

DATE: May 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26694

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 44-year-old retired Army Sergeant First Class now employed as a trainer who has had marital difficulties resulting in two arrests but no convictions and the issuance of a protective order over the past ten years. Criminal conduct mitigated by passage of time and recent actions to change his behavior. Clearance is granted.

STATEMENT OF CASE

On August 3, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to 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 Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On August 17, 2004, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned another judge December 8, 2004 and re-assigned to me on February 1, 2005. A notice of hearing was issued on February 8, 2005, and a hearing was held on February 28, 2005. Three government exhibits and nine Applicant exhibits were admitted into evidence. Applicant's wife testified for the Applicant, and the Applicant testified. The transcript was received on March 10, 2005.

FINDINGS OF FACT

Applicant admitted two allegations with explanation and denied a third. After a complete review of the record, I make the following additional findings of fact:

Applicant is a 44-year-old employee of a defense contractor who retired from the Army in 2001 as a Sergeant First

Class with 22 years of service. He now works as a contract instructor for the Army in the same field in which he served on active duty.

The only criminal allegations against Applicant have occurred over the past ten years as a result of disputes with his wife of 20 years. He has two children and one step-child who was his wife's child. All are grown.

The first two incidents were while Applicant was on active duty in the Army. The first was in 1995 when he was accused of assault after physically removing her from their home and locking her out. She called the military police and the family advocacy council recommended counseling (Exh. 3). He attended and completed the counseling sessions but she declined to attend.

The second occurrence was in 1998 and resulted in a protective order being requested by his wife and issued against him. This occurred after an incident in their car when he was driving to work and his wife began hitting him. When he arrived at his workplace he turned the car over to her to drive. She then aimed the car at him and "lunged" it towards him. She then left the area and applied for the protective order expressing fear that he would retaliate when he returned home. He remained away for four days. No incident occurred and the order was withdrawn.

The third incident was in 2002 when Applicant was arrested for felony assault and/or battery with a deadly weapon. He was accused of placing a knife on her neck and threatening to kill her. He was not prosecuted. The records of the court in their county indicates no felony or misdemeanor activity for Applicant from 1988 to 2005 (Exh. C).

Applicant and his wife have had no further difficulties since 2002 and have been counseled frequently by the pastor of their church concerning improved communication and behavior modification. They have had no difficulties since the 2002 incident and believe that their relationship has greatly improved. Both are active members of their church. He is a trustee involved in church management, and she is a choir member (Exhs. A and E).

Applicant has a good record with his employer and is valued for his dedicated professionalism. He has been employed with the company for the four years since his retirement from the Army. His supervisors and colleagues speak highly of him in their letters of support and through the awards and evaluations he has received (Exhs. B, D and F-I).

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Guideline J (Criminal Conduct) is alleged. The Government has established a sufficient basis that Disqualifying Condition E2.A10.1.1. might be applicable to Applicant in that he has twice been charged with criminal offenses. It could be mitigated by application of the facts in the case to certain of the Mitigating Conditions (MC).

Testimony by both Applicant and his wife indicated that the facts of all three incidents were not as serious as the charges indicated. In the first, the shoe that he allegedly hit her with may have been thrown but she was not hit with it. In the second incident, it was his wife who initiated the assault by hitting him while he was driving and then sought the protective order because she feared retaliation because of her own conduct. In the third, the alleged assault weapon, a knife, was the subject of dispute as to whether it was seen by the police and if any threatening language was used. Both Applicant and his wife denied that a knife was involved but acknowledged that a dispute occurred and that words were spoken but denied the alleged threat.

Applicant's wife conceded that she is argumentative, and the fact that her husband does not like to argue makes her angry prompting her to take action to aggravate him.

Although there may have been some motivation on the part of Applicant and his wife to minimize the incidents that have led to this proceeding, their testimony was credible and both appeared to take responsibility for their previous conduct. They have taken steps to improve their relationship through ministerial counseling and their own recognition that their previous conduct was inconsistent with their ages, his work, and standing in their community. Their marriage has remained intact and reflect their continued responsibilities to each other and their family.

The most recent criminal allegation occurred over two years ago, and the first two incidents occurred ten and seven years ago. I conclude that the criminal behavior was not recent. (E2.A10.1.3.1.), and there is clear evidence of rehabilitation (E2.A10.1.3.6.). Thus, the mitigating conditions are applicable.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant has a good record with his company and served honorably as a non-commissioned officer in the Army.

His minister credits him with raising a fine family and good citizenship.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude that his positive record justifies a finding that it is clearly consistent with the national interest to grant a security clearance to him.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is granted.

Charles D. Ablard
Administrative Judge