

DATE: May 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10272

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Gavin Elliot, Esquire

SYNOPSIS

Applicant was arrested four years ago and charged with aggravated battery, false imprisonment, and shooting into a building. The charges stemmed from a single domestic dispute with his wife. Through a plea agreement, he completed court-ordered domestic violence awareness and anger management training. In turn, the weapons and imprisonment charges were dismissed and adjudication was withheld as to the battery charge. He has had no other arrests, domestic problems, or other adverse conduct. An allegation of deliberate falsification of his security clearance application is unsubstantiated by the record. His criminal conduct is not recent, was an isolated event, and is mitigated through clear evidence of rehabilitation. Clearance is granted.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On May 19, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely answered the SOR (Answer), admitted the allegations of criminal conduct, but denied the allegations of adverse personal conduct; to wit, that he deliberately falsified his answers to two questions in his security clearance application (SF 86). Applicant also requested a hearing.

The case was assigned to me on September 1, 2004, and I convened a hearing October 7, 2004.⁽²⁾ The parties appeared as scheduled and the government presented four exhibits (GE 1 through 4), which were admitted without objection. Applicant proffered his testimony and that of his wife in support of his case. DOHA received the transcript (Tr) on October 19, 2004.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 49 years old and employed as a production manager by a defense contractor for whom he has worked for over 27 years. He has been married for more than 20 years, and the couple has two teenage children, one of whom is in college.

Applicant and his wife have had a generally happy and stable marriage. She is a school teacher, and he is active in the community, enjoys do-it-yourself projects, and golfs in his spare time. Save for the event at the center of this case, Applicant has not engaged in any adverse or questionable behavior.

Late the night of April 9, 2000, Applicant and his wife were driving home from a party. They got into an argument about the fact Applicant's wife had been smoking in their car, something that Applicant could not tolerate. Their argument continued after they arrived home and escalated into a physical confrontation. Applicant grabbed, shoved, and hit his wife. As she hid in their bathroom, he produced a .22 caliber pistol and threatened to kill his wife with it. After grabbing and shoving her again, Applicant fired a shot away from his wife into a bathroom wall to frighten and intimidate her.

Applicant's wife then fled the house and drove around their neighborhood into the early morning hours looking in vain for a police officer. She eventually came home and the couple spent the rest of the night in separate rooms. The next morning, more words were exchanged. Applicant again threatened to kill his wife, but left the house shortly thereafter. His wife then went to a police station and filed a criminal complaint against her husband. He turned himself in later that day and was jailed for two days. After being released, he and his wife separated for about three months.

Applicant was initially charged with the felonies of aggravated assault, domestic battery, shooting into a building or vehicle, and false imprisonment. Through a plea agreement entered into on August 2, 2000, Applicant pled guilty to a misdemeanor charge of battery; however, adjudication was withheld pending completion of 12 months probation and a court-ordered 26 week domestic violence / anger management class. The remaining charges were entered as *nolle prosequi*. Applicant was also ordered to permanently forfeit his firearm. He completed the terms of his sentence without incident. Applicant and his wife have long since resolved their difficulties in this regard.

Applicant submitted an SF 86 on April 25, 2001. In response to question 21⁽³⁾ and question 22,⁽⁴⁾ Applicant omitted his arrest the previous year. However, in response to question 26,⁽⁵⁾ Applicant listed an arrest for a "domestic dispute; no adjudication." His understanding, based on advice of his criminal defense attorney when Applicant was completing the SF 86, was that one result of the plea agreement was that no felony or firearms charges were actually entered. This understanding is wrong, in that it appears from GE 3 that the charges were made but later amended or dropped as part of the plea agreement. Applicant is an intelligent man with a sound educational background and a wealth of experience in his field, but he has no formal legal training.

POLICIES

The Directive sets forth adjudicative guidelines⁽⁶⁾ for consideration when evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁷⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the

government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁸⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁹⁾

CONCLUSIONS

The security concern under Guideline J is that a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.⁽¹⁰⁾ In some cases, the criminal activity may consist of a single serious crime. The government has established a case for disqualification by presenting sufficient evidence to support the allegation in SOR ¶1.a, that Applicant was arrested and charged with the felony offenses of aggravated battery and domestic violence, false imprisonment, and firing into a dwelling. On these facts, Guideline J disqualifying condition (DC) 1⁽¹¹⁾ and DC 2⁽¹²⁾ apply.

By contrast, Applicant's conduct is the only such instance in his background. The record shows this as an anomaly in the life of a solid citizen whose personal and professional backgrounds are more fairly characterized as stable, reliable, and productive. Further, this conduct occurred nearly five years ago. Applicant turned himself in to the police at the time, taking full responsibility for his conduct, and he successfully completed the terms of his sentence. Applicant also appears to have better insight into how to manage his anger as a result of the court-ordered training. In light of the foregoing, Guideline J mitigating condition (MC) 1,⁽¹³⁾ MC 2,⁽¹⁴⁾ and MC 6⁽¹⁵⁾ apply, and I conclude this guideline in favor of the Applicant.

Under Guideline E, an applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information.⁽¹⁶⁾ Here, the government's concern stems from Applicant's alleged falsification of his SF 86. The government has established that Applicant did not correctly answer SF 86 questions 21 and 22. The record shows he was charged with offenses that are clearly contemplated by both questions and that he should have disclosed them. However, for his omissions to be disqualifying under Guideline E, his answers must have been made with an intent to deceive or mislead the government about information relevant and material to the government's need to accurately assess Applicant's suitability for clearance.⁽¹⁷⁾

The record here does not support a conclusion that Applicant acted with intent to deceive the government when he filled out his SF 86. First, he disclosed in response to question 26 that he had been arrested for a domestic dispute. Second, Applicant's testimony about what his former attorney had told him of the effect of the plea agreement, combined with the court records⁽¹⁸⁾ of the disposition of the charges against him support Applicant's claim he believed he had not been charged with a felony or a firearms offense. The fact he was wrong is irrelevant to whether he intended to mislead the government on this point. As a layman with no formal training in the law, it is reasonable that he may not have fully appreciated the legal significance of his SF 86 answers. At any rate, the evidence as a whole on this point tends to support his claim he did not intentionally withhold information from the government. As no Guideline E disqualifying conditions can be applied here, I conclude this guideline for the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. This record initially raises reasonable doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. However, the record also supports a conclusion he has mitigated those doubts and has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: 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 the Applicant. Clearance is granted.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. The hearing could not be more timely scheduled because Applicant was at sea until mid-October. Thereafter, for administrative efficiency, this case was grouped for scheduling purposes with three others in the same geographic location.
3. "21. Your Police Record - Felony Offenses. Have you ever been charged with or convicted of any felony offenses? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued and (sic) expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."
4. "22. Your Police Record - Firearms / explosives Offenses. Have you ever been charged with or convicted of a firearms or explosives offense? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued and (sic) expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."
5. "26. Your Police Record - Other Offenses. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued and (sic) expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."
6. Directive, Enclosure 2.
7. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
8. *See Egan*, 484 U.S. at 528, 531.
9. *See Egan*; Directive E2.2.2.
10. Directive, E2.A10.1.1.

11. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
12. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
13. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
14. Directive, E2.A10.1.3.2. The crime was an isolated incident;
15. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
16. Directive, E2.A5.1.1.
17. Directive, E2.A5.1.2.2. The *deliberate* omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; (emphasis added)
18. GE 3.