

DATE: August 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07554

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 47-year-old senior staff engineer, has been arrested and charged with several misdemeanor criminal offenses and one criminal felony offense, all stemming from his divorce. The security concerns raised by his criminal conduct have been mitigated by the passage of time and his successful rehabilitation. Clearance is granted.

STATEMENT OF THE CASE

On November, 16, 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. Specifically, the SOR set forth security concerns arising under Guideline J, Criminal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 16, 2004, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on June 1, 2005.⁽¹⁾ Applicant had 30 days from receipt of the FORM to file objections and submit evidence in refutation, extenuation, or mitigation, which he did through his counsel.⁽²⁾ The Department Counsel did not object. The case was assigned to me on July 27, 2005.

FINDINGS OF FACT

Applicant admitted, with explanation, each of the allegations in Subparagraphs 1.a through 1.f of the SOR. Those admissions are incorporated here as findings of fact. In his amended response, Applicant argues that he does not fall within the Disqualifying Conditions of Guideline J because his ex-wife was a harassing and litigious person who used the criminal and civil system to prosecute him without just reason, he does not have a "pattern of criminal behavior", and he has not been convicted of a crime. He further argues that if the Disqualifying Conditions apply, he has mitigated the conditions as the pressures which lead to his problems are no longer in his life and his conduct has improved since 2001.⁽³⁾ After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant, who is 47 years old, has worked for almost three years as a senior staff engineer for his current employer, a defense contractor.⁽⁴⁾ Applicant received a Bachelor of Science degree in electrical engineering around 1980. Since 1980, he has continuously worked in electrical engineering.⁽⁵⁾ He worked for other defense contractors for nearly twenty years. He completed a security clearance application (SF 86) in September 1999.⁽⁶⁾

Applicant is divorced and has two children, now ages 18 and 16.⁽⁷⁾ In 1997, Applicant learned that his wife was having sexual relations with other men and left town for a few days to consider the situation.⁽⁸⁾ Upon his return, his wife had him served with court papers⁽⁹⁾ alleging, for the first time, continuous physical abuse.⁽¹⁰⁾ He denied any physical abuse.⁽¹¹⁾ Although she could not substantiate her allegations, he agreed to a protective order, which the Court issued on September 22, 1997.⁽¹²⁾ The Court made no findings of abuse by Applicant.⁽¹³⁾ At the same time she filed the physical abuse charges, his wife filed for divorce, which became final in 1999.⁽¹⁴⁾

In June 1998, Applicant observed his wife driving around town in the family car with their children and her boyfriend.⁽¹⁵⁾ He told the boyfriend to leave his children alone.⁽¹⁶⁾ His wife filed charges for violation of the protective order.⁽¹⁷⁾ The Court found him guilty of a technical violation, suspended imposition of a sentence, directed DJS evaluation, and placed him on one year of probation.⁽¹⁸⁾ The DJS assessment concluded that he did not have any alcohol, drug or emotional problems and recommended no further services.⁽¹⁹⁾

He was arrested on May 8, 2000 and charged with 3rd degree assault after telling his now ex-wife's then boyfriend to stay out of family business. The charge was amended to Peace Disturbance and dismissed by the Court for lack of evidence.⁽²⁰⁾ Applicant was arrested in October 2000 and charged with assaulting a person. His ex-wife's boyfriend started yelling and verbally abusing him when he returned some of his daughter's clothes to his ex-wife's home.⁽²¹⁾ He took a swing at the boyfriend then pushed him.⁽²²⁾ Applicant pled guilty to the assault charge.⁽²³⁾ The Court suspended imposition of sentence and placed him on one year probation.⁽²⁴⁾

On May 28, 2001, Applicant took some clothes for his children to his ex-wife's house.⁽²⁵⁾ Her boyfriend was in the front yard talking with a repairman.⁽²⁶⁾ He and the boyfriend had an argument about the boyfriend's presence at the house and "cohabitating" with his ex-wife.⁽²⁷⁾ Applicant rammed his car into the boyfriend's car causing property damage.⁽²⁸⁾ His ex-wife called the police, who arrested Applicant and charged him with violation of a Protective Order, a misdemeanor, and Assault 1, property damage, a felony.⁽²⁹⁾ The arrest report notes that Applicant was angry and apologetic at this time. On June 14, 2002, he pled guilty to these two charges.⁽³⁰⁾ The Court suspended imposition of a sentence; placed him on five years probation; fined him \$1,000.00; and as a condition of his probation, ordered 80 hours of community service, payment of restitution, attendance at aggressive offender program, full time employment, 30 days on work-release, and no contact with the victims or family except as ordered by family court.⁽³¹⁾ The Court decided that a determination on whether he was a prior offender, persistent offender, dangerous offender or persistent misdemeanor offender was inapplicable.⁽³²⁾ Applicant has complied with the terms of his probation.

In August 2001, the police took Applicant to the station for booking on harassing telephone calls to his ex-wife and violation of a Protective Order.⁽³³⁾ In his statement to police about his conduct, he said that he loved his ex-wife and

wanted to protect his family. The police referred this matter to family court. (34)

Applicant completed the aggressive offender program on September 24, 2002. (35) On August 1, 2003, the Board of Probation and Parole notified him that he was now enrolled in the minimum supervision program, meaning he must call in once a month on the automated reporting system. (36) He has complied as required. (37) His supervisor wrote a favorable letter on his behalf outlining his accomplishments at work and his belief that Applicant is honest, trustworthy and loyal to the U.S. (38) Applicant's troubles began when he and his wife separated, then divorced. (39) He did not want the divorce and wanted to remain a good father to his children. (40) He and his ex-wife had joint custody of their minor children. (41) Despite this, he encountered serious visitation problems when his wife failed to co-operate with the agreed upon visitation schedule. (42) He also felt harassed and taunted by his ex-wife, and disapproved of her "cohabitating" with another man in front of their children, all of which caused anger and frustration for him. (43) His ex-wife has remarried and he no longer has any contact with her. (44) He continues to have regular contact with his children.

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2, Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (45) The government has the burden of proving controverted facts. (46) The burden of proof is something less than a preponderance of the evidence. (47) Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. (48) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (49)

No one has a right to a security clearance (50) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (51) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (52) Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. (53) 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's

judgment, reliability and trustworthiness.

CONCLUSIONS

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

The government has established its case under Guideline J. Criminal Conduct Disqualifying Condition E2.A10.1.2.1 (*Allegation or admission of criminal misconduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) applies. Between 1997 and 2001, Applicant was arrested several times for misdemeanor charges and one felony charge. Applicant has acknowledged the issuance of a protective order in 1997. He was arrested for violation of this order in June 1998, May 2000, May 2001 and August 2001. In May 2000 and May 2001, the police also charged him with assault. He pled guilty to the June 1998 misdemeanor charge and to May 2001 felony and misdemeanor charges. The May 2000 assault charge was reduced to disturbing the peace charge and dismissed. The August 2001 charges were referred to family court. His conduct clearly falls under the disqualifying conditions of this guideline.

I have considered the Criminal Conduct Mitigating Conditions and concluded that E2.A10.1.3.1 (*The criminal behavior was not recent*); E2.A10.1.3.3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*); and E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) apply. Prior to confronting his ex-wife about her inappropriate sexual conduct in 1997, Applicant had not been charged with any criminal misconduct. His ex-wife responded to the confrontation by filing unsubstantiated allegations of physical abuse against him. He and his ex-wife continued to fight with each other through a messy divorce, including confrontations often coinciding with matters related to their children. His last arrest occurred four years ago. He has remained away from his ex-wife as required by the Protective Order and has not had further problems with the police. Outside of the problems related to the breakup of his marriage, he has not been involved with the police or the criminal justice system.

Applicant did not intentionally develop plans to commit crimes in violation of the law. Rather, he often reacted to his ex-wife's decisions to involve her boyfriends in their children's lives in a manner he viewed as intrusive to his role as a father and her inappropriate conduct in front of minor children. He also responded to deliberately antagonist, hostile and abusive verbiage from his ex-wife's boyfriend to his detriment. He no longer has any contact with his ex-wife, who has remarried, or her former boyfriends. He has not only recognized the need to take himself out of the situations which triggered his anger and resulted in his ex-wife calling the police, but has done so.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case, that Applicant has shown a significant change in his behavior and that the criminal conduct resulted from the antagonism between him and his ex-wife during and immediately subsequent to their divorce often over child visitation. All criminal charges, except one, occurred because he violated a protective order and thus, were misdemeanors. The only felony charge against Applicant involved property damage. Applicant has paid restitution for this damage and apologized. Since the last misdemeanor charges in August 2001, Applicant has learned to manage his anger and to separate himself from the potential source of additional anger. He has complied with the conditions of his probation by paying the fine imposed, attending the anger management program, and staying away. After one year on probation, he was transferred from supervised to unsupervised probation as he had demonstrated compliance with the Court's probation order. He has continued to comply with the terms of his probation, and thus, continues to be entitled to unsupervised probation. Applicant has corrected his behavior and has demonstrated that he has rehabilitated himself. As his ex-wife has remarried and his children are old enough to make their own decisions, the problems will not reoccur. I conclude that the Applicant has successfully mitigated and overcome the government's case under Guideline J.

Accordingly, I find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of

Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: 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 continue a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

1. The File of Relevant Material (FORM) provided to Applicant included Items one through eight.
2. Applicant's additional submissions consisted of an Amended Answer and Response to the SOR with four exhibits. These are: Exhibit 1) Certificate of Achievement dated September 24, 2002; Exhibit 2) letter dated August 1, 2003 from the Board of Probation and Parole; Exhibit 3) letter dated June 20, 2005 from Applicant's supervisor; and Exhibit 4) his resume.
3. Item 2 (Response to SOR dated December 13, 2004) at 1-2; *supra* note 2, at 2-3.
4. Exhibit 2, *supra* note 2 at 1; Exhibit 4, *supra* note 2, at 1.
5. Exhibit 4, *supra* note 2, at 1.
6. Item 4 (Security Clearance Application dated September 22, 1999) at 1.
7. *Id.* at 3-5.
8. Item 2, *supra* note 3, at 1.
9. The record contains no documents which describe the papers to which Applicant refers. I do not know if the papers are criminal charging documents or civil court documents.
10. Item 2, *supra* note 3, at 1.
11. Item 5 (Applicant's supplemental statement dated January 27, 2003) at 2.
12. Item 2, *supra* note 3, at 1.
13. *Id.*
14. *Id.*; Item 4, *supra* note 5, at 4.

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*; Item 4, *supra* note 5, at 8.
19. *Id.*
20. Item 2, *supra* note 3, at 1.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Item 7 (Police Investigative Report dated May 28, 2001) at 5; Item 2, *supra* note 3, at 1.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Item 6 (Criminal Complaint, Court Sentence and Judgment, June 14, 2002) at 3.
31. *Id.* at 4.
32. *Id.* at 3.
33. Item 7 (Police Investigative Report dated August 4, 2001) at 3.
34. *Id.*
35. Exhibit 1, *supra* note 2, at 1.
36. Exhibit 2, *supra* note 2, at 1.
37. *Id.* at 2-3.
38. Exhibit 3, *supra* note 2, at 1.
39. Item 2, *supra* note 3, at 2.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

44. *Id.*

45. ISCR Case No. 96-0277 (July 11, 1997) at 2.

46. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

47. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

48. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

49. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

50. *Egan*, 484 U.S. at 531.

51. *Id.*

52. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

53. Executive Order No. 10865 § 7.