

KEYWORD: Criminal Conduct

DIGEST: Between 1979 and 2002, Applicant was involved in five different criminal incidents and cited for another. In 2002, Applicant was diagnosed with a bi-polar condition and prescribed medications. Since then, he has routinely taken his medication and has controlled his condition. Applicant's overall behavior does not show a disregard for the law or an inability to follow rules and regulations. Applicant mitigated the security concerns raised by his criminal conduct. Clearance is granted.

CASE NO: 04-12497.h1

DATE: 06/22/2006

DATE: June 22, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12497

**DECISION OF ADMINISTRATIVE JUDGE**

**JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**

Richard Stevens, Esq., Department Counsel

## **FOR APPLICANT**

Bryant H. Schempf, Esq.

### **SYNOPSIS**

Between 1979 and 2002, Applicant was involved in five different criminal incidents and cited for another. In 2002, Applicant was diagnosed with a bi-polar condition and prescribed medications. Since then, he has routinely taken his medication and has controlled his condition. Applicant's overall behavior does not show a disregard for the law or an inability to follow rules and regulations. Applicant mitigated the security concerns raised by his criminal conduct. Clearance is granted.

### **STATEMENT OF THE CASE**

On July 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to renew or grant him a security clearance. [\(1\)](#)

Applicant answered the SOR (Answer) on August 20, 2005, and requested a hearing. The case was assigned to me on January 30, 2006. On March 23, 2006, I convened a hearing at which the government admitted four exhibits, marked governments exhibits (GE) 1 - 4, to support the SOR. [\(2\)](#) Applicant testified and presented the testimony of four witnesses, and four exhibits that were admitted without objection and marked Applicant's exhibits (AE) 1 - 4. DOHA received the transcript (Tr.) on March 29, 2006.

### **FINDINGS OF FACT**

In his answer to the SOR, Applicant admitted, with explanations, all SOR allegations (1.a - 1.f). His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's testimony, and the evidence, I make the following additional findings of fact:

Applicant is 44 years old, divorced (twice), and has a 19-year-old daughter. He served on active duty in the U.S. Navy from June 1982 to June 1985, attained the rank of petty officer third class (E-4), and was honorably discharged. He joined the Navy Reserve in 1985, and after one year of service, was administratively discharged under other than honorable conditions for his failure to attend drills. Since 1991, he has worked as a computer systems analyst at a Navy submarine training base for a Department of Defense (DOD) contractor. He has held a security clearance since 1993. (3)

Applicant expressed particular pride in his job and the fact that it allows him to provide meaningful and direct support for the Navy helping train this country's war fighters. The testimony of his witnesses, letters of recommendation, and performance appraisals (4) attest to his reputation as a responsible, motivated, hardworking and valuable employee. Those who are in a position to know him well believe him to be dependable, honest, and trustworthy. His supervisors strongly endorse his suitability for a security clearance. More importantly, they convincingly testified Applicant's 2002 criminal incident was aberrational behavior caused by his bi-polar condition. (5) Applicant's job requires him to interact with civilian and military personnel on a daily basis. His supervisors confirmed that he has never been involved in fights or arguments at work, and that he get along well with others. They also confirmed Applicant conscientiously takes his medications. (6)

Applicant's security concerns arose out of his involvement in six different incidents of criminal misconduct. In 1979, at age 17, Applicant was found guilty at a Juvenile and Domestic Relations Court for being drunk in public. He had been consuming alcohol as a minor. In 1980, at age 18, Applicant was found guilty of possession of marijuana and/or drug paraphernalia. He pled to the charge and paid a fine. He claimed the marijuana belonged to a friend who had left it in his van. In June 1983, at age 22, Applicant was fined for drinking in public. He was observed by police officers drinking beer while riding as a passenger in a car.

In January 1990, Applicant was charged with disturbing the peace, assault and battery, and brandishing a firearm. He testified that his first wife filed unfounded allegations against him as a means of obtaining leverage to force him to increase his child support obligations. (7) Applicant explained that the charges were later dismissed when his then wife realized Applicant called as his witness the police officer who investigated her complaint. In January 1997, Applicant was found guilty of disturbing the peace and sentenced to serve 10 days in jail (suspended), and to pay a fine. He explained he was in the process of separating from his second wife and asked her and her son to move out of his home. According to Applicant, she and her son falsely alleged Applicant threatened her son. While he was under arrest, she "cleaned his house" taking his property as well as hers. He was found guilty of the offense. Applicant testified he now gets along well with both ex-wives.

After his second divorce in 1989, Applicant was diagnosed with depression and prescribed medications to control his

condition. In 2002, Applicant had a back operation which involved the removal of a disk and the fusion of several vertebrae. While convalescing, he was prescribed strong pain medications. He testified the pain medications made him forgetful, and he failed to take his depression medication during the week prior to his July 2002 incident. During that week, Applicant discovered his best friend was dating his first wife and suffered a rage attack. Applicant testified he blacked out during the rage attack and has no recollection of the incident. He acknowledged, however, that he assaulted his friend with a knife and damaged his friend's truck.<sup>(8)</sup> In July 2002, Applicant was charged with felonious assault (a felony) and disturbing the peace. Applicant's friend refused to testify against him and the charge were dismissed.

After this incident, Applicant successfully completed anger management counseling, and sought psychiatric counseling/treatment. He was diagnosed, for the first time in his life, with a bi-polar disorder and prescribed medications. After the 2002, incident Applicant realized he could not deal alone with his problem anymore and became a Christian. This and taking his medications every day has made a positive change in his life. Since 2002, he has not been involved in any further incidents of misconduct, rage attacks, or memory black-outs.<sup>(9)</sup> Applicant testified he still gets angry, but not as often, and he has learned to control his anger with the assistance of his medication.

Applicant fully disclosed all the above information in his SF 86. He cooperated with government investigators and provided a detailed statement with forthcoming explanations for his behavior. Applicant presented himself as a well balanced, mature person, and was candid in his testimony. Based on all available evidence, his demeanor, and testimony I considered Applicant an honest and credible person.

## **POLICIES**

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.<sup>(10)</sup> Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) is the applicable relevant adjudicative guideline.

## **BURDEN OF PROOF**

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>(11)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish, by substantial evidence,<sup>(12)</sup> a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.<sup>(13)</sup> The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.<sup>(14)</sup>

## CONCLUSIONS

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.<sup>(15)</sup> The government established its case under Guideline J by showing that Applicant was involved in five criminal offenses and one citation between 1979 and 2002. Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,<sup>(16)</sup> and DC 2: *A single serious crime or multiple lesser offenses*<sup>(17)</sup> apply.

Applicant's behavior from 1979 to 2002 shows a pattern of periodic criminal misconduct. However, weighing the facts and circumstances of his misconduct against all available evidence, I find that Applicant's favorable information outweighs the unfavorable information. Applicant's first three incidents seemed related and have the experimentation with alcohol, and possibly drugs, as their common element. After 1983, there is no evidence of Applicant's involvement in any alcohol or drug-related misconduct. In light of Applicant's age at the time of these three incidents, the fact they are minor offenses, and the facts and circumstances surrounding the offenses, I find they may be attributed to youthful exuberance or stupidity.

Concerning Applicant's 1990 and 1997 allegations, I considered these as aberrational incidents that were likely the consequences of contentious divorce proceedings. His credible testimony concerning the 1990 allegation convinces me he did not engage in any criminal misconduct during that incident. As such, recurrence is not likely.

Regarding the 2002 allegation, it is apparent Applicant was suffering from a bi-polar disorder that caused his aberrational criminal behavior. After the incident, Applicant successfully attended psychiatric counseling/therapy and was diagnosed, for the first time in his life, with a bi-polar condition. Applicant's testimony, as well as the testimony of credible, reliable witnesses, convinces me that, as long as he takes his medications, Applicant's illness will be under control, and the likelihood of recurrence is small.

Applicant seemed remorseful and absolutely committed to do what ever is necessary to avoid the possibility of his injuring anyone ever again. He considered this incident the best thing it could have happened to him, because he was able to receive proper treatment. He now lives a normal life, and through his medications has been able to get rid of the "nightmares" that haunted him since childhood. Applicant's supervisors, all retired senior Navy petty officers, vouched for Applicant's commitment to using his medication, and his good behavior since 2002. Applicant deals with civilian and military customers and coworkers on a daily basis under some times stressful situations. He has been able to handle his personal situation well, demonstrating people's skills and the ability to adapt to changing circumstances. In light of all available evidence, I find Applicant's criminal behavior remote. I also find that considering all available evidence as a whole, his behavior did not show a disregard for the law or an inability to follow rules and regulations. Applicant demonstrated clear evidence of successful rehabilitation.

I have carefully weighed all the evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant mitigated the security concerns.

### **FORMAL FINDINGS**

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

Paragraph 1, Criminal Conduct (Guideline J) FOR APPLICANT

Subparagraphs 1.a - 1.f 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.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. GE 1 and 2 were admitted without objection. Applicant objected to GE 3 and 4, and argued the exhibits were not relevant or material. I considered the documents relevant under the whole person concept and admitted them to develop a full and complete record.
3. Tr. 66.
4. AE 4.
5. Tr. 33, 43.
6. Tr. 50, 60-64.
7. Tr. 98.
8. Tr. 88.
9. Tr. 93.
10. Directive, ¶ E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
11. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 98-0761, at p. 2 (December 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199, at p. 3 (April 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
13. *Egan*, 484 U.S., at 528, 531.
14. Directive, ¶ E2.2.2.

15. Directive, ¶ E2.A10.1.1.

16. Directive, ¶ E2.A10.1.2.1.

17. Directive, ¶ E2.A10.1.2.2.