

DATE: July 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-11290

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1985 and 2002, Applicant was arrested and charged with felony assault twice, and twice convicted on misdemeanor charges. His second arrest involved a serious physical assault on a minor after a family argument. He has not mitigated the government's concerns regarding his criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 23, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons 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. Specifically, the SOR set forth security concerns arising under Guideline J (Criminal Conduct), of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On February 21, 2006, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on March 20, 2006. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response or additional evidence. This case was assigned to me on June 14, 2006.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline J, subparagraphs 1.a. and 1.b. of the SOR. ⁽¹⁾ Those admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I

make the following additional findings of fact.

Applicant is a 45-year-old fabrication and process helper for a defense contractor.⁽²⁾ He has worked for this contractor for three years. He served two years in the United States Air Force.⁽³⁾ He has been married to his second wife for almost four years.⁽⁴⁾ He has an 18-year-old son, a 14-year-old daughter, a 19-year-old stepson, and a 16-year-old stepdaughter.⁽⁵⁾ He completed a security clearance application (SF 86) in August 2003.⁽⁶⁾

In April 1985, the police arrested Applicant and charged him with assault, battery and vandalism.⁽⁷⁾ The court convicted him of vandalism, and dismissed the other charges.⁽⁸⁾

During the evening of January 27, 2002, after listening to his girlfriend's 16-year-old son, who is now his stepson, argue with her over bedtime, he called his stepson a profane name.⁽⁹⁾ The stepson walked to the garage to call the police, and the Applicant followed him.⁽¹⁰⁾ He then hit his stepson in the face when he called the police.⁽¹¹⁾ After his stepson fell down, he continued to hit him.⁽¹²⁾ When his girlfriend, who is now his wife, tried to pull him off, he slapped her hard, causing her to fall.⁽¹³⁾ He then repeatedly kicked his stepson.⁽¹⁴⁾ The police arrested and charged him with assault with a deadly weapon, a felony.⁽¹⁵⁾ He had been drinking prior to the incident.⁽¹⁶⁾

In court, Applicant pled *nolo contendere* to two misdemeanor charges, corporal injury to a child and battery.⁽¹⁷⁾ The court found him guilty of these charges, sentenced him to 90 days in jail, and 16 hours of directed work; placed him on 48 months of probation; directed parenting counseling and one year of domestic violence counseling; and fined him \$573.22.⁽¹⁸⁾ He served 62 days of the 90-day sentence.⁽¹⁹⁾ Applicant states that he completed the domestic counseling, but has not provided documentation showing that he has.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.⁽²⁰⁾

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²¹⁾ The government has the burden of proving controverted facts.⁽²²⁾ The burden of proof is something less than a preponderance of the evidence.⁽²³⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽²⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁵⁾

No one has a right to a security clearance,⁽²⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁷⁾ Any reasonable doubt about whether an applicant

should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (28) Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. (29) It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline J. Twice, Applicant has been arrested and charged with felony assault, including assault with a deadly weapon. His conduct raises Criminal Conduct Disqualifying Condition (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 considered all the criminal conduct mitigating factors (MC CC), especially MC CC E2.A10.1.3.4. (*The . . . factors leading to the violation are not likely to recur*). Although his arrests occurred nearly 17 years apart, assault is a serious charge. Applicant lost his temper during a family dispute and after an afternoon of drinking. He viciously and physically attacked his 16-year-old stepson after his stepson called the police. He also slapped his girlfriend, now wife, hard during this incident. His physical violence was clearly excessive and inappropriate. His conduct raises questions about his judgment and reliability, and negates the application of Criminal Conduct Mitigating Conditions. I have also considered the whole person concept in reaching my decision. Applicant was over 40 when he attacked his stepson and then girlfriend. His inability to control his emotions reflects a problem with his ability to use good judgment in a stressful situation, and raises concerns about his ability to resist coercion or exploitation when under pressure or duress. His actions followed an afternoon of drinking, were very serious, and excessive. The record is devoid of documentary evidence which supports his statement that he completed counseling. In addition, since drinking was a major contributing factor in the 2002 incident, the lack of evidence regarding his current drinking habits weighs against him. Applicant has not mitigated the government's security concerns under Guideline J. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Item 1 (Applicant's response to SOR, filed February 21, 2006) at 1-2.

2. Item 4 (Applicant's security clearance application, dated August 21, 2003) at 2.

3. *Id.* at 6.

4. *Id.* at 4.

5. *Id.* at 5.

6. *Id.* at 1.

7. Item 7 (United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division) at 2.

8. *Id.*

9. Item 5 (Police report, dated January 28, 2002) at 1-6; Item 8 (Applicant's signed statement, dated April 1, 2004) at 1-2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Item 5, *supra* note 9, at 5.

17. Item 6 (Court documents, dated March 3, 2003) at 1.

18. *Id.* at 1-3.

19. Item 8, *supra* note 9, at 2.

20. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.

21. ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).

22. ISCR Case No. 97-0016 at 3 (App. Bd., December 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

23. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

24. ISCR Case No. 94-1075 at 3-4 (App. Bd., August 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

25. ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, January 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

26. *Egan*, 484 U.S. at 531.

27. *Id.*

28. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

29. Executive Order No. 10865 § 7.