

DATE: March 19, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0798

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR GOVERNMENT

Teresa A. Kolb, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On December 4, 1997, 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 and modified, issued a Statement of Reasons (SOR) to Applicant which 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, notarized on December 16, 1997, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge Jerome H. Silber on January 27, 1998, but due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on February 3, 1998. A notice of hearing was issued on February 6, 1998, and the hearing was held before me on February 19, 1998. During the course of the hearing, seven Government exhibits and four Applicant exhibits, and the testimony of three Applicant witnesses (including the Applicant), were received. The transcript was received on March 18, 1998.

FINDINGS OF FACT

Applicant has admitted the sole factual allegation pertaining to criminal conduct under Criterion J. That admission is hereby incorporated herein as a finding of fact.

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

Applicant is a thirty-eight year old male employed by a defense contractor, and he is seeking to obtain a security clearance, the level of which has not been specified. He had previously been granted a SECRET clearance in January

1993.

On October 2, 1992, Applicant and his fiancée were celebrating the extension of a contract awarded to Applicant's employer. Over the course of the evening, while in a night club shooting pool, dancing, bull riding, and drinking, he consumed six or seven rum and cokes and four or five beers. In an unprovoked assault, Applicant viciously attacked a 22 year old female, who offered no resistance, and brutally beat her in the face with his fists and boots, causing substantial multiple facial injuries. The victim sustained at least five facial fractures, including a blowout fracture of her left orbit. After her condition was stabilized, on October 4, 1992, she underwent 13 hours of reconstructive surgery, involving 10 different surgical procedures, and was listed as "stable but serious." Her subsequent discharge diagnosis, after approximately two weeks as an inpatient, was: "Le Fort II fracture; blow-out fx left orbital floor; zmc fx left; and nasal orbital ethmoid complex fx." The cost for her medical care was estimated to be approximately \$28,609.12.

The attack occurred after Applicant's girlfriend complained to him that there was a man in the ladies restroom of the night club. Applicant went to the entrance of the ladies restroom and waited for the male to emerge. When the victim appeared, Applicant, under the mistaken impression that the victim was a male, jumped the victim from behind, struck her in the face with his fists, smashed her head into the wall, and wrestled her to the floor, where he struck her several more times with his fists. While the victim was lying on the floor, Applicant also kicked her. Applicant admitted striking the victim five or six times with his fists, but denied ever kicking her. Various eyewitnesses estimated Applicant struck the victim from three to over 15 times with his fists, and kicked her one or two times.

Applicant was unable to explain why he took matters into his own hands, and why he did not seek out the assistance of one of the two bouncers in the night club to handle the suspected situation where there might have been a male in the ladies restroom. Likewise, he claimed he did not intend to beat up the victim, but offered no explanation as to what triggered the assault.

Applicant was arrested on October 2, 1992, and charged with aggravated battery. Nearly two weeks later, on October 14, 1992, he was indicted by a grand jury, and formally charged with: count I: aggravated battery (great bodily harm), a 3rd degree felony, by touching or applying force to the victim, intending to injure that person, and causing great bodily harm to her, or by acting in such a way that it would likely result in her death or great bodily harm; and count II: tampering with evidence, a 4th degree felony, by concealing evidence by throwing away or attempting to destroy his clothing worn at the time of the assault, with the intent to prevent his apprehension, prosecution, or conviction.

On August 16, 1993, Applicant, through counsel, entered a plea of guilty to the offense of aggravated battery (great bodily harm). On October 18, 1993, the court accepted Applicant's plea, and found him guilty of the count. Applicant was directed to undergo a comprehensive, social and psychological evaluation, conducted by the department of corrections. He was eventually sentenced to serve 36 months in prison, with 18 months suspended, and awarded 18 months probation, to run concurrently with a mandatory one year period of parole, with a special condition that he pay restitution in the amount of approximately \$28,609.21.

Applicant served nearly 11 months of incarceration, commencing on January 24, 1994, and ending on November 18, 1994. During the period March-June 1994, Applicant was in a work release program where he worked at a farm office, and during June-November 1994, he worked at a union headquarters. While incarcerated, Applicant attended Alcoholics Anonymous (AA) meetings, anger management counseling, and stress relief counseling.

Under the terms of his restitution agreement, in July 1996, Applicant began making monthly reimbursement payments, in the amount of \$50.00. Also, under the terms of an out-of-court settlement of a civil action brought against him by the victim, in July 1996, Applicant commenced making monthly damage payments of \$100.00 to the victim. There is no evidence to rebut Applicant's contentions that, to date, he has made timely payments in compliance with both mandates.

Applicant no longer attends AA meetings. He has reduced his alcohol consumption to the point where he now consumes no more than three rum and cokes in an evening, with the most recent episode occurring one week prior to the hearing. He has not been engaged in a fight since the assault in October 1992.

Applicant has been employed by his current employer since June 1997. From August 1992 until his incarceration in January 1994, he was with the predecessor company on the same contract, and when he was released from incarceration

in November 1994, he resumed his employment with the same employer, remaining there until June 1997. Applicant has received numerous certificates and letters of appreciation for his work performance, and neighbors, friends, family members, colleagues and supervisors, characterize him in generally glowing terms.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

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--an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision.

The Adjudicative Process factors which an Administrative Judge should consider are: (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.

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

[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:

(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.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽¹⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation

sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that 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. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that 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." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

Applicant's position, training, experience, and age, would seem to reflect a degree of maturity which would make such conduct unlikely. Applicant had knowledge of the societal rules of conduct, but still, for whatever reason, chose to disregard them. Faced with the possible presence of a male in the ladies restroom of the night club, he decided not to seek the assistance of the bouncers, or to verify the rumor, but, instead, chose to take the law into his own hands. In so doing, without provocation, he viciously attacked a 22 year old female, who offered no resistance, and brutally beat her in the face with his fists and boots, causing substantial multiple facial injuries. Under both the Regulation and the Directive, criminal conduct involving a single serious crime creates doubt about a person's judgment, reliability, and trustworthiness. This criminal conduct clearly constitutes a condition that could raise a security concern. In this instance, the criminal conduct, consisting of a single serious crime--the October 1992 savage beating of the victim, resulting in his subsequent conviction of aggravated battery (great bodily harm), brings it under criminal conduct disqualifying factor (DF) 2.

Because the aggravated battery occurred in October 1992, it cannot be reasonably argued that the criminal behavior was recent. Thus, it falls under criminal conduct mitigating factor (MF) 1. Likewise, there has apparently been no recurrence of the conduct since that October 1992 incident. That fact brings it under MF 2. Applicant served nearly 11 months of incarceration, including a work release program, commencing on January 24, 1994, and ending on November 18, 1994. While incarcerated, Applicant attended AA meetings, anger management counseling, and stress relief counseling. Unfortunately, those programs, as well as the comprehensive nature of Applicant's participation in them, has not been more fully developed to furnish me with any true sense of their value, and while I can assign them some positive evidentiary weight, I choose not to make that weight substantial.

My assessment of the evidence, and my application of the Adjudicative Process, bring me to the difficult point of decision. I have weighed the disqualifying factor; along with the nature, extent, and seriousness of the vicious and brutal unprovoked criminal conduct; the still ambiguous motivation for the conduct; the voluntariness of participation; and the circumstances surrounding the conduct, and compared that information to the mitigating factors; along with the presence of some degree of rehabilitation or other pertinent behavioral changes. The balancing of the evidence leaves me with doubts as to the degree or success of Applicant's rehabilitation; the likelihood of recurrence; as well as grave questions and doubts as to Applicant's continued security eligibility and suitability.

While a person should not be held forever accountable for misconduct from the past without a clear indication of motivation for the original criminal conduct, as well as subsequent reform, remorse, or rehabilitation, I am unable to

determine with reasonable certainty the quality of his rehabilitation or the probability that such conduct will not recur in the future. Without more, I simply do not believe that the period of time from the October 1992 assault to the hearing, is sufficient to persuade me that recurrence of such criminal conduct is unlikely, especially since Applicant continues to consume substantial quantities of alcohol, even after participating in AA for an unspecified period. The fact that Applicant mistook a female for a male before brutally beating her is not, in my mind, an acceptable exoneration for the conduct. And Applicant's inability to articulate his motivation for the assault remains a troubling aspect of the entire equation. I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, and my application of the pertinent factors under the Adjudicative Process, I believe that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegation 1.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

DECISION

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

Robert R. Gales

Chief Administrative Judge

1. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).