

KEYWORD: Criminal Conduct

DIGEST: Applicant was arrested five times within three years as a result of domestic disputes with his bipolar wife. Applicant mitigated criminal conduct security concerns by getting his wife the medical and psychiatric help she needed and by learning coping skills through a domestic violence treatment program. Clearance is granted.

CASENO: 02-17626.h1

DATE: 07/16/2004

DATE: July 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17626

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant was arrested five times within three years as a result of domestic disputes with his bipolar wife. Applicant mitigated criminal conduct security concerns by getting his wife the medical and psychiatric help she needed and by learning coping skills through a domestic violence treatment program. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 11 September 2003, DOHA issued a Statement of Reasons ⁽¹⁾ (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 6 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 27 January 2004. The hearing was originally scheduled for 2 March 2004 but had to be delayed twice, once for Applicant's attorney and once because a canceled flight prevented the Department Counsel from arriving at the scheduled time. On 13 May 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 25 May 2004.

I granted Applicant's motion to supplement record and admitted Ex. L, a letter from a physician and a monthly treatment update discharging Applicant from domestic violence treatment.

FINDINGS OF FACT

Applicant is a 43-year-old staff engineer for a defense contractor. Applicant was unhappily married for 19 years. Tr. 62. He has two children from that marriage. He was living and working with the defense contractor in State 1, but traveled often to State 2. The defense contractor offered him a better position in State 2. His wife refused to move. He moved to

State 2 in October 1999 and divorced his wife on 5 July 2000. Ex. 1 at 3. Later that month, on 28 July, he married his second wife. *Id.* at 2.

Applicant and his second wife were arrested for a domestic disturbance on 8 August 2000, 11 days after the wedding, because of a domestic disturbance. The couple had gotten into an argument and Applicant attempted to pack up his belongings and leave the house. She tried to stop him and a scuffle ensued. She called the police. After the arrest, Applicant refused a plea agreement that would have required him to attend 36 weeks of counseling and serve two years of probation. The charge was eventually dismissed. Nevertheless, the couple sought counseling for their marital problems in December 2000.

Despite the counseling the couple received over the next couple of months, Applicant was arrested three more times between April 2001 and December 2002 as a result of disputes with his wife. In April 2001, he was arrested for third degree assault, but pled guilty to harassment. He was placed on unsupervised probation for 24 months and ordered to attend a domestic violence and treatment course.

Applicant was arrested in August 2001 for harassment. He pled guilty in September 2001 and was placed on supervised probation for 36 months and ordered to attend another domestic violence and treatment program.

Applicant was arrested again in December 2002 for third degree assault. On 9 January 2003, he was arrested for violating his probation because of his arrests in April and August 2001. Both the third degree assault and probation violation charges were dismissed in July 2003. Applicant was discharged from domestic violence treatment in October 2003 after completing all program requirements and accomplishing all treatment goals. His therapist noted Applicant was "in a conflictual and volatile relationship for which he did not have the understanding or skills to cope with. This client otherwise appears socially and mentally stable. He made significant progress in treatment regarding his personal issues and improving his ability to resolve conflict reasonably." Ex. L at 4.

Applicant's wife has been diagnosed and is now receiving treatment for a bipolar disorder. Her disorder manifested itself in her need to know Applicant's whereabouts at all time. When she worked for the same defense contractor as Applicant, Applicant's office was moved to an area to which she did not have access in order to preclude her frequent interruptions of the workplace. She is no longer employed outside the home as she has recently been diagnosed with multiple sclerosis. Ex. L at 3.

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 personal 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 had been arrested for harassment in August 2000 (¶ 1.e.), arrested and convicted of harassment in April 2001 (¶ 1.d.), arrested in August 2001 and convicted in September 2001 of harassment (¶ 1.c.), arrested for third degree assault in December 2002 (¶ 1.b.), and arrested for violating his probation in January 2003 (¶ 1.a.). 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 each of the allegations in the SOR. Applicant has a history of criminal conduct-five arrests. DC E2.A10.1.2.1. There are several mitigating factors to these arrests: the bipolar condition of his wife which clearly was a significant cause of the domestic disturbances; and clear evidence of his successful rehabilitation (MC E2.A10.1.3.6). Applicant's wife is receiving treatment for her bipolar disorder and Applicant now has the coping skills necessary to avoid or defuse conflict with his wife. Applicant understands the need to avoid conflict and that any future arrests would surely result in the loss of his security clearance. After carefully considering all the facts and circumstances of this case under the "whole person" concept, I am convinced Applicant does not represent a security threat. I find for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

DECISION

In light of all of 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. Clearance is granted.

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).