

KEYWORD: Criminal Conduct

DIGEST: Applicant has a recurrent history of arrests over a five-year period involving domestic violence. In each case, the charges were challenged by Applicant for reasons she did nothing wrong. The record lacks any evidence to challenge Applicant's explanations of the events and circumstances underlying her respective arrests. The charges were dismissed in each of the cases without any qualifications to which evidence of criminal conduct might be attributed to Applicant. Considering Applicant's explanations and her overall record of meritorious service with her employer, Applicant's arrests are concluded to be unsubstantiated. Clearance is granted.

CASENO: 06-18408.h1

DATE: 08/30/2007

DATE: August 30, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-18408
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
ROGER C. WESLEY**

APPEARANCES

FOR GOVERNMENT
Julie R. Edmunds, Department Counsel

FOR APPLICANT
Robert M. Martinez
Personal Representative

SYNOPSIS

Applicant has a recurrent history of arrests over a five-year period involving domestic violence. In each case, the charges were challenged by Applicant for reasons she did nothing wrong. The record lacks any evidence to challenge Applicant's explanations of the events and circumstances underlying her respective arrests. The charges were dismissed in each of the cases without any qualifications to which evidence of criminal conduct might be attributed to Applicant. Considering Applicant's explanations and her overall record of meritorious service with her employer, Applicant's arrests are concluded to be unsubstantiated. Clearance is granted.

STATEMENT OF THE CASE

On August 25, 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 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on May 7, 2007, and requested a hearing. The case was assigned to me on June 12, 2007, and was scheduled for hearing on July 23, 2007. A hearing was held on July 23, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of two exhibits; Applicant relied on one witness (herself) and three exhibits. The transcript (R.T.) was received on August 1, 2007.

PROCEDURAL ISSUES

_____ Before the close of the hearing, Department Counsel moved to strike paragraph 1.e of the SOR. There being no objection from Applicant, and good cause shown, Department Counsel's motion was granted.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have been arrested on multiple occasions between May 1999 and May 2004 (four in all) and charged with assault/domestic violence and related charges, with the charges in each of the listed cases dismissed. She is also alleged to have been charged in January 1980 with unauthorized personnel in the barracks room, for which she was fined a \$100.00 a month for two months and placed on three months probation.

For her response to the SOR, Applicant admitted all but one of the separate charges. She denied only the January 1980 unauthorized personnel in barracks charges (which were subsequently

removed from the SOR as a source of security concern). Applicant provided explanations of the circumstances associated with each of her domestic violence arrests.

STATEMENT OF FACTS

_____Applicant is a 44year-old assembly technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant has been married for 23 years to the same husband (H) and has three children (ages 6, 7 and 11). She also has a niece (age 20) who has been living with her since her enrollment in the seventh grade (R.T., at 19).

Prior to 1999, Applicant had never been in any kind of trouble with law enforcement authorities (R.T., at 20). Applicant was three months pregnant in May 1999 and suspected H was having an affair with another woman. On her way home (with her son in the car) on May 9, 1999 (mother's day), she passed by her uncle's house. In the driveway of her uncle's house she observed H and an another woman sitting atop of their family car. Upon confronting H, she learned that he had been having an affair with the woman (R.T., at 20-21). Upset over what she learned, she threw a small rock at H's car window and shattered the window glass. Some unidentified person, in turn, then called the police who responded to the call. Once the police arrived, Applicant confirmed to the police that she had thrown a rock at their car, which broke the window. Based on Applicant's acknowledgment and H's insistence, the police arrested Applicant and charged her with assault/domestic violence, damage to property, and disorderly conduct. Once she explained the events to the court, the court referred her to domestic violence classes and deferred adjudication. Once she documented completing the classes, the court dismissed the charges against her (R.T., at 23).

The following week (on May 18, 1999), Applicant and H became involved in another domestic argument upon his return home. H threatened Applicant with calling the police and taking their son from their home. When she did not leave alone, he called the police. When the police arrived at their home, H claimed Applicant tore his shirt. Despite Applicant's denials, the police placed her under arrest and escorted her to the local police station for booking. Once in court to answer charges of domestic violence/assault and domestic violence criminal damage, Applicant persuaded the court that H was at fault and obtained a restraining order against his coming to their home. Pending charges against Applicant, in turn, were dismissed.

Soon after her May 1999 court appearances, Applicant and H reconciled. They managed to live together for a number of years in relative harmony before their marriage began to unravel over renewed Applicant concerns about her husband's fidelity.

In May 2003, Applicant was approached by her brother (B), who asked to borrow money from her. B was renting a trailer from Applicant and H at the time and sometimes encountered difficulties paying his rent (R.T., at 23-24). Applicant's mother and B's wife had passed away, and B had few financial resources to care for his two girls (one being Applicant's niece). B's financial problems were compounded after he remarried to a woman who had three children of her own. B

had since married C and often pressed Applicant to lend him money to pay his rent (R.T., at 24). Concerned about B and his daughters after their mother passed away, Applicant did not want to force B to vacate the trailer (R.T., at 23-24).

When Applicant arrived at B's trailer, she was greeted by her niece, who said her father was too ill to come out to talk with her. Overhearing the niece's request to leave with Applicant, Applicant's sister-in-law (C) interrupted Applicant's conversation with her niece and intervened in Applicant's conversation with her niece. Arguments ensued between Applicant and C (R.T., at 24, 39-40). Applicant then left the trailer site without her niece and returned home.

Following her return home, a police officer came to the house and questioned her about whether she had been to B's trailer. When Applicant responded affirmatively, the police officer informed her that B's wife claimed Applicant struck her in the arm (R.T., at 25). Despite her denials, the officer then placed her under arrest and took her to the police station to face charges of assault/minor injury-domestic violence. After telling her story of innocence to the court, the court dismissed the charges against her (R.T., at 25-26). Thereafter, H informed B and his wife that since he could not control his wife, they must vacate the trailer (R.T., at 40).

Following her 2003 arrest, Applicant did not speak to either B or C for a considerable period of time. She had maintained physical custody of her niece for a number of years when B called her on or about May 31, 2004 to inquire about seeing his daughter. After telling Applicant that he and his wife were separated, B told her that his other daughter missed her sister (Applicant's niece) and wanted to see her (R.T., at 26-28). Believing everything was alright with B and his family, Applicant consented to bringing her niece over to B's apartment.

Once B told C that Applicant had been over to see him, she called the police and claimed Applicant had come to her place and assaulted her (R.T., at 27-28). A short time later, a police officer came to Applicant's house and asked if she had been to her sister-in-law's house. Applicant replied she had not. Despite Applicant's denial, this police officer arrested Applicant for assault/domestic violence, disorderly conduct and false report to law enforcement. When Applicant appeared in court to answer charges stemming from her May 2004 arrest, the charges were dismissed (R.T., at 28). Since the dismissal of these charges, Applicant has had no further contact with B and her sister-in-law (R.T., at 30-32).

In the week preceding her security clearance hearing in this matter, Applicant became involved in a domestic quarrel with H over the same woman H was seeing in 1999. Applicant claims H struck their son in the face (R.T., at 51-53). Police investigated the incident but made no arrests or report that can be documented. Applicant says she intends to seek a divorce from H (R.T., at 54) and will ascertain whether H moved out of their house when she returns home after the hearing.

There are no available police reports to shed any further light on the events and circumstances associated with any of Applicant's arrests. The FBI's arrest identification record (see ex. 2) reports only the individual arrests and supplies no additional information about the events and circumstances and dispositions. Without any more record evidence to counter Applicant's explanations of the underlying events, her explanations are entitled to acceptance.

Applicant has good references. Her first-line supervisor and colleagues who have worked with her over the past seven years and are familiar with her work habits describe her as a good team player who is always available to help and train other personnel, and does so in a positive, professional and trustworthy way (*see ex. B; R.T., at 34-36*). Applicant is held in high esteem by her colleagues and is considered a dedicated assembler.

Applicant is the recipient of numerous certificates and awards recognizing her service achievements with her employer (*see ex. C; R.T., at 34-35*). Her certificates and awards commend her for her commitments and dedication to her employer over a 15-year period of service.

POLICIES

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

The Concern: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the

applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant is a meritorious satellite technician who has been the subject of a number of domestic violence arrests (four altogether) between May 1999 and May 2004. Security concerns are raised over Applicant's arrest history, despite the ensuing dismissal of each of them.

Applicant's four domestic violence arrests warrant initial consideration of two disqualifying conditions of the Adjudicative Guidelines for criminal conduct: DC 31a (*a single serious crime or multiple lesser offenses*) and DC 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged*). However, each of Applicant's four arrests resulted in dismissals of the underlying charges and no reports of statements from police, participants, or witnesses that, if present, might serve to challenge Applicant's claims of the events and circumstances of the underlying events.

Without any evidence to challenge Applicant's explanations of the underlying events and circumstances, the criminal conduct concerns that are based on her four respective arrests are not substantiated. True, she accepted and completed counseling under the court's diversionary program before the first May 1999 charges covering assault and property damage were dismissed. Her explanations, though, if believed by the court provide considerable provocation for her hurling a small stone at the family vehicle. The proven conduct in this first 1999 incident does not match the charges, and these dismissed charges remain for the most part unsubstantiated as well.

Applicant may rely on MC 32(c) (*evidence that the person did not commit the offense*) of the guidelines for criminal conduct. The arrests by themselves are insufficient to warrant continuing security concerns about her judgment, reliability and trustworthiness. Her first line supervisor and colleagues hold her in high esteem and value her team work and professionalism over a considerable period of time. These collective impressions of Applicant speak positively of her character. So, both from a consideration of the applicable guidelines and from a whole person perspective, Applicant meets all of the minimum requirements for continued eligibility to hold a security clearance. Taking into account all of the facts and circumstances developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.d of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the E2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE J: (CRIMINAL CONDUCT):	FOR APPLICANT
Sub-para. 1.a:	FOR APPLICANT
Sub-para. 1.b:	FOR APPLICANT
Sub-para. 1.c:	FOR APPLICANT
Sub-para. 1.d:	FOR 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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge