

DATE: September 13, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25926

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's arrest and conviction for Fighting in a Public Place or Challenging Another Person to Fight in a Public Place, which occurred over two years ago, was mitigated by sufficient evidence of rehabilitation and reform. Clearance is granted.

STATEMENT OF THE CASE

On April 25, 2002, 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 and modified, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on May 10, 2002, and requested a hearing before a DOHA Administrative Judge. This case was transferred to the undersigned Administrative Judge on July 15, 2002. A notice of hearing was issued on August 1, 2002. The hearing was held on August 28, 2002, at which the Government presented four exhibits. The Applicant presented three exhibits. The Applicant testified on his own behalf. The official transcript (Tr.) was received on September 9, 2002.

FINDINGS OF FACT

The Applicant is 40 years old, single, and has an Associates of Arts Degree in Aviation Maintenance. He is employed by a defense contractor as a Aircraft echanic and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the

Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant has a history of criminal activity that creates doubt about his judgment, reliability and trustworthiness.

On March 1, 1982, the Applicant was charged with Battery for an incident that occurred on December 23, 1981. The Applicant explained that when he was nineteen years old, he was at a park with his girlfriend (who was wearing a bathing suit at the time), when a man walked by and made an insulting remark. The Applicant commented back to him using profanity. From what he can remember, there was no physical altercation. He was not under the influence of alcohol, and did not strike the man. They simply went their separate ways. The Applicant was later approached by a police officer and questioned about the matter. There is no evidence in the record to the contrary, as the police report of this incident was not placed in the record.

Later that month, the Applicant entered the Air Force, and went to boot camp. At some point, the Applicant's father informed him that he had been charged with Battery. The Applicant, being immature at the time, did not appear for the arraignment. A warrant was issued for his arrest. Ten years later, on January 6, 1992, the Applicant was arrested for the offense. The Applicant appeared before the judge and pled Nolo Contendere to the charge. Adjudication was withheld and he was fined \$100.00. The Applicant realizes that he should have handled this matter differently. Today, he would address the situation quickly and abide by the law. (Tr. p. 20).

The Applicant was arrested on March 31, 2000, and charged with (1) Battery and (2) Fighting in a Public Place or Challenging Another Person to Fight in a Public Place. The Applicant testified that he and his son got into an argument about his son's ongoing poor attitude and behavior. The Applicant's son had a history of stealing and lying, and the Applicant was continually discussing these issues with his son. On this particular day, the Applicant was frustrated and angry with his son for stealing from his sister. The Applicant explained that his son showed no remorse or understanding. The Applicant stated that he lost control and with a closed fist he hit his then fourteen year old son in the jaw. He did not want to hurt his son, but only wake him up to let him know that his actions were hurting everybody. The Applicant then grabbed his son by the collar, and would not let him go. He continued to lecture his son. His son was very angry. Someone in the neighborhood called the police. They took a report and left. The Applicant was not arrested. He ultimately appeared in court on the charges, pled Nolo Contendere to Count (2) and was sentenced to one day in jail, placed on three years probation, fined a total of \$540.00, and ordered to take anger management classes. The Applicant successfully satisfied all of the courts requirements. On August 6, 2002, his probation was terminated early due to good conduct. Count (1) was dismissed.

The Applicant explained that he has been a single parent, raising his two children alone, since his daughter was the age of three, and his son was only nine months old. The Applicant believes that the fact that his son did not have two parents to raise him has had a negative impact on how he has developed. The Applicant has had a rigorous workload that took him away from his home much of the time. As a result, his son was left by himself with lots of unstructured time. The Applicant stated that if he had it to do again, he would not discipline his children with corporal punishment.

Since the incident, the Applicant has never hit his son again. The Applicant is extremely remorseful for losing control of his anger and realizes that he was very wrong to hit his son. The Applicant states that he is not a violent person. He has learned through his anger management classes how to better channel his anger and different methods of discipline.

The Applicant's son has recently moved out of state to live with the Applicant's sister. She can offer him a family environment that hopefully will give him a different opportunity, and the help that he needs. The Applicant hopes that his son will eventually be able to see things with a different perspective and learn and grow in maturity. The Applicant indicates that he sincerely loves his son, but they still have conflict.

Mitigation.

Letters of recommendation from the Applicant's two former managers and his present manager indicate that the Applicant's work habits and quality of work is above average. He is considered reliable, conscientious and trustworthy. (See, Applicant's Exhibits A and B).

Other letters of recommendation from coworkers of the Applicant indicate that he is a valuable employee on the job. (See, Applicant's Exhibit C).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

2. The crime was an isolated incident;
5. There is clear evidence of successful rehabilitation.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . .

shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of criminal conduct that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Criminal Conduct reflects questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information. 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 in his private affairs, then there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

The record evidence establishes that when the Applicant was nineteen years old, he got into some sort of verbal altercation that resulted in a charge and conviction for Battery. At that time, he was young, immature and irresponsible. This occurred over twenty years ago, and is no longer of security significance, as he has mitigated the impact.

The more important allegation in this case is the Applicant's arrest and conviction for Fighting in a Public Place or Challenging Another Person to Fight in a Public Place, that occurred in March 2000, over two years ago. This conduct is intolerable and unacceptable. There is, however, clear evidence of successful rehabilitation. Since the incident, the Applicant has received counseling, dealing with anger control to determine the underlying causes for his criminal violation. It appears that the Applicant has gained the insight into the seriousness of this criminal conduct, in striking his son in the jaw, and is prepared to act responsibly and is unlikely to repeat this irresponsible method of punishment. The Applicant expresses genuine remorse and empathy for his son that he appears to love very much and wants the best for. The Applicant has satisfied all of the court sentencing requirements and has completed his probationary period. I find that the Applicant's criminal conduct was isolated, in the past, and will not recur in the future. Accordingly, Guideline J (Criminal Conduct), is found for the Applicant.

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: 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 the Applicant.

Darlene Lokey Anderson

Administrative Judge