

DATE: March 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24863

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Nygina T. Mills, Esq., Department Counsel

**FOR APPLICANT**

Thomas Albin, Esq.

**SYNOPSIS**

Applicant pleaded nolo contendere in February 1999 to assault and battery with a dangerous weapon, and was sentenced to five years supervised probation, to counseling if deemed necessary by the probation office, to pay a \$550 fine, and to forfeit the handgun used in the incident. When interviewed about the offense in February 2000, Applicant initially declined to admit he had been armed. While he later admitted during the interview that he had a handgun, Applicant indicated that the gun was in his pocket when he in fact had displayed it. While his criminal assault was isolated and not likely to recur, his lack of complete candor with the Government reflects poor judgment, unreliability and trustworthiness. Clearance is denied.

**STATEMENT OF CASE**

On June 10, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which 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. [\(1\)](#) 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 Personal Conduct (Guideline E) and Criminal Conduct (Guideline J).

On June 29, 2003, Applicant, acting *pro se*, filed his response to the SOR allegations and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on August 27, 2003, and pursuant to notice dated September 11, 2003, a hearing was scheduled for October 2, 2003. At the hearing held as scheduled, the Government's case consisted of seven exhibits and of the testimony of a Defense Security Service (DSS) special agent who interviewed Applicant in February 2000. Applicant and a union representative testified on Applicant's behalf and he submitted three exhibits. A transcript of the hearing was received on October 15, 2003.

**FINDINGS OF FACT**

DOHA alleged Criminal Conduct and Personal Conduct security concerns because of an October 1998 assault and battery with a dangerous weapon and Applicant's lack of candor about his criminal involvement when he was interviewed by a DSS special agent in February 2000. In his Answer, Applicant admitted he pleaded nolo contendere to the assault and battery charge, but he denied making any false statements during his subject interview and challenged the fairness of the interview, contending the agent was abusive and intimidating. After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 42-year-old senior piping designer who has worked for a defense contractor for about 22 years, leaving the company in 1985 only to return less than two years later in the capacity as a salaried material handler. After working for about eight years as a salaried planner, Applicant went back to design about eight years ago. He seeks to retain his secret security clearance which he has held for two or three years.

From 1989 to 1994, Applicant had relatively amicable relations with his neighbors (a couple, their minor son, and the head of household's brother) whose yard abutted his. Circa 1994, his relationship with these neighbors (primarily the head of household) soured after Applicant complained about the son hitting baseballs into his yard, allegedly damaging Applicant's house, shed and cars.<sup>(2)</sup> On several occasions over the next four years, Applicant complained to the police about these neighbors, as follows:

In late May 1994, Applicant complained to the local police that the neighbor head of household and the neighbor's brother had pushed him around at an entrance to his residence, damaging the door and some plants on the steps. No one was arrested.

Circa 10:00 p.m. one evening in August 1996, Applicant yelled to the neighbor head of household to cease hitting baseballs into his yard. The neighbor reacted by shining the lights of his vehicle onto Applicant's picture window, and while standing in his yard holding a baseball bat, challenged Applicant to come outside. It took several calls by Applicant to the local police to respond. The officer talked to the neighbor and then Applicant, who expressed concerns about his and his family's safety. That weekend, Applicant wrote a letter to the police chief outlining his difficulties with the neighbor and complaining about the officer's failure to arrest his neighbor. The department sent an officer out to Applicant's residence. Applicant signed a statement to the effect the neighbors were prohibited from entering his property, and he was advised not to confront his neighbors, but to call the police should there be any problems in the future.

For the next two years, Applicant made an effort to stay away from his neighbors, and he maintains it was "fairly quiet." He filed one report with the police in June 1997 complaining his neighbors were on his property. In late July 1998, Applicant complained to the police of a youth in his yard.<sup>(3)</sup>

On a Saturday in October 1998, the neighbor boy and his friends were playing volleyball outside in the neighbor's yard when the ball came onto Applicant's property. Neither the boy nor his friends made any effort to retrieve the ball. The neighbor head of household called the local police for guidance as he was prohibited from entering Applicant's land. On the advice of a police officer, the neighbor head of household retrieved his volleyball from Applicant's property. On seeing his neighbor on his premises, Applicant asked the police to arrest his neighbor for trespassing.<sup>(4)</sup> An officer informed Applicant the neighbor could not be arrested as he had authorized the entry, and he advised Applicant to post no trespassing signs on his property. Upset by what he perceived as the local police's lack of regard for his trespassing complaints, Applicant sought the intervention of the state police without success.

That afternoon, Applicant observed the neighbors clearing another spot on their property for the volleyball court. Around 2:00 p.m., when Applicant went outside to collect his mail, he observed the neighbor head of household sitting in his truck making what he perceived to be an obscene gesture toward him.<sup>(5)</sup> While waiting for his spouse to come home and for the neighbors to go into their house so he could post no trespassing signs on his property, Applicant consumed at least a couple of beers. Expecting possible trouble from his neighbors because of the posting, Applicant grabbed a loaded .32 caliber semiautomatic weapon from his collection<sup>(6)</sup> and put it in his right coat pocket with the barrel facing down. That evening, after he had posted several signs, including on a large pine tree bordering his property and the neighbors', he was approached by his neighbors. Applicant withdrew the gun from his pocket and pointed it at

them while yelling at them to retreat because he had a gun.<sup>(7)</sup> They ran back into their house and complained to the police that Applicant had threatened to shoot them. Expecting law enforcement to be called, Applicant also contacted the police. At the directions of a police dispatcher, Applicant placed the gun, a clip, and seven rounds of ammunition on the kitchen table while awaiting the police.

When the police arrived, Applicant was placed in the cruiser where he complained of ongoing difficulties with the neighbors for the past five years, and the police being "*most of the [expletive] problem.*" Applicant told the police he had just about had enough with the neighbors and that he had pointed his gun at the neighbors to protect his property. As he spoke, the officers detected a strong odor of alcohol on his breath. Applicant admitted he had drank "*a few beers.*" He was arrested for felony assault and battery with a dangerous weapon.<sup>(8)</sup> The police took custody of the gun involved in the incident, as well as 36 long guns, 16 pistols, and one compound bow found in Applicant's home. Under the circumstances, Applicant and his spouse felt they had to leave the neighborhood and they listed their home for sale.

At the recommendation of his attorney, Applicant sought counseling in late October 1998 for depression and stress related to his recent arrest. Applicant told his counselor he was concerned for his and his family's safety and made representations to the counselor to the effect that he had pulled a gun on his neighbors when they confronted him. Claiming he had "*only taken the gun out,*" he was upset about being charged with assault and battery with a dangerous weapon. Applicant had a good response to therapy and was discharged in early March 1999.

Advised by his attorney that a nolo plea would not be considered as a felony conviction under pertinent state law, Applicant pleaded nolo contendere in February 1999 to felony assault and battery with a dangerous weapon. He was adjudged guilty as charged, placed on probation for five years, ordered to pay \$550, to attend counseling if ordered by probation, and to forfeit the weapon involved to the state. All other weapons seized from Applicant's home were to be returned to him after the sale of his residence. Applicant transferred ownership of those weapons to his spouse.

On February 22, 2000, Applicant was interviewed at work by a Defense Security Service (DSS) special agent about the October 1998 incident involving the neighbors. Applicant was not given any advance notice of the interview. When asked by the agent whether he had been armed with a handgun during the confrontation with his neighbors, Applicant declined to respond.<sup>(9)</sup> After the agent persisted in his questioning, Applicant admitted he had armed himself with a .32 caliber semi-automatic before going out of his home, but he denied he had ever taken out the gun, racked a round into the chamber, pointed it at the victim or threatened to kill him. Applicant maintained he had kept the weapon in his coat pocket and informed his neighbors he was armed. In response to whether he received all of his weapons back from the police, Applicant related he had transferred ownership of the guns to his spouse. When Applicant would not respond to the agent's inquiry about his access to the guns, the agent told Applicant he would be contacting the Bureau of Alcohol, Tobacco and Firearms (ATF) to determine if Applicant was in violation of 18 U.S.C. § 922g, as he presumed Applicant was prohibited from having access to firearms as a convicted felon. The interview was terminated with Applicant to prepare a written statement for DSS, after consultation with his attorney, explaining the events that transpired between him and his neighbors. After the interview, the agent learned from the ATF that under pertinent state law, Applicant was not considered a convicted felon as he had not been sentenced to any term of confinement.

Applicant returned to work after the February 22, 2000, DSS interview upset at the persistent, at times compound questioning of the agent, and the fact the agent planned to contact the ATF, which he perceived as a threat.<sup>(10)</sup> On February 28, 2000, Applicant met with the same agent to review a voluntary statement he prepared for the DSS in the interim. A union councilor accompanied Applicant as a witness to the interview. The DSS agent greeted Applicant's union steward with a derogatory comment about Applicant, which made the union representative uneasy,<sup>(11)</sup> but the interview proceeded with Applicant voluntarily provided a sworn statement to the agent containing his contacts with the neighbors. In that statement, Applicant indicated he had removed the pistol from his coat pocket during the October 1998 incident, but the weapon never left his side. He denied he had pointed the gun at either of his neighbors or that he had told them he would kill anyone. Applicant addressed the discrepancy between this version of events and the police account, to wit: "*They apparently did not like my version of the story, so they picked the pacing back and forth in my driveway version instead.*"

At his hearing, Applicant acknowledged he had had a gun on that day in October 1998, which he withdrew from his

pocket, but he claimed to have held it by his side barrel down. When asked why he had told the police on the day in question that he had pointed the gun at the neighbors to protect his property, Applicant denied he had told the police that and maintained the police report was untrue.

There has been no recurrence of any criminal assault or even problems with his neighbors since Applicant moved to a new neighborhood in February 1999. He is described by some friends as calm in demeanor ("slow to anger") and deliberative in his decisions.

## 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.

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

### **GUIDELINE E**

#### **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. (E2.A5.1.1.)

Conditions that could raise a security concern and may be disqualifying also include: (E2.A5.1.2.)

Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A.1.2.3.)

Conditions that could mitigate security concerns include: (E2.A5.1.3.)

None.

## **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 a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- d. . . .the factors leading to the violation are not likely to recur.

### **CONCLUSIONS**

Having considered the record evidence in light of the appropriate legal precepts and factors, I conclude the Government established its case under Guidelines J and E.

Applicant and his neighbors (primarily the head of household) had contentious relations from about 1994, when the neighbors' son began to hit balls into Applicant's yard. Following an August 1996 incident where the neighbor head of household taunted Applicant at night, Applicant signed a statement indicating the neighbor was prohibited from entering his property. For the next two years, Applicant managed a relatively peaceful coexistence with the neighbors, largely through avoidance. However, after the police gave the neighbor permission to enter Applicant's yard to retrieve a volleyball in October 1998, his frustration with the neighbors as well as the police, who he felt had not taken his problems seriously, led him to pull a gun on his neighbors during an altercation. Applicant pleaded nolo contendere to felony assault and battery with a dangerous weapon, and the judge found him guilty as charged. There is sufficient evidence to conclude that Applicant withdrew the weapon from his pocket, and pointed it at his neighbors, conduct that placed his neighbors in fear of imminent harm. Under Guideline J, Criminal Conduct, two disqualifying conditions are pertinent to an evaluation of Applicant's security suitability: a. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and b. *A single serious crime or multiple lesser offenses*.

Although his criminal assault and battery was serious, it appears to have been an aberration, committed following years of problems with the neighbors. There is little likelihood, if any, of recurrence since Applicant has moved away from the neighborhood and he has received voluntary counseling. Applicant's probation was without incident. Mitigating conditions apply: a. *The criminal behavior was not recent*; b. *The crime was an isolated incident*; d. . . . *the factors leading to the violation are not likely to recur*. A favorable finding is returned as to subparagraph 2.a. of the SOR.

Applicant's lack of full and complete candor at all times about his conduct on that evening in October 1998 raises security concerns under Guideline J<sup>(12)</sup>

as well as Guideline E, Personal Conduct, however. During the interview of February 22, 2000, Applicant failed to provide full and frank answers about his role in the assault of the neighbors. He was initially reluctant to admit he had a gun on his neighbors in October 1998. Although he subsequently acknowledged he had a .32 caliber semiautomatic on



him, he concealed from the agent that he had withdrawn the gun from his pocket and pointed it at his neighbors. The agent maintains Applicant told him he never displayed the gun. Applicant testified that when the agent asked him "*well didn't you have a firearm on you?*", he responded, "*I said it was in my pocket.*" Whether Applicant made a deliberately false statement or told a half-truth, he was not being completely forthright with the agent. Deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination raises significant security concerns (*See* DC E2.A5.1.2.3. under Personal Conduct and DC a. and b. under Criminal Conduct).

Applicant now seeks to avoid the possible consequences of his lack of candor by claiming that the agent was abusive and threatening and he was improperly denied the opportunity to consult with his attorney before he answered any questions. Allegations of improper conduct on the part of the agent, including denying one the opportunity to consult counsel, must be taken seriously. The agent testified he suspended the interview because Applicant wanted to prepare his own statement after consultation with his attorney. Applicant indicates he told the agent that he wanted to consult with his attorney in response to the agent asking him "*four questions in one*" (apparently whether he had taken the gun out, racked a round in the chamber, pointed it at the victim, and said "I'll kill you" or words to that effect).<sup>(13)</sup>

Based on the record available, the most likely scenario is that Applicant initially refused to respond to the agent's inquiry as to whether he had been armed. After Applicant admitted he had a .32 caliber semiautomatic, he was asked by the agent whether he ever took out the gun, etc. It was then after Applicant objected to the form of the question and the agent asked him well, didn't he have a gun on him, that Applicant responded that he had it in his pocket, and that he wanted to talk to his attorney before he told the agent anything else. It is not at all clear that the Applicant asked for the opportunity to consult with his attorney before he answered any questions. Applicant was reported to have complained of the compound questioning of the agent after the initial interview, but the union steward did not testify to Applicant complaining he had been deprived of the opportunity to consult an attorney.

Applicant's complaints as to the agent threatening him by calling the ATF are unfounded. The agent explained to Applicant why he thought Applicant might be in violation of the law by having possible access to firearms, so the basis for him contacting the ATF was made known and was a rational one. The agent then informed Applicant during his February 28, 2000, interview that he had contacted the ATF and learned that due to state law, Applicant was not considered a convicted felon.

While the agent may have had a brusque or aloof demeanor, this does not constitute abuse. Both Applicant and his witness testified to an inappropriate remark made by the agent at the start of the second interview. Even though the agent had good reason to believe Applicant had not been forthright during his earlier interview, any derogatory comment cannot be defended. However inappropriate, the remark preceded the second interview, not the first. In his Answer, Applicant complained he was being confronted ("interrogated") in a small room during his first interview. Yet, when asked for specifics of abusive conduct by the agent, Applicant testified the agent remarked about everyone being a conspiracy theorist or something to that effect, and of Applicant having had an expensive day, which the Applicant perceived as the agent making light of his situation. There is simply not enough for me to conclude that Applicant was somehow pressured by the agent into making false or misleading statements.

Doubts persist as to whether Applicant's representations can be relied on. In his written statement prepared in February 2000, Applicant admitted he removed the gun from his coat pocket during the confrontation with his neighbors in October 1998, but it never left his side. He denied he ever pointed it at his neighbors, a denial he reiterated at his hearing ("*I drew it out like this and held it at my side . . . [pointing] down towards the ground.*" Tr. 102-03). When asked on cross examination to explain why the police report indicates that he stated to a patrolman on the scene that he pointed the gun at his neighbors to protect his property, Applicant responded it was not true. (Tr. 151-52). There is no apparent motive for the officer to report other than what Applicant said. Absent proof of intentional misconduct, the law enforcement officer is presumed by me to have acted properly in the exercise of his official duties. Lingering concerns about Applicant's honesty and trustworthiness lead me to find against him as to subparagraphs 1.a. and 2.b. of the SOR.

### **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 E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: 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.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. The SOR was issued under the authority of 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).
2. In a statement presented to the DSS agent on February 28, 2000, Applicant complained of "almost constant problems" with the family ("*Their [son] and his friends were constantly damaging our property with rocks or hardballs, we had debts in our cars and our house and we always seemed to have their garbage blowing around our yard, even their siding and roof shingles to their house.*" See Ex. 1). He provided no proof of the damage claimed.
3. This youth is likely to have been his neighbor's son, although the police report of record indicates only "reported youth in yard." Applicant related in his February 2000 statement that the neighbor head of household and neighbor's brother were told by the police to stay off Applicant's property at or around that same time.
4. When asked on cross examination why the neighbor's appearance in his yard upset him so since all the neighbor did was retrieve a ball, Applicant initially claimed to have known what his neighbor was doing in his yard ("*I don't know what he was doing, he was behind--There was a row of pine trees in the back of my property, right behind my shed, and then I had a large field behind that. All I saw was him coming onto my property. That's all I saw.*"). When confronted with his February 2000 written statement where he had indicated he saw the neighbor head of household come over and retrieve the ball, Applicant admitted he had seen the neighbor walk back with the ball. (Tr. 142).
5. Applicant indicated in his statement of February 2000 that the neighbor head of household was making obscene gestures and "yelling stuff" at him. (Ex. 1). Yet, on direct examination Applicant testified at the hearing that there was no verbal accompaniment of the obscene gesture as "[*he*] *just tried to get in the house as quick as possible.*" (Tr. 97).
6. A gun collector with a federal firearms permit, Applicant had 36 long guns and 16 pistols in his home. Since he had a young son, he kept them in a gun safe in an alarmed, locked closet. (Tr. 140).
7. Applicant told the police he had pointed the gun at his neighbors to protect his property. (Ex. 6). In his February 28, 2000 statement, Applicant indicated that he had gone to a local retailer to purchase more no trespassing signs. When he returned, he saw the neighbor head of household's pickup truck with the lights out in the neighbor's field. He claimed that as he exited his car in his driveway, the neighbor head of household and his brother came running around the corner of their house "*yelling and screaming*" at him, telling him he had better not mow the grass too close to the property line or they would kill him. After a further exchange, they walked back to their home claiming they would tell the neighborhood that Applicant was stalking their son. When Applicant responded that they should both stop doing drugs, they ran toward him. Applicant maintained that it was only when he realized they were not stopping that he removed the pistol from his pocket and yelled at them to go back. Applicant claimed the gun never left his side. (Ex. 1). The neighbors complained to the police that as they were attempting to talk to Applicant, he began calling them a "*bunch of*

