

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to successfully explain, extenuate, or mitigate the security concern stemming from his history of criminal conduct based on a series of domestic-violence incidents with his now ex-wife and a single incident with a former girlfriend. Clearance is denied.

CASENO: 03-23344.h1

DATE: 04/18/2006

DATE: April 18, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23344

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant failed to successfully explain, extenuate, or mitigate the security concern stemming from his history of criminal conduct based on a series of domestic-violence incidents with his now ex-wife and a single incident with a former girlfriend. Clearance is denied.

STATEMENT OF THE CASE

This case arose when the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 10, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J for criminal conduct and Guideline E for personal conduct (falsification of a security-clearance application). Applicant replied to the SOR on January 8, 2005, and he requested a hearing. The case was assigned to me August 15, 2005. A notice of hearing was issued scheduling the hearing for October 17, 2005. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript October 28, 2005.

RULINGS ON PROCEDURE

Department Counsel moved to amend SOR as follows: 1) to reflect that the SOR should have been dated December 10, 2004; and 2) by deleting the word "charged" and inserting the word "arrested" in SOR subparagraph 1.d. The motion was explained to Applicant who did not object. Accordingly, the SOR was amended accordingly.

FINDINGS OF FACT

In his response to the SOR, Applicant admitted to the allegations in subparagraphs 1.a, 1.b, 1.c, 1.e, and 1.f. He neither admitted nor denied the allegation in subparagraph 1.d and explained he had no memory of this particular incident in 1996. He did not reply to the falsification allegation in subparagraph 2.a, which will be construed as a denial. In addition, I make the following findings of fact.

Applicant is a 44-year-old man who is seeking a security clearance. He is employed as a HVAC control technician and he works for a company engaged in government contracting. He married in 1984, separated in 1999, and divorced in 2000. During the marriage, he and his wife had three children, now ages 20, 18, and 15. Applicant has had a regular relationship with a girlfriend for the past two and one-half years or so and they currently live together. She is aware that Applicant has this matter pending as she helped him prepare his response to the SOR.

Applicant has a history of criminal conduct from 1987 to 2002. His criminal conduct consists of a series of domestic-violence incidents with his now ex-wife and a single incident with a former girlfriend.

In 1987, Applicant was arrested and charged with simple assault stemming from an incident with his wife. Although arrested, the charge against him was *nolle prossed*.

In 1994, Applicant was arrested and charged with domestic assault and battery stemming from an incident with his wife. Although arrested, the charge against him was dismissed.

In 1994, Applicant was arrested and charged with assault and battery on a family member stemming from an incident with his wife. Applicant appeared in court without counsel and he pleaded guilty to the charge. The court found sufficient facts to find him guilty, but deferred adjudication/disposition and placed him on a first-time offender program requiring him to attend an anger management course (Exhibit 3). Applicant complied, and the court dismissed the charge in December 1994.

In 1996, Applicant was arrested and charged with family abuse stemming from an incident with his wife. The record evidence is less than clear, but it appears this charge was dismissed.

In 2001, Applicant was cited for the improper operation of a vessel and equipment. This matter stemmed from operating his boat in such a way as to cause a wake in a no-wake zone. He paid a fine of \$75 and \$40 in costs. The record

evidence does not establish this incident was criminal in nature as opposed to a citation for violating an ordinance, statute, or some other rule or regulation.

In June 2002, Applicant was charged with a Class I misdemeanor for using obscene, vulgar, profane, or abusive language over the telephone (Exhibit 4). This charge stemmed from an incident with a former girlfriend who was also a tenant of Applicant's. He described her as a scorned woman who was trying to get back at him because he decided not to continue their relationship. Applicant appeared in court without counsel, and the court reduced the charge to the lesser offense of using abusive language to another (a Class III misdemeanor) and found him guilty. The court ordered him to pay a penalty of \$500 with \$400 suspended. Also, he was ordered to have no contact with the woman.

On or about February 14, 2002, Applicant completed a security-clearance application (Exhibit 1). In signing the application, he certified his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith, and that he understood that a false statement could be punished under federal law. Concerning his police record, Applicant answered no to Question 26, ⁽²⁾ which required him to disclose any miscellaneous criminal offenses dating back to February 1995. He did not disclose the incident in 1996 when he was charged with family abuse. Applicant explained that he has no memory of this particular incident that took place during his difficult marriage. Also, he explained he completed the security-clearance application honestly and to the best of his ability. In that regard, he presented another application completed in 2001 (Exhibit A) wherein he disclosed the 1994 assault and battery incident in response to a question similar to Question 26.

Applicant attributed the domestic-violence incidents with his wife to a difficult marriage and his inability to manage or control his anger. He painted her as the aggressor and that he would grab her by the arms to restrain her. He admits that his wife told him that she had a fractured arm due to an incident, but he never saw anything indicating a fracture (Transcript at 47). He admits throwing things, such as plates and bowls, at his wife and he says she did the same (Transcript at 48). Also, he admits to throwing a basket of clothes at his wife and she later told him she cracked a rib or something to that effect (Transcript at 48).

Applicant believes the anger management course was helpful. He gets along well with his current girlfriend and they have experienced no incidents of domestic violence or fights. Since the June 2002 incident with his former girlfriend, Applicant has had no involvement with law enforcement (arrests, charges, or convictions), and he is not under any type of court-ordered supervision or probation. He has a valid state driver's license without restrictions.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility,

including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.⁽³⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only 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.⁽⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁵⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽⁶⁾ An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁷⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

As noted by the Supreme Court in *Department of Navy v. Egan*, "it should be obvious that 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."⁽⁹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline J,⁽¹⁰⁾ criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J.⁽¹¹⁾ The record evidence is clear: Applicant has a history of criminal conduct from 1987 to 2002 based on a series of domestic-violence incidents with his now ex-wife and a single incident with a former girlfriend. Given these circumstances, DC 1⁽¹²⁾ applies against Applicant. Applicant's inability or unwillingness to conduct his personal relationships with women in such a way as to avoid law-enforcement intervention creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the MC under the guideline and conclude Applicant receives credit in mitigation. Applicant's last run-in with the law was the June 2002 incident with his former girlfriend/tenant. This incident took place more than three years ago; thus, his criminal behavior may be considered as not recent under MC 1.⁽¹³⁾ Applicant receives credit under MC 4⁽¹⁴⁾ because his ex-wife and former girlfriend are no longer part of his life thereby reducing the likelihood of additional offenses. Applicant also receives credit under MC 6⁽¹⁵⁾ based on 1) his completion of the anger management course; and 2) the passage of time since June 2002 with no further incidents. Taken together, this constitutes evidence of rehabilitation.

This case presents both disqualifying and mitigating facts and circumstances that require me to balance one against the other. Applicant was involved in some rather rough and violent behavior with his now ex-wife as well as an incident with a former girlfriend. Although charged with several misdemeanor offenses, the four charges involving his ex-wife were dismissed or dropped for one reason or the other. His only conviction is for a relatively low-level misdemeanor offense with a small monetary penalty stemming from the telephone incident with his former girlfriend in June 2002. He has been gainfully employed in the HVAC field for many years and he has had no further incidents of criminal behavior since the June 2002 incident. Of note, he has had a relationship with another woman for more than two years and there is no evidence of similar behavior.

Although most of these matters are favorable, Applicant's history of domestic violence from 1987 to 2002 speaks volumes about his overall character and judgment. Applicant deserves credit for his law-abiding behavior since the June 2002 incident, but this is a relatively brief period considering his 15-year pattern of behavior and it is too soon to tell if he has truly changed his ways. In short, his pattern of behavior is proof of extremely poor judgment, unreliability, and untrustworthiness, all of which cannot be squared with the clearly-consistent standard and the strict guidelines followed in security-clearance cases. In other words, in close cases the clearly-consistent standard mandates a denial in favor of protecting national security. Based on the record evidence as a whole, I conclude the evidence of reform and rehabilitation is insufficient to successfully explain, extenuate, or mitigate the criminal conduct security concern. Accordingly, Guideline J is decided against Applicant.

Personal conduct under Guideline E⁽¹⁶⁾ 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. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely

forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, based on the record evidence as a whole, the government failed to establish its case under Guideline E. The record evidence is insufficient to prove that Applicant knowingly and willfully omitted the 1996 domestic-violence incident when he answered Question 26 of his security-clearance application. Given the several incidents, it is reasonable to conclude that Applicant did not recall this particular incident. In addition, the alleged falsification is undermined by Applicant's disclosure of another domestic-violence incident in response to a similar question when he completed a different application in 2001 (Exhibit A). Accordingly, given this failure of proof, Guideline E is decided for Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. The clearly-consistent standard requires I resolve any doubt against Applicant, ⁽¹⁷⁾ and this case presents doubt because his pattern of behavior is inconsistent with the strong character and good judgment required of a person who holds a security clearance. In reaching my decision, I considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: For Applicant

Subparagraph f: Against Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in [questions] 21, 22, 23, 24, or 25?
3. Executive Order 10865, § 7.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
6. Directive, Enclosure 3, Item E3.1.14.
7. Directive, Enclosure 3, Item E3.1.15.
8. Directive, Enclosure 3, Item E3.1.15.
9. 484 U.S. at 528, 531 (1988).
10. Directive, Enclosure 2, Attachment 10.
11. In reaching this conclusion, I have given no weight to citation for improperly operating his boat (SOR subparagraph 1.e) because there is no indication this incident was a criminal offense as opposed to a mere citation.
12. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

13. E2.A10.1.3.1. The criminal behavior was not recent.

14. E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

15. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

16. Directive, Enclosure 2, Attachment 5.

17. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials").