

DATE: June 30, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-05682

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant pleaded guilty to a single count of battery following his arrest and charge of spousal abuse and battery arising out of an isolated pushing and shoving exchange between Applicant and his spouse of over 20 years. Applicant completed all of the probation conditions required by the State A court and is in the process of working with the court to have his criminal record expunged. Applicant mitigates the security concerns associated with his isolated March 2001 domestic incident and demonstrates the judgment and trust restoration requisite for continuing to hold a security clearance. Clearance is granted.

**STATEMENT OF THE CASE**

On October 28, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on November 11, 2003, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on January 22, 2004, and received it on February 3, 2004. Applicant did not respond to the FORM within the 30 days provided him. The case was assigned to me March 22, 2004.

**SUMMARY OF PLEADINGS**

Under Guideline J, Applicant is alleged to have been charged in March 2001 in State A with spousal abuse and battery, to which he pleaded guilty to battery, with the balance of the complaint being dismissed on a motion of the people in the furtherance of justice. The SOR further alleges that Applicant was placed on three years summary probation, ordered to pay a restitution fine of \$100.00, ordered to pay a domestic violence fine of \$200.00, participate in a ten-day public

service work program and attend a one year domestic violence program. The SOR alleges Applicant failed to appear for a court review of his domestic violence program completion, for which a bench warrant was issued in May 2002 for his arrest, with bail set at \$20,000.00.

For his response to the SOR, Applicant admitted to his March 2001 arrest and charge in State A of spousal abuse and battery (an isolated argument between Applicant and his spouse in State A that got out of hand, resulting in mutual pushing and shoving). Applicant admitted to pleading guilty to a battery, but denied any pattern of spousal abuse or battery. Applicant denied the balance of the complaint was dismissed on a motion to dismiss in the furtherance of justice; he claimed he and his wife wanted all of the charges dropped but were unsuccessful in stopping the prosecution. Applicant further claimed the State A prosecutor filed his motion to dismiss in the knowledge there had been no history of spousal abuse and the charges were untrue. Applicant admitted to being placed on summary probation and ordered to satisfy the other alleged conditions, but denied failing to appear in State A's court without court permission (claiming he received written permission from the State A court to carry out the rest of his probation obligations (classes, *etc.*) in his current state of residence (State B)).

### **FINDINGS OF FACT**

Applicant is a 54-year-old vice president for technology in a defense contractor who seeks retention of his security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant and his current spouse (W) married in 1982 in State A and have one child, an adopted daughter who attends a prestigious university in State B, Applicant's current state of residence. In their marriage of over 20 years, they have never engaged in singular or mutual violence and report no prior history of instability in their home (before the events of March 2001). Applicant is an executive for a defense contractor in State B. He enjoys strong support from his managers and colleagues for his reliability and trustworthiness in completing missions.

Applicant and his spouse became embroiled in a heated exchange in their State A home in March 2001. The exchange escalated to the point where both engaged in mutual pushing and shoving. In her anger, W reached for the phone and called the police; even though at the time she was not injured (her version). W's account is not controverted, appears credible, and is accepted.

W had been emotionally on edge over the prospect of their only daughter leaving for college and had not handled the situation very well. According to her account, she had been under the care of mental health professionals for some time for a condition she describes as cyclothymia (a mild form of manic depression). She had been on medication for this condition, but had stopped taking her medication around the time of the March 2001 incident between she and Applicant.

When the police arrived at Applicant's home in March 2001, they arrested Applicant and charged him with two counts of spousal abuse and battery. After both she and Applicant failed to get all of the charges dropped, she and Applicant were advised by their attorney to go to trial where they most certainly would get the charges dropped.

Neither Applicant nor W were comfortable having their family problem on trial before a jury. So, Applicant (with W's concurrence) arranged to take an offered plea deal from the State that entailed an Applicant admission to one battery count and dismissal of the more serious spousal abuse charge.

After pleading guilty to one count of battery, Applicant accepted the State A court's probation conditions: three years of summary probation, restitution of \$100.00, payment of a domestic violence fine of \$200.00, participation in ten days of a public service work program, and attendance of a domestic violence program. Applicant was progressing well towards satisfying the court's probation conditions when he obtained a job out of state that required he and his wife to move to State B. So, instead of completing the attendance part of the program in State A, he worked out an arrangement that enabled him to complete the required classes he had started in State B. He was told to document enrollment in these classes in State B by April 15, 2002, which he assures he did.

Having heard nothing more from the State A court about approvals of his State B courses, he checked the court's record

by the internet in November 2002, only to learn a warrant had been issued since August 2002. As the result of some apparent confusion among State A officials over the conditions in which Applicant would be permitted to complete his probation in State B, Applicant failed to appear in State A for a scheduled court review of Applicant's domestic violence program progress. As a consequence, the State A's court issued a bench warrant for Applicant's arrest in May 2002. Applicant had mistakenly believed his out-of-state classes had been approved and his State A lawyer was handling the local details with the court.

Since resolving his warrant issues with State A, Applicant has completed all of the State A court's required programs, paid all imposed fines and satisfied all of his probation conditions. Specifically, he completed a required 52-week domestic violence program and ten days of community service imposed by the court. He is currently in the process of working with the court to have his criminal record expunged.

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Criminal Conduct**

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

#### **Disqualifying Conditions:**

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

#### **Mitigating Conditions:**

MC 1 The criminal behavior was not recent.

MC 2 The crime was an isolated incident.

MC 6 There is clear evidence of successful rehabilitation.

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of

Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of

material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

case.

## **CONCLUSIONS**

Applicant comes to these proceedings with no prior history of domestic violence issues in his marriage before the incident of March 2001 that involved mutual pushing and shoving between himself and his wife and his ultimate arrest on charges of spousal abuse and battery. The incident raises security concerns under Guideline J.

Acting on the advice of his attorney, Applicant pleaded guilty to one count of battery (associated with the March 2001 incident) and was placed on three years of summary probation. The incident, though isolated, is a serious one and warrants the application of two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious or multiple lesser offenses). Government must be able to repose a high degree of trust in those it bestows access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

Applicant's 2001 domestic violence incident, while serious, is isolated and the result of an exchange between Applicant and W that was totally atypical for them. Addressing the incident head on, Applicant accepted the State A's probation conditions and has completed all of the conditions required of him. On the strength of his demonstrated overall marriage success and affirmative steps he has taken to improve and strengthen marriage communications between himself and W, Applicant is entitled to the application of several mitigating conditions (MC) covered by the Adjudicative Guidelines for criminal conduct: MC 1 (behavior not recent), MC 2 (isolated incident) serious positive steps taken to significantly reduce or eliminate vulnerability to coercion, exploitation or duress), and MC 6 (there is clear evidence of rehabilitation).

By the accepted accounts of both Applicant and W, the couple has enjoyed a stable and prosperous marriage before the March 2001 incident in State A that resulted in Applicant's plea deal. His non-appearance seems to have been the result of a misunderstanding with the State A court and has since been rectified. Applicant, in the meantime, has satisfied all of his probation conditions and is presently working with the State A court to have his criminal record expunged.

Taking into account all of the circumstances surrounding Applicant's spousal incident of March 2001, the isolated nature of the incident, the shared responsibility assumed by W, and the steps Applicant has taken to satisfy the court's conditions and resume his stable marriage, Applicant's conduct is mitigated. Applicant's lengthy history of holding a security clearance (dating to 1985) without any reported adverse incidents must be weighted as well when assessing any residual risks associated with Applicant's judgment lapse in connection with the March 2001 incident. This excellent record of holding a security clearance, when supplemented by the accounts of Applicant and W and the restorative steps Applicant himself has taken to comply with the court's probation conditions, conduce to enable safe predictive judgments that the type of conduct covered in the SOR will not be repeated in the foreseeable future. Favorable conclusions warrant with respect to the allegations covered by Guidelines J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

## **FORMAL FINDINGS**

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR 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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge