

DATE: April 22, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0649

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Barry M. Sax

Department Counsel

FOR THE APPLICANT

Barry P. Steinberg, Esquire

STATEMENT OF THE CASE

On December 5, 1996, the Defense Office of Hearings and Appeals (DOHA), 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 Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR on December 23, 1996 and requested a hearing before a DOHA Administrative Judge. The case was reassigned to this Administrative Judge on January 15, 1997, after having been previously assigned to another Administrative Judge on January 6, 1997. On February 20, 1997, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant Applicant's security clearance. The Government's case consisted of four exhibits; Applicant relied on one exhibit (with 51 [\(1\)](#) attachments), his own testimony, and the testimony of four additional witnesses. A transcript of the proceedings was received on March 3, 1997.

FINDINGS OF FACT

In his answer to the Statement of Reasons, Applicant denied each of the factual allegations set forth under Criterion J (Criminal Conduct). At his administrative hearing, he admitted his involvement in the activity described by each of the

factual allegations, but continued to deny that his involvement in these incidents established a pattern of criminal activity.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 53 years old, and is the founder, owner, president and chief executive officer of Company X, a ----- firm, which currently employs more than 100 people. He is applying for a secret clearance. A favorable preliminary determination could not be made in his case because of Applicant's six arrests for criminal misdemeanors, and because of his involvement in an assault--upon his former spouse--for which he was not arrested.

Applicant's first arrest which is of concern in these proceedings occurred during the gasoline crisis in 1974.⁽²⁾ Applicant had been waiting in line to fill gas when the attendant from the service station placed the "LAST CAR" sign immediately in front of his car--meaning that Applicant and the cars behind him would not be getting gas. Applicant became very upset because he believed the sign was put in front of his car because he and his family were the only blacks in a line with 40-50 cars. After he moved the sign to the back of his car, there was an altercation with the service station attendant and Applicant was arrested. The charges were subsequently dismissed.

The next arrest is documented only by the sketchy information in a Report of Investigation prepared by the Defense Investigative Service (DIS). According to this information (Gov. Exh. 3), Applicant was arrested for assault and resisting arrest on February 4, 1975. He forfeited bond on the resisting arrest charge and the assault charge was dismissed at the request of the prosecuting attorney. Applicant has no recollection of this incident but does not deny that it occurred.

Applicant was next arrested on January 26, 1977 for criminal damage, assault, and resisting arrest. Prior to being arrested, Applicant had attempted to push a police vehicle⁽³⁾ out of the way with his vehicle in an effort to avoid being issued a parking ticket on the campus of - State University. He did not believe that a parking ticket was warranted by the circumstances. Applicant began arguing with the policeman who had decided to issue the ticket. The conflict escalated further after a wrecker called by the policeman arrived and blocked Applicant from leaving the area. When Applicant told the driver of the wrecker to move his vehicle, he was subdued by students and arrested. He was subsequently found guilty of criminal damage and assault, and sentenced to 60 days in jail (which was suspended for the time served) and ordered to pay court cost of \$250.00--\$150.00 of which was suspended. The charge of resisting arrest was dismissed by the prosecuting attorney.

On an undisclosed date 1978, Applicant struck his wife incident to a domestic quarrel. Authorities were not summoned and he was never arrested. Applicant admits that the incident occurred and accepts responsibility for his actions. Striking a spouse is a violation of section 2903.13 (A) of the Ohio Revised Code.

In 1982, Applicant was arrested and charged with criminal damage after he used his car to bulldoze another car--that was blocking his exit from a parking lot--out of the way so that he could exit the parking lot. The charge was dismissed after Applicant agreed to pay the owner of the other vehicle \$150.00 in damages.

In 1990, Applicant had a dispute with a landlord after the ceiling in an apartment he was renting fell down and spread dirt and debris on his furniture. Applicant cleaned up the apartment and had the ceiling repaired. When he filed a claim in small claims court against the landlord seeking reimbursement for the cleanup and repairs, the landlord cross-claimed for the rent which Applicant had refused to pay. After the judge ruled in the landlord's favor, Applicant became very upset and challenged the judge in open court. The judge had his bailiff call the police whereupon an altercation occurred which ultimately resulted in Applicant's arrest for resisting arrest, disorderly conduct, and contempt of court. He was found guilty of resisting arrest and sentenced to ten days in jail (with credit for the one day served). He was also ordered to perform 40 hours of community service and to pay a fine of \$250.00. The disorderly conduct charge was dismissed.⁽⁴⁾

Applicant's final arrest occurred on January 13, 1992. He had been having problems with his ex-wife about his parental rights vis a vis their son. After numerous instances when she would refuse to answer the phone or would answer and

hang up during their conversation, Applicant left a threatening message on her answering machine in which he advised her that he had a "shotgun and two ouzzies (sic)," and was coming over to get his son (Tr. 155-156). Following this telephone conversation, he went to his ex-wife's house to confront her about why she had not been allowing him to see his children. The police were waiting for him at his ex-wife's house. When he entered the house and began questioning her about her actions, the police grabbed him from behind, threw him on a couch and put him in handcuffs. Applicant resisted what he considered to be the excessive use of force by the arresting officers (Tr. 156-157). He was subsequently charged with domestic violence, assault (3 counts), and resisting arrest. He was found guilty of one count of assault and ordered to serve 180 days in jail (168 days of which were suspended), and he was awarded five years probation under the condition that he complete an Alcohol Safety Program being offered by the local city health department. Applicant was also found guilty of the charge of resisting arrest. He was ordered to serve 90 days in jail (88 days of which were suspended),⁽⁵⁾ and awarded probation for that charge. The domestic violence charge and two counts of the assault charge were dismissed.

Applicant has not been arrested since January 13, 1992. His five years of probation was terminated as of February 11, 1997. (See Attachment 44 to Applicant's Exh. A). Although he has had to make arrangements for seeing his children, he has not had one-to-one contact with his ex-wife since his 1992 arrest. He remarried a year ago and is very happy in this relationship.

The facts of this case are unusual in that Applicant's achievements, record and reputation--apart from incidents described in the SOR--are notable and exemplary in every respect. He is a self-made man in the true sense of the word. After spending four years in the United States Navy during the early 1960's, he progressed through a series of jobs--as diverse as inhalation therapist, drug counselor, insurance salesman, to being the owner and CEO of his own company--the position he currently occupies. Along the way, he encountered, overcame, and negotiated his way through and around many obstacles to achieve the goals he had set for himself. The challenge which did not yield to Applicant's best efforts was his relationship with his second wife.

After his first marriage ended in divorce in the early 1970's, Applicant married his second wife⁽⁶⁾ in 1975 (Tr. 146). He had wanted this marriage to work "more than anything." (Tr. 130). Because of the unhappy relationship he had had with his father, Applicant describes a near obsession with achieving the image of a happy family with a wife and children (Tr. 130). In spite of this desire and his best efforts, he and his second wife divorced in 1982. Although divorced, they would continue to attempt reconciliation for ten more years. Applicant has described the years when he was married to his second wife, and attempting to work out a satisfactory relationship with her, as a time when he was continuously "upset" (Tr. 155) because despite his best efforts, the relationship was not working. He felt "desperate" and "trapped;" he "didn't want to be the way (he) was;" he "didn't like (himself) the way (he) was." He knew "there was something wrong, and (he) didn't know how to get out of it" (Tr. 130). Because of the dysfunctional and highly stressful relationship⁽⁷⁾ with his ex-wife, Applicant was desperate and frustrated with the fact that his life was not working. As a result of his unhappiness and frustration, he was more likely to overreact to the least bit of provocation.

Applicant is now a changed man. He has been very active in his church and has helped to organize a men's group which meets for several hours every Monday night (Tr. 110).⁽⁸⁾ This group has been very beneficial for him and has helped him to discuss and confront issues that men have a difficult time discussing. He realized that he needed help (Tr. 131). By talking about his problems and listening to other men talk about theirs, he learned "a better way....to relieve a lot of the tension and the pressure and the desperation and the guilt" (Tr. 133). As a result of his participation in this group, he is no longer desperate, he does not "have to carry the weight of the world..any more," he does not have to feel "guilty of all the things that happened between (him) and (his) father... (and) about the things that happened between (him) and (his) ex-wife," (Tr. 134) and he no longer has to "fight all of the battles" (Tr. 167).⁽⁹⁾

Applicant has been recognized as a leader in the business community. In 1994, he was selected the ----- by the ----- of State -, and was one of ten finalists for ----- by City - -- a major idwestern city. In addition, Applicant was the recipient of the ----- Award, and received the ----- Award. He has received letters of appreciation from the clients he has served in both the public and private sectors. (See Attachments 1,4 and 6 to Applicant's Exhibit A).

In addition to being an active member of his church, Applicant is active in a number of community and civic organizations. He is a trustee of the -----; he is a member of the -----; he serves on the Mayor's Task Force for -----; he has been a member of the Chamber of Commerce of City - for more than 20 years, and he is active in an organization which helps the parents of handicapped children identify resources and services for their children.

POLICIES

The Adjudicative Guidelines of 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 with reasonable consistency that are clearly consistent with the interests of national security. In making those 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 the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

CRIMINAL CONDUCT

(Criterion J)

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

1. Any criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offenses

Conditions that could mitigate security concerns include:

1. The criminal behavior was not recent.
2. The crime was an isolated incident.
5. There is clear evidence of successful rehabilitation.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criterion J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established its case with respect to Criterion J. Applicant has been arrested on criminal misdemeanor charges six times since 1972. In addition to these arrests, Applicant has admitted that he assaulted his ex-wife in 1978--an incident of criminal misconduct for which he was not arrested. While some of the charges were later dismissed by the prosecutor, Applicant has admitted that he was involved in criminal misconduct on each of the occasions alleged.⁽¹⁰⁾ His testimony explaining the circumstances of each arrest elicits a measure of sympathy for his actions, and provides some illumination of the circumstances under which they occurred, but does not on any occasion rise to a defense which would exonerate him and excuse his behavior. Applicant admits that he lost his temper and behaved inappropriately on each occasion.

That these incidents occurred over a period of twenty years under greatly varying circumstances is troubling. While credence is given to Applicant's testimony that he was frustrated and desperate during the time that he was attempting to salvage his marriage to his second wife--and was inclined to take out his frustrations on whomever was convenient--this explanation does not explain Applicant's arrests in 1972 and 1975. Both of these arrests occurred before he married his second wife,⁽¹¹⁾ and both arrests disclose a behavior pattern similar to that which is evident in his arrests after 1975. And Applicant's 1975 arrest--the facts of which he does not remember--was for assault and resisting arrest, a combination of charges that would reappear in later arrests.

There is an obvious nexus between Applicant's criminal conduct and the national security. An individual who repeatedly loses his temper and breaks the law is much more likely to violate security rules and regulations than someone who does not have a record of breaking the law incident to a temper tantrum, or for any other reason.

Applicant's evidence in mitigation is solid. None of his criminal conduct has been recent. He has not been arrested, or involved in an incident of misconduct in more than five years. Also mitigating, Applicant's earlier arrests are isolated events. They are isolated, not because he has been involved in only one or two incidents, but because the arrests represent an extremely minute percentage of Applicant's interactions with other people. He does not work in an environment where he is isolated from other people. His business involves people. Whether interacting with subordinates, bankers, business clients, or the other volunteers of the civic organizations in which he is active, he is continuously interacting with people. It is apparent from the recognition Applicant has received for his contributions as a business and civic leader that the overwhelming majority of occasions when Applicant interacts with other people, it is a positive and enriching experience for everyone involved. The six arrests do not establish a norm; they are isolated incidents in the life of person who has had countless positive interactions with people during the same time period.

The most important evidence in mitigation is what Applicant has done in the past five years to rehabilitate himself and ensure that there would not be a recurrence of the misconduct that resulted in his arrests. Most significant perhaps is the fact that he has given up on the relationship that was the principle source of his anger and frustration. It is self-evident that a person--consistently preoccupied with his unsuccessful attempts to work through the most important relationship in his life--will not have the same patience to cope with life's other frustrations as a person who is not so preoccupied. Applicant has since remarried and is now in a much more compatible and pleasant relationship.

In addition to getting out of a relationship that was not working, Applicant has provided other persuasive evidence of rehabilitation. He realized long before he received the SOR that there was something wrong in his life that needed to be corrected. He did not like himself and he did not have an answer for his life. This realization caused him to help organize a men's group in his church where he could talk over his problems, listen to the problems and concerns of other men, exchange ideas, and come away with a better understanding of how he could cope with his own problems and concerns. He wanted his life to work better and he wanted to feel better about himself. And there is evidence that Applicant's efforts have paid off. He now feels better about himself; he does not have to fight every battle; and he is not desperate anymore. Through his participation in the men's group, he has developed insights into why he had overreacted on the occasions when he had been arrested. Although he has provided exculpatory explanations for most of his arrests, he has come to own the role that he played in escalating the conflict in each instance (Attachment 47 to Applicant's Exh.

A). By all accounts, Applicant is a more accepting and patient person now than he has been in the past.

It is significant that Applicant's concerns about his own emotional well-being--and his involvement and participation in the men's group--preceded his security clearance application by more than a year. He did not become involved, and he has not continued to participate in this group, because he wanted to provide some window dressing that would conceal his arrest record. When he helped to organize this group, he did it to address some deep felt need within himself, not because he wanted to give some outward manifestation of rehabilitation.

Applicant's life since 1992 has not been without its irritations. He identified an incident where his ex-wife had attempted to initiate legal proceedings because he had not paid a utility bill which was not yet due (Tr. 108-109); and he described the frustrating and humiliating ordeal which accompanies his efforts to talk with his son (Tr. 180). Applicant also identified one other occasion when he has adopted a more accepting attitude toward other people's foibles (Tr. 116).

This Administrative Judge is mindful of cases wherein the Appeal Board has opined that good behavior during probation does not deserve the same weight as good behavior under other circumstances, i.e., where an applicant is not under the threat that a suspended sentence will be vacated. However, I believe the evidence of Applicant's rehabilitation set forth above is sufficiently persuasive to quiet the concerns raised by his probationary status during the past five years. His testimony, and the observations of his many character references, have convinced me that Applicant has applied the same character traits: tenacity, intensity and strategic planning--which have enabled him to succeed in business--to understanding and moving beyond the behavior which precipitated his arrests. Moreover, I do not believe that Applicant would have achieved the success that he has, in the kind of business enterprise he has begun, if he had not left behind the anger and frustration which was controlling his life--until at least January 1992. Criterion J is concluded for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion J) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. The last attachment in Applicant's Exhibit A is # 54, however there are no attachments bearing the numerical designations 42, 43, and 46.
2. Although this arrest is not alleged in the SOR, it was listed in Gov. Exh. 3--to which Applicant did not object. It is considered because it is one more incident in a pattern of allegations.

3. The vehicle in question was not a cruiser but a three-wheeled vehicle being used by the campus police of M State University.
4. The record does not disclose the disposition of the contempt of court charge.
5. For both the assault charge and resisting arrest charge, Applicant was credited for the two days he had spent in jail prior to the sentencing.
6. Applicant has described his second wife--who had earned her Ph.D. by age ----as "brilliant, fast-moving, independent, exciting," but with a "dark side" that could cause her "to be the cruelest most evil human being..." (Tr. 105).
7. The nature of this marriage, and the acrimony attendant its dissolution is evident in the litigation which has been initiated since the divorce. See Attachments 20 through 41 of Applicant's Exhibit A.
8. Applicant testified that he had not missed a meeting of this group for three and one-half years (Tr. 110).
9. Applicant has submitted numerous letters from business associates and friends in which they describe the changes they have observed in Applicant in the past five years. See Attachments 47, 48, 49, 50, 52 and 53.
10. Applicant did not make such admission with respect to his arrest on February 4, 1975; he was unable to recall the specifics of the incident, but did not deny that this incident occurred.
11. Applicant married his second wife on an undisclosed date in 1975 (Tr.), presumably after his arrest on February 4, 1975.