

KEYWORD: Criminal Conduct

DIGEST: Thirty-five year old Applicant's October 1994 arrest for violation of a protective order, and his subsequent conviction of same, along with his sentence to imprisonment for 2 ½ years; his subsequent arrests, conviction, and imprisonment for the same crime; and the absence of clear evidence of successful rehabilitation raise grave questions and doubts as to his security eligibility and suitability. Furthermore, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied, and further consideration of this case for a waiver of 10 U.S.C. 986 is not recommended.

CASENO: 01-13695.h1

DATE: 06/14/2002

DATE: May 14, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13695

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Thirty-five year old Applicant's October 1994 arrest for violation of a protective order, and his subsequent conviction of same, along with his sentence to imprisonment for 2 ½ years; his subsequent arrests, conviction, and imprisonment for the same crime; and the absence of clear evidence of successful rehabilitation raise grave questions and doubts as to his security eligibility and suitability. Furthermore, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied, and further consideration of this case for a waiver of 10 U.S.C. 986 is not recommended.

STATEMENT OF THE CASE

On January 14, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, 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 a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated February 4, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the Government's written case on April 9, 2002. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity, until May 12, 2002, to file objections and submit material in refutation, extenuation, or mitigation. He chose not to do so. The case was assigned to this Administrative Judge on June 3, 2002.

FINDINGS OF FACT

Applicant has admitted both of the factual allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a. and 1.b. Those admissions are incorporated herein as findings of fact. He denied the one conclusory allegation (subparagraph 1.c.).

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 35 year old male employed by a defense contractor, and is seeking to obtain a security clearance.

In October 1992, Applicant and a female neighbor (the victim) commenced a dating relationship.⁽²⁾ In about February 1993, the relationship turned serious when he professed his love for her. In October 1993, he proposed marriage and she accepted. Formal wedding plans commenced at that time. During their engagement, Applicant became concerned because she was becoming moody, disrespectful and uncaring, while at the same time telling him he was "smothering" her.⁽³⁾ On February 14, 1994, he received an unexpected telephone call from the victim announcing she was breaking up with him. Although Applicant sought an explanation from her, she declined to offer one.⁽⁴⁾ Thereafter, he made "persistent efforts" to obtain the explanation.⁽⁵⁾

On July 11, 1994, the victim sought and obtained an Abuse Prevention Order (restraining order) directing that Applicant: (1) not abuse the victim, (2) not contact the victim, either directly or through someone else, and remain 100 yards away from her; (3) leave and stay away from the victim's residence; and (4) surrender all firearms in his possession.⁽⁶⁾ The restraining order was renewed on July 25, 1994, and scheduled to expire on July 25, 1995.⁽⁷⁾ In support of her application for the restraining order, the victim furnished an affidavit claiming Applicant had been consistently harassing her since they broke up in February 1994. The victim stated Applicant had been calling her, following and chasing her around, threatening her, threatening to kill himself, and giving her reason to fear him.⁽⁸⁾ He also purportedly stated he was going to make sure she never did this to anyone else.⁽⁹⁾ She felt he was "obsessed" with her.⁽¹⁰⁾

On October 26, 1994, Applicant was arrested for violating the restraining order the previous evening when he confronted the victim at a local restaurant and told her she had to talk to him, and then later standing in front of her automobile, preventing her from leaving.⁽¹¹⁾ Following a jury trial on the charge of violating the protective order, on

March 2, 1995, Applicant was found guilty, and sentenced to 2 ½ years in the House of Corrections, with one year to serve, two years probation, directed to undergo hospital observation and evaluation, and ordered to attend the Preventing Abuse and Violence Education program.⁽¹²⁾ He was also ordered to have no contact of any type with the victim, including by electronic or print means.⁽¹³⁾

On December 17, 1994, Applicant was arrested for having violated the restraining order earlier that day as well as on a previous occasion.⁽¹⁴⁾ The more recent incident occurred when Applicant telephoned the victim and left a message on her telephone answering machine,⁽¹⁵⁾ and the older incident involved his driving by the victim.⁽¹⁶⁾ On April 27, 1995, upon his plea of guilty to the charge of violation of protective order, he was found guilty and sentenced to three months in the House of Corrections to be served concurrently with the sentence he was at that time already serving.⁽¹⁷⁾

On February 23, 1995, the victim again informed the police that Applicant had again violated the restraining order earlier that month when he sent her a message through a paid newspaper advertisement.⁽¹⁸⁾ Shortly thereafter, Applicant again made contact with the victim at a local nightclub when he spoke to her friends to thank the victim for causing his prior arrest problems.⁽¹⁹⁾ These two incidents were included in his April 1995 charges and sentence.⁽²⁰⁾

The designated forensic psychologist who conducted the aid-in-sentencing evaluation of Applicant in April 1995, reported his impressions of Applicant, in part, as follows:⁽²¹⁾

. . . although [Applicant] presented himself as very open and reasonable regarding his situation with his ex-fiancee, he repeatedly showed great difficulty grasping the need for him to stay away from her. Despite being pressed about the unlawfulness of some of his actions, he continually referred to "deserving an answer" from his ex-fiancee about their break-up and no amount of persuasion seemed to alter his views. He showed a remarkable lack of regard and insight about his role in creating a volatile situation as he focused almost solely on the faults and problems of his ex-fiancee. . . .In short, although he presented to the contrary, he did appear quite obsessed and unrelenting in his righteous pursuit of her. . . .He gave no indication that he would refrain from future restraining order violations.

Applicant admitted being "devastated and emotionally overwhelmed" by the abrupt termination of the relationship, but adamantly denied ever engaging in any type of obsessive or stalking behavior, as described by the victim.⁽²²⁾

Applicant has been employed by his current employer since February 1996. The quality of Applicant's performance was not documented.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision found in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Guideline J]: 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:

(1) allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

(2) a single serious crime or multiple lesser offenses;

(3) conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

Conditions that could mitigate security concerns include:

(1) the criminal behavior was not recent;

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

(1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The memorandum also notes that the statute "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," [\(23\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these

proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline J, the Government has established its case. By his own admission, Applicant was arrested on a number of occasions for violating a restraining order, with several incidents being combined, and resulting in convictions and sentences to jail. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., DC E2.A10.1.2.2., and DC E2.A10.1.2.3.

Applicant admitted the arrests and convictions, but contended they were isolated and not recent. It is true that seven years have passed since his criminal conduct resulted in the conviction after a jury trial on the charge of violation of protective order, and sentenced to 2 ½ years in the House of Corrections. Applicant was, unfortunately involved in a series of such criminal "stalking" incidents, and that negates his contention the incidents were isolated. He has apparently not been involved in any subsequent criminal conduct. Those facts alone might seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1.

However, while a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. In this case, there is a psychological profile to describe his past motivation for the crimes for which he was convicted, and they present a picture of an obsessed personality with little regard for the law or for the consequences of his violations of the law.

Moreover, despite his initial arrest, he disregarded the restraining order and continued to harass and stalk the victim, notwithstanding his denials. Recidivism does not engender confidence in purported rehabilitation. Without more, I simply do not believe the period of time from the most recent incidents to the closing of the record, is sufficient to

persuade me recurrence of such criminal conduct is unlikely. Under these circumstances, I am unable to find any evidence of successful rehabilitation, and the potential application of MC E2.A10.1.3.6. (there is clear evidence of successful rehabilitation) fails. Consequently, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

Applicant's criminal conduct--violation of a protective order--in this regard also falls within the application of 10 U.S.C. 986. He was convicted in a state court of a crime and sentenced to imprisonment for a term of 2 ½ years, a term which obviously exceeds the one year period envisioned in the new law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to be released from prison long before the full term of his sentence was actually served, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegation 1.c., as it applies to allegation 1.b. of the SOR, is concluded against Applicant.

Applicant is now fully accountable for his past actions and activities. In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Robert Robinson Gales

Chief Administrative Judge

1. The Government submitted 13 items in support of its contentions.
2. *See* Item 9 (State Hospital Aid-In-Sentencing Evaluation, dated April 7, 1995), at 2.
3. *Id.*, at 3.
4. *See* Item 5 (Statement, dated December 15, 2000), at 1.
5. *Ibid.*
6. *See* Item 6 (Abuse Prevention Order (209A), dated July 11, 1994), at 1.
7. *Ibid.*
8. *See* Item 6 (Affidavit attached to 209A), *supra* note 6, at 2.
9. *Ibid.*
10. *Ibid.*
11. *See* Item 7 (Police Incident Report, dated October 26, 1994), at 1-2.
12. *See* Item 8 (Court Docket, undated, but covering period November 8, 1994 through April 13, 1995), at 2-3.
13. *Ibid.*
14. *See* Item 10 (Police Department Arrest Report, dated December 17, 1994), at 1-3.

15. *Id.*, at 3.

16. *See* Item 5, *supra* note 4, at 3.

17. *See* Item 11 (Court Docket, undated).

18. *See* Item 12 (Police Officer's Narrative Report, dated February 23, 1995), at 1.

19. *See* Item 5, *supra* note 4, at 3.

20. *Id.*, at 4

21. *See* Item 9, *supra* note 2, at

22. *See* Item 5, *supra* note 4, at 4.

23. *See* Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)