

KEYWORD: Criminal Conduct

DIGEST: Applicant was convicted of misdemeanor assault in May 2003, and placed on two years unsupervised probation as a result of his involvement in a fist fight in which his opponent sustained a broken jaw. He was previously convicted of contributing to the delinquency of a minor in 1993, and fined \$50.00. Applicant has successfully mitigated the security concern caused by his criminal conduct. Clearance is granted.

CASENO: 03-18921.h1

DATE: 01/06/2005

DATE: January 6, 2005

---

In Re:

-----  
SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-18921

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Melissa J. Howell, Esq.

**SYNOPSIS**

Applicant was convicted of misdemeanor assault in May 2003, and placed on two years unsupervised probation as a result of his involvement in a fist fight in which his opponent sustained a broken jaw. He was previously convicted of contributing to the delinquency of a minor in 1993,

and fined \$50.00. Applicant has successfully mitigated the security concern caused by his criminal conduct. Clearance is granted.

**STATEMENT OF THE CASE**

On April 5, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J (criminal conduct). Applicant submitted a sworn answer to the SOR that was received by DOHA on April 19, 2004, admitted all allegations contained in the SOR, and requested a hearing.

The case was assigned to me on September 10, 2004. A notice of hearing was issued on October 28, 2004, scheduling the hearing for November 15, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant called two witnesses, testified on his own behalf, and submitted three documentary exhibits that were marked as Applicant's Exhibits (AE) 1-3, and admitted into the record without objection. The transcript was received on November 23, 2004.

## FINDINGS OF FACT

Applicant's 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 32 years old, has been married since June 1998, and has a stepdaughter who is 15 years old, and a daughter who is three years old. Applicant has been employed by a defense contractor as an electronics technician since November 2004. He was previously employed by a different defense contractor as a maintenance technician from April 2003 to October 2004. Prior to that employment, Applicant worked for a company as a communication technician from April 1998 to April 2003. The testimony of his witnesses and the performance evaluation he submitted establish he is considered to be a trustworthy individual, and a valued employee who performs his assignments well.

Applicant was ticketed for trespassing in 1992 after he turned his vehicle around in a private parking lot. The charge was *nolle prossed*. He was charged with illegal possession of alcohol and contributing to the delinquency of a minor in 1993, after police found alcohol in a vehicle in which he and a person who was under 18 years old were passengers. Applicant was 20 years old at the time. The illegal possession of alcohol charge was dismissed and he was convicted of contributing to the delinquency of a minor and fined \$50.00.

Applicant attended a tractor pull with a number of co-workers on June 30, 2002. He drank four to five beers over the course of the approximately six hours the event lasted. An incident occurred in the parking lot as people were leaving that resulted in Applicant and another man getting into a fist fight. While their versions of what caused the altercation differ, it is clear that Applicant punched the man in the face and the man suffered a broken jaw. Applicant and the victim both state the victim was struck by others in addition to Applicant. Applicant believes the broken jaw was the result of the beating the victim sustained at the hands of the other individuals, while the victim attributes his serious injury to Applicant.

Applicant was charged with the felony offense of assault with a deadly weapon. (2) He entered a plea of no contest to misdemeanor charges of assault with a deadly weapon and assault inflicting serious injury on May 19, 2003, and was sentenced to 60 days jail. The jail sentence was suspended, and Applicant was placed on two years unsupervised probation, and ordered to pay a fine of \$300.00, court costs of \$175.00, and make restitution to the victim of about \$7,000.00. He has paid the fines, costs, and restitution in full and remains on probation until May 2005. Applicant adamantly denies causing the broken jaw, and believably testified he only pled no contest to that offense to avoid a possible felony conviction if he went to trial and the finder of fact disagreed with him.

Applicant began anger management counseling on May 12, 2004, and had completed 15 therapy sessions covering the following subjects at the time of the hearing: time-out; warning signs; cycle of violence; and anger sequences. He undertook the anger management under his own volition, and not in response to issuance of the SOR or as a consequence of his assault conviction. Rather, the counseling was entered into to help him deal with the stresses and issues involved in raising a 15-year-old daughter. His primary care physician did prescribe a medication to help Applicant control his anxiety following the assault conviction.

Applicant has learned from his assault conviction and altered his lifestyle. He has modified his drinking habits, primarily associates with family and friends, and no longer goes to bars or otherwise puts himself in a position where fisticuffs might ensue. He also takes seriously his obligations to his wife and family, and is keenly aware that he cannot afford to become involved in future criminal activity.

### **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, with its respective DC and MC, is 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>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(5)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</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>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</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>(12)</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 qualification for 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 was convicted of a minor offense in 1993 and rather serious offenses, albeit misdemeanors, in 2003. He was also arrested on one other occasion in 1992 for a minor offense, although the charge was *nolle prossed* on appeal. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant's 1992 and 1993 offenses are extremely minor in nature, totally dissimilar from the 2002 offense, and would not, standing alone, raise any security concern at this time. The 2002 offense was a situational occurrence that resulted in severe charges being filed against Applicant because of the unfortunate but serious injury that resulted from what was a nonsensical fist fight. He quickly satisfied all court-ordered financial obligations, has changed his lifestyle, and voluntarily undertaken counseling intended to make him more capable of dealing with anger when it arises. Overall, Applicant has demonstrated he is a mature, steady, responsible, and trustworthy individual who is unlikely to re-offend. MC 2: *The crime was an isolated incident*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Once again, it must be noted that no one has a right to a security clearance<sup>(13)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(14)</sup> After considering the evidence of record in this case, I find Applicant has mitigated the security concern caused by his criminal conduct. Guideline J is decided for Applicant.

## **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: 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. Clearance is granted.

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. The indictment (GE 5) alleges Applicant's hands were the deadly weapon.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id.* at 531.
12. *Egan*, Executive Order 10865, and the Directive.
13. *Egan*, 484 U.S. at 528, 531.
14. *Id.* at 531.