

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 37-year-old married man, who has been employed by the same defense contractor for the last 17 years. Since March 2001, he has been taken on the position of a technical survey specialist 3, and seeks a security clearance for the first time in conjunction with those duties. During the background investigation, criminal conduct concerns arose primarily focused on domestic violence allegations that arose during his marriage to a former spouse. The passage of time and convincing evidence submitted by Applicant to include the credible testimony of his current spouse have mitigated these concerns. Clearance is granted.

CASENO: 04-08501.h1

DATE: 05/31/2006

DATE: May 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08501

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant is a 37-year-old married man, who has been employed by the same defense contractor for the last 17 years. Since March 2001, he has been taken on the position of a technical survey specialist 3, and seeks a security clearance for the first time in conjunction with those duties. During the background investigation, criminal conduct concerns arose primarily focused on domestic violence allegations that arose during his marriage to a former spouse. The passage of time and convincing evidence submitted by Applicant to include the credible testimony of his current spouse have mitigated these concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 10, 2005, DOHA issued a Statement of Reasons (SOR) [\(U\)](#) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on June 29, 2005, and elected to have a hearing before an administrative judge.

The case was assigned to me August 15, 2005. On October 11, 2005, DOHA issued a notice of hearing scheduling the case to be heard on October 25, 2005. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered ten documents, which were admitted without objection as Government Exhibits (GE) 1 through 10. The Applicant offered seven documents, which were admitted without objection as Applicant Exhibits (AE) A through G. DOHA received the transcript on November 9, 2005.

FINDINGS OF FACT

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

Applicant is a 37-year-old married man. He graduated from high school in June 1986, and from August 1986 to August 1988, he attended vocational school and was awarded an associates degree in aviation maintenance. In September 2002, he enrolled in a four-year college program working toward a bachelor of science degree in computer science. As of the hearing date, he had completed 95 hours of college credit with a 3.5 GPA. AE B, AE C.

Since September 1989, Applicant has been continuously employed by the same defense contractor employer. He started out as an assembler/installer and remained in that position until January 1994. From January 1994 to March 2001, he was employed as an aircraft technician and from March 2001 until present, he has been employed as a technical services specialist 3. He seeks a security clearance for the first time to enhance his position within the company. Tr. 28.

From April 1990 to November 1994, he was married to his first wife. That marriage ended in divorce. From February 1998 to December 2002, he was married to his second wife. That marriage ended in divorce. In June 2003, he married his third and present wife. He has a nine-year-old daughter born during his second marriage for whom he pays child support and has visitation rights.

On June 4, 1995, Applicant was arrested for driving under the influence (DUI) and reckless driving. Although he had been drinking and was speeding at the time he was pulled over, his alcohol limit was not sufficient at the time to warrant prosecution for DUI. He later pled not guilty to the DUI and guilty to reckless driving. Having been found guilty of reckless driving, he was sentenced to 365 days in jail, of which 364 days was suspended; fined \$5,000.00, of which \$4,650.00 was suspended; and ordered to complete an alcohol assessment and complete recommendations of the agency or probation department. Applicant successfully completed all terms and conditions of his court imposed sentence. GE 2, GE 3.

[Note - SOR ¶ 1.b. is a duplicate of ¶ 1.a., which was acknowledged by Department Counsel.]

On October 10, 1997, Applicant and his then fiancé were involved in a physical domestic dispute. Applicant's then fiancé called the police following a physical altercation and Applicant was arrested and charged with domestic violence, 4th degree assault. Applicant later pled guilty to the charge and was sentenced to 365 days in jail, of which all jail time was suspended for two years, fined \$250.00, and ordered to refrain from similar violations or any violations involving the use of excessive force or violence. Applicant successfully completed all terms and conditions of his court imposed sentence. GE 2, GE 4, GE 5.

On December 14, 1997, Applicant and his then fiancé were involved in another physical domestic dispute and Applicant was arrested and charged with domestic violence, 2nd degree assault - felony. While Applicant admits he struck his then fiancé, the underlying facts are in dispute, as are the facts in all three of these incidents, involving Applicant's former spouse. AE A, AE B, AE F, AE G. His then fiancé declined to prosecute and the charge was dismissed. GE 2, GE 6.

Following these two altercations, Applicant and his fiancé were married in February 1998. At the time they married, their daughter was approximately 15 months old. Their relationship was mercurial and remained so after they separated and divorced. During this relationship, Applicant attended marriage counseling and anger management sessions. Tr. 90.

In November 2001, Applicant's wife applied for and was granted a protective order against Applicant. GE 7. On December 19, 2001, Applicant was arrested and charged with violation of a protective order. At hearing and upon motion from the state, the court dismissed this charge against Applicant. GE 2, GE 8.

Applicant's third and current wife credibly testified at hearing on his behalf. She has known Applicant since September 2001 and, as indicated above, married him in July 2003. She holds a masters in physics and works for a defense contractor in "electromagnetic compatibility for the military." Tr. 109. She testified Applicant is "the best father I know," who never misses a visitation visit with his daughter. Tr. 103. She spoke of Applicant as a "good father," a "great husband," and had "no complaints." Tr. 104. She spoke of her "frustration" with Applicant's second wife, who had "made life very difficult for [Applicant]." Tr. 104. Of note, she testified, "I'm not the kind of woman that would be with a batterer. . . . I'm not going to be stuck in a relationship where I'm going to be beat up, you know, or abused or emotionally abused. . . . I'd like that for the record. I'd like that. I'm tired of the crap that she (second wife) claims - the monster she claims [Applicant is] and it's not fair. It isn't. So, you know, thanks." Tr. 110.

Applicant submitted a 2005 salary notice from his employer, which reflected that his 2004 integrated performance assessment was rated "Highly Effective," and awarded him salary increase. AE D.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The

government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. 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.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline J - Criminal Conduct

In the SOR, DOHA alleged five allegations under criminal conduct (SOR ¶¶ 1.a. and 1.e.) to include a June 1995 arrest resulting in a conviction for reckless driving; an October 1997 arrest resulting in a conviction for assault 4th degree, domestic violence; a December 1997 arrest for for assault 2nd degree, domestic violence - felony, which was dismissed; and a December 2001 arrest for violation of a protection order, which was dismissed. SOR ¶ 1.b. is a duplicate of ¶ 1.a. and is withdrawn.

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive E2.A10.1.1.

The government established its case, in part, under Guideline J by Applicant's admissions and evidence submitted for the allegations contained in the SOR under ¶ 1. Such conduct gives rise to Criminal Conduct Disqualifying Conditions (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*); and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

I have carefully considered the Criminal Conduct Mitigating Conditions (CC MC) under E2.A10.1.3. and have determined CC MC 1: *The criminal behavior was not recent*; and CC MC 6: *There is clear evidence of successful rehabilitation* apply.

With the exception of Applicant's conviction for reckless driving in 1995, which occurred approximately 10 years ago, his three remaining arrests in October and December 1997 and December 2001 involving law enforcement intervention involved his second and former wife. Of those three arrests, the October 1997 arrest was the only arrest that resulted in a conviction. This conviction came about as a result of Applicant pleading guilty to assault 4th degree, domestic violence. It is clear that Applicant and his second wife experienced a very contentious relationship. As in cases such as this, many of the factual issues surrounding these three arrests are in dispute. What is not in dispute is that Applicant was convicted of assault 4th degree, domestic violence in 1997 pursuant to his guilty plea.

With elapsed time, Applicant and his second wife divorced, and he met and married this third wife. Impressive and persuasive, was the testimony of Applicant's third and current wife. The toxic effect of combining Applicant's personality with his second wife's personality appears to be a thing of the past. Counseling, time, maturity, and a relationship that fits all seem to weigh in Applicant's favor. Applicant's current wife is a bright, educated, and savvy woman, whose testimony brought considerable insight to the case at bar. Probably no one knows better than she who Applicant was, and who he is today. The evidence supports the notion Applicant is a conscientious worker, a good husband and father, and a responsible citizen. Considering the facts of this case and applying the "whole person" concept, I find Applicant has mitigated the criminal conduct concerns raised and find for him on Guideline J.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant/duplicate of ¶ 1.a.

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: 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 or continue a security clearance for Applicant. Clearance is granted.

Robert J. Tuidor
Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.