

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 45- year-old software engineer working for a government contractor. He was arrested in 1990 for Disorderly Conduct and Resisting Arrest, and in 1991 for Trespassing. In 2000, he was arrested and found guilty of Deadly Conduct and Criminal Mischief based on two separate incidents of aggressive driving. Applicant satisfied the courts' judgments, including attendance in an Anger Management class. In 2001, Applicant, on his own initiative, additionally sought and completed behavioral counseling. Applicant's successful rehabilitation and the age of the arrests mitigate security concerns. Clearance is granted.

CASENO: 03-17542.h1

DATE: 05/11/2005

DATE: May 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17542

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 45- year-old software engineer working for a government contractor. He was arrested in 1990 for Disorderly Conduct and Resisting Arrest, and in 1991 for Trespassing. In 2000, he was arrested and found guilty of Deadly Conduct and Criminal Mischief based on two separate incidents of aggressive driving. Applicant satisfied the courts' judgments, including attendance in an Anger Management class. In 2001, Applicant, on his own initiative, additionally sought and completed behavioral counseling. Applicant's successful rehabilitation and the age of the arrests mitigate security concerns. Clearance is granted.

STATEMENT OF THE CASE

On November 5, 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) detailing why, pursuant to Guideline J-Criminal Conduct, it 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. In his response, dated November 26, 2004, Applicant admitted two of the allegations set forth in the SOR and admitted in part and denied in part the remaining two allegations. In that same response, Applicant also elected to have this matter determined on the record.

The Government's case was submitted on December 29, 2004, and a complete copy of the file of relevant material (FORM) [\(u\)](#) was provided to Applicant. Applicant received a copy of the FORM on January 13, 2005. Having been afforded the opportunity to file objections and submit evidence in refutation, extenuation, or mitigation of the allegations, Applicant, on February 9, 2005, responded with further explanation and two letters of support. I was

assigned this case on February 17, 2005.

FINDINGS OF FACT

Applicant has admitted to two of the allegations set forth in the SOR, and admitted in part and denied in part the third allegation, all of which pertain to Criminal Conduct - Guideline J. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 45 year-old software engineer employed by a defense contractor. In 1990, he was charged with Disorderly Conduct and Resisting Arrest, resulting in a fine of approximately \$80.00. In 1991, Applicant was charged with Trespassing Property After Warning. He pled *nolo contendere*, had adjudication of guilt withheld, and paid court costs of \$85.00.

On March 30, 2000, while maneuvering her car from the left lane into the Applicant's right hand lane in order to make an upcoming right hand turn, an automobile driver cut Applicant off. When that driver turned, Applicant followed. At a light, Applicant left his truck, banged on the other driver's window, and yelled at the driver. He was given "the middle finger." ⁽²⁾ He then returned to his vehicle and proceeded to chase the other driver until the two vehicles eventually collided. While the on-site investigation took place and the question as to whether Applicant intentionally collided into the other driver was examined, one officer told Applicant that "trying to contact other drivers about driving behaviors could be dangerous and he should not do it." In response, Applicant stated, "You've got to be kidding me. You mean I'm just supposed to let someone just drive away?" ⁽³⁾ On May 3, 2000, Applicant was arrested for Deadly Conduct for this aggressive driving.

Again, on November 15, 2000, Applicant was cut-off in traffic. Tailgating ensued that resulted in the two vehicles making impact. Applicant stopped and ran back to the other driver, who was stuck in his own vehicle. Using his right fist, Applicant struck the other driver's windshield twice, causing two indentations and spidering cracks to appear. Applicant then left the scene, but not before the second driver was able to identify Applicant's license number. On December 5, 2000, after being identified in a lineup, Applicant was arrested on a charge of Criminal Mischief.

On February 23, 2001, Applicant pled guilty with regard to the March 2000 incident. He was given deferred adjudication, 18 months probation, a \$750.00 fine plus court costs, and ordered to attend Anger Management classes. Subsequently, Applicant pled guilty to the November 2000 incident, for which he received 90 days labor detail, fined \$1,500.00, plus court costs, and ordered to pay \$225.00 in restitution. Applicant satisfied the judgments, including the completion of the Anger Management class.

In the Applicant's state, the qualifications for certification as a Licensed Professional Counselor (LPC) are quite numerous and rigid. Once licensed, an LPC may prevent, assess, evaluate, and treat mental, emotional, and behavioral disorders and distresses that interfere with mental health, and may also implement and evaluate treatment plans using interventions. In 2001, Applicant regularly met with such a LPC for 16 sessions over a 10 month period regarding his attitude, behavioral volatility, and social judgment. The LPC certified that Applicant, working within a primarily Cognitive Therapy model, made a "significant recovery." This learning and rehabilitative process included identification of stressors and how to make appropriate attitudinal and behavioral changes. Applicant was reassessed by the LPC on February 1 and February 8, 2005. The LPC determined that Applicant's recovery remains intact and noted that he had no concerns regarding Applicant's capabilities.⁽⁴⁾

Applicant's supervisor attests to the Applicant's reliability and trustworthiness, noting that he has demonstrated the ability to mentor others and teach co-workers the appropriate ways to safeguard information. The supervisor notes that he is aware of Applicant's behavioral issues and that Applicant has been forthcoming to identify them so that they could work on them in the appropriate manner together. The supervisor also notes that he does not view Applicant's behavior to be a threat to his security clearance and strongly recommends that his clearance be retained.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, these adjudicative guidelines are subdivided into those that may be considered in deciding whether to deny or revoke one's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to determine one could still be eligible for access to classified information (Mitigating Conditions).

In application, an Administrative Judge is not strictly bound to the adjudicative guidelines. They are guidelines. As such, they are but part of an amalgam of elements for the Administrative Judge to consider in assessing an applicant in light of the circumstances giving rise to the SOR, as well as in assessing the applicant as a whole. The concept of the "whole person"⁽⁵⁾ means that all available, reliable information about the person - whether it is good or bad, present or past - should be considered in making a fair, impartial, and meaningful decision as to his or her suitability to hold a security clearance. To that end, Enclosure 2 also sets forth factors to be considered during this part of the adjudicative process, including: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct,

to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individuals age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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:

Guideline J-Criminal Conduct. The Concern. A history or pattern of criminal activity creates doubts about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

After a full and thorough examination, however, the final assessment must comport with the considerable gravity of the final decision. There is no right to a security clearance⁽⁶⁾ and one seeking access to classified information must be prepared to enter into a fiduciary relationship with the United States Government that is inherently predicated on trust and confidence. Therefore, when the facts proven by the Government raise doubts as to an applicant's judgment, reliability, or trustworthiness, the applicant has the heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁷⁾ Therefore, any doubts will be resolved in favor of the national security, not the applicant.

Finally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that 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." Therefore, nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions,

including those described briefly above, I find the following with respect to the allegation set forth in the SOR:

With respect to Guideline J-Criminal Conduct, the Government has established its case. Applicant's police record since 1990 includes four separate incidents from which arrests and charges were derived for Disorderly Conduct, Resisting Arrest, Trespassing Property After Warning, Deadly Conduct, and Criminal mischief, the last two of which occurred in 2000. Such conditions raise a security concern, as well as Criminal Conduct Disqualifying Conditions (CC DC) E2.A10.1.1 (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*).

In order to mitigate this concern, Applicant must turn to the Criminal Conduct Mitigating Conditions (CC MC) found at E2.A10.1.3. Here, Applicant's criminal record consists of a string of lesser offenses. Moreover, none of the resultant charges were resolved by an acquittal. Therefore, neither CC MC E2.A10.1.3.2. (*the crime was an isolated incident*) nor CC MC E2.A10.1.3.5 (*acquittal*) apply. Further, Applicant was neither pressured nor coerced into committing the offenses at issue, therefore 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 that person's life*) does not apply.

Mitigation may be raised, however, under CC MC E2.A.10.1.3.6 (*there is clear evidence of successful rehabilitation*). Applicant, on his own initiative, chose to complement his court ordered class in anger management by seeking counseling with a LPC. In Applicant's state, a LPC is subject to particularly rigorous state licensure requirements and, upon licensure, is authorized to assess, evaluate, and treat behavioral disorders.⁽⁸⁾ During his treatment, Applicant was taught how to identify his stressors and how to manage his conduct by making appropriate attitudinal and behavioral changes. Given Applicant's nearly year-long treatment, his successful completion of that counseling, his recent, successful, reevaluation, and his LPC's recommendation, I find that there is clear evidence of successful rehabilitation. Therefore, I find that mitigation is raised under CC MC E2.A10.1.3.6.

Moreover, Applicant has remained both in control and incident free for nearly five years. Given his progress and his commitment to prophylactically manage both his attitude and his behavioral responses, future incidents of such inappropriate behavior should become considerably minimized, if not eliminated completely. Therefore, I additionally find that 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*)(emphasis added) applies.

Furthermore, taken piecemeal, half the incidents occurred in 1990/1991, a time distant in the past, while the other half took place in 2000, a time no longer recent. As well, taken as a whole, Applicant's pattern of criminal conduct came to a close with the November 2000 incident, with the potential of recurrence considerably reduced by Applicant's subsequent rehabilitation. Either way, neither his criminal history nor pattern are recent. Therefore, CC MC E2.A10.1.3.1 (*the criminal behavior was not recent*) also applies.

Looking at the whole person, Applicant seems to be evolving. At age 30, he was arrested for Disorderly Conduct and Resisting Arrest; a year later, he was arrested for Trespass After Warning. Consequentially, he complied with the court's orders, but did nothing more. At age 40, he again found himself arrested twice - this time for incidents arising from extremely aggressive driving practices in which he posed a danger to his target, himself, and everyone in between. What differs between Applicant at 30 and Applicant at 40, however, is his response to his arrests. As a more mature man, he went beyond passive compliance with the dictates of the court and took proactive steps to address the problem underlying his arrests - specifically, his behavior and situational judgment: Demonstrating a degree of maturity, responsibility, and judgment that he clearly lacked at age 30, Applicant, pro-actively and on his own initiative, sought and completed an appropriate therapy with a licensed professional in order to modify his behavior and to learn acceptable responses to various stressors. Since completing that regimen, he has experienced no relapses and, given the results of his recent reassessment, demonstrated that his behavioral control remain in check.

In light of the expressions of responsibility cited above, and in view of both his supervisor's continued support and personal assessment regarding Applicant's suitability for a clearance, I find that Applicant's judgment, reliability, and trustworthiness, as reflected by his past history or pattern of criminal activity, no longer poses a risk to national security. Indeed, based on the record evidence as a whole, the facts and circumstances in this matter, and Applicant's proffer regarding reform and rehabilitative efforts, I find that Applicant has met his burden in proving that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Finally, owing to the age of the conduct at issue and Applicant's rehabilitation, I consequentially find subparagraphs 1.a. through 1.d. of the SOR in Applicant's favor.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph 1.a For the Applicant

Subparagraph 1.b For the Applicant

Subparagraph 1.c For the Applicant

Subparagraph 1.d 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 Appellant. Clearance is granted.

Arthur E. Marshall, Jr.

Administrative Judge

- 1.
2. Item 4 (Statement of Applicant, dated June 23, 2003), at 1.
3. Item 5 ("Records concerning May 3, 2000, arrest," printed on June 19, 2003), at 8.
4. Applicant's Response to the FORM, dated February 9, 2005, Attachment 1 (Letter of LPC, dated February 8, 2005).
5. ⁰ Directive, Enclosure 2, at E2.2.
6. ⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
7. ⁰ *Id.*, at 531
8. In contrast to the conditions under Guideline H (*Drug Involvement*) and Guideline I (*Emotional, Mental, Personality Disorders*) that require the participation of a "credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist)" or a "credentialed mental health professional (e.g., clinical psychologist or psychiatrist)" as part of a basis for finding a mitigating condition, Guideline J provides no such guidance as to the level of professional required for rehabilitation.