

KEYWORD: Criminal Conduct

DIGEST: Applicant has a long history of criminal conduct. He failed to mitigate security concerns raised by his conviction for driving under the influence and the three incidents of battery. Clearance is denied.

CASENO: 02-06033.h1

DATE: 08/16/2004

DATE: August 16, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-06033

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant has a long history of criminal conduct. He failed to mitigate security concerns raised by his conviction for driving under the influence and the three incidents of battery. Clearance is denied.

## **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 15 October 2003, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 11 November 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 22 March 2004. A hearing was originally docketed for 13 May 2004, but was reset due to conflicts in Applicant's counsel's schedule. On 22 June 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 30 June 2004.

## **FINDINGS OF FACT**

Applicant is a 47-year-old principal research scientist and manager for a defense contractor. He has a Ph. D. in electrical engineering, is widely published, and is one of only a few people in the world who understands his area of science. He is a dedicated and conscientious employee who has held a secret clearance since 1993. He has applied for a top secret clearance.

Applicant first applied for a security clearance in the late 1980s. The Directorate for Industrial Security Clearance Review<sup>(2)</sup> declined to grant Applicant a clearance and, on 13 July 1990, issued a statement of reasons detailing the basis for its decision-security concerns raised by his drug involvement and acts of omission or commission that indicated poor judgment. Ex. 19. A hearing was held on 26 November 1990. On 26 June 1991, Administrative Judge William R. Kearney found against Applicant on both criteria and determined it was not clearly consistent with the national interest to grant Applicant a security clearance. In reaching this decision, the judge made the following findings of fact:

The evidence of record reveals that he first began using marijuana in 1968, when he was 11 years of age. At the time he was 13 years of age, he was using it on a daily basis. During the period 1972 until 1976, he experimented with many different drugs including: depressants, stimulants, hallucinogens, and cannabis and in 1981 he first began experimenting with cocaine. From 1986 until 1988, he was addicted to cocaine, wherein he was spending \$50 to \$100 every two days for his cocaine addiction. He received 5 days of inpatient treatment in November 1987, wherein he remained drug free for approximately one month and then he returned to using cocaine and "crack" cocaine. In June 1988, he voluntarily admitted himself to a three month drug rehabilitation program, wherein he remained drug free until in March 1989, when he had a relapse and used cocaine daily for a two week period. thereafter, he became involved with another ministerial drug treatment program during the period April 1989, until October 1989. He was purchasing and selling cannabis since he was 18 years old until he was 29 years of age. At time, he would purchase as much as five pounds of cannabis and sell it for \$100 an ounce. He was engaged in the illegal trafficking of cannabis for approximately 11 years.

At the time the Applicant was approximately 9 years of age, he was involved, with his brother, in the theft of an automobile and a burglary of a home. He appeared in Juvenile Court wherein he pled guilty to the said charges and was assigned 48 hours of community service and placed on probation. In 1972, he was arrested for shoplifting from various stores in a shopping mall. No formal charges were placed against him and he was released to his parents. In 1973, he was arrested for trespassing and the possession of marijuana, wherein he was again sent to a Juvenile facility and then released to his parents. On November 16, 1987, he struck a man who filed a criminal complaint of battery against him. (3) He pled "no contest" to the said criminal charge and was subsequently sentenced by the court to 10 days community service; fined \$300; and placed on one year unsupervised probation.

Ex. 21 at 2-3. Applicant did not file a timely notice of appeal so the decision became final and Applicant was so notified on 23 July 1991. Ex. 22. Applicant reapplied for a security clearance. On 9 August 1993, the re-application was accepted and Applicant subsequently obtained a secret clearance. Ex. 24.

On 23 June 1986, Applicant pled nolo contendere to a battery. He was fined and ordered to have no contact with the party he battered. Applicant later settled a suit by paying the battered party \$10,000. Ex. 17.

In April 1992, between the denial of his clearance in 1991 and the grant of 1993, Applicant was arrested and charged with battery (domestic violence). The charge were subsequently dismissed. Answer.

In May 1994, Applicant was arrested for domestic violence and aggravated battery after he struck his third wife. She suffered a fractured skull and injury to her brain. Charges were dropped in September 1994 because the victim was uncooperative and refused to testify against Applicant. Answer. *See* Ex. 13.

Applicant was arrested in June 2000 for assault in the 3d degree, false imprisonment, and harassment of his third wife. Applicant paid a fine, court costs, received a 24-month deferred sentence, and was ordered to complete a 36-hour domestic violence counseling program. Answer; Ex. 6 at 2; Exs. 8-11. The couple have since divorced, and he is now married to another woman.

On 15 October 2003, Applicant was arrested for driving while under the influence of alcohol (DUI). Applicant pled guilty to driving while his ability was impaired (DWAI). He was sentence to 20 days in jail, suspended; fined; and ordered to perform community service, comply with the findings of an alcohol evaluation, and complete 6-18 months of probation. Ex. 25

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶

E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

### **CONCLUSIONS**

In the SOR, DOHA alleged Applicant pled nolo contendere and was convicted of battery in 1986 (¶ 1.a), arrested for battery (domestic violence) in 1992 (¶ 1.b), arrested for domestic violence and aggravated battery in 1994 (¶ 1.c), arrested in 2000 for 3d degree assault, false imprisonment, and harassment (¶ 1.d), and arrested for DUI in September 2003. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has an admitted history of criminal conduct including several offenses of varying degrees of severity. DC E2.A10.1.2.1, E2.A10.1.2.2. None of the mitigating conditions apply. Applicant has had scrapes with the law since he was nine years old. Although much of his criminal conduct is not recent (MC E2.A10.1.3.1), the continuing nature of his legal problems requires consideration of them in the context of the whole person. DOHA did not allege in the SOR many of the criminal acts Applicant was involved in before he was granted a clearance in 1993. But it is appropriate to consider such evidence in evaluating Applicant's judgment, reliability, and whether there is evidence of rehabilitation. Applicant blames two of the assaults on his third wife. He claims he was only acting in self-defense. He refuses to take responsibility for his actions. After carefully considering all of the evidence, I conclude that Applicant failed to demonstrate it is in the interest of national security to grant him a clearance.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

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: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

**James A. Young**

**Administrative Judge**

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).
2. DOHA's predecessor.
3. It appears the battery charge stemmed from a 16 November 1985, not 1987, incident as he was convicted and sentenced on 23 June 1986. Ex. 15. This incident was also alleged in ¶ 1.a of the current SOR.