

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26162

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Scott Desind, Esq.

SYNOPSIS

Applicant committed criminal conduct on at least eight separate occasions, including spousal abuse, domestic battery, domestic violence, failure to appear for a bench warrant, and vandalism, during a period from 1986 to 2001. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On January 26, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or granted.

Applicant filed a notarized response dated February 21, 2005, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On April 4, 2005, the case was assigned to this Administrative Judge to conduct a hearing, and pursuant to formal notice dated May 3, 2005, a hearing was held on August 17, 2005.

At the hearing, Department Counsel offered twelve documentary exhibits (Government's Exhibits 1-12) and no witnesses were called. Applicant, through his attorney, offered four documentary exhibits (Applicant's Exhibits A-D) and offered his own testimony and the testimony of his daughter. The transcript (Tr) was received on August 25, 2005.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) of the Directive. The SOR contains eight allegations, 1.a. through 1.h., under Guideline J.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the live testimony and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 42 years old and is currently married. He is employed as a field service engineer by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline J (Criminal Conduct)

The Government alleges that Applicant is ineligible for clearance because he has engaged in criminal acts. Applicant's conduct that occurred in 1986 through 2001, and which has been alleged in the SOR as 1.a. through 1.h., is included in this paragraph as criminal conduct.

The allegations will be discussed as they were alleged in the SOR:

1.a. On June 4, 1986, Applicant was arrested and charged with Felonious Assault with a deadly weapon. Applicant testified that the incident which caused this event did involve a fist fight,

but he argued that no weapon was involved. Applicant admits that this allegation is true in his Response to the SOR (RSOR).

1.b. On June 17, 1994, Applicant was arrested and charged with Inflicting Corporal Injury on Spouse. He was sentenced to 36 months probation. In his RSOR, he partially admits and partially denies this allegation. Applicant testified that he had a fight with his brother-in-law, but initially denied his wife was involved. Upon additional questioning, he did concede that his wife may have been injured by him when she was trying to break up the fight (Tr at 51-52).

1.c. Applicant failed to appear for a Bench Warrant Hearing that was set for June 30, 1994, and a Bench Warrant was issued in the amount of \$15,000. Applicant denies that this allegation is true in his RSOR and during his testimony.

He initially claimed that he never lived in the city from where a ticket, which became the subject of the bench warrant, was issued, and therefore he could not have received the ticket. His explanation during his testimony continued to change. He first averred that only his mother-in-law lived in this city. Then he admitted that his wife also lived within the city. Thereafter, he testified that he spent a great deal of time at that address in the city, but he did not live there permanently. Finally, his SCA indicates that he did live there during this period. (Tr at 54-60).

Additionally, Applicant contended that he was not aware of this Bench Warrant Hearing until he was involved in the security clearance process. However, in Exhibit 11, a signed, sworn statement made by Applicant to a special agent of the Defense Security Service (DSS) he admitted that he first became aware of the warrant in 2002 by a clerk of the court where he was going to pay for a traffic ticket.

1.d. On May 4, 1995, Applicant was arrested and charged with Domestic Battery. He admits in his RSOR that he was arrested and charged with Domestic Battery.

1.e. On August 25, 1995, Applicant was arrested and charged with Spousal Abuse. He admits that that he was arrested and charged with Spousal Abuse.

During his testimony, Applicant testified that these 2 incidents in 1995 did not involve his wife, but rather were as a result of fights with his brother-in-law. He could give no explanation for why both of these arrests involved charges of abuse against his wife and never mentioned his brother-in-law (Tr at 52-53).

1.f. On September 21, 2001, an incident report was filed against Applicant charging him with Domestic Violence and Vandalism. In his RSOR, he partially admits and partially denies this allegation.

1.g. On September 23, 2001, an incident report was filed against Applicant charging him with Vandalism. During his testimony Applicant admitted to allegation 1.g., in the SOR (Tr at 71-72).

1.h. On September 29, 2001, Applicant was arrested and charged with 1) Battery against a Former Spouse, and 2) Vandalism. He pled Nolo Contendere to Count 1 and was sentenced to 36 months probation, to pay a fine of \$337, and restitution of \$300. He was sentenced to serve 10 days in jail, and he was also ordered to attend one year of weekly sessions (52) of a domestic violence counseling program. Applicant testified that he did not serve any time as a result of this arrest, but that the rest of this allegation is correct.

Exhibits 3, 4, and 6 are the incident reports involving these three events that occurred in 2001. Applicant's testimony of these event were significantly different from the incident reports. He could give no reasonable explanation for why his version of the facts differed form those on the incidents reports.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent 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 (*See* Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following:

The Government has established by substantial evidence that Applicant's conduct, which occurred from 1986 until 2001, and which is the basis for allegations 1.a. through 1.h. of the SOR, is criminal.

Under Guideline J, I conclude that Disqualifying Conditions a, Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and b, A single serious crime or multiple lesser offenses, apply because Applicant's conduct did involve eight serious criminal offenses over a period of at least 15 years. Applicant failed to offer any significant evidence to rebut the Government's case regarding his criminal conduct. During the hearing, Applicant gave inconsistent and sometimes contradictory explanations of how these events occurred. I find that his entire testimony was less than credible.

While an argument may be made that the criminal behavior was not recent, I find that based on the history and seriousness of Applicant's conduct, it is too soon to make that finding, and therefore, no Mitigating Conditions apply. I resolve Guideline J against the Applicant.

FORMAL FINDINGS

Formal Findings, as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive, are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1. a.: Against Applicant

Subparagraph 1. b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against 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.

Martin H. Mogul

Administrative Judge