

DATE: March 17, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-18627

## **DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

#### **FOR APPLICANT**

Carmen A. Frattaroli, Esq.

Michael A. Troncellito, Esq.

### **SYNOPSIS**

Following an altercation with his then eighteen-year-old stepson in mid-July 2001, Applicant was charged with misdemeanor assault and battery. The case was continued without a finding to June 2003, on the condition Applicant continue with counseling, which he had commenced voluntarily before judicial intervention. Court supervision was terminated early and the charge dismissed in mid-November 2002. Applicant demonstrated a serious lack of restraint in dealing with a stepson with whom he had a contentious relationship, but there is little risk of recurrence, given the insights gained by Applicant in his counseling and the termination of his personal relationship with this stepson. Clearance is granted.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated October 17, 2002, to the 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 for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on criminal conduct (guideline J) due to a July 2001 domestic assault and battery.

Applicant filed a response dated October 30, 2002, to the SOR in which he requested a hearing before a DOHA Administrative Judge. The case was assigned to me on December 3, 2002, and pursuant to formal notice dated December 16, 2002, a hearing was scheduled for January 8, 2003. On December 20, 2002, Counsel for Applicant submitted a pre-hearing memorandum.

At the hearing held as scheduled, the Government's case consisted of five documentary exhibits. Counsel for Applicant submitted twelve exhibits, which were entered without any objections from Department Counsel, and the testimonies of the Applicant and of a former coworker with whom Applicant has a continuing friendship. With the receipt on January 21, 2003, of the transcript of the hearing, the case is ripe for a decision.

## **FINDINGS OF FACT**

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 53-year-old president and chief executive officer of a privately financed software and services company with a focus on facilities capital planning and management solutions. Applicant seeks a secret security clearance, which is required before the firm can perform classified work for the Department of Defense.

Applicant has a record of accomplishment in the military, and for the past twenty plus years, in the private sector. His personal life has not been without difficulties, although he has not allowed relationship problems and stressful life events to negatively impact his work performance or dedication to duty. Salient details of Applicant's background follow:

Following his graduation from high school in June 1967, Applicant attended a service academy. In 1971, he graduated with a bachelor of science degree in engineering and a commission as an ensign. Applicant served as the anti-submarine warfare officer on a cutter for the next eighteen months. At sea for much of that time, the crew faced extremely adverse weather conditions for ten days in 1972 in conjunction with a surveillance and rescue standby effort involving a foreign nuclear submarine. A meritorious unit citation was awarded for this hazardous duty. Applicant earned an overall rating of excellent for the rating period of February 1972 to June 1972, and in October 1972, he was promoted to lieutenant junior grade (LTJG). As a LTJG, Applicant's leadership skill and maturity set him apart from others of his grade, and he was recommended by his command for accelerated advancement.

On completion of his tour on the cutter, Applicant was selected in an officer exchange program to serve with another branch of the military on a destroyer escort. Initially assigned navigator duties in February 1973, Applicant impressed the ship's command with his personal initiative, superb performance, and mature judgment, meriting his assignment as the ship's anti-submarine warfare officer that fall. Directly responsible for much of the nuclear weapons training within the command, Applicant was granted a top secret security clearance. Applicant consistently earned outstanding ratings in all areas of responsibility, and at the conclusion of his exchange tour, the ship's commanding officer in August 1974 strongly recommended Applicant be afforded greater responsibility and authority.

From August 1974 to September 1977, Applicant was assigned to the service academy, where he had responsibility for cadet training (until June 1975 as the assistant training officer). Significant collateral duties included managing the maintenance of a building complex and coaching baseball. As a lieutenant (O-3), Applicant served as the senior training officer with direct responsibility for the planning, coordinating, and executing of a cadet summer program with a budget of \$250,000.00. For his service at the academy, Applicant was awarded a commendation medal.

As a member of the academy staff, Applicant applied for postgraduate education in management. Selected after a competitive process, Applicant pursued his master of business administration degree at a renowned private university in the United States from September 1977 to May 1979. <sup>(1)</sup> Assigned thereafter to a shore duty in the military, Applicant began to suffer from a debilitating hip condition which rendered him unfit for future sea duty. In August 1980, at the rank of lieutenant commander, Applicant was granted an honorable discharge from the service because of physical disability (degenerative arthritis).

Following his discharge from the military, Applicant began a career in the commercial sector as a manufacturing controller for a chemical company. In 1982, he commenced employment in the computer industry, where he established a record of significant accomplishment. While managing a software division of a computer company involved in Government contract work in the 1980's, Applicant suspected an employee was padding overtime. On confirmation of his suspicions, the employee was terminated and forced to pay restitution. Applicant demonstrated an ability to handle positions of significant financial and corporate management responsibility, meriting his hire at the vice president/general

manager level in 1989.

From 1989 to 1998, Applicant was employed as a vice president by a succession of private companies (five total). In 1998, Applicant became the president and chief executive officer of a private venture capital-funded software company. Capital was limited and when the company did not turn around, Applicant informed the company's board of directors that the company had to cease operations to make payroll obligations. To insure that the assets were properly distributed, Applicant stayed on for about six months without compensation. Since 2000, Applicant has been the president and chief executive officer of another venture capital-funded company. This company performs assessments of the condition of building portfolios, in terms both of their structural condition as well as functional adequacy, for commercial entities as well as for federal and state agencies. Under Applicant's leadership, the company has grown to four times its original size.

As for his personal life, as a young cadet at the academy, Applicant began a relationship with a student at a nearby college. Married in 1972, they had two daughters, born to them in August 1975 and July 1977, respectively. Applicant developed a close relationship with his daughters, even with three years of sea duty. After eleven years of marriage, Applicant and this spouse divorced, with the couple sharing joint custodies of, and parenting responsibilities for, their two daughters.

In February 1985, Applicant married a coworker, a widow with two children-a daughter born in about 1980 and a son born in January 1983. Applicant and his second wife had three children born of their union, a son in January 1987 and daughters in September 1991 and March 1993. With the blending of the two families, Applicant raised all the children (including his two daughters from his first marriage and his second wife's children) as a single family. He and his wife, a business executive, tried to stay involved in the activities of all seven children. Applicant coached softball for the girls, and since about 1996, has coached recreational youth baseball in his community.

Applicant developed a close bond with his stepdaughter, but he and his stepson had a strained relationship made more difficult by this stepson's resentment of household rules which he considered unreasonably strict. When Applicant's stepson was a sophomore in high school, he complained to a guidance counselor about physical abuse he claimed was inflicted on him by Applicant.<sup>(2)</sup> The stepson was thereafter sent away to boarding school.

During her last semester in college, Applicant's younger daughter from his first marriage was hospitalized for treatment of what was eventually diagnosed as advanced stage malignant melanoma. Applicant and his first wife spent most of their time at the hospital for four months in late spring and summer 2000 while their daughter underwent aggressive treatment for metastatic cancer, which included an intensive chemotherapy regimen and several surgeries. In August 2000, his daughter succumbed to complications following her fourth surgery. Applicant reacted to his daughter's death by keeping his grief hidden and not seeking any professional help.

As Applicant was struggling to cope with his daughter's death, his stepson continued to challenge his authority. In about late June 2001, Applicant and his stepson, who had returned to the family home for the summer following his high school graduation, had a physical altercation during which Applicant placed a baseball bat to the throat of his stepson.<sup>(3)</sup>

After playing golf on an occasion in mid-July 2001, Applicant returned home to find his stepson in his private office, an area which was out of limits to all the children.<sup>(4)</sup> When Applicant confronted his stepson, his stepson became belligerent and a physical scuffle ensued. Applicant's spouse attempted to diffuse the situation by counseling her son in the kitchen about the household rules. Applicant followed his stepson into the kitchen where he and his stepson had a heated exchange. As the stepson rose from his seat, Applicant pushed him over the chair. Their argument continued with some physical contact between them<sup>(5)</sup> until Applicant grabbed his stepson in a stranglehold. Applicant's spouse contacted the police, and Applicant was arrested for misdemeanor assault and battery-domestic. On the stepson's application, an emergency restraining order was issued against Applicant. Served with the order while at the police station, Applicant was advised to refrain from any contact with his stepson. He was also required to surrender to the police his license to carry firearms as well as firearms and ammunition secured at the family home.

Released on his own recognizance, Applicant moved into a hotel temporarily until the stepson went off to college in

September 2001. Living apart from his family that summer and concerned about his biological son, who felt threatened by his half-brother, Applicant was unable to eat properly or to sleep. After a consultation with his internist, Applicant was referred to a psychologist.

Following an initial session on August 21, 2001, Applicant continued in weekly psychotherapy with this psychologist for a year, for treatment of a condition initially diagnosed as adjustment disorder because of disturbing life events (marital separation from his second wife, court case and the death of his daughter). During these sessions, Applicant discussed his marital separation, the impact on his children, issues related to the death of his adult daughter, and how he could have better handled the situation with his stepson. Committed to treatment, Applicant displayed strong interest in his personal concerns, including those surrounding the July 2001 incident.

In late December 2001, Applicant and his second wife separated and Applicant purchased a new home. Their son, still a teenager, elected to reside with the Applicant while their two young daughters remained with their mother.

On the advice of legal counsel, Applicant in late December 2001, admitted to sufficient facts to misdemeanor assault and battery, and the case was continued without a finding until late June 2003. Applicant was placed on court supervision and ordered to pay a \$35.00 victim witness fee, refrain from any contact with his stepson in accordance with the restraining order, and continue in his counseling with the psychologist on a monthly basis. Applicant participated in weekly psychotherapy sessions until August 2002, when they were reduced to twice monthly. <sup>(6)</sup> In August 2002, Applicant's license to carry firearms was reinstated. With the support of his second wife, stepson and court supervisor, Applicant's court supervision was terminated early and the misdemeanor assault and battery charge against him dismissed in mid-November 2002.

Applicant's divorce from his second wife became final in December 2002. As of January 2003, Applicant has no personal relationship with his stepson, having purposely avoided any contact with him since the incident of July 2001. Applicant regrets the pain his actions of that day caused his family, and understands he should have "let the emotion die." Applicant continues to see his psychologist on a monthly basis, even though he has been told by the psychologist that it is no longer necessary. In the psychologist's professional opinion, Applicant exhibits no signs of a mental illness, and he is essentially free of the concerns which led him to enter treatment. He opined Applicant possesses sound judgment and strong leadership ability, which includes an ability to take responsibility for his mistakes.

## POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

### GUIDELINE J

#### Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

E2.A10.1.3. Conditions that could mitigate security concerns include:

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

\* \* \*

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline J:

Applicant was arrested for misdemeanor assault and battery in July 2001 after police determined he had been the aggressor in a physical altercation with his teenage stepson. The charge was dismissed in November 2002 without a finding of guilty being entered. Applicant having admitted sufficient facts to sustain a conviction of criminal assault and battery (he pushed his stepson and restrained him in a stranglehold), disqualifying condition E2.A10.1.2.1. (allegations or admission of criminal conduct, regardless of whether the person was formally charged) under guideline J must be considered in assessing Applicant's security suitability. A history of criminal activity creates doubts about a person's judgment, reliability and trustworthiness.

In mitigation, Applicant cites the aberrational nature of the incident in his otherwise unblemished record as a patriot, successful business man, and involved father. However, just two weeks prior to the fight which led to his arrest in July 2001, Applicant was involved in an altercation with his stepson where he held a baseball bat to his stepson's neck. Since the police were not notified of the incident until after the dispute in July, there was no investigation and no charges filed. While the stepson claims Applicant intended to use the bat to smash the stepson's property, there is insufficient evidence

to conclude that Applicant aggressively acted to harm his stepson or the latter's property. However, there is also no proof that Applicant was under an imminent threat to his own safety which would warrant holding the bat to his stepson's neck from behind, a reaction similar to holding his stepson in the military-type stranglehold. Physical altercation between Applicant and his stepson was a recent phenomenon (the stepson told the police in July 2001 "the first real 'fight'" had occurred about a month before), but not isolated.

Recent criminal conduct may be mitigated where there is clear evidence of successful rehabilitation (*see* E2.A10.1.3.6.). Meaningful reform depends in large measure on an acknowledgment of wrongdoing with genuine remorse accompanied by concrete actions in reform maintained long enough to persuade there is little, if any, risk of recurrence. At the time of his arrest in July 2001, Applicant clearly felt himself to be the victim of his stepson's aggressive actions and that his actions were in self-defense. While Applicant has not changed his position on this (he testified he threw no punches and was "pummeled" by his stepson), he has accepted responsibility and expressed regret for the situation with his stepson getting out of control. As for concrete actions taken in reform, Applicant never violated the restraining order obtained by his stepson following the July 2001 incident. He secured a guest suite in a local hotel where he resided until his stepson left for college. Distressed about the pending legal charge and the impact of the incident on his children, Applicant sought professional counseling voluntarily, and he committed himself to treatment. As evidenced by the early termination of court supervision, the state considers Applicant to be successfully rehabilitated.

From a clinical standpoint, Applicant does not suffer from a mental or emotional condition which could negatively impact his judgment, reliability or trustworthiness. With the benefit of individual psychotherapy, Applicant has come to realize he should have let the emotion die that day and left the house with his two young daughters. In the opinion of his treating psychologist, Applicant is "essentially free of the concerns that led him to enter treatment." This mental health provider's opinion is entitled to significant weight in light of his treatment of Applicant on a regular basis since August 2001 and his professional qualifications, which include a clinical position in the psychiatry department at a major university-affiliated teaching hospital.

Given the insights Applicant has gained into his behavior through his psychotherapy and the fact that Applicant has no contact with his stepson, there is little risk of recurrence of criminal assault. Indeed, in light of their discordant relationship in the past, Applicant's avoidance of his stepson does not engender concern. Although Applicant's stepson suffers from physical (epilepsy) and mental (ADD) ailments, he has managed to pursue his education at the university level. To Applicant's credit, he has seen that his stepson is provided for financially, and he has done nothing to alienate his two young daughters from their half-brother. Applicant's decision not to attempt a personal relationship with his stepson is understandable in the circumstances and not indicative of a failure of rehabilitation.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

### **DECISION**

In light of all 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.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. Applicant indicates he was the first active duty United States military officer after the Vietnam War to pursue graduate education at the university. *See* Transcript p. 50.
2. The exchange between the stepson and the guidance counselor is not of record. In an unsigned statement of October

2001, written in support of a guilty finding and probation for Applicant for the July 2001 incident, Applicant's stepson described a history of physical abuse ("two fingers to [his] eyes and with sharp continuous smacking with both sides of [Applicant's] hand. . . chest butting, shoving to the ground then stepping on, spitting and even ripping/tearing clothes off"), and ostracism from the family to the extent of exclusion from family events and being the "butt of every joke in public and inside the family." When interviewed by a Defense Security Service (DSS) special agent, Applicant denied any physical or verbal abuse of his stepson. While he admitted to slapping his stepson on the side of the head two to three times per year, Applicant maintained it was an attempt to discipline a boy who has behavior problems due to epilepsy, attention deficit disorder, and frequent bizarre behavior. (*See* Ex. 2). The record evidence supports a finding that Applicant slapped his stepson in the past, but there is no corroboration that Applicant had a history of spitting on his stepson, stepping on him or ripping off his clothes, or of deliberately alienating the stepson from the other children. In recommending Applicant for a security clearance, Applicant's second wife indicated that despite the "somewhat strained relationship" between Applicant and her son, the family had a very warm and loving life, and Applicant was involved in all of their lives, including his stepson's. (Ex. F).

3. During the police investigation of the July 2001 incident, Applicant's stepson indicated the month before, Applicant had grabbed a bat to smash his [the stepson's] property, and when confronted, Applicant placed the bat to his throat in an attempt to choke him. Applicant told the police following his arrest in July 2001 that his stepson had threatened him with a baseball bat in the past. (Ex. 3). When asked by the DSS about the incident, Applicant admitted he had an encounter with his stepson involving the bat, but he maintained he used the bat defensively to stop his stepson's aggressive moves toward him. (Ex. 2). Given the rancor in their relationship, it is difficult to accord either Applicant or his stepson full credibility. Perceptions are likely clouded by emotion.

4. Applicant told the DSS agent in mid-May 2001, and reiterated at his hearing, that as he entered the room, his stepson appeared to be inhaling something up his nose, which Applicant assumed was an illegal drug. (Ex. 2; Transcript pp. 63, 93). On cross examination, Applicant indicated his stepson could have been using his prescribed Ritalin in an illegal manner, although he was unaware as of July 2001 that the drug could be snorted. (Transcript p. 119). If Applicant suspected drug use, he did not relay those suspicions to the police. On the occasion of his arrest in July 2001, Applicant told the investigating officers that he had found his stepson working on his computer in his office, and that the stepson became "mouthy" when Applicant told him to leave. (Ex. 3)

5. As with the June 2001 baseball bat incident, Applicant's account of what transpired differs somewhat from his stepson's. According to Applicant, after he told his stepson to leave his office, the stepson punched him. He followed his stepson into the kitchen, where his spouse was attempting to calm her son. A heated discussion ensued between Applicant and his stepson during which his stepson rose from his chair and "came at [him]." Applicant testified as he pushed his stepson away, his stepson fell over a chair. Applicant maintains he was then pursued into the dining room, where his stepson hit him four or five times with a closed fist. Denying he struck back, Applicant indicated he put his stepson in "a military type of restraint, kind of a choke restraint" until his stepson stopped swinging. (Transcript p. 64). Applicant's stepson reported to the police back in July 2001 that Applicant had insulted him in the office. Applicant followed him into the kitchen where he yelled at him, poked him in the eye, openhanded him in the forehead and pushed him over the chair. The stepson admitted he pushed Applicant in the chest whereupon Applicant put him in a "strangle hold." He claimed Applicant put him in a second strangle hold but released him. The stepson then turned around and punched Applicant. At that point, Applicant walked away. (Ex. 3). Based on initial accounts, the police concluded Applicant was the aggressor, provoking the struggle in the kitchen. Applicant's spouse, who had witnessed Applicant push her son in the kitchen, indicated after her son got up, he went toward Applicant. Applicant and her son then engaged in mutual pushing until they ended up in the dining room. She subsequently contradicted her son's claim that Applicant had poked him in the eye in the kitchen. (Ex. 3.) Applicant's stepson had visible bruises immediately after the incident while Applicant showed little sign of injury, although Applicant maintains he was treated the following day for multiple deep bruises which were subsequently photographed by the police. (Transcript pp. 101-02). Applicant's treating psychologist believes Applicant's claim that he acted in self-defense. (Ex. I). Not being privy to the reasons for the therapist's assessment, and with limited knowledge of the history of the relationship between Applicant and his stepson, I can find little to justify Applicant's actions. Instead of allowing tempers to cool, Applicant followed his stepson into the kitchen and pushed him. It is also undisputed that Applicant held his stepson in a physical stranglehold. At the time of his booking, Applicant was overheard to remark that his "'military training had kicked in.'" (Ex.3). However, with evidence of aggressive conduct by the stepson clear, the stepson bears some blame for the escalation of the dispute.

6. Based on the assessment of Applicant's psychologist, anger management counseling was not required. (*See* Ex. G).