

DATE: September 14, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01459

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested on two separate occasions in 1998 and 2002 for domestic violence-related offenses. Both arrests involved his former wife and raised criminal conduct concerns. Applicant has complied with all aspects of sentencing requirements to include extensive individual counseling. Additionally, he and his former wife divorced in 2003 and went through family counseling. Applicant submitted evidence he is trustworthy and reliable, and made significant life changes. Considering the whole person concept and the totality of the circumstances, Applicant has mitigated this security concern. Clearance is granted.

STATEMENT OF THE CASE

On April 6, 2006, the Defense Office of Hearings and Appeals (DOHA), under 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) to Applicant. The SOR detailed reasons under Guideline J (Criminal Conduct) 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated May 19, 2006, Applicant responded to the SOR allegations. He requested his case be decided on the written record in lieu of a hearing. In his response, he correctly pointed out and provided documentation establishing that SOR ¶ 1.b. incorrectly stated his probation would end in "about August 2006." The actual end date of Applicant's probation was August 19, 2005.

On June 13, 2006, Department Counsel submitted the government's case through a file of relevant material (FORM), ⁽¹⁾ a copy of which was provided to the Applicant. In Department Counsel's FORM, the government moved to amend the

SOR deleting the last sentence of SOR ¶ 1.b., which incorrectly stated Applicant's probation ended on August 19, 2005. Without objection, Department Counsel's request to amend the SOR is granted.

Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional exhibits, without objection from Department Counsel. The case was assigned to me on August 2, 2006.

FINDINGS OF FACT

Applicant admitted subparagraphs 1.a, as amended, and 1.b. These admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a 37-year-old man employed by a defense contractor. He seeks a secret clearance, which is an employment requirement. Applicant served as an enlisted member in the Air Force from April 1989 to August 1996, and held a secret clearance. From 1989 to 2003, Applicant was married. That marriage ended in divorce in 2003. Applicant's security clearance application, dated December 3, 2003, indicates he has a 17-year-old son from a previous relationship, and a 14-year-old daughter from his marriage with his ex-wife. The two incidents leading to Applicant's arrests in 1998 and 2002, discussed below, involved his ex-wife.

On February 14, 1998, Applicant was charged with assault/domestic violence following an argument with his ex-wife because he did not "plan anything with her for Valentine's Day." In his May 2004 statement to the Defense Security Service (DSS), Applicant denied physically assaulting his wife, but did admit that he extended his arm and pushed her to the side of the door after she attempted to block him from leaving the bedroom. Applicant left the house after this argument and upon his return home, she informed him she had called the police. The next day Applicant went to the police station and was charged.

Applicant subsequently appeared unrepresented at court, and after discussing his case with the prosecutor, agreed to plead guilty to the charge. In exchange for his plea, the charges were reduced to disorderly conduct after Applicant successfully completed a 12-week anger management course, paid approximately \$150.00 in court fees, and underwent five months of probation.

On August 18, 2002, Applicant was charged with disorderly conduct/domestic violence, two counts of assault/domestic violence, and preventing use of a telephone in emergency, following an argument with his ex-wife after they attended a neighborhood party. In his May 2004 statement to DSS, Applicant stated his wife did not want their daughter to go to a neighborhood party. Applicant rented a video for their daughter to watch while they went to the party.

During the party, Applicant went home to check on their daughter. Their daughter had completed watching the video and requested to accompany Applicant to the party to play with the neighbor's daughter. Upon returning home, Applicant's wife initiated an argument with him over bringing their daughter to the neighbor's party. The argument became worse after Applicant began removing a 12-pack of beer from the refrigerator to prevent his wife from drinking further. A physical altercation ensued, and Applicant's wife called the police. Applicant was taken into custody and charged.

Applicant subsequently appeared unrepresented at court, and after discussing his case with the prosecutor, agreed to plead guilty to the charges. Applicant was sentenced to six days in jail, fined \$550.00, ordered to attend a 26-week domestic violence course and report to a city counselor for seven months of counseling, and placed on eight months probation. Applicant completed the six-day jail sentence on three separate weekends, completed his probation on August 19, 2005, and has successfully completed and complied with all other terms of his sentence. As indicated above, Applicant and his wife divorced in 2003.

Applicant's ex-wife submitted a statement indicating she had known Applicant for almost 20 years, that she and Applicant went through a "terrible divorce" three years ago in which "emotions ran very high," that as a divorced family with children they have sought out counseling, and that Applicant is a "very dedicated and hard worker." She further stated she and Applicant "co-parent daily."

Applicant's current girlfriend submitted a statement indicating she and Applicant have been in an "intimate relationship for two years." She noted Applicant is an "exceptional father and role model." She added Applicant is "honest, reliable, and considerate," and "exceeds the definition of a trustworthy friend and companion."

In addition to the two letters referenced above from his ex-wife and girlfriend, Applicant submitted five additional letters of reference. Two were from his current employer, and both individuals indicated Applicant is a trustworthy and reliable employee, and were very supportive of Applicant being granted a security clearance. The three remaining letters of reference were social contacts. One letter was from his next door neighbor of four years, a former police officer for 14 years, who referred to Applicant's past difficulties as "an aberration . . . and truly not reflective of [Applicant]. This neighbor also referred to Applicant as "the type of person everybody wants as their neighbor," and stated his "character, integrity and work ethic would make [Applicant] a valuable asset to any organization." The two remaining letters were equally complimentary of Applicant.

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

E2.A.10.1.1. *The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Concerning Guideline J, the Government has established its case. Applicant was convicted, pursuant to his plea, of two separate offenses involving domestic violence in 1998 and 2002 with his ex-wife. Applicant has fully complied with all sentencing aspects from those convictions, to include extensive individual counseling. Since these incidents, Applicant and his former wife divorced in 2003 and sought family counseling. Applicant's ex-wife spoke favorably of Applicant as a person and of his efforts to be a good father and of their collective desire to move forward. Applicant also has been in a two-year committed relationship with a woman, who echoed similar positive comments.

Applicant's employer, and personal references collectively speak of Applicant as being an individual of the highest character, who is a decent, loyal, and trustworthy individual. Applicant honorably completed his service in the Air Force and successfully held a secret clearance.

Applicable Criminal Conduct Disqualifying Conditions (CC DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged;* and CC DC 2: *A single serious crime or multiple lesser offenses.* Applicable Criminal Conduct Mitigating Condition (CC MC) 6: *There is clear evidence of successful rehabilitation.* I conclude for Applicant.

Additionally, I considered the evidence submitted in light of the whole person concept. While Applicant's past behavior cannot be condoned, he has fully complied with all court imposed requirements, he is no longer married to the woman with whom he had marital difficulties, he and his ex-wife went through post-divorce family counseling, he is a committed and responsible father, he has been in a committed relationship for two years, and he is a valued and trusted employee. Furthermore, he is highly regarded in the community, and he honorably served in the Air Force and held a secret clearance. While no individual factor is dispositive, taken as a whole, Applicant has demonstrated he is a trustworthy and reliable individual.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: For the Applicant

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

DECISION

In light of all the circumstances and facts 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. Tuider

Administrative Judge

1. The Government submitted seven items or exhibits in support of its contention.