

KEYWORD: Criminal Conduct

DIGEST: This 50-year-old systems engineer was court-martialed in 1976, when he was 20, but went on to receive an Honorable discharge after six years of meritorious service in the Air Force. In 1982, he was charged with battery, but the case was dismissed after he attended anger management classes. In 1994, his unhappy wife filed a complaint for sexual battery, but no formal charges were ever filed. In 2002, complaints from the same wife led to the filing of "Threaten Crime/Intimidate/Terrorize" charges. He was allowed to plead to misdemeanor Stalking charges. Overall, the Government's evidence was outweighed by Applicant's explanations and documentation. Mitigation has been established. Clearance is granted.

CASENO: 06-17378.h1

DATE: 02/27/2007

DATE: February 27, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-17378
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
BARRY M. SAX**

APPEARANCES

FOR GOVERNMENT
Jennifer Goldstein, Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

This 50-year-old systems engineer was court-martialed in 1976, when he was 20, but went on to receive an Honorable discharge after six years of meritorious service in the Air Force. In 1982, he was charged with battery, but the case was dismissed after he attended anger management classes. In 1994, his unhappy wife filed a complaint for sexual battery, but no formal charges were ever filed. In 2002, complaints from the same wife led to the filing of “Threaten Crime/Intimidate/Terrorize” charges. He was allowed to plead to misdemeanor Stalking charges. Overall, the Government’s evidence was outweighed by Applicant’s explanations and documentation. Mitigation has been established. Clearance is granted.

STATEMENT OF THE CASE

On August 30, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On September 28, 2006 DOHA received Applicant’s response to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The case was assigned to me on October 27, 2006. A Notice of Hearing was issued on December 7, 2006. A hearing was conducted on January 2, 2007. At the hearing, the Government offered seven (7) exhibits (Government’s Exhibits (GX) 1-7). Applicant testified and offered four (4) exhibits (Applicant’s Exhibits (AX) A-D). Applicant also timely submitted seven (7) post hearing exhibits (AX E1-E7). The transcript (Tr) was received at DOHA on January 10, 2007.

FINDINGS OF FACT

Applicant is a 50-year-old employee of a defense contractor. The SOR contains four (4) allegations under Guideline J (Criminal Conduct). In his response to the SOR, Applicant admitted allegations 1.a and 1.b., and denied 1.c. and 1.d. All admissions are incorporated herein as Findings of Fact.

After considering the totality of the evidence, I make the following additional FINDINGS OF FACT as to the status of each SOR allegation.

Guideline J (Criminal Conduct)

1.a. - On or about September 17, 1976, Applicant was the subject of a Special Court Martial for violating Article 92 of the Uniform Code of Military Justice (UCMJ). He was found guilty and sentenced to a reduction in grade to Airman Basic, confined to hard labor for one month, and forfeited \$150 per month for six months.

1.b. - On or about August 1982, in State A, Applicant was charged with battery. As a result of this charge, he was required to attend anger management classes, after which the case was dismissed.

1.c. - On or about January 30, 1994, a complaint for sexual battery was filed against Applicant. Formal charges were not filed.

1.d. - On or about October 21, 2002, in State A, Applicant was charged with Threaten Crime/Intimidate/Terrorize. In about December 2003, he was allowed to plead guilty to Misdemeanor Stalking in about December 2003. He was sentenced to 60- days in jail, placed on five years probation, required to attend a violent offender treatment program, prohibited from any contact with his ex-wife. Applicant's personal weapons, seized by the police on October 21, 2002, were returned to him by court order on December 23, 2002, citing the lack of evidence that such a return would "result in endangerment to [Applicant] or others" (AX E5).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant to the conduct, to include (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; knowing participation; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Applicant is a 50-year-old system engineer for a defense contractor.

1.a. - In 1975, at age 19, Applicant entered the Air Force and was granted a security clearance (Tr at 23). In 1976, he responded to pressure from his “trainer,” and agreed to a scheme to make “some quick money,” by making purchases at a local military exchange and then reselling the merchandise (including a stereo) for a profit to non-authorized individuals (Tr at 20-23). Applicant knew it “was illegal” (Tr at 21). When he left the Air Force after six years, he was given an Honorable Discharge and a Commendation Medal (Tr at 22). Because of the youth and immaturity of Applicant at the time and the passage of some 30 years without similar misconduct, I conclude this matter is no longer of security significance.

1.b. - In 1982, he was married to a woman with whom he had a rocky relationship, including arguments and some violence on both sides. Applicant claims his wife attacked him with a butcher knife and cast iron skillet and he responded by hitting her (Tr at 24). She had some bruises on her body and he did not, so he was arrested. He attended anger management classes, and the charges were ultimately dismissed (*Id.*).

1.c. - In 1994, Applicant and his wife attended a Super Bowl party at a friend’s house. There were some hard feelings between Applicant and his wife and another couple. The next day, Applicant learned the other woman had complained that Applicant had touched her breasts and filed a criminal complaint (GX 3). Applicant reported the charges to his company, which submitted an Adverse Information Report (GX 7). He denies any inappropriate contact with the woman (GX 3 and Tr at 25). There is no record of any formal charges being filed.

1.d. - On or about October 21, 2002, Applicant was charged with Threaten Crime/Intimidate/Terrorize. The record show this incident involves the woman to whom he was married from 1989 to 1997. Applicant claims that beginning in 1992, after birth of their second child, A, his wife suffered from post partum depression and showed a change in personality, including verbally and physically abusing him (GX 2). He further claims that in about 1997, his wife was arrested for biting him and made statements he construed as being threatening. In 2002, she complained that Applicant had placed three bullets in her mailbox. (GX 2 at 2). Applicant claims that his daughter A told him what his wife had done (*Ibid.*), a claim his daughter corroborates (AX E7). Applicant stated that he was shown his daughter’s diary before trial and agreed to plead guilty to lesser charges to avoid any emotional damage to her by asking her to testify against her mother (*Id.* at 4). Applicant claims he accepted the punishment imposed by the court to avoid having his daughter forced to testify that her mother had lied. Applicant remains on probation until December 2008. Considering the unusual nature of the evidence, I have carefully considered Applicant’s testimony, the court documents, and documents submitted by the daughter, which have been admitted into evidence (AX A, AX D, and AX E7).

Applicant has clearly had a sometimes troubled past, mostly in the context of his relationship with his wives. As to the two most recent incidents, 2002 and 2004, both involve his second (now ex) wife and must be considered in the context of the failure of the marriage and the fight over custody of their child (then 13 and now about 16). That charges were made is clear, but it is not so

clear that the incidents actually occurred as alleged by the ex-wife. In this context, I conclude that the documents from Applicant's daughter are authentic, relevant and material. These documents, along with others and Applicant's testimony, suggest that most of Applicant's problems were situational (occurring during bad marriages) and are not reflected in the bulk of his 50 -year life span.

In the last 25 years, Applicant's legal problems have both involved his ex-wife. In the 1994 incident, no formal charges were filed and Applicant's explanations, in the context of his marital problems, are not countered by any other substantive evidence. His explanations are found to be credible enough to overcome the conclusions urged by the Government, i.e., that Applicant committed a criminal act.

As to the 2002 matter, it is a fact that Applicant remains on probation until 2008. However, the bulk of the record, specifically (1) the circumstances of the alleged misconduct, (2) the lack of other recent problems, and (3) the otherwise praiseworthy life he has documented, make a strong case that Applicant can be relied upon to work with and protect classified information and material. I note particularly his Air Force records (AX E2), and the letters and certificates of appreciation for his long service in support of the national defense (AX E3, AX E4, and AX E6). I have carefully considered the recent letter from his now 16 year old daughter (AX E7), and conclude that it supports his version of the events surrounding 2002 events and his decision to plead guilty to Misdemeanor Stalking.

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions: (1). Allegations or admission of criminal conduct, regardless of whether the person was formally charged; and (2). A single serious crime or multiple lesser offenses.

Mitigating Conditions (MC): (1). Most of the criminal behavior was not recent; MC (2) applies in part, in that the pressures leading up to the conduct are no longer present in that person's life; (5) The factors leading to the violation(s) are not likely to recur; and (6). The overall record indicates clear evidence of successful rehabilitation.

In summary, considering Applicant under the whole person concept, the totality of the evidence suggests that the problems shown by Applicant's past conduct are not likely to recur and that he can be relied upon to safeguard classified information and material.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

<i>Guideline J (Criminal Conduct)</i>	For the Applicant
Subparagraph 1.a.	For the Applicant
Subparagraph 1.b.	For the Applicant
Subparagraph 1.c.	For the Applicant

Subparagraph 1.d.

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.

**BARRY M. SAX
ADMINISTRATIVE JUDGE**