

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 34-year-old engineering technician with a federal contractor. In 2003, he was arrested and charged with second-degree assault, two counts of malicious property damage, and carrying a concealed weapon. He was found guilty of these three counts. He was sentenced to 18 months confinement for each count. He was ordered to pay \$1,500 costs and fees of \$55, and ordered to complete an anger management program. After approximately 3 months of incarceration, execution of sentence was suspended and he was placed on 24 months supervised probation. He successfully completed both a 26-week anger management program and his probation. He successfully mitigated the security concerns about criminal conduct. Clearance is granted.

CASENO: 05-02974.h1

DATE: 04/30/2007

DATE: April 30, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 05-02974
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 34-year-old engineering technician with a federal contractor. In 2003, he was arrested and charged with second-degree assault, two counts of malicious property damage, and carrying a concealed weapon. He was found guilty of these three counts. He was sentenced to 18 months confinement for each count. He was ordered to pay \$1,500 costs and fees of \$55, and ordered to complete an anger management program. After approximately 3 months of incarceration, execution of sentence was suspended and he was placed on 24 months supervised probation. He successfully completed both a 26-week anger management program and his probation. He successfully mitigated the security concerns about criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. DOHA issued a statement of reasons (SOR) to him pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified, on September 27, 2005, detailing the basis for its decision security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on October 7, 2005 and November 1, 2005, and elected to have a hearing before an administrative judge. The case was assigned to another administrative judge on June 20, 2006, and transferred to me on December 18, 2006, due to caseload considerations. The Notice of Hearing was issued on December 28, 2006. I convened a hearing on January 17, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The government offered thirteen exhibits, marked as exhibits 1-13. Applicant offered no exhibits. I kept the record open until January 26, 2007, to allow Applicant to file additional documents. On January 22, 2007, he filed three exhibits, marked as Applicants Exhibits A, B, and C. The government had no objection. Applicant's Exhibits A through C are admitted. DOHA received the hearing transcript (Tr.) on January 25, 2007.

FINDINGS OF FACT

Applicant admitted the one allegation in the SOR. The admission is incorporated herein as a finding of fact. After a complete and thorough review of the evidence, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 34-year-old engineering technician with a federal contractor.¹ He is divorced, has two children, one of whom resides with him, and he is engaged.² He has an associates degree in engineering technology, has no military service, and this is his first security clearance.³

In 2003, Applicant and his former wife, who started separation proceedings in 2001, had drawn up a separation agreement between the two of them, but the document had not been filed in court. Applicant's ex-wife was in a relationship with another man, who had called Applicant on the phone and had threatened to "kick his butt." Applicant had been drinking, lost his temper, drove to this man's house, and pulled into his gravel driveway with such speed that he could not stop, sliding into the man's car, forcing it through the garage door. He then initiated a fist-fight with this person.⁴

On May 6, 2003, Applicant was arrested and charged with second-degree assault, two counts of malicious property damage over \$500, and carrying a concealed deadly weapon. He was found

¹Tr. at 11, 14.

²*Id.* at 11.

³*Id.* at 13-14.

⁴*Id.* at 16-18, 23.

guilty of the first three counts and found not guilty of the concealed weapons charge. He was sentenced to 18 months confinement for count one and for each of counts two and three, with count three to run consecutively to count one. He was ordered to pay \$1,500 restitution, pay court costs and fees of \$55, and ordered to complete an anger management program. After approximately 3 months of incarceration, execution of sentence was suspended, counts two and three were changed to run concurrently with count one, and he was placed on 24 months supervised probation.⁵ He successfully completed both a 26-week anger management program⁶and his probation.⁷

When asked what he had learned from the anger management class he stated: “Actually I learned a lot so ever since I completed it I control my anger much better, especially with the kids and especially with the additional two kids that I have now, so it takes a lot. And from this overall incident I did learn a lot. I wish it didn’t come to that but this is a life lesson I will definitely learn from it.”⁸

Applicant’s supervisor stated that Applicant was a trustworthy and dependable employee, that he had done everything requested of him, and was an outstanding employee.⁹ He observed no anger management issues, and in his last employee evaluation dated August 15, 2006,¹⁰ he rated him outstanding.¹¹

POLICIES

“No one has a ‘right’ to a security clearance.”¹² 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.”¹³ 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.”¹⁴ Each security clearance decision “must be a fair and impartial common sense determination based upon consideration of all the relevant and material information

⁵*Id.* at 14-15.

⁶Applicant's Exhibit B (Letter of Completion, Anger Management Program, dated June 15, 2004) at 1.

⁷Applicant's Exhibit A (Letter From Probation and Parole, dated January 18, 2007) at 1.

⁸Tr. 22.

⁹*Id.* at 36.

¹⁰Applicant's Exhibit C (Employee Evaluations, dated from August 15, 2006, going back to February 25, 1997) at 1-2.

¹¹Tr. at 36-39.

¹²*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹³*Id.* at 527.

¹⁴Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

and the pertinent criteria and adjudication policy.”¹⁵ An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁶

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the 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: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.¹⁷ 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

The government established its case under Guideline J. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.3.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) applies. Applicant admitted his arrest and convictions. And the court records¹⁸ clearly set forth the findings, convictions, fines, probation, and other terms.

Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*The criminal behavior was not recent*) applies. This criminal offense occurred almost four years ago.

Criminal Conduct Mitigating Condition E2.A10.1.3.2. (*The crime was an isolated incident*) applies. This is the only criminal activity on Applicant’s record.

Another mitigating condition is CC MC E2.A10.1.3.3. (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*). Applicant’s then-wife’s boyfriend had called him and threatened to “kick his butt.” Given the circumstances, this is certainly a provocation. However, Applicant could have avoided the situation, but did not. Instead, he voluntarily chose to drive to the man’s house and provoked a fist fight. Applicant put himself into the situation that resulted in an altercation. Applicant was not pressured into committing the act. This mitigating condition does not apply.

¹⁵Directive ¶ 6.2.

¹⁶ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁷See Exec. Or. 10865 § 7.

¹⁸Government Exhibits 2-12.

Finally, CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) is applicable. Applicant successfully completed a 26-week anger management course. He stated that he had learned a valuable lesson by taking the course. He relates better with his children and step-children. He shows no anger management problems at work. He is no longer involved in the situation with his former wife. I find that he has rehabilitated himself, and conclude Guideline J for Applicant.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a persons life to make an affirmative determination that the person is eligible for a security clearance.”¹⁹ Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.²⁰ In evaluating Applicant’s case, in addition to the disqualifying and mitigating conditions, I also considered the whole person concept in evaluating Applicant’s risk and vulnerability in protecting our national interests.²¹

As noted above, Applicant’s offenses are sufficiently serious to raise a security concern. His actions were knowledgeable and voluntary. He is 34 years old, sufficiently mature to be fully responsible for his conduct. The motivation for his offense was anger at his wife for her marital infidelity. His conduct was not prudent or responsible. This offense creates doubt about his judgment, reliability, and trustworthiness, and it calls into question his ability or willingness to comply with laws, rules and regulations.

Applicant presented substantial extenuating and mitigating evidence. His anger towards his wife for her betrayal of their marriage is reasonable and understandable. His wife was seeing another man. That man called Applicant and threatened to kick his butt. Applicant’s crime occurred in the heat and passion of the moment. He successfully completed an anger management course and his court-ordered probation. His crime occurred in May 2003, and not recent. He disclosed his criminal record on his SF 86. He has been an outstanding employee for the contractor. Their subsequent divorce and the passage of time has relieved much of the stress of this situation, and reduced the potential of more violence. The absence of evidence of any prior violence, his forthright and candid statement at his hearing, and his evident sincerity about avoiding future violence all weigh in his favor.

In sum, the likelihood of recurrence is very low because sufficient evidence was presented about improvement in his mental and emotional understanding of his situation, and responses to stress. The counseling and therapy he received are particularly important because he now has better and clearer perceptions of his reaction to stress and understands how to avoid problematic situations. His rehabilitative efforts have removed my doubts about his reliability, trustworthiness, and good judgment.

²⁰*Id.*

²¹*Id.*

The totality of the record raises no reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: FOR APPLICANT

 Subparagraph 1.a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Christopher Graham
Administrative Judge