

DATE: June 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24215

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 34-year-old civil engineer was arrested and convicted of assault in 2001 after physically attacking and injuring his girlfriend, until stopped by other individuals. A few hours later, he attempted to enter the victim's apartment with her inside, but left when she said she had called the police. Applicant had been drinking heavily prior to the incident. A court issued a restraining order on February 13, 2001, which was not lifted until October 2, 2003. His three-year probation was to end in March 2004. Applicant completed a compulsory 52-week Domestic Violence/Anger Management class. In his explanation, Applicant minimized the seriousness of his conduct and the injuries to the victim. Rehabilitation has not been established. Clearance is denied.

STATEMENT OF THE CASE

On October 31, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On November 21, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made based on the written record, without a hearing before a DOHA Administrative Judge. The File of Relevant Material (FORM) was issued on January 31, 2003, and Applicant was informed that any response had to be submitted within 30 days of receipt of the FORM. The reply was due by March 26, 2003, but none was received. The matter was assigned to me for decision on March 28, 2003.

FINDINGS OF FACT

Applicant is a 34-year-old civil engineer employed by a defense contractor. The SOR contains three allegations under

Guideline J (Criminal Conduct). As I understand Applicant's response, he admits the factual part of each allegation, s in each case, but denies that the admitted facts make him ineligible to hold a security clearance. His admissions are accepted as findings of fact.

After considering the totality of the evidence derived from the contents of the FORM, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline B (Foreign Influence)

1.a. - Applicant was arrested on February 28, 2001, for an assault that occurred on January 1, 2001. He was charged with two counts of battery and one count of assault, under specified State A law (GX 1, GX 3 - GX 8).

1.b. - As a result of the criminal offense arrest alleged in SOR 1.a., above, a Restraining Order requested by the victim was granted by the court on February 13, 2001, forbidding Applicant from having any contact with the female victim. The restraining order was lifted on October 2, 2001.

1.c. - As a result of the criminal offense cited in SOR 1.a., above, on March 23, 2001, Applicant pleaded No Contest to one count of Assault by Force Likely to Produce Great Bodily Injury. He was found guilty and sentenced to four days in jail, suspended, compulsory attendance at a 52-week Domestic Violence/Anger Management class, and three years probation.

Based on the totality of the evidence, including documents submitted as part of the victim's request for a restraining order (GX 4), I make the addition findings of fact: The female victim in the above matter was a friend of Applicant. They did not live together, but occasionally stayed at each other's residence. Applicant sometime consumed alcohol to the extent that he became verbally and physically abuse toward her. In about May 2000, Applicant began getting more aggressive than usual after becoming drunk. In each case, he accused the victim of being at fault

The criminal conduct alleged in SOR 1.a. began at about 4:00 a.m. on January 1, 2001, after Applicant and the victim left a New Years Eve Party and returned to his apartment. Once inside, he physically abused the victim for about an hour, banging her face on the floor and making her bleed. Applicant allowed the victim to answer a telephone call, which turned out to be from her sister. In a foreign language, the victim told the sister that she was being beaten. When the sister and the sister's boyfriend arrived, Applicant was still assaulting the victim, until the newcomers were able to get her out of the apartment and back to her own.

A short time later, Applicant came to her apartment, banged on her door for two hours and pleaded with her to let him in, blaming his conduct on alcohol and drugs. He returned at about 10:30 that morning and repeated his efforts to persuade the victim to let him in. She called the police, but Applicant had left by the time they arrived. After listening to her and observing her condition, they took photographs and gave her an emergency restraining order. Applicant suffered bruises on her arms, a bruise on her forehead, and a sore neck from when Applicant attempted to strangle her. The police report (GX 5) cites the taking of photographs of the victim's injuries. Applicant surrendered himself to the Police Domestic Violence Unit on February 28, 2001, after receiving notice of the effort to contact him.

From the day of the incident to the date she requested the formal Restraining Order, on February 13, 2001, Applicant sent the victim two to three e-mails at her place of employment, almost every day, repeating his explanation that the drugs and alcohol were responsible for his conduct.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

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

GUIDELINE J (Criminal Conduct)

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

Conditions that could raise security concerns and may be disqualifying include:

1. Any criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns include:

2. The crime was an isolated incident.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that 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.

If the Government meets its initial burden of proof and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Although Applicant admits (in his response to the SOR) the arrest, issuance of the restraining order, and the conviction and sentence alleged on SOR 1.a., 1.b., and 1.c., the only explanations appear in his Sworn Statement (GX 8). His claim that he only pushed her, causing her to hit her head on a dresser and suffer a bruise on her forehead, does not match what the police observed some hours after the assault. Considering that he does remember enough to describe one part of the assault and resulting injury, I conclude it is more likely than not that Applicant has been seeking to minimize the seriousness of what he did. I also conclude that even more damage to the victim, and perhaps even her death, might have resulted if Applicant's ongoing battery had not been interrupted by the appearance of the victim's sister and her male friend. The continuation of his misconduct hours later at the victim's apartment, resulting in the issuance of a restraining order, indicates that Applicant's conduct was the result of his lack of self control and anger as it was by the effect of alcohol.

The above conclusions are especially significant since any explanatory evidence stops with Applicant's sworn statement on March 7, 2002. There is no evidence that Applicant's feelings about the victim have changed, except that he was able to convince a judge to withdraw the restraining order in October 2001. There is no evidence as to the extent of Applicant's current alcohol consumption or the presence or absence of any additional alcohol-related problems. He apparently completed an anger management course, but there is no evidence of a favorable prognosis or the absence of

subsequent problems. Finally, there is no evidence of Applicant's recognition of how serious his misconduct was or what he has done to ensure it will never happen again.

The evidence, even without Applicant's admissions, establishes that the three SOR allegations are correct and that they have a nexus, or logical connection, with Applicant's suitability to hold a security clearance. The impact is clearly a negative one. The only disputed issue is whether Applicant has adequately demonstrated rehabilitation

Possible Mitigation

In his response to the SOR, Applicant contends that (under the language of the Concern), "the reasons stated in paragraphs a., b., and c., do not show a history or pattern of criminal activity." The SOR and the overall record do show criminal conduct on just one date, January 1, 2001. Although Applicant's contention about the Guideline's general statement of concern is correct, the applicability of specific Disqualifying Conditions (DC) may still establish ineligibility for access to the nation's secrets. In the present case, Applicant conduct does qualify as "any criminal conduct, regardless of whether the person was formally charged" (DC 1). Under DC 2, I conclude that the act of violence established by the totality of the record qualifies as a "single serious crime," although apparently punished as a misdemeanor. In any case, I also conclude that the record does show "multiple lesser offenses," based on the victim's statement to police that Applicant had physically assaulted her in the past, when he had been drinking (GX 5 at page 3).

I therefor reject Applicant's claim that MC 2 (the crime was an isolated offense) is applicable. Applicant also contends that MC 3 is applicable (the person was coerced or pressured into committing the act and those pressures are no longer present in that person's life). The record does not indicate who pressured or coerced Applicant into attacking the victim, but the statement appears to suggest that the victim was somehow responsible and, since he is no longer seeing her, he is not likely to act the same way in the future as to the victim or any other person. Whatever Applicant's rationale is, it is not a valid excuse of his conduct. As to MC 4 (the factors leading to the violation are not likely to recur), Applicant does not explain why he believes this condition to be applicable. Except for the passage of two years, during which Applicant has been on probation, nothing in the record establishes genuine rehabilitation, rather than simply submitting to official pressure. Applicant has simply not carried his burden of establishing any of the possible Mitigating Conditions.

FORMAL FINDINGS

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

Guideline J (Criminal Conduct) Against the Applicant

SOR 1.a. Against the Applicant

SOR 1.b. Against the Applicant

SOR 1.c. 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.

BARRY M. SAX

Administrative Judge