

KEYWORD: Criminal Conduct

DIGEST: Applicant has a history of criminal conduct involving his current wife, who is deeply troubled. He was arrested on four occasions in 2000, 2004, and 2006, and he has three misdemeanor convictions. He is on probation until April 2009. The potential for exploitation and for recurrence of similar conduct cannot be ruled out. Eligibility for a security clearance is denied.

CASENO: 06-14166.h1

DATE: 08/06/2007

DATE: August 6, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-14166
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD**

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of criminal conduct involving his current wife, who is deeply troubled. He was arrested on four occasions in 2000, 2004, and 2006, and he has three misdemeanor convictions. He is on probation until April 2009. The potential for exploitation and for recurrence of similar conduct cannot be ruled out. Eligibility for a security clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant authority,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on December 28, 2006. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges a security concern under Guideline J for criminal conduct.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending formal amendment. The Revised Guidelines apply to this case because the SOR is dated December 28, 2006, which is after the effective date.

Applicant replied to the SOR on February 8, 2007, and requested a hearing. In his reply to the SOR, he admitted the factual allegations in subparagraphs 1.a, 1.b, 1.c, and 1.d. The case was heard on June 19, 2007. DOHA received the hearing transcript on June 27, 2007.

In general terms, the major issue is as follows: Is it clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance given his history of four arrests, three misdemeanor convictions, and current sentence to probation until April 2009?

FINDINGS OF FACT

Based on the record evidence as a whole, the following facts are established.

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

1. Applicant, a 51-year-old man, works as a production control supervisor for an aerospace and defense company where he supervises 17 employees. He has worked for this company since November 1979. His annual salary is about \$85,000. He is seeking to retain a security clearance previously granted to him by the Defense Department.

2. He married his first wife in 1975. The marriage ended in divorce in 1998. Applicant and his first wife had one child, a daughter, who is now 13 years old and lives with her mother. Applicant has visitation rights and he has regular contact with his daughter. He is also required to make child support payments, which are in good standing. There were never any incidents of family violence during Applicant's first marriage. At no time were the police called to intervene between Applicant and his first wife.

3. Applicant has a history of criminal conduct involving his current wife, who is deeply troubled. He was arrested on four occasions in 2000, 2004, and 2006, and he has three misdemeanor convictions. He is on probation until April 2009. The circumstances surrounding Applicant's situation are described below.

4. Applicant married his current wife in 2004, although they have lived together since sometime in 2000. She is now 37 years old. The first incident of criminal conduct was in December 2000. Applicant was arrested and charged with family violence battery, and battery and simple battery. The charges surfaced after his current wife went to the hospital and alleged Applicant attacked her. Applicant denies doing so. He appeared in court, without counsel, and elected to dispose of the charges via a first-offender program. He completed anger-management counseling in the program. Upon completion, the charges against him were *nolle prosequed*.

5. He was arrested a second time in May 2004. He was charged with family violence battery, battery and simple assault, disorderly conduct, and cruelty to children. Applicant was arrested after his current wife's ex-husband reported allegations to the police. Applicant denies any wrongdoing. With the assistance of counsel, Applicant agreed to a negotiated plea agreement wherein he pleaded guilty to disorderly conduct and the other charges were dismissed. As a result, he served probation, paid a fine, and went to several weeks of counseling.

6. He was arrested for the third and fourth time in April 2006. On about April 3rd, he was arrested and charged with aggravated assault, two counts of family violence battery, and possession of methamphetamine. He was arrested after his current wife's sister reported allegations to the police. Applicant denies any wrongdoing. On about April 10th, he was arrested and charged with stalking aggravated. The basis for this charge was an alleged violation of a no-contact order after he was bonded out of jail on the April 3rd arrest. In particular, Applicant met with his wife on April 10th for her to sign an affidavit in which she exonerated Applicant from any wrongdoing for the April 3rd charges. In the affidavit (Exhibit 9), his wife explained that she has been diagnosed with bipolar disorder and schizophrenia. She had been committed for residential treatment three times in the past 12 months. Applicant assists her in administering her prescribed medications because she cannot manage on her own.

7. Applicant escorted his wife to a notary to sign the affidavit. After she signed it, Applicant dropped the affidavit off at his lawyer's office. Applicant believed his lawyer would take the affidavit and get the court to change the no-contact order to a no-violent-contact order. On that basis,

Applicant returned home where he was arrested that night shortly after he and his wife had gone to bed. The April 10th arrest took place after his wife's sister called the police.

8. On April 18, 2006, his wife was deposed by Applicant's lawyer (Exhibit 6). In the deposition, she further exonerated Applicant from any wrongdoing on April 3rd and denied Applicant had harassed and intimidated her into signing the affidavit. Also, she claimed her sister has a history of drug-related criminal conduct and of making false claims against people, and she assumed the methamphetamine found on Applicant's property belonged to her sister. She also wanted the no-contact order changed so Applicant could return home and assist her with her medications.

9. The charges were adjudicated on about April 30, 2007, when Applicant agreed to a negotiated guilty plea (Exhibit A). For the initial charges, he pleaded guilty to simple battery instead of one charge of family violence battery. The remaining charges against Applicant were *nolle prossed*. The court sentenced him to a misdemeanor sentence of 12 months confinement to be served on probation. For the stalking charge, he pleaded guilty to simple assault. The court sentenced him to a misdemeanor sentence of 12 months confinement to be served on probation. The court further ordered that the sentence was consecutive with the other sentence. As a result, Applicant is on probation until April 30, 2009.

10. Applicant underwent an evaluation for alcohol and chemical dependency in June 2007 (Exhibit A). The evaluation was favorable and concluded that Applicant did not have a need for treatment for alcohol or drug use or abuse. The evaluation recommended Applicant continue to abstain from alcohol and any drug not lawfully prescribed and that random testing for alcohol and drugs should take place during his probation.

11. Applicant describes his second marriage as "totally insane" (R. 114). He married so she would be covered by his health insurance, because she had neglected her health over the years and was in need of medical care. He agreed that his marriage was such that he could be arrested at anytime (R. 116–118). Indeed, since the last charges were disposed of on April 30, 2007, she has made threats to call the police on nearly a daily basis (R. 108–109). Also, he has some concern that she could make a false claim against him to obtain leverage (R. 119). He recently initiated divorce proceedings. She has not yet responded to the divorce petition, but he hopes the proceeding will be uncontested. He is concerned, however, that she will contest the divorce and drag out the process. Currently, he lives alone in a garage apartment detached from the house, where she resides.

GENERAL PRINCIPLES OF LAW AND POLICIES

No one has a right to a security clearance.³ The President authorized the Secretary of Defense or 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."⁴ As noted by the Supreme Court in

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

⁴ Executive Order 10865, § 2.

Department of Navy v. Egan, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

The agency appellate authority has made it clear that the only purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁶ There is no presumption in favor of granting or continuing access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court said that the burden of proof in a security clearance case is less than the preponderance of the evidence.¹¹ The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant’s loyalty.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

CONCLUSIONS

⁵ *Egan*, 484 U.S. at 531.

⁶ ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

Under Guideline J,¹⁴ a security concern typically exists because criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. It calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The government contends Applicant's history of criminal conduct raises a security concern under Guideline J. Applicant does not dispute his arrests and convictions. But he contends that the allegations against him are false and that his wife's condition makes her unstable and likely to invent complaints against him, and he is taking action to divorce her, which should end the problems. The question is whether Applicant's history of four arrests, three misdemeanor convictions, and current sentence to probation until April 2009 is consistent with eligibility for access to classified information under the clearly-consistent standard.

The record evidence supports a conclusion that Applicant has a history of criminal conduct with his current wife. Although he denies wrongdoing, he pleaded guilty to three misdemeanor offenses. He did so with the assistance of counsel. His four arrests, three misdemeanor convictions, and current sentence to probation until April 2009 raise a security concern under Guideline J because two DC apply against Applicant. First, DC 1¹⁵ applies because his three misdemeanor convictions constitute multiple lesser offenses. Second, DC 4¹⁶ applies because Applicant is serving probation until April 2009. His history of criminal conduct creates doubt about his judgment, reliability, and trustworthiness. Indeed, his probationary status is a circumstance that cannot be overlooked.¹⁷

One of the mitigating conditions under Guideline J applies in Applicant's favor. MC 3¹⁸ applies because there is some evidence suggesting Applicant did not commit the offenses. This is especially so with the April 2006 charges because his wife provided information exonerating him from any wrongdoing.

In addition, Applicant receives credit under the whole-person concept. He has worked for the same company since 1979. He has enjoyed a successful career, judging by his position, supervisory authority, and annual salary. Unlike the current situation, his first marriage did not have similar problems. And he and his first wife have acted like mature adults in raising their daughter. His current wife appears to be a deeply troubled person with mental-health problems and substance-abuse issues. It is likely that her troubles are a major contributing factor to Applicant's arrests and convictions. All these circumstances weigh in Applicant's favor.

Three other matters deserve consideration under the whole-person concept. First, the likelihood of recurrence of similar conduct with his current wife is high because Applicant candidly

¹⁴ Revised Guidelines at 21–22 (setting forth the disqualifying and mitigating conditions).

¹⁵ DC 1 is “a single serious crime or multiple lesser offenses.”

¹⁶ DC 4 is “individual is currently on parole or probation.”

¹⁷ See ISCR Case No. 98-0247 (App. Bd. Jan. 20, 1999) (“probationary status is a circumstance that cannot be overlooked in assessing an applicant's suitability to hold a clearance”).

¹⁸ MC 3 is “evidence that the person did not commit the offense.”

acknowledged that he could be arrested at anytime.¹⁹ And it is simply too soon to tell if a divorce will terminate Applicant’s problems with his current wife. Second, Applicant has some concern that his wife could make a false claim against him to obtain leverage. This situation creates the potential for pressure, coercion, exploitation, or duress.²⁰ Third, the current state of Applicant’s marriage is, at best, unstable. It is also a reminder of the commonsense understanding that individuals in the middle of great emotions are not safe risks.²¹ On balance, the whole-person analysis weighs against Applicant.

Applicant’s history of four arrests, three misdemeanor convictions, and current sentence to probation until April 2009 outweighs the favorable evidence. In reaching this conclusion, his probationary status is a circumstance that received substantial weight, because it is too soon to tell if he will complete his sentence to probation without violation. Based on the record evidence as a whole, Applicant did not rebut, explain, extenuate, or mitigate the criminal conduct security concern. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

_____ SOR ¶ 1–Guideline J:	Against Applicant
Subparagraphs a–d:	Against Applicant

DECISION

_____ In light of all the facts and circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Eligibility for a security clearance is denied.

Michael H. Leonard
Administrative Judge

¹⁹ Revised Guidelines at 2 (“the likelihood of continuance or recurrence”).

²⁰ Revised Guidelines at 2 (“the potential for pressure, coercion, exploitation, or duress”).

²¹ Revised Guidelines at 2 (“The ultimate determination . . . must be an overall commonsense judgment . . .”).