

DATE: February 27, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-22240

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

#### **FOR APPLICANT**

R. John Westberry, Esq.

### **SYNOPSIS**

Applicant began stalking the attorney who was representing him in a divorce proceeding. She terminated their professional relationship and notified the police. Despite being questioned and warned by a police officer, Applicant continued the stalking activities leading to his arrest and conviction of stalking. He was placed on probation, which he subsequently violated by his continued stalking activity. Applicant has failed to mitigate the criminal and personal conduct security concerns that arise from these actions. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) 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 submitted a sworn answer to the SOR that DOHA received on September 22, 2003, and requested a hearing. Applicant admitted the four alleged criminal conduct concerns and denied the single alleged personal conduct concern.

This case was assigned to me on October 29, 2003. A notice of hearing was issued on November 24, 2003, scheduling the hearing for December 11, 2003. The hearing was conducted as scheduled. The government submitted eleven documentary exhibits that were marked as Government Exhibits (GE) 1-11 and admitted into the record without an objection. Applicant testified at the hearing, presented one character witness, and submitted five documentary exhibits that were marked as Applicant's Exhibits 1-5, and admitted into the record without an objection. The transcript was received on January 2, 2004.

### **FINDINGS OF FACT**

Applicant's partial admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review

of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 54-years-old and has been employed as a test engineer by a defense contractor since April 1998. He received a bachelor of science degree in aeronautical engineering in 1971, and became a commissioned officer in the United States Air Force in June 1971. He served as a weapons systems officer, attained the rank of Lieutenant Colonel, and retired in October 1993. He earned a master of science degree in 1980 from an Air Force school. Applicant held a variety of jobs for relatively short periods of time between his retirement from the Air Force and his being hired by his present employer. The letters of recommendation and testimony offered on Applicant's behalf attest to his reputation for being a valued employee and a loyal, trustworthy, and reliable individual. Those persons do not consider him to be a security risk, and recommend granting him a security clearance,

Applicant married in August 1983 and separated from his spouse in 1996. He was arrested on August 27, 1997 and charged with Battery-Domestic Violence and Damage to Property-Criminal Mischief. Applicant's explanation for this arrest is that he got into a verbal argument with his wife, she began yelling for a neighbor to call police and stood in front of his automobile when he attempted to drive away, and he therefore had to drive across the lawn at her residence to depart. His ex-wife submitted an affidavit that was admitted at the hearing (AE 3) in which she avers that he never posed a threat to her or acted in a reckless manner. Applicant was found not guilty of both charges on April 28, 1998.

Applicant's wife filed for a divorce in 1996, and he retained a female attorney to represent him. Applicant initially visited his attorney's office on an approximate monthly basis, but at some point began stopping in to visit much more frequently. He also began sending her articles from newspapers, magazines, and gifts. She repeatedly asked him to stop sending her things and stopping by her office, but he continued. She eventually terminated her professional representation of Applicant, but he continued to leave items at her office, send her flowers, and began to stalk her.

Applicant's stalking included: sitting across from her office while looking toward the office with the aid of binoculars; taking photographs of her using a telescopic lens; and following her in his car as she drove home from her office. The attorney contacted the police, who spoke with Applicant on October 21, 1999, advised him of the state stalking law, and warned him that if his behavior continued he would be charged. Applicant continued to send items to the attorney, and her husband called Applicant and told him to cease his behavior. Applicant, however, continued to drive by the attorney's office and through her office parking lot. On March 21, 2000, Applicant defaced a sign at the attorney's office by writing on it "your shit stinks" and "liar."

Applicant was arrested on March 24, 2000 and charged with stalking. He entered a plea of nolo contendere on May 15, 2000, and was placed on 12 months probation. Conditions of probation included completing a psychological evaluation and recommended treatment, and having no contact with the victim, her family, and her employees.

Applicant received the court-ordered psychological evaluation on June 17, 2000.<sup>(2)</sup> The clinical impressions included the following findings: "(a) decreased personal insight into his own interpersonal behavior and functioning, coupled with a degree of defensiveness"; "at times, he is self-critical and presents with feelings of inadequacy and questions if he may be spiraling downward in life"; "this man can be quick to project blame onto others and can be argumentative and belligerent. While he may have temper outbursts with verbal abusiveness, he is unlikely to exhibit physical assaultiveness." However, the evaluation concluded that Applicant "did not present any signs or behaviors suggestive of a major mental disorder. Furthermore, there were no personality traits suggesting a predatory criminal or antisocial personality." Accordingly, no treatment was recommended at that time.

Applicant was arrested for violating his probation on December 28, 2000. He violated his probation by continuing to stalk the victim by: parking and sitting in his vehicle, near her vehicle, in a parking lot at a movie theater while she was inside with a friend; parking and sitting in his vehicle in the parking lot adjacent to her office; driving through the parking lot of the gym she was using; and, on another occasion, parking across from the gym and walking up to the gym complex while she was inside. On January 16, 2001, Applicant was found to be in violation of the terms of his probation, was sentenced to 20 days in jail, had his probation reinstated for an additional 12 months, was ordered to have no contact with the victim, and was again ordered to obtain a psychological evaluation and treatment.

Applicant received another psychological evaluation on February 9, 2001 at the insistence of his employer.<sup>(3)</sup> The

evaluation found that although Applicant had engaged in socially inappropriate and threatening behavior he was not a psychopath. It also disclosed that while Applicant "is not the type of person who is cold hearted, manipulative, dominant, and sensation seeking. . . . He can be deceitful, defiant, and lack empathy or remorse, but he is not an impulsive person by nature, nor is he in general irresponsible or an antisocial person." The evaluation concluded that "Given his oppositional tendencies and personality characteristics, perceived injustice, lack of personal support, and financial and legal stress he is currently under, (Applicant) can be vulnerable and unpredictable. He posses [sic] continuing risk for further offense without clinical and behavioral interventions."

The February 9, 2001 evaluation recommended long-term psychotherapy or counseling, preferably with a female clinician. Instead of accepting this recommendation, Applicant began sessions with a male psychologist on May 7, 2001, meeting with him only once a month on approximately four occasions. That psychologist issued a favorable report on October 29, 2001. <sup>(4)</sup>

Applicant was arrested again on December 7, 2001 for an alleged violation of his probation. The allegation was based on a postcard sent to the victim at her office that read "Congratulations, your son is a criminal you taught him well." Applicant denies sending the card, however, the victim submitted an affidavit on November 16, 2001, in support of a request for an arrest warrant, attesting to the fact that she recognized the handwriting on the card based upon the numerous other cards and letters he had sent her. In view of all the evidence, I find her assertion that Applicant wrote the card credible. The violation of probation was dismissed on January 4, 2002 and the case was closed, apparently based upon a finding that the reinstatement of probation for an additional 12 months that occurred on January 16, 2001 was improper.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

### **BURDEN OF PROOF**

The sole 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. <sup>(5)</sup> The government has the burden of proving controverted facts. <sup>(6)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence <sup>(7)</sup>, although the government is required to present substantial evidence to meet its burden of proof. <sup>(8)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." <sup>(9)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. <sup>(10)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. <sup>(11)</sup>

No one has a right to a security clearance <sup>(12)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>(13)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. <sup>(14)</sup>

### **CONCLUSIONS**

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. Willingness to abide by rules is an essential part of eligibility for access to the nation's secrets. 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.

The government has established its case against Applicant under Guideline J. Applicant entered a plea of nolo contendere to the offense of stalking, was placed on probation, and violated that probation on multiple occasions by continuing to stalk the victim. The multiple individual acts of stalking were themselves criminal acts, despite being lumped together and handled solely as violations of probation, including the act of sending a post card to the victim during a time when he apparently was serving an unauthorized term on probation. Disqualifying Conditions (DC) 1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

Applicant's conduct continued for more than two years and consisted of multiple acts of stalking the victim. The last reported incident occurred a mere two years ago, after Applicant had completed the court-mandated psychological treatment. Applicant failed to follow through on the specific recommendations of the psychologist who evaluated him at his employer's insistence to engage in long-term psychotherapy or counseling, preferably with a female clinician. He instead attended approximately four sessions on a monthly basis with the court-mandated psychologist and reoffended shortly after he stopped seeing him. I have considered all mitigating conditions under Guideline J and conclude that none apply in this case. Applicant has failed to present evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him. Guideline J is decided against Applicant.

Under Guideline E personal conduct 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. 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.

Applicant's repeated acts of stalking his victim for more than two years and his refusal or inability to comply with court orders to have no contact with the victim clearly demonstrate, at a minimum, serious judgmental error. DC 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency* apply in this case.

I have considered all mitigating conditions under Guideline E and, for the same reasons stated under the discussion of mitigating conditions under Guideline J, conclude that none apply in this case. Applicant has failed to present evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him. Guideline E is decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

SOR ¶ 1-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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. GE 8
3. GE 9
4. AE 5
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
12. *Egan*, 484 U.S. at 528, 531.
13. *Id* at 531.
14. *Egan*, Executive Order 10865, and the Directive.