

DATE: July 12, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12736

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Gary L. Rigney, Esq.

SYNOPSIS

Applicant's marriage was particularly contentious. On several occasions his ex-wife filed criminal complaints against him, often to obtain leverage in the divorce proceedings. The evidence reveals a single incident of minor domestic assault in 1998. Additionally, on one occasion Applicant downloaded adult material to his company-owned laptop computer contrary to policy. Considering all the evidence, Applicant mitigated the security concerns arising from his personal and criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On April 24, 2001, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On March 13, 2006, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct, of the Directive.

Applicant answered the SOR in writing by letter dated March 22, 2006. He elected to have a hearing before an administrative judge.

The case was originally assigned to another judge, but was reassigned to me on May 31, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on June 12, 2006. The government introduced Exhibits 1 through 4. Applicant's counsel provided Exhibits A through F, and presented the testimony of six witnesses. Applicant also testified on his own behalf. Department Counsel moved to amend ¶ 1.b of the SOR by deleting the word "March" and substituting the word "April." There being no objection, I granted the motion. DOHA received the transcript of the hearing (Tr.) on Jun 27, 2006.

FINDINGS OF FACT

In his Answer to the SOR, dated March 22, 2006, Applicant admitted the factual allegations in the SOR, with explanations. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in September 1957. (Ex. 1 at 1.) He received a bachelor's degree in 1979 and began working for a defense contractor that year. He was awarded a security clearance in about 1979. (Tr. at 19.) Applicant went back to college and received a master's in business administration (MBA) in 1986. (Ex. 1 at 2.)

Applicant was married in March 1986. (Ex. 1 at 3.) Two children were born of the marriage. (Ex. 2 at 1.) According to Applicant, he discovered his wife had problems with anger-management and was having extra-marital affairs. His wife was upset that Applicant had adult magazines in the home, and required him to remove them. They attended counseling to help with their marital problems. (Tr. at 20.)

Applicant began working as a pricing manager for his current employer, a defense contractor, in September 1993. (Ex. 1 at 2.) He was awarded a high-level clearance in December 1994. (Ex. 1 at 8; Tr. at 29.)

In August 1998, Applicant and his wife got into an argument at home. (Ex. 3 at 4.) His wife claimed the argument was about her removing Applicant's adult magazines. (Ex. 3 at 4.) Applicant asserted the argument involved his wife's extramarital affairs. (Tr. at 24.) According to Applicant, his wife pushed him up against a doorframe while holding their four-year-old son. (Tr. at 21.) Applicant pushed his wife-she moved backwards, then fell forward to her knees, resulting in small carpet burns. (Tr. at 23, 52.) He maintained she jumped up and said, "I've got you now," or words to that effect, and called the police. (Tr. at 22.) Applicant left for work. The police responded and observed bruises on his wife's knees. (Ex. 3 at 6.) Authorities charged Applicant with Spousal Battery and Child Endangerment. (Ex. 3 at 9.) Applicant plead *nolo contendere* to the battery charge. The court found Applicant guilty of a misdemeanor, dismissed the child endangerment allegation, and sentenced him to 10 days in jail (served through a work-release program, counseling for one year, payment of court costs and fees, and probation for 36 months. (Ex. 3 at 13-16; Tr. at 27.) Applicant attended counseling between about October 1998 and September 1999 (Ex. 1 at 6.) In May 2003, Applicant applied to have the record of conviction and sentence expunged. (Ex. 3 at 17.) The court granted the motion.

Applicant continued to live with his wife, although the marriage was strained. She threatened that if she ever saw another adult magazine in the house she would call the police and claim he was hitting her. (Tr. at 27.) He continued to suspect his wife was having extra-marital affairs. (Tr. at 29.)

In about March 2003, Applicant confronted his wife about her conduct, and she stated she wanted a divorce. (Tr. at 30.) She threatened that if he did not give her what she wanted in a marital settlement, she would get him fired and have his security clearance taken away. (Tr. at 31.)

He hired a private investigator to obtain proof of adultery as grounds for divorce. (Tr. at 31.) In March 2003, Applicant informed his wife that he knew the man with whom she was having an affair, and indicated he would tell the man's wife. (Tr. at 32.) His wife threw her cellular telephone at him, striking him in the mouth and splitting his lower lip. (Tr. at 32; Ex. A; Ex. B at 3.) As they struggled for the telephone, she scratched her finger. She called the police and reported him for assault; Applicant remained and made a statement on his own behalf. (Ex. A.) Because of the conflicting statements, the police declined to file charges.

Three days later, on April 4, 2003, Applicant's wife filed for divorce and obtained a protective order at the same time. (Tr. at 33, 59-60.) While the divorce was pending, Applicant's wife remained in the home and kept custody of the children. Applicant exercised visitation privileges. He noticed that his eldest son, then 16 years old, became hostile and defiant towards him.

On one occasion when Applicant picked up his two sons for a visit, his oldest son began acting out. (Tr. at 36.) He threw the gear shift into "park" as the car was moving, threw a compact disc out the car window, and attempted to do the same with a removable stereo component. Applicant reached over to remove his son's sunglasses; his son thrust his hand out, causing the sunglasses to snap off, scratching his son's temple. (Tr. at 36.) Applicant's wife reported the incident to the police, who charged Applicant with domestic assault. (Tr. at 37.)

Through counsel, Applicant and his wife attempted to negotiate the terms of a divorce settlement. (Tr. at 38.) His wife then filed a criminal complaint against him for the incident resulting in her scratched finger. Applicant's wife asserted that if Applicant did not agree to her terms, she would use the pending criminal charges to his disadvantage. His wife's attorney sent a letter, dated August 7, 2003, with revised terms for the divorce, stating, "If your client agrees to the terms, all pending charges, including the Protection from Abuse charges would be dismissed." (Ex. E; Tr. at 38.) The divorce was final in June 2004. In addition to a division of property, Applicant was required to pay spousal support of \$1,100.00 a month for 30 months. (Tr. at 53.)

Applicant retained separate counsel for the criminal charges, which were to be heard together in July 2004. (Tr. at 39.) Shortly before the trial, his ex-wife called and offered to drop the charges in exchange for the payment of additional sum of money, above and beyond the terms of the divorce. (Tr. at 40.) His counsel recommended that he record such conversations. (Tr. at 68.) The day before the date set for the criminal trial, his ex-wife called again and Applicant recorded the call. (Ex. F; Tr. at 40-45.) She indicated she did not know what would happen the next day, because her attorney had not received any funds from Applicant. He asked her how much she wanted; she replied, "I want you to make it look good." (Tr. at 42.) She refused to indicate a dollar amount over the telephone, because "you could be recording me." She also wanted the stocks and "some extra." (Tr. at 43.) She told him to "Throw out a number or you get time. Your choice." She also threatened that he would "lose that clearance of yours, that [precious] clearance that keeps you employed." (Tr. at 44.) Applicant declined to offer an additional payment.

His ex-wife did not appear for trial the next day. The state's attorney intended to request a delay until his witness could be available. (Tr. at 71, 74.) Applicant's counsel provided the state's attorney with the tape recording of the conversation. (Tr. at 68, 71.) The state's attorney concluded the ex-wife's conduct constituted a felony of offering a bribe to a witness. (Tr. at 75.) He also concluded that the conduct had so tainted her credibility that he could not in good faith proceed with the prosecution. (Tr. at 75-77.) The prosecutor moved to dismiss the charges with prejudice, and the trial judge granted the motion. (Tr. at 76.) On the advice of counsel, Applicant did not file criminal charges against his former wife.

In August 2004, Applicant learned his eldest son was physically abusing his younger son, and obtained an emergency protective order and custody of his youngest son. (Tr. at 45-46.) In about April 2005, his older son also came to live with him permanently. (Tr. at 48.) Applicant remarried in June 2005. (Tr. at 50.)

While traveling for business in about November 2005, Applicant used a laptop computer owned by the company. (Tr. at 48.) Applicant was aware that company policy prohibited having pornography on a company computer. (Tr. at 64.) He claims he put what he believed to be a blank disc into the computer and pornographic images of adult women came up on the screen. (Tr. at 62.) Applicant admitted he had created the disc on his home computer but denied intentionally opening the file on the laptop. (Tr. at 48, 56.) Sometime later, the hard drive crashed. When he took the computer in for repair, a technician found the adult material in the computer's memory. The contractor's representatives warned Applicant about improper use of the computer. Applicant informed his wife and supervisor of the incident.

Applicant's supervisor considers Applicant his top performer at work. (Tr. at 85.) He opined Applicant was trustworthy and the kind of person who could hold a security clearance. (Tr. at 89-90.) A co-worker described Applicant as professional, conscientious, reliable and dependable. (Tr. at 94, 96-97.)

POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (Exec. Ord. 10865, § 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and

mitigating conditions under each guideline.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) "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.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

The adjudicative guidelines at issue in this case are Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline J, Criminal Conduct

The security concern arising under Guideline J, Criminal Conduct, is that "[a] history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness." (Directive, ¶ E2.A10.1.1.)

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. The SOR, ¶ 1.a, alleges Applicant committed battery against his former wife in August 1998, resulting in a conviction and sentence. Applicant admitted pushing his wife, but claimed he did so to get away from her. He asserted he pushed her backwards and she fell forward to her knees deliberately. The injuries observed by the responding police were consistent with Applicant's version of events. Applicant plead *nolo contendere* to the charge, and the court found him guilty of the offense. I find the evidence minimally sufficient to raise this potentially disqualifying condition.

Paragraphs 1.b, 1.c, 1.d and 1.e of the SOR allege Applicant was the subject of a temporary protective order and was arrested for violating the order and committing assault on two occasions. The allegations were based largely upon the testimony of Applicant's ex-wife. The evidence reveals she repeatedly attempted to use the pending criminal charges as leverage to force Applicant to pay her more money. This greatly undermines her credibility as a witness. Ultimately, the state's attorney concluded she committed a felony offense and that she was an unreliable witness. Reviewing the evidence, I find the ex-wife's statements are unreliable, and conclude the evidence relating to these allegations is insufficient to raise a potential disqualifying condition under ¶ E2.A10.1.2.1 of the Directive.

Under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." The available evidence shows one misdemeanor offense in 1998. This does not constitute a "single serious crime" or "multiple lesser offenses." The available evidence does not raise this potentially disqualifying condition.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. As noted above, Applicant has the burden of showing that potentially mitigating conditions apply.

Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." Similarly, ¶ E2.A10.1.3.2 also provides that it may be mitigating where "the crime was an isolated incident. As discussed above, the available evidence shows one incident of criminal conduct in 1998. I find it was both "not recent" and "an isolated incident," therefore both these potentially mitigating conditions apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." The incident in question arose from the continuing animosity between Applicant and his ex-wife. The parties are now divorced, and the ex-wife's attempt to pressure him into paying additional funds were stymied by the tape recording. I conclude this potentially mitigating condition applies.

Guideline E, Personal Conduct

The security concern under Guideline E, Personal Conduct, is that "[c]onduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information." (Directive, ¶ E2.A5.1.1.)

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Under ¶ E2.A5.1.2.1 of the Directive, "reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances" involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations may raise security concerns. Applicant downloaded pictures of adult material on his company's laptop computer. Considering his history of possessing and viewing adult materials, and his professed care in segregating and safeguarding the materials, I am not persuaded that he did so inadvertently. I find the evidence sufficient to raise this potentially disqualifying condition.

It may be disqualifying where the evidence shows a "pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency." (Directive, ¶ E2.A5.1.2.5.) Applicant was aware that downloading adult materials onto a company-owned laptop violated policy. However, the available evidence indicates this occurred on one occasion, thus there is nothing to indicate a "pattern" of rule violations.

Under the Directive, ¶ E2.A5.1.3, an applicant may mitigate the security concerns arising from questionable personal conduct. Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Applicant's use of the company laptop computer for an unauthorized personal purpose tends to show poor judgment; therefore, I find this mitigating factor does not apply. However, it must be noted that the material in question, while prohibited by regulation, was not the sort of "hard-core" pornography that is illegal to transport. Also, the company considered it a minor transgression, requiring only a warning against similar conduct in the future.

The "Whole Person" Concept

I carefully considered all the facts and circumstances, including the potentially disqualifying and mitigating conditions, in light of the "whole person" concept. Applicant is a mature individual who has held a security clearance since about 1979. (Directive, ¶ E2.2.1.1.) His criminal conduct was an isolated incident occurring many years ago, arising out of a particularly difficult marriage. (Directive, ¶ E2.2.1.2; ¶ E2.2.1.3; ¶ E2.2.1.7.) Since then, he divorced his former wife and resolved their marital disputes, so there is little likelihood of recurrence. (Directive, ¶ E2.2.1.9.) The single incident of improper use of a company computer shows a lapse in judgment. However, it was a relatively minor matter, and an isolated incident. At this point, it provides no potential for pressure, coercion, exploitation, or duress. (Directive, ¶ E2.2.1.8.) I find little likelihood of a recurrence of such problems. (Directive, ¶ E2.2.1.9.) I conclude Applicant has mitigated the security concerns arising from the alleged history of personal and criminal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: 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.

Michael J. Breslin

Administrative Judge