

DATE: April 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02885

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Following a domestic altercation in early January 2001, Applicant and his then live-in girlfriend were granted protective orders. In February 2001, Applicant was charged with a violation of protective order for contacting this girlfriend (at her request). In March 2001, he was charged with three counts of misdemeanor domestic violence/simple assault following allegations by this girlfriend of biting her index finger in August 2000, choking her in December 2000 and grabbing and squeezing her arm in early January 2001. Sentenced in June 2001 to twelve months in jail (deferred for one year) for violating the protective order, Applicant in August 2001 pleaded nolo contendere to one count of simple assault for his conduct in August 2000. Given the limited evidence reflective of aggressive behavior on Applicant's part, and the termination of his relationship with this individual, there is little risk, if any, of Applicant committing criminal assault in the future. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated July 30, 2002, to the Applicant. The SOR 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on criminal conduct (guideline J) due to a February 2001 protective order violation and his nolo plea in August 2001 to one count of domestic violence/simple assault involving an ex-girlfriend.

Applicant filed a response dated August 15, 2002, to the SOR, admitting the criminal charges and dispositions as alleged but denying he was the aggressor in any of the domestic incidents. Applicant requested a hearing before a DOHA Administrative Judge, and the case was assigned to me accordingly on December 24, 2002. Pursuant to formal notice dated January 21, 2003, a hearing was scheduled for February 7, 2003.

At the hearing held as scheduled, the Government submitted eight documentary exhibits, which were admitted into the record, Exhibit 3 over Applicant's objection. Applicant and his ex-wife testified on his behalf, and eleven Applicant exhibits were accepted into the record. With the receipt on February 27, 2003, of the transcript of the proceeding, this case is ripe for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 46-year-old senior electronics technician, who has been employed by the same defense contractor since April 1982. Applicant seeks to retain a secret security clearance which he has held since 1985.

After ten years of marriage, Applicant and his spouse separated in December 1997 due to irreconcilable differences.⁽¹⁾ With no history of physical abuse or assaultive behavior by Applicant during their marriage, Applicant's spouse had no problem sharing joint custody of their daughter with him. Applicant became the primary custodial parent of their ten-year-old daughter, especially during the school year, as his spouse moved to a neighboring state.

Circa April 1998, Applicant began dating a woman with whom he had been acquainted through her previous boyfriend. Aware this woman (Ms. X) had problems with alcohol, Applicant found her charming when she was sober. Their relationship progressed to where she moved in with Applicant and his daughter.

Applicant and this girlfriend had a volatile relationship, due in part to Ms. X verbally abusing his daughter and to Ms. X's abuse of alcohol. On more than one occasion, Applicant's daughter contacted her mother, upset about being subjected to verbal abuse from the girlfriend. Three or four times, Ms. X moved out of the residence only to return a week or two later, promising she would not drink alcohol. Despite the volatility of their relationship, Applicant loved her, so he allowed her to move back in.

On an occasion in August 2000, Applicant and Ms. X had an argument. After he thought they had settled their differences, she began to admonish him to not swear in front of his daughter, pointing her finger at him as she did so. Applicant told her to stop or he would bite her finger. In response to her taunts, he bit her finger in anger and it became infected, requiring treatment at a local hospital at significant cost (approximately \$1,200.00).⁽²⁾

In late December 2000, Applicant came home from work one day to find Ms. X under the influence of alcohol. Angered by his girlfriend's drinking when his daughter was in the home, Applicant got into a verbal altercation with Ms. X during which he grabbed her by the chin and admonished her to stop drinking around his daughter.⁽³⁾

In celebration of New Year's 2001, Applicant and Ms. X attended a gathering at a friend's home where she consumed alcohol to the point of intoxication, and Applicant imbibed two beers. Back at their residence, Ms. X complained of not feeling well. Upset at Applicant's response, she struck him with her fist,⁽⁴⁾ and an argument ensued during which she grabbed a kitchen knife and threatened to kill herself. Applicant physically wrestled the knife from her and called the police. The first officer on the scene observed Ms. X to be "highly intoxicated, disheveled, and bleeding about the mouth." He attempted to interview her, but she could not keep on topic nor relate the exact nature of the assault on her. Applicant told the police his girlfriend became violent toward him during an argument, and as he attempted to contact the police, she grabbed a knife and threatened to kill herself. He managed to wrestle the knife away from her, sustaining a cut to his right index finger. Applicant denied striking her, but admitted he had grabbed her "by the chin, arms, hair and breast just to stop any further violence (sic)." Interviewed by the police as well, Applicant's daughter related she had overheard Ms. X state that she would kill herself. Having observed Applicant as sober, calm and articulate, the police determined Ms. X was the primary aggressor, and they arrested her for domestic violence/simple assault.

At the suggestion of the police, Applicant obtained a temporary restraining order against Ms. X the next day. Six days later, Ms. X applied for a temporary protective order against Applicant for assaultive behavior committed by him on New Year's Day 2001, claiming it was the fifth such incident against her. Following a hearing held in late January 2001, the judge found both parties had been abused and granted each a protective order. At the hearing on Ms. X's protective order, Applicant was questioned by her lawyer about the August 2000 incident where Ms. X claimed he had bitten her

index finger, and about the December 2000 alleged attempt to choke her.

In mid-February 2001, Ms. X contacted Applicant about getting back together and both dropping their respective protective order. Over the next two days, she contacted Applicant at work and at his home. At Ms. X's request, Applicant called her at her home the following Tuesday. After Applicant informed her he did not want to resume their relationship, Ms. X contacted the police and reported him for violating the protective order. Interviewed by the police, Applicant confessed to the violation, but he reported those calls made to him by Ms. X. When asked why he did not report her violations of the restraining order, Applicant reported he had hoped he and Ms. X would work things out. Applicant was arrested for violation of protective order, while his claims against Ms. X were not pursued due to their being unsubstantiated. (S) In fulfillment of his responsibilities as a defense contractor employee with a secret security clearance, Applicant informed his employer of his domestic-related arrest. In June 2001, Applicant pleaded guilty to the misdemeanor offense, and he was sentenced to twelve months in the house of correction, deferred for one year, and fined \$250.00. In June 2002, the court granted a motion to suspend the deferred sentence.

In March 2001, Applicant attended Ms. X's trial on the January 2001 domestic violence/simple assault charge. He reluctantly took his daughter with him to the trial as he felt he had to protect himself, since he had been informed by the police charges were to be filed against him for the incidents which occurred in August 2000, late December 2000, and on New Year's Day 2001. The case against Ms. X was dismissed before Applicant or his daughter testified.

One week later, Applicant was charged with three counts of misdemeanor domestic violence/simple assault: (1) knowingly causing unprivileged physical contact to Ms. X by grabbing her by the neck and squeezing in late December 2000; (2) knowingly causing unprivileged physical contact to Ms. X by grabbing her by the right arm and squeezing on January 1, 2001; and (3) knowingly causing unprivileged physical contact to Ms. X by biting her on the left index finger in August 2001. Applicant pleaded not guilty to all three counts in April 2001. Applicant disclosed his arrest on domestic assault charges to his employer, and he listed both the restraining order violation and domestic simple assault charges as pending when he completed his security clearance application on April 17, 2001. Pursuant to a negotiated plea, Applicant pleaded nolo contendere in August 2001 to one count of domestic violence/simple assault (biting Ms. X on her left index finger in August 2000). He was sentenced to twelve months in the house of correction, deferred, to run concurrent with the sentence for violating the protective order, and ordered to pay restitution (costs of medical treatment) for the injury to Ms. X's finger, to enroll in alcohol counseling, and to complete an anger management program.

One week after his sentencing on the domestic assault charge, Applicant was interviewed by a special agent of the Defense Security Service (DSS). With respect to the January 1, 2001, incident, Applicant indicated he had been assaulted by Ms. X, who had threatened to kill herself with a knife. Applicant indicated that at the hearing to obtain a final restraining order against her, he was asked about the December 2000 and August 2000 incidents where Ms. X claimed self-defense. Applicant denied any intentional infliction of injury to Ms. X's finger in August 2000 or that he attempted to choke her in December 2000. Denying he was the aggressor, Applicant related he did nothing more than protect himself on January 1, 2001, and had never expected to be ordered to alcohol counseling, as he has not been intoxicated since the early 1980s. Citing his unblemished record outside his relationship with Ms. X, including his adherence to the responsibilities of holding a secret clearance for the past seventeen years, Applicant expressed his willingness to provide to the DSS any relevant information regarding the domestic assault charges.

As required by the court, Applicant attended an anger management seminar from mid-September 2001 to early December 2001. In compliance with the program, Applicant attended all thirteen weekly sessions. Applicant found the sessions beneficial and he made progress in the areas of contemplative thinking and making positive deliberate choices in reaction to stress producing situations. In mid-January 2002, Applicant sought a substance abuse evaluation at the recommendation of the court. He was assessed by a licensed alcohol and drug counselor who found he was not a good candidate for substance abuse counseling. In the opinion of this counselor, the anger management counseling had been needed and Applicant benefitted from those sessions.

In August 2002, Applicant paid \$1,192.16 in required restitution to the hospital for the cost of treating Ms. X's injured finger, which amounted to approximately \$1,200.00.

Applicant has not renewed his relationship with Ms. X since the incident of New Year's Day 2001. His divorce from his wife was final that same month. As of February 2003, he was engaged to be married to another woman, with whom his ex-wife is acquainted. Applicant's ex-wife has no concerns for her daughter's physical safety as she knows Applicant's fiancée to be a stable individual. Applicant's ex-wife considers the likelihood of Applicant committing any criminal assault in the future to be "zero," as he was not physically abusive toward her, nor had he exhibited a "short fuse" with regard to his temper.

Applicant is a well respected and valued member of the engineering project team at his place of employment. His effort to comply with company and government rules, practices and procedures has been above average. Conscientious and reliable, Applicant has exhibited no evidence of anger or aggressive behavior on the job. Forthright and aware of his responsibilities as an employee with a security clearance, Applicant informed supervisory and security personnel of the domestic violence incident and his arrest around the time the charges were filed. Impressed by Applicant's forthcoming attitude, the engineering laboratory manager with custodial responsibility for classified information was surprised by the domestic allegations, which he considers to be "unfair and unfounded." He has no reservations about Applicant retaining his clearance, as Applicant has always been a strong team player, personable, and polite on the job, with "one of the most laid back and easy going personalities of anyone [he'd] ever known." The supervisor of the engineering lab, who has worked with Applicant for the past two years "in a dynamic, fast paced and sometimes stressful environment," also attests to Applicant's professional demeanor and temperament at the workplace. Applicant's work performance for the review period from May 2000 to May 2001 was rated as excellent. In March 2002, Applicant was recommended by his supervisor for a monetary award for performance above and beyond his normal job responsibilities.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

GUIDELINE J

Criminal Conduct

The Concern: 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, regardless of whether the person was formally charged
- b. A single serious crime or multiple lesser offenses

Conditions that could mitigate security concerns include:

c. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur

f. There is clear evidence of successful rehabilitation

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion 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 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline J:

From April 1998 to January 1, 2001, Applicant was romantically involved with Ms. X, who had alcohol and personal stability issues. Cohabitants for much of that time, Applicant and this girlfriend had a very volatile personal relationship. On January 1, 2001, Applicant had her arrested for domestic violence/simple assault, following a verbal argument which escalated to unwanted physical contact between them. In late January 2001, each was granted a protective order against the other, after a finding of mutual abuse. In February 2001, Applicant was arrested for violation of the restraining order, and in March 2001 for domestic violence (three counts) for misdemeanor assaults allegedly committed against Ms. X in August 2000 and December 2000, as well as on January 1, 2001.

A history or pattern of criminal activity raises doubts for an individual's judgment, reliability and trustworthiness. Applicant does not dispute that he violated the protective order issued against him in late January 2001 when he contacted Ms. X by telephone (albeit at her request) in February 2001. In court in June 2001, he pleaded guilty to a misdemeanor violation, for which he received a twelve month deferred sentence. In contrast, Applicant pleaded nolo contendere in August 2001 to one count of misdemeanor domestic violence/simple assault (biting his then girlfriend's index finger in August 2000). By entering a nolo plea, Applicant understood that he was admitting to, or not contesting the truth of, the charge against him, and that a conviction would be entered against him. With respect to the August 2000 incident, Applicant claims he was just joking with Ms. X when he grabbed onto her finger "lightly" with his teeth. Applicant was adjudged based on the nolo plea to have knowingly caused unprivileged physical contact to his girlfriend. There is no evidence to corroborate Ms. X's accusation that Applicant attempted to choke her in December 2000, although Applicant does admit he grabbed her by the chin during an altercation. As for the January 1, 2001 incident,

while Applicant grabbed his girlfriend's arm and wrist, I am persuaded it was not an act of provocation on Applicant's part. The restraining order violation in February 2001 and simple assault in August 2000 warrant consideration of disqualifying conditions a. (allegations of criminal conduct) and b. (multiple lesser offenses) under criminal conduct.

Applicant's criminal conduct is regarded as too recent to apply mitigating condition a. in his favor, but there is little likelihood of recurrence (*see* mitigating condition d., the factors leading to the violation are not likely to recur.). Applicant has not committed any criminal conduct outside of his relationship with Ms. X, whom he has not seen romantically since January 1, 2001, when he had her arrested for domestic violence/simple assault. Applicant's ex-wife testified credibly Applicant never assaulted her and did not display an anger problem during their ten-year marriage. Applicant's coworkers attest to their surprise at learning of the domestic assault charges, which they regard as "out of character" for Applicant. In their experience, Applicant has been forthcoming, polite and professional at all times. As of February 2003, Applicant was engaged to be married to another woman. There is no indication this relationship has been other than stable.

Applicant has attributed the difficulties in his relationship with Ms. X to her personal issues, including a history of suicide attempts, and her eruptive behaviors, especially when under the influence of alcohol. The police report of the January 1, 2001, incident is supportive of Applicant's testimony with respect to that incident. While there is no evidence to indicate that Applicant was himself assaulted in August 2000, there is nothing in his present lifestyle which presents a security risk. Pursuant to his negotiated plea, Applicant was evaluated in January 2002 and determined not to need substance abuse counseling. He attended all thirteen sessions of the court mandated anger management classes and found them helpful. With the insight gained from the seminar, and with his present fiancée a positive, stable influence, it is likely Applicant will continue to demonstrate he can be counted on to adhere to the rules and regulations regarding the safeguarding and handling of classified information.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 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 Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. According to the testimony of his ex-wife, "[They] just kind of grew in separate directions." Transcript p. 122.
2. Applicant does not deny he bit her finger, but he contends it was not intentional:

I tried to make a joke of it, and I did go to bite her finger, but the intent was not to bite her, literally bite her finger and hurt her. I tried to turn it into a play thing. She scratched her finger as a result of pulling it out of my mouth. (Transcript p. 90).

In August 2001, Applicant pleaded nolo to a charge of domestic violence/simple assault (biting her on left index finger), and he was required to pay restitution for her medical costs since she did not have insurance. While there are no documents in the record reflecting the nature of the medical treatment rendered, the cost of treatment suggests the injury was consistent with a bite rather than the mere scratch described by Applicant.

3. After Applicant had his girlfriend arrested for the incident of January 2001, his girlfriend complained to the police that Applicant had attempted to choke her in December 2000. In March 2001, Applicant was charged with domestic violence/simple assault for allegedly grabbing his girlfriend around the neck and squeezing in December 2000. (Ex. 6). Applicant denies attempting to choke her or grabbing her as she claims, and he pleaded not guilty to the charge. Although it is clear Applicant caused unwanted physical contact with his girlfriend on that occasion, there is insufficient evidence to conclude that he grabbed his then girlfriend around the neck.

4. Applicant told a Defense Security Service (DSS) special agent in August 2001 that his girlfriend had assaulted him repeatedly (threw punches and objects at him) while his daughter remained in a nearby room, scared and upset. (Ex. 2). Applicant acknowledged he had wrestled with his girlfriend over the knife, but claimed he did nothing other than hold up his arms to block her repetitive punches. (Transcript p. 98). Yet, Applicant admitted to the police immediately after the event that he had grabbed his girlfriend:

I never once struck me (sic) her, but I grabbed her to try and stop the violence. I grabbed her by her chin, arms, hair and breast just to stop any further violence (sic). At this time I attempted to call 911. (Ex. A).

Applicant's girlfriend, in contrast, claimed Applicant had thrown her to the floor of the bedroom and he had also struck her in the mouth. She denied there was any knife involved. The police report of the incident reflects Applicant's girlfriend was so intoxicated that she could not keep on topic nor relate to the police the exact nature of the assault on her. Given she was intoxicated at the time, as confirmed by the observations of the interviewing police officer, her account is afforded little credibility. While Applicant was not the aggressor, there is sufficient evidence to conclude that he grabbed her in a struggle over the knife.

5. Intending to file a complaint against Ms. X for her violation of protective order, Applicant attempted without success to obtain local telephone records confirming her contact with him. Since some of her calls were made to his workplace, he enlisted the assistance of his employer. (Ex. J).