommendations, Applicant or his legal counsel is likely to have proposed content language to his references. While this affects their weight, it is in Applicant's favor that so many references from throughout the government protective services sector elected to submit a reference for him.

[13]*See School District of Beverly v. James Geller*, 50 Mass. App. Ct 290, October 2000, citing *Commonwealth v. McCan*, 277 Mass. 199, 203 (1931).

is not likely to recur in light of the passage of time without recurrence (¶ E2.A10.1.3.1. *The criminal behavior was not recent*), and his divorce (¶ E2.A10.1.3.4. *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*).

The government alleged a third, more recent domestic assault in 1998, apparently based on Applicant's disclosure to a DSS agent in March 2004 of "two occasions around 1995 and 1998 where the police contacted [him] after [his] former spouse made allegations of Domestic Assault." (Ex. 2) Available district court (Ex. 32, Ex. 33) and state criminal history records (Ex. H) do not substantiate that any charges were filed against Applicant in 1995 or 1998, or that there was a third incident of domestic assault.

Applicant does not dispute, and the court records confirm, that he was charged in January 2003 with possession of a hoax explosive device after he checked in as airline baggage simulated weapons and explosive devices, and that he was placed on one year of pretrial probation.[14] Applicant need not be convicted for his conduct to raise criminal conduct concerns, as allegations of criminal conduct are enough to trigger DC ¶ E2.A10.1.2.1.

There is conflicting evidence as to Applicant's motivations. Following her investigation, the TSA lead inspector concluded that Applicant acted deliberately in that he knew the airport screening systems in place and conducted a test within an operating airport environment after he had been denied the opportunity to do so. Applicant submits he was taking the case to Washington, D.C. at the request of his government client to test equipment manufactured by his employer as he had done many times before. Applicant knew TSA had new equipment in place because he had asked on January 13, 2003, if he could "image on one of [TSA's] new standard transmission X-ray systems, a test object designed to assess the capabilities of X-ray system technology in general" (Ex. 29), but he also had a more immediate obligation to his employer to conduct his business in Washington in a timely fashion (*see* Ex. D). However, the concerns in this case do not turn on whether Applicant had taken advantage of a legitimate business trip to conduct an unauthorized test. A baggage screener looking at an object designed to simulate pliable plastic explosives or a pipe bomb could reasonably believe that the device or substance was an infernal machine or a harmful chemical agent that could cause bodily injury, endanger life, or inflict unusual damage to property. As an expert in x-ray detection systems, Applicant knew or should have known that detection could cause anxiety, unrest, fear, or personal discomfort. The passage of time (*see* ¶ E2.A10.1.3.1. *The criminal behavior was not recent*) and his expressed regrets over his mistake (Tr. 217), are not persuasive of his reform where he persists in justifying his behavior by claiming he had done nothing other than what he had always done.

Considerable Guideline E, Personal Conduct, concerns are raised as well by his failure to disclose the contents of the test bag to airline or TSA personnel. *See* ¶ E2.A5.1.1, *Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information*. Applicant carried a letter justifying his possession of the test bag, showing he knew he might have to explain himself. The fact that the bag was marked as a "X-Ray Test Bag" does not excuse his conduct since the markings provide little clue as to the bag's contents. It was

[14] *See* Footnote 9, *infra*. While Applicant has in his possession a device that could be characterized as a hoax device, items designed to simulate Semtex or other plastic explosives cannot ignite or explode. The state differentiates between a hoax device under § 102A1/2 and an infernal machine under § 102A that can endanger life or property.

arrogance, so clearly on display when he challenged the need for him to disclose the contents of his checked baggage since other passengers did not need to do so, which led him also to interfere with the airport screener at the checkpoint that morning. Upset with being selected for secondary screening, Applicant made derogatory comments about the airport screening process and grabbed a screener's wrist. Applicant claim of a reflexive action is not supported by the screener, who with no apparent motive to misrepresent, was sufficiently apprehensive to call for his supervisor.

As a member of the traveling public, Applicant has a responsibility to not tamper with or interfere with an aviation security system (*see* 49 C.F.R. § 1540.105), to not transport in checked baggage an unauthorized explosive or incendiary (*see* 49 C.F.R. § 1540.111(c)(3)), and to not interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties (*see* 49 C.F.R. § 1540.109). Under the terms of his settlement agreement with TSA, Applicant did not admit to any wrongdoing with respect to attempting to circumvent a security system or to transporting in checked baggage any unauthorized weapon, explosive or incendiary prohibited by 49 C.F.R. § 1540.111(c)(3). Yet the evidence shows that by failing to present the letter disclosing the contents of the test bag, he caused a disruption in the screening process for checked baggage. Federal regulations, as interpreted by the Transportation Security Administration on February 14, 2003, prohibit realistic replicas of explosive and incendiary devices in checked baggage "because their detection would have the potential for causing delays and requiring the unwarranted expenditure of time and resources on the part of law enforcement personnel."[15] He acknowledges and regrets that he interfered with the TSA employee's performance of his duties at the security checkpoint, and TSA assessed a $1,100 civil fine for the violation. Although the SOR allegations concern a single business trip, he testified he traveled with the same suitcase without disclosing the contents on several occasions. His violations of federal aviation transportation security regulations raise DC.¶ E2.A5.1.2.5. *A pattern of dishonesty or rule violations, including violations of any written or recorded agreement made between the individual and the agency.* There is no corresponding mitigating condition.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Directive ¶ E2.2.1. In making the overall common sense decision required under ¶ 6.3 of the Directive, Applicant's contributions to the defense effort weigh in his favor. Yet, his expertise and associations with high-ranking government and business clients do not exempt him from complying with aviation security regulations. Applicant's failure to notify the airline that he was carrying simulated explosive and weapon devices is especially troubling (¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*), in light of his knowledge of x-ray detection systems and experience as a frequent traveler (¶ E2.2.1.4. *The individual's age and maturity at the time of the conduct*). Even if his company did not manufacture screening systems for checked luggage, Applicant, better than most, should have appreciated that the security of the U.S. depends on compliance without regard to personal position or convenience. It is simply not credible for him to claim that it never crossed his mind that he shouldn't check the bag (*see* Tr. 220), or that the letter he carried divulging the contents of the test bag had no value in his mind at the time (*see* Tr. 227).

[15] *See* 68 Fed. Reg. 7444 (Feb. 14, 2003).

In evaluating the likelihood of continuation or recurrence (¶ E2.2.1.9), Applicant and his employer have complied with the terms of their settlement agreements with the TSA and sent the test bag to client sites by commercial baggage service. However, a change in the way in which the test bag is shipped does not remedy the judgment concerns caused by Applicant acting as if the rules do not apply to him. He challenged why he should have presented the letter if other passengers did not have to declare the contents of their checked baggage and questioned the security screener as to why he was selected for secondary screening ("and I said what for, it didn't, the gate didn't alarm?"). When asked on direct examination what impact that incident had on him, Applicant responded:

> It's certainly shown me that there are things you should be aware of and take steps to avoid, and I learned a valuable lesson, you should not, even if you think you lost your keys, try to get them before you are allowed to do that, and certainly the test suitcase will never become a part of what I travel with unless it's shipped the proper way. (Tr. 245)

Although Applicant regrets that he interfered with the security screener at the checkpoint (Tr. 233), he continues to exhibit denial and/or minimization of his failure to comply with aviation transportation security regulations.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski
Administrative Judge