

DATE: December 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08949

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Though Applicant receives credit for completing all elements of the domestic violence program in 2002, he continues to minimize and/or shift the blame for his criminal behavior that occurred between April 1997 and February 2002. Applicant's good job performance over the years does not satisfy his ultimate burden of persuasion. Clearance is denied.

STATEMENT OF CASE

On August 11, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the 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 referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On September 1, 2004, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on January 31, 2005. On February 28, 2005, this case was set for hearing on March 16, 2005. The Government submitted ten exhibits, and Applicant submitted twelve exhibits. Testimony was taken from Applicant and one witness. The transcript (Tr.) was received on March 24, 2005.

FINDINGS OF FACT

The SOR alleges criminal conduct based on one alcohol-related incident (Applicant admits) that occurred over fifteen years ago. Subparagraph 1.a. is found in Applicant's favor as there has been no more recent alcohol-related conduct in the past fifteen years.

The SOR also alleges two crimes against a former (and current) wife and a former wife, and two civil orders to stay away a former family member, beginning with an assault, 3rd degree domestic violence on April 19, 1997 (subparagraph

1.b.), an Order of Protection from Abuse issued against Applicant on June 8, 1999 to last until July 25, 2000 (subparagraph 1.c.), Public Peace - Harassment (Domestic Violence) 3rd Degree (subparagraph 1.d.), and a Restraining Order (subparagraph 1.e.) that was issued on February 8, 2002. Though Applicant admitted subparagraphs 1.b. through 1.e. in his Answer, he also contradicted his admission with the following statements:

I will be presenting evidence to explain and mitigate the facts above for item 1C, 1D, and 1E in which I did not voluntarily commit the act and/or factors leading to the violation are not likely to recur. Specifically item 1D, I was coerced into committing the act and those pressures are no longer in my life. Also, I will show clear evidence of successful rehabilitation via therapy, counseling and restoration of a healthy family relationship. (Answer to SOR)

Applicant is 40 years old and has been employed as a principal system analyst for his employer since October 2000. He seeks a secret security clearance.

On April 19, 1997 (subparagraph 1.b.), Applicant struck his wife, knocking two of her teeth out. (GE 3) He was certain he pushed her (instead of punching her) and demonstrated a pushing gesture with his hands (Tr. 71), but surmised her broken front teeth must have occurred from more than a push. He was also upset over her not spending the night at home, and for intentionally moving his fishing gear to get his attention. Applicant was arrested for 3rd degree domestic violence; he was found guilty and received a 60 day suspended sentence, and a \$300.00 fine.

An Order for Protection was filed against Applicant in June 1999 (subparagraph 1.c.) after spanking his child (from his first wife) left whelps and abrasions on the child's body. While Applicant testified several times he was not blaming his first wife for the Order of Protection, he was sure: (1) she was always hostile and vindictive towards him (Tr. 61; GE 3), (2) she believed he was a danger to the children (Tr. 63), and (3) she was waiting for him to make a mistake concerning their children's treatment so she could deny him visitation rights altogether. Applicant testified that the incidents that are described in subparagraphs 1.c. through 1.e. were triggered by the domestic violence in subparagraph 1.b., and are not as serious as the citations make them appear. (Tr. 76-77)

On June 1, 2001 (subparagraph 1.d.), Applicant was arrested for 3rd degree domestic violence for an altercation with his third wife. A lack of communication seemed to be the primary problem with his third wife provoking arguments, then, in his view, calling the police for no apparent reason. On the day in question, he and his son were headed up the stairway of his house and his wife was headed down the stairway. Applicant grabbed her upper arm to prevent her from pushing him and his son against the wall. She called the police and he was charged. Although he was convinced he did nothing wrong, he completed the domestic violence diversion program that included two anger management sessions with a psychologist, 36 hours of education to find out ways to handle life's problems, and to address and manage anger while increasing communication skills. He unsuccessfully tried to get his third wife to participate in training. At the hearing, Applicant withdrew the word "coerce" he had used in his Answer to describe this altercation, and instead testified, "I was taken advantage of in a very difficult and unhealthy relationship." (Tr. 78)

In February 2002, a Restraining Order was filed against Applicant. Applicant claims he went to his third wife's work location to discuss the status of their relationship. He parked next to her vehicle. Then, he opened the trunk of her vehicle presumably looking for documents that had been missing. He found some documents that he believed should not have been located in the trunk of the car. He asked her about the documents and she became mad and claimed he had harassed her. The confrontation led to the Restraining Order being filed against him. He believes he did nothing wrong.

As a result of the two anger management sessions, 36 hours of education, and the intervention program in 2001, Applicant believes he has reshaped his thinking by controlling his anger and no longer carrying the guilt issues associated with his childhood. The education has helped him remove certain perfectionist views he had about himself and listen to the views of others. Even with his revised thinking, Applicant's statements and testimonial explanations of subparagraphs 1.b. through 1.e. reflect a continuing effort to minimize his own culpability in these incidents.

Applicant's second wife testified she has been married to him about 2 1/2 years. She has found him to be more open in discussing issues than he was the first time she was married to him. (Tr. 100)

Applicant produced certificates of completion of all portions of the domestic violence program from August 2001 to

January 2002. Applicant's good job performance from 1996 to 2002 was recognized eight times with achievement or appreciation awards. Applicant's performance evaluation for 1993/1994 was rated excellent. Applicant became an minister in January 1999 and carried out religious duties at three churches before landing a position in October 2004 where one of his assignments is to introduce religion into the lives of young people.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct

A pattern of criminal conduct raises security concerns regarding a person's judgment.

CONCLUSIONS

A history of criminal activity raises security concerns regarding an individual's judgment, reliability and trustworthiness. If the person has demonstrated his willingness to violate the law, then the ultimate issue becomes whether he will apply the same attitude towards security rules and regulations he chooses not to follow. Applicant's criminal conduct (CC) falls within CC disqualifying condition (DC) E2.A10.1.2.2. (*a single crime or multiple lesser offenses*). Applicant committed two criminal offenses and two quasi-criminal offenses which triggered the orders for protection and restraint.

[\(1\)](#) In April 1997, he punched his wife breaking two teeth. In June 1999, he spanked his child with a belt, leaving whelps and abrasions. In June 2001, he committed domestic violence with his third wife. In February 2002, a restraining order was lodged against him for harassing his third wife. The Government has established a case under CC DC E2.A10.1.2.2.

Though there are five mitigating conditions (MC) that are relevant to the circumstances of this case, Applicant has not furnished sufficient evidence to support a finding in his favor under CC. Because the criminal behavior occurred only three years ago, CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*) does not apply. Four criminal offenses committed in five year period constitutes a pattern of criminal conduct that removes CC MC E2.A10.1.3.2. (*the crime was an isolated incident*) from consideration.

CC MC E2.A10.1.3.3. (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) and CC MC 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*) shall be discussed together as Applicant raised both conditions in his answer by claiming the acts in subparagraphs 1.c. through 1.e. were coerced or involuntarily committed. Having weighed and balanced the entire record, particularly Applicant's counseling and education, there is no evidence Applicant was coerced into committing the offenses listed in the SOR. Still present is Applicant's minimization mechanism motivating him to deflect the blame from himself, even in his description of the events leading to punching his wife in April 1997. In sum, CC MC E2.A10.1.3.3. and CC MC E2.A10.1.3.4. do not apply to this case.

Applicant's case in mitigation fails because he has not presented sufficient evidence under CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Successful evidence of rehabilitation is more than simply the passage of time. Successful evidence of rehabilitation is more than counseling, anger management sessions, or sessions to learn how to listen. Convincing evidence of successful rehabilitation begins with taking the blame for the original conduct. By indicating he was taken advantage of or that he was coerced does not persuade me that Applicant accepts complete responsibility for his conduct in subparagraphs 1.b. through 1.e. While Applicant's religious involvement and job performance evidence have been carefully considered, that favorable evidence does not overcome the adverse evidence under the CC guideline or the whole person factors listed at page 16 of Enclosure 2 of the Directive.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J):

Subparagraph a. For the Applicant.

Subparagraph b. Against the Applicant.

Subparagraph c. Against the Applicant.

Subparagraph d. Against the Applicant.

Subparagraph e. Against the 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.

Paul J. Mason

Administrative Judge

1. Both orders are legal mechanisms of the court to discourage the perpetrator from committing a crime against a family member.