

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant pleaded guilty in 2001 to aggravated child abuse by aggravated battery (a felony) and associated misdemeanor fire arms offenses. The court imposed ten years probation on him, which remains in affect. While the incident is an isolated one it a serious one that continues to draw upon the supervising court's probation authority. Despite demonstrated rehabilitative progress, it is still too soon to make the necessary safe predictive judgments about the absence of any recurrence risks. Applicant is credited with successfully refuting allegations he falsified his security clearance application (SF-86). Clearance is denied.

CASENO: 02-18267.h1

DATE: 09/22/2004

DATE: September 22, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-18267

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Juan J. Rivera, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant pleaded guilty in 2001 to aggravated child abuse by aggravated battery (a felony) and associated misdemeanor fire arms offenses. The court imposed ten years probation on him, which remains in affect. While the incident is an isolated one it a serious one that continues to draw upon the supervising court's probation authority. Despite demonstrated rehabilitative progress, it is still too soon to make the necessary safe predictive judgments about the absence of any recurrence risks. Applicant is credited with successfully refuting allegations he falsified his security clearance application (SF-86). Clearance is denied.

### **STATEMENT OF THE CASE**

On July 18, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on August 5, 2003, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on January 2, 2004, and received it on February 10, 2004. Applicant responded to the FORM within the 30 days provided him with supplemental documentation. The case was assigned to me April 14, 2004.

### **SUMMARY OF PLEADINGS**

Under Guideline J, Applicant is alleged to have been arrested in State A in November 2000 and charged with

aggravated assault (felony), aggravated child abuse by aggravated battery (felony), improper exhibition of a dangerous weapon and discharging a firearm in public (misdemeanors), to which he pled guilty in May 2001 to aggravated child abuse charge (a felony), improper exhibition of a dangerous weapon and discharging a firearm in public (both misdemeanors) and was awarded withholding of sentencing on the felony charge and placed on 10 years probation to be served concurrently with the probation sentence for the misdemeanor charges.

Under Guideline E, Applicant is alleged to have falsified his SF-86 of November 2000 by omitting his November 2000 arrest when answering questions 21, 22, 23 and 24.

For his answer to the SOR, Applicant admitted his November 2000 arrest and disposition but denied any intent to falsify his 2000 SF-86. Applicant to have complied with his probation terms, reconciled with his son, received company awards for his excellent performance and expressed remorse for his actions. He denied falsifying his November 2000 SF-86, which he signed while stilling receiving the effects of the incident. He claimed to have notified his company security of the incident on his work day back to work in November 2000, and to have informed his DSS interviewer voluntarily of the aggravated assault incident on his first day back from work. And he claimed rehabilitation through the positive steps he has since taken to eliminate future such incidents.

### **FINDINGS OF FACT**

Applicant is a 51-year-old analyst who seeks a security clearance. 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.

Through his marriage to his wife, Applicant raised and supported a stepdaughter from his wife's former marriage and a son born to them. After a period of marital problems, Applicant and his wife divorced in 1993. Following the divorce, Applicant's son continued to live with him. The son would visit his mother on a weekly basis, or when he wanted to. To address his advancing inflammatory arthritis, Applicant was prescribed pain pills (estimated to be sometime in 1997). Eventually, he became addicted to mood altering pain medications, to include Lorcet, oxycontin and morphine (*see ex. 10*).

In the evening of November 22, 2000, Applicant was at home alone and sedated with prescription pain killers and alcohol when his son arrived home to share television time with Applicant. After a verbal exchange over the television, an angry exchange ensued between Applicant and his son (17 at the time). Soon thereafter a physical exchange erupted between them. When Applicant arose from a dazed and state he grabbed his shotgun, moved outside the home and fired off several rounds in the direction of his son's truck. One of the rounds ricocheted off the truck and struck the son in the leg. Applicant waited for the police to arrive and was arrested without incident. Applicant's son went on to the hospital

for a check up and was released the same night.

Following his arrest in the evening of November 22, 2000, Applicant was jailed pending further investigation of the incident. He spent three days in jail before being released. When he appeared in court on May 18, 2001, Applicant pled guilty to aggravated child abuse by aggravated battery (felony), improper exhibition of a dangerous weapon, and discharging a firearm in public (both misdemeanors). After withholding sentencing on the felony charge, the court placed Applicant on 10 years probation to be served concurrently with the one year probation sentence for the misdemeanor charges.

Applicant's supervised probation conditions comprised drug and alcohol screening, random urinalyses, completion of an anger management course, no non-consented contact with his son, counseling and educational programs as established by his probation counselor, and abstention from alcohol and controlled substances and paraphernalia. Applicant's probation conditions included provision for early termination of probation after five years, if, he committed no violations and complied with all of the probation conditions, subject to continued drug treatment (*see ex. 8*).

Based on his demonstrated compliance with all of his probation conditions, Applicant has been permitted to travel out of the state to perform his work assignments, subject to his payment to the State of a \$50.00 processing fee. The state's attorney has reportedly recommended Applicant's probation time be reduced from 10 to five years. It is not documented, however, as to whether the court has approved a probation reduction.

Asked by his facility security officer (FSO) to update his SF-86 in November 2000, Applicant did so. The SF-86 that is referenced in the exhibit file (*ex. 4*) is electronically generated and contains no Applicant signature. Applicant assures he provided the requested information prior to his November 22, 2000 offense and, accordingly, could not have omitted his November 22, 2000 arrest/charge. While his claims cannot be documented, he is of record in reporting the incident to his FSO on November 27, 2000, shortly after his release from jail (*see ex. 7*). Such a prompt report is consistent with mind-set intent on disclosing the adverse information to the proper authorities and serves to reinforce Applicant's assurances that he did not falsify his SF-86. Based on, his assurances, his prompt report of the incident to his FSO, and his credited voluntary disclosure of the offense to the DSS agent who interviewed him in July 2001, Applicant's assurances are fully accepted.

Applicant has since reconciled with his son and no longer relies on prescription pain killers to control the pain from arthritis. He is once again highly regarded by his supervisor and coworkers. He has received excellent performance evaluations, that his supervisor assures are comparable to his pre-addiction levels. Applicant appears to have regained the trust and confidence of his supervisor and coworkers.

## POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list guidelines to be considered by judges in the decision making process covering DOHA cases. Judges must 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 factors 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 E.2.2 of the Adjudicative Process 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 judgment, 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:** None

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Disqualifying Conditions:** None.

**Mitigating Conditions:** None.

### **Burden of Proof**

By virtue 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 a 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 of establishing admitted or controverted facts, 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 comes to these proceedings with no criminal history before the incident with his son in November 2000 that resulted in his pleading guilty to aggravated child abuse by aggravated battery (a felony) and associated misdemeanors involving his use of a firearm. Applicant's guilty plea and ensuing deferred sentencing and accompanying ten year probation (not due to expire until 2001) unless reduced by court approval raise security concerns about his judgment and reliability under Guideline J (criminal conduct). Besides his criminal history, a security issue is raised about his omission of his 2000 arrest/charge from his SF-86, which Applicant successfully refutes.

Applicant's aggravated assault offense involving his son, although isolated as he claims, is a serious one and warrants the application of two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 ( a single serious or multiple lesser offenses). Government must be able to repose a high degree of trust in those it bestows access to classified information. *Snepp v. United States*, 444 U.S. 507, 511n.6 (1980).

Because Applicant's 2000 assault incident was the first such incident involving a physical assault of his son or family member, it is as he claims: isolated and the result of an exchange between Applicant and his son that was totally atypical for them. Addressing the incident head on, Applicant accepted the State's probation conditions and has maintained compliance with all of the conditions required of him. He may, accordingly, apply pertinent mitigating conditions (MC) covered by the Adjudicative Guidelines for criminal conduct: MC 1 (behavior not recent) and MC 2 (isolated incident)serious positive steps taken to significantly reduce or eliminate vulnerability to coercion, exploitation or duress).

Still, Applicant remains subject to the probation conditions set by the court on what must be regarded as a serious felony and related misdemeanor offenses. Even with low-risk re-offense assessments from Applicant's probation counselors and Applicant's own assurances, it is difficult to credit Applicant with successful mitigation efforts in the face of his pending probationary status, his still unfinished treatment, and the considerable supervised probation he still faces. While there is certainly nothing in the Directive that makes current probationary status a *per se* bar to a favorable security decision, it cannot be discounted either. Our Appeal Board has observed that continued probationary status is a consideration that significantly undercuts an applicant's claim of successful reform and rehabilitation. *See* ISCR Case No. 96-0710 (June 20, 1997); DISCR Case No. 90-1115 (October 6, 1992). Because he is still on probation, he may not at this time invoke MC 6 (clear evidence of rehabilitation) of the Guidelines.

Taking into account all of the circumstances surrounding Applicant's 2000 offense, the isolated nature of the incident, Applicant's still unfinished probation status, and the steps Applicant has taken to date to restore and rehabilitate the damaged trust he has created with his son (aided by the support he has continued to receive from his supervisor and work colleagues), it is still too soon to make safe predictive judgments about Applicant's being able to stay clear of addictive pain killers and the psychological affects they produce. Given his probation status at the present, it is too early to conclude he has mitigated security risks associated with his admitted offense. This is not to diminish the positive

impressions he has gathered from his supervisor and colleagues at work who continue to support him. But in the face of his still relatively recent offense, for which he remains under the court's probationary supervision, his favorable character evidence alone is not enough to mitigate security concerns extant with the Government over his past conduct. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines J.

By successfully refuting allegations he deliberately falsified his SF-86, Applicant surmounts Government concerns over the omission of his November 2000 SF-86 that was electronically generated without his signature or demonstrated approval of the completed questions after the November 2000 incident. Favorable conclusions warrant with respect to the allegations covered by Guideline E.

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**

**GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT**

**Sub-para. 2.a: FOR APPLICANT**

**Sub-para. 2.b: FOR APPLICANT**

Sub-para. 2.c: FOR APPLICANT

Sub-para. 2.d: FOR 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. Clearance is denied.

Roger C. Wesley

Administrative Judge