

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to report an arrest to his employer as required by company policy. Applicant mitigated security concerns raised by his arrest for assault with bodily injury to a family member. Applicant rebutted any personal conduct concerns raised by his failure to report the incident. Clearance is granted.

CASENO: 05-01704.h1

DATE: 02/09/2006

DATE: February 9, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01704

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

John R. Teakell, Esq.

SYNOPSIS

Applicant failed to report an arrest to his employer as required by company policy. Applicant mitigated security concerns raised by his arrest for assault with bodily injury to a family member. Applicant rebutted any personal conduct concerns raised by his failure to report the incident. 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. As required by Department of Defense Directive 5220.6 ¶ E3.1.3 (Jan. 2, 1992), DOHA issued a Statement of Reasons (SOR) on 30 March 2005 detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in an undated writing that was received by DOHA on 18 April 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on 27 July 2005. On 16 December 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 28 December 2005.

FINDINGS OF FACT

Applicant moved from England to the U.S. in 1982. He joined the U.S. Air Force and received a security clearance. After six years, he left the Air Force and went to work for research and development agencies. In 1997, Applicant joined his current employer, a defense contractor. He held a clearance as a missions system interface team leader. Other employees who know Applicant and a former supervisor believe he is honest, trustworthy, and worthy of a security clearance.

Police arrested Applicant at his home on 15 August 2003 on a misdemeanor charge of assault with bodily injury to a

family member. Applicant's wife had called the police complaining that he had assaulted her. The incident occurred shortly after Applicant moved his family from State 1 to State 2. He was working long hours, his wife was pregnant with their fourth child, and she was upset Applicant was working such long hours and did not spend more time with the family. This resulted in a heated family argument in which Applicant pushed his wife. He was released from jail on bond on 19 August 2003. On 11 May 2004, he appeared in county court and pled no contest to the charge. Applicant was granted a deferred adjudication and sentenced to a 12-month probation term and a fine. He was also required to complete a prevention of abuse/batter class and an 18-week anger management course of weekly group sessions. Applicant successfully completed all the requirements of probation and the charge was dismissed. His wife attended some stress management classes. There have been no further domestic incidents.

Applicant did not report this arrest to his employer. In accordance with Department of Defense rules, the company security manual requires employees who have been granted access to classified information to report arrests, regardless of whether or not convicted or charges dropped for lack of evidence." Ex. 3 at 2. Applicant's company did not discipline him in any way for failing to report his arrest. In fact, they have recently promoted him, and he is more involved in classified information than ever.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 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. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was convicted of assault with bodily injury to a family member in August 2003. ¶ 1.a. In his answer, Applicant denied the allegation. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government's evidence establish potentially disqualifying conditions under Guideline J. Applicant engaged in criminal conduct in committing an assault with bodily injury to his wife. DC E2.A10.1.2.1. An applicant may mitigate security concerns by establishing the criminal behavior was not recent (MC E2.A10.1.3.1), was an isolated incident (MC E2.A10.1.3.2), factors leading to the violation are not likely to recur (MC E2.A10.1.3.4), and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). Each of these mitigating conditions apply. Applicant committed the offense almost three years ago, it was the only criminal offense he has committed, and after the physical abuse and anger management courses, Applicant better understands the stress his wife was under and seems to be fully rehabilitated. After carefully considering all of the evidence, the disqualifying and mitigating conditions, and the adjudicative process factors, I find for Applicant on ¶ 1.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant failed to report his August 2003 arrest to his employer, in violation of the company security manual. ¶ 2.a. In his answer, Applicant admitted the allegation. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government's evidence failed to establish potentially disqualifying conditions under Guideline E. Although not specifically alleged, the gravamen of the accusation is that Applicant concealed information from his company and DoD that he was required to report, thus making him vulnerable to coercion, exploitation, or duress. See DC E2.A5.1.2.1; DC E2.A5.1.2.4. Although he does not recall the details of any security briefings he may have had, Applicant knew he had to report serious offenses, but insists he did not believe he had to report minor offenses. He considered this offense minor because the offense was a misdemeanor. The Government established that the employees who were called as character witnesses for Applicant had been briefed and knew they had to report all offenses, but there is no evidence Applicant received such a briefing. Even if he had received the briefing, if he honestly but mistakenly believed he had no duty to report this arrest, his failure to do so was not an act of concealment. Applicant now understands his responsibilities. He is not vulnerable to coercion, exploitation, or duress. Under all the circumstances, I am convinced Applicant did not intend to conceal his misdemeanor from his employer or from the Department of Defense. I find for Applicant on ¶ 2.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young
Administrative Judge