

DATE: January 13, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31497

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is unable to successfully mitigate the security concerns stemming from his failure to resolve an outstanding bench warrant for his arrest. Clearance is denied.

STATEMENT OF THE CASE

On March 22, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct. Applicant's response (Item 3) to the SOR is dated April 7, 2004, and he indicated he did not wish to have a hearing.

On June 21, 2004, Department Counsel submitted her written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM)⁽²⁾ was mailed to Applicant on or about June 24, 2004, and it was received by Applicant on July 8, 2004. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me on August 13, 2004. Issuing a decision in this case was delayed due to a heavy caseload.

RULINGS ON PROCEDURE

The FORM also contains a police report (Item 8) that concerns a matter that was investigated in July 2001, and this matter is not alleged in the SOR. Accordingly, the report is irrelevant, and I have not considered it in reaching my decision.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 36-year-old man who is a native-born U.S. citizen. He is employed as a key operator for an aerospace company, and he has worked for this company since February 1998. On or about September 26, 2000, Applicant submitted a security-clearance application in conjunction with his employment.

The genesis of this case is a 1997 misdemeanor child abuse (physical) charge stemming from a domestic argument between Applicant and his then wife. Applicant was married on April 15, 1996, and divorced on October 20, 1997. In particular, the SOR alleges the following:

In February 1997, a citation was issued against you by the [police department] alleging a January 30, 1997, instance of child abuse. On April 16, 1997, in the [state court] you pled no contest to Child Abuse. Your plea was held in abeyance until January 15, 1998, on condition that you pay a \$100 abeyance fee, have no similar violations, and complete anger management and parenting classes. On October 8, 1997, a warrant was issued when you failed to complete the required counseling. On October 20, 1997, you pled guilty to Contempt of Court, were fined \$50, and sentenced to five days in jail (suspended). On May 20, 1998, a warrant was issued for parole violations. As of October 21, 2003, this warrant had not been satisfied.

In his response to the SOR, Applicant admitted this allegation with the following explanation:

What you want is facts and only facts. No statement I make could change the end result. What statement I did make I already made when I was sent Interrogatory Letter wanting more information on the [security-clearance application]. Nothing has changed since that time.

In August 2002, as part of the background investigation, Applicant was interviewed by a special agent of the Defense Security Service (DSS). The interview produced a sworn statement (Item 5) wherein Applicant addressed various subjects, including the child abuse incident at issue here:

I was married to [my wife] and we started to experience marital problems. She filed for divorce and moved out of our residence. One day I had custody of our son and was babysitting for my wife. She came to pick up our son and we got into a verbal argument over the terms of the divorce. The argument escalated and we moved it into the back bedroom for more privacy. I was carry [sic] our son in my arms and laid him on the bed. We argued some more, she picked up our son and left. Later the police . . . arrived at my residence and indicated there had been a complaint filed for child abuse. My wife claimed I threw our son onto the bed. I deny ever abusing my son. The police officer questioned me and left. I was later served papers charging me with child abuse. I appeared in court and on the advice of my attorney pled no contest to the charges. I was fined \$100.00, and ordered to complete anger management course. I paid the fine, however I did not complete the anger management course because I didn't have any transportation to the course. I received a letter in the mail, informing me I had not completed the course. I appeared in court, and he cited me the contempt of court and ordered me to complete the course. I attended the course and completed it as required, however the instructor failed to notify the court. A warrant was issued without my knowledge. I was unaware of the warrant until I was informed by the agent from DSS. I intend on contacting the court in . . . and taking care of the outstanding warrant. I contact[ed] the court at . . . in an attempt to talk to the judge. The[y] informed me I needed to be represented by an attorney before I could get an appointment with the judge. I have contacted several attorneys and I am currently awaiting a reply.

The two court records contained in the FORM (Items 6 and 7) indicate a bench warrant was issued on May 20, 1998. More specifically, according to Item 7, a probation violation affidavit was filed on April 15, 1998, an order to show cause hearing was scheduled for May 4, 1998, and Applicant apparently failed to appear. A bench warrant was then issued with a requirement for a \$500 cash bond. Nothing in the FORM or Applicant's response to the SOR indicates that Applicant has resolved the bench warrant, and so, I presume the warrant for Applicant's arrest is still outstanding.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility,

including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Guideline J-Criminal Behavior

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. Starting with a misdemeanor child abuse charge in 1997 (to which he pleaded no contest), Applicant was subsequently found in contempt of court for not complying with the court's order, and he remains entangled with the court due to the outstanding bench warrant issued after he failed to appear in response to an allegation that he violated his probation. Although the initial misdemeanor child abuse charge does not appear to be serious, the subsequent events are troubling. These facts and circumstances are evidence of a history or pattern of illegal behavior that creates doubt about his judgment, reliability, and trustworthiness. Given these circumstances, both DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply.

I have reviewed the mitigating conditions under Guideline J and conclude none apply in Applicant's favor. Although the initial offense took place in 1997, Applicant's legal situation is ongoing as evidenced by the outstanding bench warrant. Given these circumstances, his criminal conduct is not mitigated by mere passage of time.⁽¹⁴⁾ In addition, MC 6⁽¹⁵⁾ does not apply because the bench warrant is still outstanding. Given this circumstance, Applicant has not presented clear evidence of successful rehabilitation. Accordingly, Guideline J is decided against Applicant.

2. Guideline E-Personal Conduct

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Here, based on the record evidence as a whole, the government established its case under Guideline E. The available evidence shows Applicant has engaged in a pattern of rule violations⁽¹⁶⁾ based on the initial misdemeanor offense in 1997, the contempt

of court finding in 1997, and the probation violation allegation and resulting bench warrant in 1998, which is still outstanding. Taken together, these circumstances are indicative of poor judgment, unreliability, and untrustworthiness. I have reviewed the relevant mitigating conditions under the guideline and conclude none apply. Applicant's failure to resolve the outstanding bench warrant precludes a favorable outcome for Applicant. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph a: 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The FORM contains several documents identified as Items 1 - 8 for consideration.
 3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
 4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
 5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
 6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
 7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
 8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
 9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
 10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
 11. *Egan*, 484 U.S. at 528, 531.
12. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

13. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

14. E2.A10.1.3.1. The criminal behavior was not recent.

15. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

16. E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violations of any written or recorded agreement made between the individual and the agency.