



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
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----- ) ISCR Case No. 10-05404  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Candace L. Garcia, Esq., Department Counsel  
For Applicant: Arnold Weinstock, Esq.

07/09/2013

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Applicant was involved in an incident of domestic violence involving a former girlfriend in January 2012, which ultimately resulted in a no-contest plea to a misdemeanor offense. He completed all terms of the court’s sentence in 2013. Given the recency of these matters, he did not present sufficient evidence to explain and mitigate the concern about his fitness and suitability to hold a security clearance. For the reasons discussed below, this case is decided against Applicant.

**Statement of the Case**

On December 19, 2012, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly

consistent with the national interest to grant him access to classified information.<sup>1</sup> The SOR is similar to a complaint, and it detailed reasons for the action under the security guideline known as Guideline J for criminal conduct.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 11, 2013. The hearing took place by video teleconference as scheduled on June 18, 2013. The transcript (Tr.) was received on June 26, 2013.

The record was kept open to allow Applicant to submit additional documentary evidence. Those matters were timely received on June 24, 2013, and they are admitted without objections as Exhibits D, E, and F.

### **Findings of Fact**

The SOR alleged a single incident of criminal conduct in January 2012. Applicant made a qualified admission to the allegation and provided a brief explanation. His admission and explanation are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 63-year-old employee of a federal contractor. He is employed as a housekeeper or custodian by a company that provides such services to a military installation. His company is sponsoring him for a security clearance for this job, which he began in January 2010. He submitted a security clearance application the same month; this is his first application for a clearance.<sup>2</sup>

There is substantial evidence establishing that Applicant was involved in an incident of domestic violence involving a former girlfriend in January 2012. Initially, he was arrested and charged with two offenses stemming from an altercation with his former girlfriend who was present in his home. The first charge was a misdemeanor offense of battery/domestic violence; the second charge was a felony offense of battery/domestic violence constituting strangulation. The police report indicates that the arresting officers observed large scratches on the former girlfriend's chest, a large bump on her head, and bruising around her neck.<sup>3</sup>

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<sup>1</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>2</sup> Exhibit 1.

<sup>3</sup> Exhibit 3. Statements in a police report about matters personally observed by the reporting officers in execution of their duties are admissible in these proceedings. ISCR Case No. 98-0582 at n.1 (App. Bd. Nov. 12, 1999), citing ISCR Case No. 99-0119 at 2-3 (App. Bd. Sep. 13, 1999); ISCR Case No. 96-0575 at 3 (App. Bd. Jul. 22, 1997) (citations omitted). See Fed.R.Evid. 803(8) (Sometimes called the official record exception)

The case was resolved when Applicant pleaded no contest to a single misdemeanor offense of battery constituting domestic violence. The court's sentence included several terms as follows: (1) stay out of trouble while the case was pending; (2) attend domestic-violence counseling; (3) pay a fine and work off part of the fine by performing community service; and (4) 180 days in jail, which was suspended for completion of the sentencing requirements. He completed all terms of the court's sentence, to include attending 52 sessions (once per week) of domestic-violence counseling for first offenders, which he completed in April 2013.<sup>4</sup>

At the hearing, Applicant admitted grabbing his former girlfriend, but denied attacking her, and he stated that her injuries were self-inflicted. He stated that he was acting out of emotion at the time. He acknowledged that the incident should not have happened. He no longer associates with her, and he is unaware of her whereabouts.

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>5</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>6</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>7</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>8</sup>

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to the hearsay rule; but in a criminal case, it excludes matters observed by police officers and other law enforcement personnel). While I considered the personal observations of the reporting officer in Exhibit 3, I have not considered the oral statements of the former girlfriend recorded in the report. At the hearing, Applicant disputed her account and she was not a witness. Consideration of her oral statements in the report would deprive Applicant of the opportunity to cross-examine a person providing information adverse to him, which is contrary to DOD policy. Directive, ¶ 4.3.3.

<sup>4</sup> Exhibits E and F.

<sup>5</sup> *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>6</sup> 484 U.S. at 531.

<sup>7</sup> Directive, ¶ 3.2.

<sup>8</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>9</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>10</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>11</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>12</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>13</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>14</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>15</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

## Discussion

Under Guideline J for criminal conduct,<sup>16</sup> the security concern is that criminal activity creates doubt about a person's judgment, reliability, trustworthiness, and ability or willingness to comply with laws, rules, and regulations. By its nature, criminal conduct calls into question a person's ability or willingness to comply with laws, rules, and regulations, which is relevant to the proper handling and safeguarding of classified information.

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<sup>9</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>10</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>11</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>12</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>13</sup> *Egan*, 484 U.S. at 531.

<sup>14</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>15</sup> Executive Order 10865, § 7.

<sup>16</sup> AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

The guideline contains several disqualifying conditions. Given the evidence here, I have especially considered the following disqualifying condition:

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The guideline also contains several mitigating conditions. Given the evidence here, I have especially considered the following mitigating conditions:

AG ¶ 32(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant is a 63-year-old employee who is seeking a security clearance for the first time. He was involved in an incident of domestic violence involving a former girlfriend in January 2012. It was a fairly serious matter in light of the fact that the initial charges included a felony offense for strangulation. It was resolved when Applicant pleaded no contest to a single misdemeanor offense and received what appears to be a first-offender sentence. He receives credit in mitigation for successfully completing the sentence in 2013, which included attending 52 counseling sessions for domestic violence. And he no longer associates with his former girlfriend. He was sincere and articulate during the hearing, and he expressed the benefits and lessons learned from the counseling.

Nevertheless, the evidence in mitigation is not persuasive. First, although the incident took place in January 2012, he completed serving his sentence just a few months ago in April 2013. Given these circumstances, the incident is considered recent; it is certainly not in the distant past. Second, there is documentary evidence of criminal conduct in 2006, which was also resolved by the court system.<sup>17</sup> Given these circumstances, the 2012 incident cannot be viewed as a one-time or isolated incident of criminal conduct. And third, there is documentary evidence of workplace misconduct at his current job during 2010.<sup>18</sup> Although the workplace misconduct took place before the January 2012 incident, it militates against a conclusion of Applicant having a good employment record with his current employer, which tends to undermine his evidence of reform and rehabilitation. The second and third matters—which are not alleged in the

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<sup>17</sup> Exhibit 2 at various pages.

<sup>18</sup> Exhibit 2 at 2.

SOR—are considered only for these limited purposes consistent with Appeal Board caselaw.<sup>19</sup>

Applicant’s recent criminal conduct raises doubt about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve that doubt in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>20</sup> Having done so, I conclude that Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:                   Against Applicant

Subparagraph 1.a:                         Against Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard  
Administrative Judge

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<sup>19</sup> ISCR Case No. 09-08108 at 6 (App. Bd. Feb. 15, 2011) (citations omitted). It was unnecessary to make findings of fact about the second and third matters because they are considered only for the limited purposes noted above.

<sup>20</sup> AG ¶ 2(a)(1)–(9).