

KEYWORD: Criminal Conduct

DIGEST: The Applicant was arrested in 1992 and 2004 for assault. The Applicant does not have a pattern of criminal conduct. The two incidents were isolated in nature and the evidence shows that there is little to no chance that they will recur. Adverse inference is overcome. Clearance is granted.

CASENO: 05-09564.h1

DATE: 01/10/2007

DATE: January 10, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 05-09564
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Goldstein, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant was arrested in 1992 and 2004 for assault. The Applicant does not have a pattern of criminal conduct. The two incidents were isolated in nature and the evidence shows that there is little to no chance that they will recur. Adverse inference is overcome. Clearance is granted.

## STATEMENT OF THE CASE

On December 7, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on December 14, 2005, and requested that his case be decided without a hearing. Subsequently, on April 12, 2006, the Applicant requested to have a hearing. The case was originally assigned to another Administrative Judge on May 1, 2006. The case was reassigned to the undersigned on July 6, 2006, and a Notice of Hearing was issued on August 22, 2006.

A hearing was held on September 13, 2006, at which the Government presented three documentary exhibits (Government Exhibits 1 through 3). Testimony was taken from the Applicant, who called one additional witness, and also submitted two hearing exhibits (Applicant's Exhibits A and B) and one post-hearing exhibit (Applicant's Exhibit C). The transcript was received on September 25, 2006.

## FINDINGS OF FACT

The Applicant is 46, single and has a Bachelor of Science degree. He is employed by a defense contractor, and he seeks to retain a DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

The record shows that the Applicant was arrested in 1992 on a charge of battery. (Government Exhibit 2.) The Applicant does not deny this arrest. He credibly testified that he had no clear memory of the incident which resulted in the charge, nor could he remember the disposition of the charge. The Applicant further testified that he had contacted the city where the arrest took place to find out more information. However, based on the age of the incident, none could be found. The city police department forwarded documents to the Applicant that would enable him to have the record, if any, expunged. (Transcript at 32-34, 46-48; Applicant's Exhibit B.) There is no evidence as to the ultimate disposition of this charge.

The Applicant was involved in a physical altercation with his then 18 year old son in March 2004. According to the Applicant, his son attacked him with a baseball bat and the Applicant had to defend himself. The police were called and the Applicant was arrested for Domestic Violence Assault. He plead guilty to an amended charge of Disorderly Conduct and was sentenced to a suspended jail term, two years of probation, a fine, ordered to attend an anger management course and to have no contact with his son for 180 days. (Transcript at 34-36.) The Applicant successfully completed the anger management course in July 2004. (Applicant's Exhibit C at 4.)

Prior to this incident, the Applicant had a Protective Order issued concerning his son in 2003. Part of the reasoning behind obtaining this order was because his son had threatened the Applicant with a baseball bat. (Transcript at 36, Applicant's Exhibit A.) The Applicant's son has left that house and now has a better relationship with the Applicant.

### Mitigation.

The Applicant submits that the two incidents described above are the only ones in his record. He is an honorably retired member of the US Air Force.

Documentary evidence was submitted by the Applicant showing that his state of residence has granted his partner approval to run a day care center at the Applicant's house. This approval was granted in 2006, after the date of the Domestic Violence arrest. (Applicant's Exhibit C at 5-6.)

Written statements from superiors and co-workers were submitted by the Applicant. He is described as "reliable, diligent and extremely professional" by a senior military officer. (Appellant's Exhibit C at 8-9.) Testimony from a co-worker, and the other statements contain similar statements. (Appellant's Exhibit C at 10-19.)

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct

- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal acts that demonstrate poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...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."

## CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go

forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has two criminal arrests on his record, in 1992 and 2004. Disqualifying Condition E2.A10.1.2.2. applies to this case, "A single serious crime or multiple lesser offenses."

The Applicant, on the other hand, has successfully mitigated the Government's case. The two incidents were separated by 12 years. There is no evidence that the Applicant has a pattern of engaging in violent behavior. The second incident in particular, involving his son, is isolated in nature and there is little or no possibility that the conduct will be repeated. Under the particular circumstances of this case, it is appropriate to apply Mitigating Condition E2.A10.1.3.2., "The crime was an isolated incident." In addition, specifically regarding the second incident, Mitigating Conditions 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"; and 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" also apply.

The Applicant has successfully attended an anger management course and the evidence shows him to have internalized the teachings. (Transcript at 56-59.) He has support from co-workers and superiors and the record shows him to be a very worthwhile and respected employee. Mitigating Condition E2.A10.1.3.6. applies as, "There is clear evidence of substantial rehabilitation."

In addition, application of the General Factors and the whole person concept is appropriate and supports a decision in the Applicant's favor. The Applicant is motivated not to engage in similar criminal conduct in the future (factor g.), he shows considerable evidence of rehabilitation (factor f.), and, under the particular circumstances of this case, the probability that the Applicant will engage in such conduct again are virtually nil (factor i.).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

- Paragraph 1: For the Applicant.
- Subparagraph 1.a.: For the Applicant.
- Subparagraph 1.b.: 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 the Applicant.

Wilford H. Ross  
Administrative Judge