

KEYWORD: Criminal

DIGEST: The Applicant's last incident involving criminal behavior occurred in 1995, more than 12 years ago. The last four incidents of criminal behavior, in 1985, 1986, 1991 and 1995, all involved the Applicant's wife, who suffers from alcohol abuse and depression. Often, he was on the receiving end of the spousal abuse. "There is clear evidence of successful rehabilitation" on the part of both the Applicant and his spouse, as evidenced by seven letters of recommendation, and his spouse's admission. Mitigation is shown. Clearance is granted.

CASENO: 06-17481.h1

DATE: 09/07/2007

DATE: September 7, 2007

In Re:)	
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SSN: -----)	ISCR Case No. 06-17481
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
RICHARD A. CEFOLA**

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esquire, Applicant's Counsel

SYNOPSIS

The Applicant's last incident involving criminal behavior occurred in 1995, more than 12 years ago. The last four incidents of criminal behavior, in 1985, 1986, 1991 and 1995, all involved the Applicant's wife, who suffers from alcohol abuse and depression. Often, he was on the receiving end of the spousal abuse. "There is clear evidence of successful rehabilitation" on the part of both the Applicant and his spouse, as evidenced by seven letters of recommendation, and his spouse's admission. Mitigation is shown. Clearance is granted.

STATEMENT OF THE CASE

On August 17, 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, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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.

Applicant filed an Answer to the SOR on August 28, 2006, however, the Government was not "Ready to Proceed" with this case until April 9, 2007.

The case was originally assigned to another Administrative Judge, but was reassigned to the undersigned on May 8, 2007. A notice of hearing was issued that same day, and the case was heard on June 20, 2007. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence, and who called a witness to testify on his behalf. The transcript (TR) was received on July 18, 2007. The issue raised here is whether the Applicant's admitted past criminal activity militates against the granting of a security clearance. [The Applicant admits the underlying factual basis of all of the allegations, except for subparagraph 1.f., in that he categorically denies that any criminal incident occurred in 2005.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 54 years of age, and is employed by a defense contractor, which seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional Findings of Fact.

Guideline J - Criminal Conduct

1.a. The Applicant was arrested in July of 1971, and subsequently charged with Possession of Narcotic - Marijuana (TR at page 27 line 11 to page 28 line 18). Although this charge was ultimately dismissed, the Applicant admits the marijuana possession, when he was 19 years of age (*Id.*).

The Applicant was married to his current spouse in 1983 (Government Exhibit (GX) 1 at page 2). She suffers from alcohol abuse and depression (TR at page 47 line 21 to page 48 line 22, and Applicant's Exhibit (AppX) R).

1.b. The Applicant was arrested in September of 1985, and subsequently charged with a Battery, in an incident involving his spouse (TR at page 28 line 23 to page 29 line 12, and GX 6 at page 4). This charge was ultimately dismissed (*Id*).

1.c. The Applicant was arrested in November of 1986, and subsequently charged with Inflict Corporal Injury to Spouse/Co-Habitant (Felony) (TR at page 29 line 13 to page 31 line 7, and GXs 2 and 5). This charge was not prosecuted due to "Lack of Corpus," as both spouses showed signs of Corporal Injury (GX 5 at page 12).

1.d. The Applicant was arrested in September of 1991, and again subsequently charged with Inflict Corporal Injury to Spouse/Co-Habitant (Felony) (TR at page 31 lines 8~21, and GXs 2 and 4). This charge was ultimately dismissed (*Id*).

1.e. The Applicant was detained in June of 1995, and subsequently charged with Spousal Abuse (TR at page 32 line 20 to page 33 line 7, at page 49 line 18 to page 51 line 13 and GX 3). This charge was ultimately dismissed (*Id*). After this last incident, the Applicant's spouse sought professional help to combat her depression (TR at page 49 line 18 to page 51 line 13, and AppX R).

1.f. The Applicant categorically denies that any criminal incident occurred in 2005 (TR at page 33 lines 8~19, at page 34 lines 13~22, and at page 45 line 22 to page 46 line 10). The Government has offered no evidence showing that any incident occurred.

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.

f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, 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.

The Government must make out a case under Guideline J (criminal conduct), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant's admitted past Criminal Conduct is evidenced by four arrests occurring in 1971, 1985, 1986 and 1991; and a detention occurring in 1995. The first and second disqualifying conditions under Criminal Conduct are therefore applicable, as there are "[a]llegations or admissions of criminal conduct," and "multiple lesser offenses" present. However, the first and last mitigating conditions are also applicable, as the "criminal behavior is not recent," having occurred more than 12 years ago; and "[t]here is clear evidence of successful rehabilitation," as evidenced by those who know and/or work with the Applicant.

Furthermore, I am not limited to the mitigating conditions, delineated in the Directive, in deciding if an Applicant has demonstrated extenuation or mitigation. Here, as stated above, those who know the Applicant speak most highly of his character, credibility and trustworthiness (AppXs A~D, and O~Q). The totality of the Appellant's conduct and circumstances, as set forth at length above, clearly warrants a favorable Decision under the "whole person concept." Mitigation is shown; and as such, Guideline J is found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his past Criminal Conduct. The Applicant has thus met the mitigating condition of Guideline J, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guideline J.

