

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Criminal harassment of the Applicant's wife during the time the parties were separated, and his constant violation of court orders prohibiting him from contacting her has placed him in jail on three different occasions in 1997. On January 26, 2000, Applicant plead guilty to five criminal Stalking charges, wherein he was place on supervised probation for five years. His period of supervised probation will expire in December 2005. At the time of the ISCR hearing he was on supervised probation. Clearance denied.

CASENO: 01-05909.h1

DATE: 01/31/2002

DATE: January 31, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-05909

DECISION OF ADMINISTRATIVE JUDGE

WILLIAM R. KEARNEY

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Criminal harassment of the Applicant's wife during the time the parties were separated, and his constant violation of court orders prohibiting him from contacting her has placed him in jail on three different occasions in 1997. On January 26, 2000, Applicant plead guilty to five criminal Stalking charges, wherein he was placed on supervised probation for five years. His period of supervised probation will expire in December 2005. At the time of the ISCR hearing he was on supervised probation. Clearance denied.

STATEMENT OF THE CASE

On, March 2, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 granted, continued, denied, or revoked. In a sworn written statement, dated, March 22, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

AMENDMENTS TO THE STATEMENT OF REASONS

The Government on April 24, 2001, filed a Motion to Amend the SOR, which sets forth an additional subparagraph 1(f), which alleges that the Applicant, on December 26, 2000, was criminally charged with five misdemeanor counts of Stalking in violation of the Georgia criminal code Section 16-5-90. This motion was formally withdrawn by the Department Counsel during the hearing. (Tr page 15).

On December 26, 2000, the Applicant plead guilty to the five misdemeanor criminal counts, and later he was sentenced to five years probation. On August 16, 2001, Department Counsel filed another Motion to Amend the SOR, which is more detailed and it alleged two additional subparagraphs 1(f) and 1(g). Subparagraph 1(f) is similar to the allegations stated aforesaid, with the exception that it alleges that the Applicant was sentenced to confinement for a period of 12 months for each count to be served consecutively. The Court ordered that the sentence to confinement may be served on probation for a total of five years probation. Subparagraph 1(g) alleged that as a result of the facts alleged in subparagraph 1(f), that 10 U.S.C. Section 986 disqualifies the Applicant from holding a security clearance. It also provided that, in a meritorious case, the Secretary of Defense may authorize an exception to this prohibition. The Applicant did not file a written response to this latest Motion to Amend the SOR. The motion, dated April 24, 2000, was formally withdrawn by the Department Counsel during the hearing. (Tr page 15).

At the time of the hearing, the matters of the amendments to the SOR and the Applicant's answer to them were addressed. The Motion to Amend the SOR, dated April 24, 2001, was withdrawn by the Department Counsel, *supra*. As to the second Motion to Amend the SOR, dated August 16, 2001, it was granted and the Applicant was given the opportunity to orally answer the motion including the two new subparagraphs 1(f) and 1(g) to the SOR, on the record. Applicant admitted the allegations contained in both subparagraphs 1(f) and 1(g), of the SOR, as set forth in the Government's Motion dated August 16, 2001. (See Tr pages 17 and 19).

The undersigned Administrative Judge received the case assignment on September 13, 2001, and an amended notice of hearing was issued on September 19, 2001. The undersigned held a hearing on October 22, 2001. The Department Counsel presented eighteen (18) exhibits in support of its case. The Applicant's case consisted of the presentation of eleven (11) exhibits and his own testimony. The record in this case was closed at 4:55 p.m. on October 22, 2001. The undersigned Administrative Judge received the Transcript ("Tr") of the hearing on October 30, 2001.

FINDINGS OF FACT

The Statement of Reasons (SOR) and the amendments thereto, consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline J (criminal conduct); and paragraph 2, Guideline E (personal conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence of record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 56 year old divorced male who has been married and divorced twice. He was first married in November 1965, and was divorced in 1973. Thereafter, he was married for the second time on October 10, 1978. This marriage also ended in a divorce on August 26, 1997. At the present time he has twenty-four-years of employment with U.S. Government contractors. The Applicant seeks to retain a secret level security clearance.

Under Guideline J, criminal conduct, Applicants' criminal conduct derives primarily from Applicant's relationship with his second ex-wife and his disregard and violation of several court orders wherein he was ordered not to be near or around her. During the time the parties were separated, the Applicant was attempting to stop their divorce, settle their differences, reconcile and win his wife back.

The Applicant, in his written and sworn Answer to the Statement of Reasons, dated March 22, 2001, admitted the first sentence of paragraph one, subparagraph 1.a, of the SOR, which charged him on June 2, 1974, with Simple Battery and committing Terroristic Threats and Acts concerning his first wife. He denies the remaining section of the subparagraph. The evidence of record reflects that the acts of the Applicant occurred more than twenty-seven years ago and are quite old. However, after several years he began similar conduct with his second wife.

SOR subparagraph 1.b; the Applicant in his response to the SOR, has admitted that on November 13, 1996, he was charged with Family-violence Battery, and two counts of Battery, and that he was released from jail, subject to a temporary protective order which included special terms imposed by the court, which prohibited the Applicant from having any further contact with his wife. He went to trial on these criminal charges and on June 12, 1997, after a jury trial, he was found not guilty of these criminal charges.

SOR subparagraph 1.c; the Applicant was arrested on January 15, 1997, and charged with Aggravated Stalking, a felony, and Aggravated Assault, a felony, as Applicant had met with his wife and exhibited a hand gun, all in violation of the existing protective order. On February 3, 1997, he was released from jail after posting an additional \$50,000.00 bond.

SOR subparagraph 1.d; the Applicant, on or about February 14, 1997, in violation of his bond, the made numerous telephone calls to his ex-wife. On February 20, 1997, at a bond revocation hearing, the court found that the Applicant violated the conditions of his bond, dated February 3, 1997, and revoked his bond and ordered him to report to jail by 5:00 P.M. February 20, 1997. The court further ordered that his bond be increased to a total of \$75,000.00, and a special condition that the Applicant is to have no contact whatsoever directly or indirectly with his ex-wife, which includes any form of written or electronic communication. He was released from jail on the same date after making bond.

SOR subparagraph 1.e; the Applicant, in violations of the conditions of his bond, rode his motorcycle around his ex-wife's house while waiving at her. He was subsequently arrested and charged with Aggravated Stalking, a felony. His bond was revoked and he was ordered held without bond pending trial. Subsequently he was also indicted by a grand jury on two counts of Aggravated Stalking, a felony and one count of Aggravated Assault. As a result of the Applicant's bond being revoked, he remained in jail from May 7, 1997 until October 23, 1997. The Applicant then pled guilty to all three criminal charges, and was placed on 36 months probation, (12 months consecutively for each conviction), fined \$1,000.00, plus court cost, and was ordered to perform 48 hours of community service , plus undergo psychiatric counseling. He was further ordered to have no contact, with direct or indirect, with his ex-wife.

SOR subparagraph 1.f; the Applicant on November 13, 2000, sent his ex-wife flowers and a card, thereafter, on November 27, 2000, December 4, 2000, December 6, 2000, and December 11, 2000, sent her additional cards. These cards were entitled "I'm Gonna Love You Forever," "Hanging On Until Your Next Hug," "Hello, I Love You," and "Can't Wait Until I See You Again ...Naked." On January 25, 2001, the Applicant was arrested and charged with five counts of misdemeanor Stalking in violation the State Law. On the same date, he plead guilty to all five counts of stalking and was sentenced to confinement for a period of 12 months for each count to be served consecutively. The Court ordered that this sentence of confinement could be served on probation for a total of five years probation. In addition, he was fined \$500.00 and assessed additional court costs. The Applicant on the record (Tr page 90) has admitted the allegations set forth in this subparagraph. He claims that he plead guilty to the five counts of Stalking, to save his job, by getting out of jail and going back to work.

SOR subparagraph 1.g; interjects Title 10 U.S.C. Section 986, (Smith Amendment), which alleges that the Applicant is disqualified from having a security clearance granted or renewed by the Department of Defense, as the facts allege that Applicant was convicted for more than one year. It further alleges that in his response he may include information which could support consideration of a waiver of this statute. However, at the time of the hearing, when the Applicant answered or responded to subparagraphs 1.f, and 1.g, he did not include sufficient additional information or evidence that would support a waiver of the statute.

The Applicant has testified that he would not hurt or harm his wife, and that his actions were attempts to reconcile with his ex-wife and to prevent her from getting a divorce. However, his actions were in violation of several court orders wherein he was advised by the court several times not to be near or around his wife. In the court order of February 20, 1997, (Exhibit No. 11.a) the court specifically instructs the Applicant that he ". . . is to have no contact whatsoever directly or indirectly with his wife. This includes any form of written or electronic communication. This includes family members as well as any other person. r. M. is to communicate with his wife regarding the divorce and any other necessary matters through his attorney. Any other communication or contact in any manner shall be considered grounds for revoking this Bond. Since Mr. and Ms. M. live in close proximity to each other, inadvertent contact is to be avoided. However, should Mr. M. inadvertently find himself in close proximity to Ms. M. he has an affirmative duty to remove himself from the vicinity immediately r. M. is to avoid going in the neighborhood where her home is located and is to avoid going in the neighborhood where she works."

Under SOR Paragraph 2, Guideline E, personal conduct, it is derived from the Applicant's unwillingness to comply with the Court's orders and rules stemming from the Applicant's many violations of Court imposed sanctions and conditions based on his criminal conduct regarding his wife, and his violation of the court's order to stay away from her.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE J - CRIMINAL CONDUCT

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

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, re-gardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses.
- c. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year (under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts-martial, and sentenced to im-prisonment for a term exceeding one year, may not be granted or have renewed access to classified inform-ation. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concern-ed, may authorize a waiver of this prohibition);

Conditions that could mitigate security concerns include:

No mitigating conditions are applicable.

GUIDELINE E - PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(5) A pattern of dishonesty or rule violations.

There are no mitigating conditions that could apply to the facts in this case.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an Applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching a fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an Applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an Applicant's judgment, reliability or trustworthiness, the Applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and during the subject hearing, I had ample opportunity to evaluate the demeanor of the Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony. Aside from the unexplained inconsistencies regarding the current status of some of his criminal activities, it is my impression that his explanations regarding his past domestic and criminal problems are inconsistent, and hence, considering the quality of the other evidence before me, have the resonance of untruthfulness. Therefore, the undersigned concludes that the Applicant has not successfully rebutted or overcome the Government's case with regard to all the allegations contained in Guideline J of the SOR. I further conclude that the Government has established its

case with regard to Guideline E.

A review of all the evidence of record reveals that the Applicant's problems stem from his domestic relations with his wives. He apparently could not control the thought of them leaving or divorcing him. He had the same problem with his first wife, wherein he was charged with Simple Battery and committing Terroristic Threats and Acts. At the time of his second marriage, he carried on the same way, and, on November 13, 1996, he was charged with Family Violence-Battery and two counts of Battery. As the result of a jury trial, on June 12, 1997, the Applicant was found not guilty of the criminal charges of Family Violence-Battery and the two Battery criminal charges.

The court made a temporary protective order which prohibited him from having any further contact with his wife. During the calendar year 1997, the Applicant was arrested and placed in jail on three different occasions for violating the protective order. These arrests occurred in January 1997, February 1997, and May 1997. On December 26, 2000, he was again arrested and charged with five counts of Stalking (by sending cards, notes and packages repeatedly professing a desire to continue romantic contact) his ex-wife. On January 25, 2001, he plead guilty to the five counts and was sentenced to supervised probation for a period of twelve months consecutive for each of the five counts of Stalking, or a total of five years probation. (Exhibit 16. C). Applicant's supervised probationary status is scheduled to last until December 12, 2005.

Black's Law Dictionary, Revised Fourth Edition, defines Collateral Estoppel as "The collateral determination of a question by a court having general jurisdiction of the subject." Under the doctrine of Collateral Estoppel, I am precluded from reviewing the facts of a particular case and must accept the decision of a competent court that ruled on the matter. I am required to give full weight to Applicant's guilty pleas and reject Applicant's attempt to attack the validity of his guilty pleas. Therefore, I am bound to accept the fact that on January 25, 2001, the Applicant plead guilty to five Stalking criminal charges, and was sentence to probation for twelve months consecutive for each count, or a total of five years probation. The court gave the Applicant credit for time served. It would be arbitrary, capricious and contrary to law for this Judge to find that Applicant did not engage in the criminal conduct covered by his guilty pleas.

Due process of law does not give an Applicant the right to relitigate matters that have been adjudicated in a prior due process proceeding. *See, e.g. Montana v United State*, 440 U.S.147, 153-54 (1979); *Chisholm v. Defense Logisitcs Agency*, 656 F.3rd 42, 46 (3rd Cir. 1982). Federal and state criminal proceedings are entitled to be given full recognition and respect under the doctrine of collateral estoppel because they are conducted under procedural and evidentiary requirements that exceed those applicable to industrial security clearance cases, and must satisfy Federal and state constitutional requirements of due process that pay special attention to the rights of criminal defendants. *See ISCR Case No. 96-0525* (June 17, 1997) at p. 4 n.4, and *ISCR Case No. 99-0116*, Appeal Board Decision, (May 1, 2000). at p. 3. Applicants' motivation for entering the guilty pleas is irrelevant to its legal effect.

In reaching my decision in this particular case, I have seriously considered Applicant's current supervised probationary status, and the fact that he was on supervised probation at the time of the hearing, and he has more than four years to serve before being released from his supervised probation.

Each clearance decision is required to take into consideration pertinent factors set forth in Enclosure 2 under the Adjudicative Process of the Directive. In reaching my conclusions and decision, I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; his motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstances or conduct will continue or recur in the future.

A review of the guidelines under Guideline J reveals that disqualifying conditions a. and b. (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and A single serious crime or multiple lesser offenses;) are most applicable to the facts of criminal conduct in this case and they raises a serious security concern about the Applicant. Disqualifying condition c. (Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year) is not applicable to the facts in this case. The Smith Amendment 10 U.S.C.986, requires that one must be convicted and sentenced to imprisonment for a term exceeding one year. In this case, the Applicant was not sentenced to imprisonment, he was sentenced to twelve months supervisory probation for each of the five counts that he plead guilty, or a total of five years supervisory probation.

There is no doubt that if the state court wanted to place the Applicant in jail, it could have done so without placing him on supervisory probation, however, it did not. The Government is attempting to twist the facts in this case to conclude that the Applicant was sentenced to imprisonment instead of probation. I find against the Applicant as to SOR subparagraphs 1.a, 1.b, 1.c, and 1.d.

A review of the disqualifying guidelines under Guideline E, personal conduct, reveals that condition five does raise a security concern regarding the Applicant and it is disqualifying. There were no mitigating conditions that are applicable to the facts in this case. I find against the Applicant as to SOR subparagraph 2.a.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2. Guideline E: Against Applicant

Subparagraph 2.a.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

William R. Kearney

Administrative Judge