

DATE: December 9, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-05394

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn A. Trowbridge, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was charged with aggravated assault on a public servant in June 2000, to which he was placed on seven years of probation, ordered to complete 160 hours of community service, and fined \$6,500.00, plus court costs and probation fees, all subject to deferred adjudication. Despite credited progress in addressing one of the contributing causes (alcohol abuse) of his judgment lapses associated with his aggregated assault offense, Applicant remains on probation and lacks any documented alcohol rehabilitation program. His judgment lapses are still too recent to justify safe predictions they will not recur in the foreseeable future, should he find himself in similar circumstances. More time is needed to mitigate judgment risks associated with his aggravated assault offense. Clearance is denied.

**STATEMENT OF CASE**

On April 10, 2003, 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. The SOR detailed reasons why DORA 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 (undated) and requested a hearing. The case was assigned to me on July 17, 2003, and was scheduled for hearing. A hearing was convened on August 20, 2003, 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 three exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on August 29, 2003.

**SUMMARY OF PLEADINGS**

Applicant is a 45-year-old tool builder for a defense contractor who seeks a security clearance.

Under Guideline J, Applicant is alleged to have been arrested in June 2000 and charged with aggravated assault on a public servant (a felony offense), to which he pleaded guilty and was sentenced to 7 years of probation, 160 hours of community service, and approximately \$6,500.00 in fines, court costs, and probation fees.

For his answer to the SOR, Applicant admitted the allegation while claiming he would never be a security risk to either his country or his company.

### **FINDINGS OF FACT**

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

In the evening of June 25, 2000, Applicant had been drinking excessively and engaged in an argument with his wife (W) in their living room. Unbeknownst to him, she called the police and then began throwing Applicant's guns into the living room, directly at him, with one striking him. When she finished, she returned to the bedroom. Shortly thereafter, police knocked at the front door. Somewhat inebriated at the time, he told the police they didn't need to be in his home, and proceeded to pick up one of his guns on the table. One of the arresting officers immediately responded by demanding Applicant put the gun down and place his hands above his head. When Applicant didn't promptly comply, but rather shouted expletives at the officer, the officers seized Applicant's weapons at the scene, handcuffed him and placed him under arrest (*see* R.T., at 29-30).

Applicant pleaded guilty to the aggravated assault charge and was accorded deferred adjudication, condition on his satisfactory completion of seven years of probation, performance of 160 hours of community service, and payment of approximately \$6,500.00 in fines, court costs, and probation fees (*see* exs. 2 and 3). Now sober for over three years, he has avoided counseling and AA participation and is still obligated for 40 hours of the 160 hours of community service he was court-ordered to perform. To date, Applicant's guns have not been returned to him. While he is considering petitioning the court for their return, he has taken no action as yet on filing such a petition.

Applicant attributes much of his poor behavior preceding his June 2000 arrest to a drinking problem. Before giving up alcohol altogether over three years ago, he was accustomed to drinking regularly, sometimes excessively. Despite having a drinking problem, he has not envisioned the need to participate in AA or attend substance counseling. His probation has never required alcohol counseling or AA participation, and he has never foreseen the need for it (*see* R.T., at 32-33). Noting his adjudication was deferred by the court, Applicant hopes to have his probation completion accelerated. But as of the completion of this administrative record, Applicant remains on probation for an aggravated assault offense, which if adjudicated as charged would carry a felony conviction and potential imprisonment.

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) lists policy guidelines to be made by judges in the decision making process covering DOHA cases. These policy guidelines, as interpreted by the DOHA Appeal Board, requires 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 guidelines 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 E2.2 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:* A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

**Disqualifying Conditions:**

DC 1. Allegations or admission of criminal conduct.

DC 2. A single serious crime or multiple lesser offenses.

**Mitigating Conditions:**

MC 1: The criminal behavior was not recent.

MC 6. There is clear evidence of rehabilitation

**Burden of Proof**

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for 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 accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof by either showing admitted facts or establishing controverted facts relative to the SOR allegations, the burden of proof 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 presents with a single serious charge of aggravated assault on a police officer arising of an arrest at his home in June 2000. Because the court deferred adjudication pending the outcome of other conditions the court ordered, he avoided a conviction at the outset. However, the offense is a serious one just the same and continues to be monitored pending satisfaction of Applicant's probation term. While alcohol was likely a contributing factor in Applicant's domestic quarrel and his ensuing reactions to investigating police that triggered his arrest, the court manifestly considered all of these circumstances in holding Applicant responsible for his actions and deserving of corrective measures: community service and fines, in addition to a lengthy probation period. That Applicant was never actually convicted of the offense does not preclude consideration of the underlying events surrounding the charges and disposition when evaluating the security significance of his conduct. The Adjudication Guidelines affirm that security significant criminal conduct may derive from established criminal offenses, irrespective of whether the conduct has resulted in a criminal conviction.

In Applicant's case, he was not only charged with aggravated assault on a public servant, but he was fined, placed on seven years probation, and ordered to perform community service, all subject to deferred adjudication by the court. While Applicant has paid the fine and performed most of his ordered community service, he has not as yet received court certification of his completing all the terms of his deferred adjudication. Considering the seriousness of Applicant's June 2000 aggravated assault offense and the recency of it, two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct warrant application: DC 1 (allegations or admission of criminal conduct)

and DC 2 (a single serious or multiple lesser offenses).

In fairness to Applicant, his probation compliance efforts warrant some mitigation credit. Applicant has exhibited considerable success in complying with the court's probation conditions to date and hopes for accelerated completion of his probation in recognition of his efforts. He and his spouse have kept their marriage intact despite their arguments that precipitated his June 2000 arrest. Applicant's personal development is marked by over three years of trouble-free behavior and is encouraging.

Applicant's mitigation efforts to date, however, still lack court certification of completion of his probation, the absence of which continues to fuel doubts over whether he has been able to successfully resolve the anger issues associated with his 2000 aggravated assault offense. For sure, his aggravated assault offense is a serious one: It is classified as a felony, which could result in incarceration should his currently deferred adjudication ever be decided in an adverse way. The absence of probation satisfaction (absent documented proof of comparable persuasion) precludes Applicant from taking advantage of the pertinent mitigating conditions (MC) covered by the Adjudicative Guidelines for criminal conduct: either MC 1 (behavior not recent) or MC 6 (there is clear evidence of rehabilitation).

Because of the seriousness of the offense, for which Applicant remains on probation, more time is needed before safe predictions can be made about any risks of recurrence. Taking into account all of the evidence and considerations in the record, unfavorable conclusions warrant with respect to the allegation covered by Guideline J of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge