

KEYWORD: Criminal Conduct

DIGEST: The police arrested and charged Applicant, the then 18-year-old, with assault, reckless endangerment, unlawful discharge of a firearm, carrying a pistol without a permit, and criminal use of a firearm. He pled guilty to attempted assault, a felony; served ten months in jail; and successfully completed 14 months of parole and 5 years of probation. Ten years later, he pled guilty to threatening, a misdemeanor, following two separate arguments with his then wife. Applicant has mitigated the government's concerns under Guideline J. Clearance is granted.

CASENO: 03-16742.h1

DATE: 01/26/2006

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16742

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Thomas F. Mitola, Esq.

SYNOPSIS

The police arrested and charged Applicant, the then 18-year-old, with assault, reckless endangerment, unlawful discharge of a firearm, carrying a pistol without a permit, and criminal use of a firearm. He pled guilty to attempted assault, a felony; served ten months in jail; and successfully completed 14 months of parole and 5 years of probation. Ten years later, he pled guilty to threatening, a misdemeanor, following two separate arguments with his then wife. Applicant has mitigated the government's concerns under Guideline J. Clearance is granted.

STATEMENT OF THE CASE

On November 18, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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 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. 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 7, 2004, Applicant submitted a notarized response to the allegations and requested a hearing.

This matter was assigned to me on November 8, 2005. A notice of hearing was issued on November 9, 2005, and a

hearing was held on December 8, 2005. Six Government Exhibits and three Applicant Exhibits were admitted into evidence. Applicant testified. The hearing transcript was received on December 19, 2005.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.a. through 1.c. of the SOR.⁽¹⁾ Those admissions are incorporated here as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 31-year-old engineer for a defense contractor.⁽²⁾ He has worked for this contractor for six and one-half years.⁽³⁾ He completed a security clearance application (SF 86) in December 2001.⁽⁴⁾

On October 31, 1992, when he arrived at his cousin's residence,⁽⁵⁾ Applicant became embroiled in an incident with a group of street tough young people who were blocking the access to his cousin's residence.⁽⁶⁾ They argued verbally. One of the group jumped on his car hood, one broke the car window, and another threw a bottle at his car.⁽⁷⁾ He left the area, but returned two hours later to leave his cousin at the residence.⁽⁸⁾ Only four individuals remained.⁽⁹⁾ Three approached him and an argument ensued.⁽¹⁰⁾ At least one individual picked up a rock and one had a handgun.⁽¹¹⁾ Rocks were thrown at the car, nearly hitting him in the head.⁽¹²⁾ He felt threatened and thought the person with the gun was going to shoot him.⁽¹³⁾ In response to his fear, he pulled a gun from the floor of his car and shot at the sidewalk.⁽¹⁴⁾ The bullets ricocheted, hitting one of the individuals in the group.⁽¹⁵⁾ In November 1992, he voluntarily drove to the police station and along with his mother, met with the police to discuss the incident.⁽¹⁶⁾ The police then arrested and charged him with first degree assault, reckless endangerment, unlawful discharge of a firearm, carrying a pistol without a permit, and criminal use of a firearm, arising from this incident.⁽¹⁷⁾ He was eighteen years old.

Applicant pled guilty to the lesser charge of attempted assault, a felony.⁽¹⁸⁾ The other charges were dismissed. The Court sentenced him to two years in jail and five years probation.⁽¹⁹⁾ He served only ten months of his jail sentence.⁽²⁰⁾ Following his release, he spent fourteen months on parole, then five years on probation.⁽²¹⁾ He did not violate the terms of either his parole or probation.

Subsequent to his release from jail, Applicant attended college. He received his Bachelor of Science degree in electrical engineering in 1999.⁽²²⁾ In June 2001, he married his long time girlfriend.⁽²³⁾

Four months later, he learned that his wife was having an affair.⁽²⁴⁾ Over the next year, he and his wife tried to resolve the problems with their marriage, and care for her seriously ill mother.⁽²⁵⁾ During this time, they lived together on and off, and often argued.⁽²⁶⁾ On one occasion when living separate, she ransacked his apartment.⁽²⁷⁾ When he tried to confront her about this conduct, she called the police, alleging harassment.⁽²⁸⁾ While the evidence of record is unclear as to the dates of this incident, Applicant and his former spouse agree that the police arrested him, charging him with threatening (the exact nature of the threat is not identified) conduct.⁽²⁹⁾ At the time of this arrest, the Court set his bail at \$10,000.00.⁽³⁰⁾ His wife got the money to post his bail.⁽³¹⁾ Shortly after his arrest, the Court issued a civil protective order prohibiting him from threatening his wife, but not from staying away from her.⁽³²⁾ He never hit or otherwise physically abused his wife nor has he been arrested for this type of conduct.⁽³³⁾

Applicant and his wife began living together after his second arrest, again as part of their effort to salvage their marriage.⁽³⁴⁾ Two months later, they argued again, and he voluntarily left their residence.⁽³⁵⁾ When he returned a few days later to apologize, he wife refused to speak to him and would not allow him to retrieve his belongings from the house.⁽³⁶⁾ Instead, she called the police even though he was not threatening her.⁽³⁷⁾ He waited for the police in the parking lot to ask about retrieving his personal belongings.⁽³⁸⁾ When he did not leave, the police arrested him and charged him with violation of the civil protective order, which prevented him from threatening his wife but not from entering their residence.⁽³⁹⁾ At the time of his arrest, he was offered anger management classes as a resolution to this situation. Because he did not believe he had done anything wrong, he declined, and his arrest was referred to criminal court.⁽⁴⁰⁾ His wife and he split the cost of a lawyer to defend him on these charges.⁽⁴¹⁾

Under state civil law, the court has the authority to issue a protective order, and as relief under the order, enjoin a respondent (in this case Applicant) from "... (1) imposing a restraint upon the person or liberty of an applicant;⁽⁴²⁾ (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking the applicant; or (3) entering the family dwelling or the dwelling of the applicant."⁽⁴³⁾ The law also declares that the entering or remaining in a building or any other premises in violation of this order constitutes criminal trespass under the criminal code.⁽⁴⁴⁾ Based on the credible statements of Applicant's former wife, which corroborated his statements and testimony, the protective order did not enjoin him from entering the building or being on the premises where his wife lived.

After a lengthy delay in the processing of the above two charges and insufficient financial resources, Applicant pled guilty to the threatening charge only, a misdemeanor.⁽⁴⁵⁾ The Court sentenced him to one year in jail, which was suspended, and he was placed on two years of probation.⁽⁴⁶⁾ After his arrest for violation of the protective order, he

decided to end his marriage. He and his wife divorced in 2003.⁽⁴⁷⁾ They had no children.⁽⁴⁸⁾ He completed his probation in October 2005, without incident.⁽⁴⁹⁾ He is engaged and will marry soon.⁽⁵⁰⁾

In May 2003, his estranged wife signed a statement, which was given to the Court.⁽⁵¹⁾ She stated that she and Applicant argued and said things to each other, but that she did not recall any threats by him.⁽⁵²⁾ She further opined that the investigating police officer told her to write that Applicant threatened her.⁽⁵³⁾ She requested that a protective order not be issued and indicated that she did not want to proceed with the charges.⁽⁵⁴⁾ Within a few months, they divorced.⁽⁵⁵⁾ Two years after their divorce, she wrote a second letter, dated December 7, 2005, reiterating her previous statements.⁽⁵⁶⁾ She also stated that she had not intended that he be arrested.⁽⁵⁷⁾ The evidence does not reflect that he provides any type of financial support to his ex-wife.

Applicant's employer granted him an internal, limited security clearance.⁽⁵⁸⁾ He received a positive recommendation for his security clearance. He has financial stability.

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.⁽⁵⁹⁾ The government has the burden of proving controverted facts.⁽⁶⁰⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁶¹⁾ 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.⁽⁶²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶³⁾

No one has a right to a security clearance⁽⁶⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁶⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁶⁶⁾ 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.⁽⁶⁷⁾ 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 (CC DC) E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) applies. Applicant was arrested in 1992 for assault, reckless endangerment, unlawful discharge of a firearm, carrying a pistol without a permit and criminal use of a firearm. He pled guilty to attempted assault, a felony. He served ten months in jail, followed by fourteen months on parole and five years on probation.⁽⁶⁸⁾ Approximately ten years after the first incident, the police arrested him for threatening conduct, which lead to the issuance of a civil protective order by the court. He was later charged with violation of the civil protective order. He pled guilty to threatening conduct, a misdemeanor under criminal law, and received a sentence of one year, suspended, and was placed on two years probation which ended in October 2005.

I considered the Criminal Conduct Mitigating Conditions (CC MC). Concerning allegation 1.a., Applicant's arrest and felony conviction for attempted assault occurred over twelve years ago, just after his eighteenth birthday. His ten-month incarceration led to a change in his attitude and his behavior. Following his release from jail, he made positive changes in his lifestyle. He enrolled in college and graduated in 1999. During this time, he worked full-time and/or part-time. Since his college graduation, he has worked steadily for his current employer. He has not been involved in any similar serious felony criminal activity, such as theft, drugs, illegal use of guns, etc. Applicant has mitigated the government concerns as to allegation 1.a. under CC MC E2.A10.1.3.1. (*The criminal behavior was not recent*), E2.A10.1.3.2. (*The crime was an isolated incident*), and E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*).

Ten years after his first arrest, Applicant was arrested for allegedly making threats to his then wife during a domestic argument which did not involve physical abuse. An arrest for an alleged threat uttered during a heated argument with one's spouse is distinctly different from shooting a gun near a crowd, the conduct which led to his conviction for attempted assault. For purposes of mitigation, these arrests are discussed separately.

Following an argument, his then wife called the police alleging a threat, which on two subsequent occasions, she has denied he made. Although his then wife asked the Court not to do so, the Court issued a protective order, as authorized by civil law, prohibiting him from making future threats. The protective order did not prohibit him from going physically near his then wife. In fact, he and his then wife started living together after his arrest for threats and the issuance of the order.

Several months later, they argued again. In an exercise of proper judgment, he left their residence before the argument got out of control, testimony supported by his then wife's affidavit. When he tried to return to their residence a few days later to apologize, his then wife acknowledged that she refused to let him in the house and called the police, even though he was not threatening her. His testimony and his then wife's supporting affidavits do not reflect that Applicant violated the terms of the protective order. Nevertheless, when he would not leave the area, he was arrested and charged with violating the protective order. The investigating police officer's decision to arrest Applicant came as a result of specific procedures developed and followed by the police when responding to a possible domestic dispute. While I cannot decide on the validity of the arrest under the proper statutory criteria or the reasons for the police officer's decision, based on the credible statements of Applicant and his then wife, I find that under the facts presented, Applicant did not violate the terms of the protective order. This findings weighs favorably towards mitigation of the government's concern in allegation 1.c.

Applicant chose to plead to threatening conduct, a misdemeanor, after months of delaying and no resolution of his case in the courts. At the time of his plea, he had exhausted his financial resources and had not yet presented his case to the court. His decision to plead guilty weighs against him, in that it is an admission against his interests. However, his former wife has provided two affidavits, denying that Applicant threatened her. She also twice opined that she requested the court not issue a protective order. She provided the second affidavit two years after their divorce. Since they have no children and no longer have any ties to each other, she had no ulterior motive for writing the second affidavit and again denying threats to her by the Applicant. I find her affidavits credible. Thus, I find that her credible statements weigh heavily towards mitigation and to negate the impact of his decision to plead guilty. Subsequent to the last incident, he and his wife separated and are now divorced. They are no involved in each other's life. He has moved forward in a new

direction.

I have also considered his three arrests together to determine if there is a course of criminal conduct which would effect his security worthiness. He wrongfully used a gun to resolve a threatening situation as a teenager. He has not been involved in other criminal activity since this incident. His second arrest ten years later stemmed from a domestic argument, not criminal activity. His subsequent arrest for violation of a civil protective order also followed an argument with his then wife. These arrests do not indicate a course of criminal conduct which would impact his security worthiness. Applicant has mitigated the government's concerns as to allegations 1.b. and 1.c. under 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*); and E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*).

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. As a teenager, he resolved a threatening situation by shooting a gun, a very inappropriate response. As a result of his poor decision, he pled guilty to attempted assault, and served time in jail. He used this time to reflect on his conduct and its consequences. Not only did he change his attitude, he changed the direction of his life for the positive.

He and his former wife argued frequently during the course of their short marriage. In retaliation for one argument, his wife called the police, alleging threatening conduct, even though she did not feel threatened. This call led to the protective order, which is designed to help calm emotional situations, a fact Applicant came to understand. His wife on the other hand used it as a weapon. Following the issuance of the protective order, when he feared that an argument might get out of control, he left their house before a more serious the situation developed, a definite exercise of good judgment. His then wife called the police a second time, claiming a threat when there was none. After this argument and his subsequent arrest, he recognized that the marriage would not work, and moved out. Again, he exercised positive judgment. They divorced within the year. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to 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

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 a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

1. Applicant's response to SOR with attachments, dated December 7, 2004, at 1-2.
2. Government Exhibit 1 (Applicant's Security Clearance Application, dated October 10, 2001) at 1.
 3. *Id.* at 2.
 4. *Id.* at 1.
5. Applicant also describes his cousin as his god-brother. *See* Tr. at 23, 33.
6. Government Exhibit 5 (Applicant's Statement, dated June 13, 2003) at 2.
 7. *Id.*
 8. *Id.*
9. Tr. at 34-35.
10. Government Exhibit 5, *supra* note 6, at 2-3.
 11. *Id.* at 3.
12. *Id.*; Government Exhibit 2 (Police report, dated October 31, 1992 and November 24, 1992) at 4.
 13. *Id.*; Tr. at 36.

14. Government Exhibit 5, *supra* note 6, at 3.
15. *Id.*
16. *Id.*; Government Exhibit 2, *supra* note 12, at 8.
17. Government Exhibit 2, *supra* note 12, at 9.
18. Government Exhibit 5, *supra* note 6, at 3.
19. *Id.* at 4; Tr. at 24-25.
20. Government Exhibit 3 (State correctional records, dated June 9, 2003) at 1, 4, 6.
21. Government Exhibit 5, *supra* note 6, at 4; Tr. at 24-25.
22. Government Exhibit 1, *supra* note 2, at 2.
23. *Id.* at 5.
24. Government Exhibit 5, *supra* note 6, at 4.
25. *Id.* at 4-5.
26. Applicant's Exhibit C (Statement of former wife, dated December 7, 2005); May 19, 2003 statement of former wife attached to Applicant's response to SOR; Tr. at 28-29.
27. Government Exhibit 5, *supra* note 6, at 5.
28. *Id.*
29. The police record for this arrest has not been submitted as evidence. In his response to the SOR, Applicant admitted that he was arrested for threatening conduct towards his then wife, but not the other charges listed in the allegation. *See* Applicant's response, *supra* note 1, at 1-2; Applicant's Exhibit C, *supra* note 26, at 1; May 2003 statement, *supra* note 26, at 1. His response is deemed a denial as to the allegation of criminal charges for breach of the peace and criminal trespass.
30. *Id.*; Tr. at 29.
31. Tr. at 29.
32. *Id.*; *See* State General Statutes Annotated § 46b-15.
33. Tr. at 37.
34. Government Exhibit 5, *supra* note 6, at 5; Tr. at 28.
35. Government Exhibit 5, *supra* note 6, at 5; Tr. at 30.
36. *Id.*
37. *Id.*; Applicant's Exhibit C, *supra* note 26, at 1.
38. Tr. at 30.
39. Government Exhibit 5, *supra* note 6, at 5; Applicant's Exhibit C, *supra* note 26, at 1.

40. Tr. at 38-39.

41. *Id.* at 31.

42. The individual requesting a protective order is called "applicant" under the statute.

43. *See* State General Statutes Annotated § 46b-15(b).

44. *See* State General Statutes Annotated § 46b-15(c).

45. Government Exhibit 5, *supra* note 6, at 6; Government Exhibit 6 (Court Order of Condition Discharge, dated October 2, 2003); Tr. at 44.

46. Tr. at 31.

47. *Id.* at 26, 32.

48. Government Exhibit 1, *supra* note 2, at 5.

49. Tr. at 31.

50. *Id.* at 32.

51. May 19, 2003 statement, *supra* note 26.

52. *Id.*

53. *Id.*

54. *Id.*

55. Tr. at 26.

56. Applicant Exhibit C, *supra* note 26.

57. *Id.*

58. Applicant Exhibit B (Employer's briefing form, date June 6, 2005); Tr. at 22.

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

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

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

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

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

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

65. *Id.*

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

67. Executive Order No. 10865 § 7.

68. Under the recent amendment to 10 U.S.C. § 986, this Disqualifying Condition will apply when an Applicant has been incarcerated for at least a year. Because Applicant served ten months in jail for attempted assault, a felony under the applicable state law, 10 U.S.C. § 986 is not applicable in this case.