

DATE: October 27, 1999

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0122

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The security significance of Applicant's personal conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations, called into issue by Applicant's two purely verbal disputes, not resulting in arrests; two relatively minor physical clashes, one involving a bumping and the other, a mutual slapping, both resulting in arrests and the imposition of counseling; a "situation" with his son who has ADHD, Tourette's Disorder, and Obsessive-Compulsive Disorder in which the son had to be physically restrained; a temporary restraining order obtained by his then-wife during marital discord; and one security violation in which no classified information was left unattended and no compromises occurred, even when combined to show a pattern of rule violations, has been overcome by Applicant's active and successful participation in formal rehabilitation and counseling and the minimization of stressors. Clearance is granted.

STATEMENT OF THE CASE

On February 23, 1999, 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 sworn written statements, dated April 27, 1999 and July 8, 1999, ⁽¹⁾ Applicant responded to the allegations set forth in the SOR, and eventually requested a hearing. The case was assigned to, and received by, this Administrative Judge on July 30, 1999. A notice of hearing was issued on August 2, 1999, and the hearing was held before me on August 18, 1999. During the course of the hearing, four Government exhibits, and the testimony of one Government witness, and two Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on August 25, 1999.

RULINGS ON PROCEDURE

During the proceeding, Department Counsel moved for me to take Official Notice of certain portions of the Annotated Laws of Massachusetts under Part IV. Crimes, Punishments and Proceedings in Criminal Cases, Title I. Crimes and Punishments, Chapter 265. Crimes Against the Person, Section 13A, and 13B--pertaining to Assault and Assault and Battery, and Indecent Assault and Battery on Child under Fourteen, respectively. There being no objection, I took Official Notice of the cited provisions.

FINDINGS OF FACT

Applicant has admitted all but one of the factual allegations pertaining to personal conduct under Criterion E (subparagraphs 1.a., and 1.c. through 1.g.), as well as the one allegation pertaining to criminal activity under Criterion J (subparagraph 2.a.). Those admissions are incorporated herein as findings 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 47 year old male employed by a defense contractor, and he is seeking to regain a SECRET security clearance which had previously been revoked.

Applicant has been married four times. He was married to his first wife during 1971-74 and again during 1977-80. He was married to his second wife during 1982-96, and they had three children. He married his third, and current, wife, in July 1998. He has seemingly had a somewhat volatile relationship with several close family members, resulting in police or court involvement, during a three year period commencing in late 1995.

The initial incident occurred in November 1995 when the police were called to his residence by a person not identified during a "situation" with Applicant's son. The child, whose age was not revealed, has a combination of conditions, including Attention-Deficit/Hyperactivity Disorder (ADHD); Tourette's Disorder; and Obsessive-Compulsive Disorder. ⁽²⁾ During the incident, Applicant's son "lost control," and attacked Applicant, ripping his shirt. Applicant physically restrained his son and took him to his room. As a result of the episode, the police were called to the residence, but no charges were filed and no further "official" action was ever taken.

The second "incident" occurred some time in March 1996, when Applicant and his second wife were having a dispute over her spending money in a manner which he felt was frivolous, and his opening a separate bank account in order to pay the bills. Although there is no evidence that Applicant threatened physical violence or that his wife feared any such physical violence, their dispute resulted in her obtaining a temporary restraining order requiring that he remain away from their son. The order was canceled approximately one week later. No further "official" action was ever taken.

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The third incident occurred in December 1997, when Applicant and his then-girlfriend--his current wife--became involved in a verbal dispute over money and her receiving his ex-wife's mail. The money issue developed over his having to work overtime to pay off his older financial obligations. For some reason, not otherwise explained, Applicant called the police during the argument. The police arrived after the dispute had already been resolved, and offered him an opportunity to leave the residence in order to cool off. Applicant accepted the offer and was transported to the police station. He was released without any charges being filed, and no further "official" action was ever taken.

The fourth incident--a purely verbal dispute--occurred in January 1998,⁽⁴⁾ and once again, involved the same issues and the same disputants as the third incident. This time, however, the police were called by a neighbor. Upon their arrival, the police informed both parties of their rights, and, without further "official" action, departed the premises.

The fifth incident occurred in March 1998,⁽⁵⁾ and started out as a verbal disagreement between the same disputants as the third and fourth incidents over her refusal to leave a billiard parlor. Applicant left her and returned home at about 10:15PM, but his then-girlfriend did not return to their shared home until about 1:45AM. The dispute turned physical when Applicant tried to leave, but his exit was blocked by his then-girlfriend. He tried to "shoulder" his way past her, and while doing so, bumped into her, injuring her eye. It is unclear who called the police. The police arrived at the residence at about 2AM, and after interviewing the victim, arrested Applicant for domestic assault and battery. The victim refused medical treatment. Applicant remained in jail overnight, and was bailed out the following morning. Applicant's case was continued without a finding until July 1998.

The sixth, and most recent incident, occurred nearly four weeks later, also in March 1998,⁽⁶⁾ and again involved the same disputants. They became involved in a verbal dispute which deteriorated into a physical confrontation with mutual slapping. The police report mentions "drunkenness" being a factor, but other than one such brief reference, there is no evidence to support that situation. For some, unexplained reason, Applicant called the police. When they arrived at the scene at about mid-night, the circumstances of the dispute were discussed, and Applicant was arrested for domestic assault and battery. While Applicant sustained a minor injury to his ear and hand, both disputants refused medical attention. Applicant remained in jail overnight, and was bailed out the following morning.

As a direct result of the two March 1998 arrests, the charges were joined and Applicant entered an admission to facts sufficient for a finding of guilty. The dispositional terms ordered by the court were: the matters were continued without finding for one year; Applicant was directed to pay \$35.00 to the victim/witness fund; he was placed on supervised probation until July 1999; and ordered to attend the Batterers' Treatment Program.⁽⁷⁾

Applicant commenced attending weekly counseling sessions at a center for addictive behavior in October 1998. Upon completion of those sessions, he was to participate in one dozen weekly individual awareness group sessions.⁽⁸⁾ In addition, he started attending group batterers' counseling sessions, and at the time of the hearing, had six weeks of sessions left to successfully complete his program.

On three occasions, in October 1997, October 1998, and February 1999, Applicant violated security rules and regulations of his employer. The first incident occurred when, as a "controlled room" custodian, he left the room unattended for more than 10 minutes. Applicant was in and out of the room for brief periods attending to other matters, and his absence was reported by someone who wanted to drop off some classified equipment, but who had to wait until Applicant returned to the room.⁽⁹⁾ No classified information was left unattended, and no compromises occurred. As a result of his violation, he was given a warning by the company security officer. The other two incidents involved Applicant's failure, at the end of the work day, to secure the dial lock on a particular cabinet. Neither incident involved compromise of classified information.⁽¹⁰⁾ It is unclear if subsequent action was taken against Applicant for the violations.

No evidence was produced regarding Applicant's work performance.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in evaluating 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 Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

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 purposeful 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:

[Personal Conduct - Criterion E]: Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;
- (5) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns include:

- (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure.

[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:

- (4) the factors leading to the violation are not likely to recur;
- (5) there is clear evidence of successful rehabilitation.

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," 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 allegiance, 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 allegiance, 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 allegiance, loyalty or patriotism.

CONCLUSIONS

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

With respect to Criterion E, the Government has established its case. Examination of Applicant's actions reveals a pattern of conduct involving explosive relationships with several individuals which has evolved into verbal disputes and physical clashes. Applicant's apparent inability to control his impulses or manage his anger have seemingly contributed to a number of incidents, the last two of which resulted in his arrest and eventual court action. Applicant's overall questionable personal conduct in this regard ostensibly falls within Personal Conduct Disqualifying Condition (DC) 4.

On its face, Applicant's initial incident in November 1995, nominally falls within the pattern of his explosive relationship, but is, in fact, something quite different. The evidence is unrebutted that Applicant's son has a combination of conditions, including ADHD, Tourette's Disorder, and Obsessive-Compulsive Disorder, and that the son "lost control" and attacked Applicant. The son's conduct required Applicant to physically restrain his son and take him to his room. That action by Applicant, without more, does not raise questions as to Applicant's judgment, trustworthiness, or reliability, and the fact that police may have been called, in this instance, does not enhance the security significance of the "altercation." Under the circumstances, Applicant has, through evidence of extenuation and explanation, successfully overcome the Government's case with respect to allegation 1.a. of the SOR, and that allegation is concluded in favor of Applicant.

The second "incident"--the obtaining of a temporary restraining order by Applicant's then-wife, without more, in light of the strained marital relationship which apparently existed prior to the eventual divorce, and with Applicant's unrebutted explanation, also fails to raise questions as to Applicant's judgment, trustworthiness, or reliability. Thus, it appears to be of little security significance. Under the circumstances, Applicant has, through evidence of extenuation and explanation, successfully overcome the Government's case with respect to allegation 1.b. of the SOR, and that allegation is also concluded in favor of Applicant.

The third and fourth incidents--both purely verbal disputes between Applicant and his then-girlfriend in December 1997 and January 1998--are slightly different in the overall scheme of security significance. If those incidents had existed without any subsequent verbal/physical altercations or arrests, their security significance, in my estimation, would be nil. However, two subsequent incidents, both of which escalated from verbal disputes into physical altercations and arrests, and eventual court action and the imposition of dispositional terms, raise the specter of a possible pattern of questionable judgment, untrustworthiness, and unreliability, and must thus be considered in detail.

It is important to note that in each of the two purely verbal disputes, the police arrived after the disputes had been resolved without deteriorating into a physical clash. Thus, their overall security significance is diminished because they differ substantially from the physical disputes. While there was minor police involvement in both instances, that involvement did not raise the security significance of the verbal disputes, for Applicant was not arrested. Under the circumstances, Applicant has, through evidence of extenuation and explanation, successfully overcome the Government's case with respect to allegations 1.d. and 1.e. of the SOR, and those allegations are also concluded in favor of Applicant.

The fifth and sixth incidents--the verbal disputes which evolved into physical clashes in arch 1998--are, in my view, the incidents with the most security significance. While the eventual disposition of the incidents included police and court action, an examination of the circumstances surrounding the conduct of both incidents reveals that it was not as serious as it initially appeared. The "assault and battery" in the initial incident involved a minor injury resulting from Applicant's "shouldering" his way past, and bumping into, his then-girlfriend. No punches were thrown, and other indicia of violence are absent. The conduct was more in the nature of an unfortunate accident rather than an intentional infliction of injury. The second incident, coming about four weeks later, was a mutual "assault and battery" involving slapping, with a possible alcohol factor, and the only injury reported was sustained by Applicant.

After joining the fifth and sixth incidents, the court disposed of them in a manner deemed appropriate. While acknowledging the unacceptable nature of domestic assault and battery, the court, nevertheless, concluded that these incidents were not sufficiently serious to warrant incarceration. In a clear signal to Applicant to clean up his conduct, he was ordered to attend the Batterers' Treatment Program.

Applicant's formal rehabilitation began when he actively participated in weekly counseling sessions for addictive behavior in October 1998, and subsequently participated in group batterers' counseling. That counseling seems to have been successful, for Applicant has not been involved in any similar conduct since the incident in late March 1998. Applicant married his present wife--the "victim" in the two 1998 incidents--in July 1998, and the stressors that apparently ignited the earlier disputes have been minimized, if not eliminated. As a result, it appears that Applicant has matured and become more acutely aware of his responsibilities in his conduct with others. Even though the rehabilitative efforts may have been court-imposed, I believe that Applicant has taken positive steps to significantly reduce or eliminate any vulnerability to coercion, exploitation, or pressure which may have existed as a result of his conduct and explosive nature. Under the circumstances, Applicant has, through evidence of extenuation and explanation, successfully overcome the Government's case with respect to allegations 1.f. and 1.g. of the SOR, and those allegations are also concluded in favor of Applicant.

The Government has also alleged a very different type of component as constituting Applicant's overall pattern of questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. In addition to Applicant's verbal disputes and physical clashes, Applicant's October 1997 security violation has been identified as supporting the Government's contention. It is important to note that this incident, standing alone, did not justify bringing the allegation as a security violation under Criterion K. The evidence is un rebutted that the violation did not result in unauthorized disclosure of classified information; was not deliberate, but rather, inadvertent; and was isolated.

As indicated above, Applicant was also involved in two other security violations in October 1998 and February 1999. As they are not alleged in the SOR, and Department Counsel has not moved to amend the SOR to include them, I am unable to base my decision on the two additional incidents. Nevertheless, despite the potential seriousness of Applicant's October 1997 security violation, I do not believe his conduct in that instance increases the "negative" security

significance of Applicant's other alleged conduct. Under the circumstances, Applicant has, through evidence of extenuation and explanation, successfully overcome the Government's case with respect to allegation 1.c. of the SOR, and that allegation is also concluded in favor of Applicant.

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 and conditions under the Adjudicative Process, I believe that Applicant has mitigated and overcome the Government's case. The evidence leaves me with no questions or doubts as to Applicant's continued security eligibility and suitability.

With respect to Criterion J, the Government has established its case. Criminal conduct by an applicant for access to classified information encompasses matters within the jurisdiction of the Department of Defense. As indicated above, Applicant's two arrests in March 1998 are the incidents with the most security significance. The assault and battery in the first incident involved a minor injury resulting from Applicant's "shouldering" his way past, and bumping into, his then-girlfriend, with no punches thrown, and no other indicia of violence. The second incident was a mutual assault and battery involving slapping, with a possible alcohol factor, and the only injury reported was that sustained by Applicant. Such conduct clearly falls within Criminal Conduct DC 2 and DC 3.

Notwithstanding the disqualifying nature of the criminal conduct, it is also clear, in this instance, there are at least two conditions that could mitigate security concerns. Applicant married his present wife--the "victim" in the two 1998 incidents--in July 1998, and the stressors that apparently ignited the earlier disputes have been minimized, if not eliminated. Furthermore, it appears Applicant has matured and, as a result of his continuing active participation in several counseling programs directed to addictive behavior and batterers' counseling, become more acutely aware of his responsibilities in his conduct with others. That counseling seems to have been successful, for Applicant has not been involved in any further similar conduct since the incident in late March 1998. Thus, Criminal Conduct Mitigating Condition (MC) 4 and MC 5 seem to apply. Under the circumstances, Applicant has, through evidence of extenuation and explanation, successfully overcome the Government's case with respect to allegation 2.a. of the SOR, and that allegation is also concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible 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 E: 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

Subparagraph 1.g.: For the Applicant

Paragraph 2. Criterion J: FOR THE APPLICANT

Subparagraph 2.a.: 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 or continue a security clearance for Applicant.

Robert Robinson Gales

Chief Administrative Judge

1. During the proceeding it was determined that Applicant's Response to the SOR, dated July 8, 1999, had not been forwarded to me with the case file. Upon being made aware of its existence, I requested Department Counsel to furnish it for the record. He did so.

2. *See* Tr. at 46.

3. *See* Government Exhibit 1 (Police Report), at 2.

4. *Id.* at 1.

5. *See* Government Exhibit 2 (Statement of Subject, dated October 9, 1998), at 1-2. *See also* Government Exhibit 1, *supra* note 3, at 3.

6. *Id.* Government Exhibit 1, *supra* note 3, at 7.

7. *Ibid.* at 6.

8. *See* Government Exhibit 3 (Statement of Subject, dated December 16, 1998), at 1.

9. *See* Tr. at 49.

10. *See* Government Exhibit 4 (Culpability Report, dated March 1, 1999).

11. *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).