

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was involved in four domestic violence incidents between 1988 and 2002, and an argument at work with a co-worker in 1994. The 1988 domestic violence incident resulted in Applicant's first wife obtaining a divorce. Two of the other domestic violence incidents resulted in Applicant being arrested. He completed an anger management program following the 2002 arrest, and he and his wife have been actively involved in marriage counseling for the past few years. Applicant has mitigated the criminal and personal conduct security concerns that existed in this case. Clearance is granted.

CASENO: 03-16849.h1

DATE: 06/03/2005

DATE: June 3, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16849

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

SYNOPSIS

Applicant was involved in four domestic violence incidents between 1988 and 2002, and an argument at work with a co-worker in 1994. The 1988 domestic violence incident resulted in Applicant's first wife obtaining a divorce. Two of the other domestic violence incidents resulted in Applicant being arrested. He completed an anger management program following the 2002 arrest, and he and his wife have been actively involved in marriage counseling for the past few years. Applicant has mitigated the criminal and personal conduct security concerns that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On October 1, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct), and Guideline E (personal conduct). Applicant's answer to the SOR was received by DOHA on November 26, 2004. Applicant admitted all allegations except SOR subparagraph 2.b., and requested a hearing.

The case was assigned to me on February 16, 2005. A notice of hearing was issued on February 25, 2005, scheduling the hearing for March 25, 2005. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4, and admitted into the record without objection. Applicant testified, called three witnesses, and submitted two documentary exhibits that were marked as Applicant Exhibits (AE) 1 and 2, and admitted into the record without objection. The transcript was received on April 7, 2005.

FINDINGS OF FACT

Applicant's admissions to SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 43-year-old married man. He graduated from college in 1984 with an electrical engineering degree, and obtained an MBA in June 1995. He began work as an engineer with a defense contract immediately after he graduated from college in 1984. He worked continuously with that employer until he resigned in 1998 to attend a bible college. He left the bible college in 1999, was rehired by his former employer in 2000, and continues to work for that defense contractor to the present. Applicant possessed a secret security clearance at all times while he was employed with the defense contractor. There have never been any complaints made alleging he mishandled classified material, and no prior action has been taken to revoke or downgrade his clearance.

Applicant was first married in December 1987. During an argument with his wife in October 1988, he struck her in the stomach. Both had been drinking alcohol before the argument. Applicant's wife separated from him following the incident and they were divorced in May 1989.

Applicant married his present wife in November 1990. Applicant's wife testified they had only known each other for four months when they got married, and the reason they married was because she was pregnant. She also testified that Applicant did not want to marry her because he did not want to assume the responsibility of a wife and child. In December 1990, Applicant entered into a month long inpatient counseling program to deal with the depression he experienced as a result of the marriage. Their first child, a daughter, was born in June 1990.

Applicant and his wife consumed alcohol on a social basis until the mid-1990s when they both decided to abstain from alcohol consumption based upon their evolving religious beliefs. There were no domestic violence issues in the marriage while Applicant continued his employment with the defense contractor, and the couple had two more children, daughters born in December 1995 and May 1997.

Applicant was involved in an argument at work in the mid-1990s. There apparently had been ongoing disagreements between Applicant and several inspectors which culminated in a "heated debate" between Applicant and one of the inspectors. During the argument, Applicant placed his hand on the shoulder of the inspector who then reported the incident. Management issued a memo that the antagonistic bantering was to cease, and it did. Applicant changed work assignments following this incident on his own volition, and not at the request of management.

Applicant's decision to attend bible college created a considerable amount of family stress. Applicant quit his job and moved the family to a distant state. He was unable to sell the family home and had to instead rent the house. He was unable to find steady employment, so he worked for temporary agencies that paid the minimum wage for jobs that would only last for a few months and then be followed by as many as six weeks unemployment. Applicant found it necessary to tap into his retirement funds to try and make ends meet. His wife was not working, but was attending the bible college, which created scheduling difficulties between Applicant and his wife as to who was going to attend class and who was to stay home with the children.

Applicant's wife indicated she was going to contact the dean of the bible college in the course of one of their arguments over who was to stay home with the children. Applicant did not want the dean brought into the argument, and he struggled with his wife over the phone when she attempted to

call the dean. After a couple of seconds of attempting to pull the phone from her hands, Applicant pulled the cord from the wall. His wife left the house and called the police. The police responded, calmed the situation, and filed a domestic incident report. Applicant was not arrested. The couple undertook marriage counseling with their church pastor following this incident.

Applicant eventually quit the bible college, was rehired by his former employer, and moved back into the family home. He testified that he felt he was a failure because he had to quit the school, and that he lacked direction in his life at that time.

On September 12, 2001, Applicant and his wife got into an argument because of his failure to do the laundry as she had asked while she took one their children for a doctor's appointment. During the argument, Applicant gestured as though he was going to hit her, and he threw a pitcher of tea across the floor, all in the presence of their children. Applicant cut the telephone cord when his wife indicated she was going to call her mother and tell her that she was going to divorce Applicant. She told him to leave the house, he complied, and she called the police.

A warrant was issued for Applicant's arrest charging him with Simple Assault, Domestic Violence. He was arrested on the warrant, spent a night in jail, and released on a bond on September 15, 2001. He complied with the condition of the bond that he obtain treatment for domestic violence/anger counseling. Applicant and his wife both participated in the counseling, and both testified they were dissatisfied with the counseling provided. It is unclear from the record what actually happened with the criminal charge. Applicant at various times has indicated they were dismissed and at other times that he was on probation for a year.

Applicant's last act of domestic violence occurred on April 12, 2002. His wife was five months pregnant, had worked all week, was tired, and asked Applicant to bathe their youngest daughter. He ignored her multiple requests to bathe the child, and she became progressively more irritated. He finally angrily acceded to her request, but began to yell at the child for not bathing herself. When his wife entered the bathroom to intercede, he threw a plastic shampoo bottle at her, striking her in the head, and causing a one-inch laceration that required medical attention.

Applicant's wife called police, but he left the residence before their arrival. He surrendered himself at the police station later that evening, was arrested, and charged with Battery/Family Violence, and Cruelty to Children. He was released on a bond after spending a couple of days in jail. The charges were dismissed on March 19, 2003, after Applicant and his wife completed a pre-trial diversion program which included anger management training. Both Applicant and his wife testified that his ability to control his anger has improved as a result of anger management training. His wife testified there have been no further outbursts such as occurred in April 2002.

Applicant and his wife have engaged in marriage counseling at several churches with different pastors since 2002. In October 2004, they began pastoral counseling with a minister who was the first they felt confident had the ability to help them through their problems. That pastor eventually placed them in contact with a counselor who they believe is effective in helping them deal with the root issues that have caused friction in their marriage.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government established its case against Applicant under Guideline J based upon the four domestic violence incidents that occurred between

1988 and 2002. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses apply*.

Applicant struck his first wife in 1988. There were no further incidents of domestic violence until Applicant quit his job and he and his wife attempted to attend bible college in 1999. The financial and family stress that resulted from that move, the failure to complete the school, and the return to his former employment were all contributing factors to Applicant's outbursts and unacceptable criminal behavior between 1999 and 2002. There have been no repeats since 2002, he has successfully completed anger management training and apparently has learned much from that training, and Applicant and his wife have been actively involved in marriage counseling they feel is helping them to understand and deal with the root causes of their marital discord. Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 3: *The person was pressured . . . into committing the act and those pressures are no longer present in that person's life*; MC 4: *. . . the factors leading to the violation are not likely to recur*; or MC 6: *There is clear evidence of successful rehabilitation all apply*.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Although no specific disqualifying condition under Guideline E applies to Applicant's domestic violence incidents and the "heated debate" that occurred at work, that conduct certainly placed at issue his judgment, trustworthiness, and reliability. However, his successful completion of anger management training, the lessons he has taken away from that training, and the active and ongoing participation in what apparently is effective marriage counseling substantially obviates that concern, and strongly indicates he does possess the judgment, trustworthiness, and reliability of a person who is to be entrusted with access to classified information.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered Appellant's appearance and demeanor while testifying, along with the evidence submitted, most notably the testimony of his wife and persons with whom he works. I am persuaded by the totality of the evidence that Appellant is trustworthy, reliable, and does not pose a risk to national security. Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline J and guideline E are decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph c: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: 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 a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

9. *Egan*, 484 U.S. at 528, 531.

10. *Id* at 531.

11. *Egan*, Executive Order 10865, and the Directive.