



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



In the matter of:)
)
-----) ISCR Case No. 09-06197
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

October 27, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant was involved in an incident with his then wife in January 2009 that resulted in his arrest. A misdemeanor charge of assault and battery on a family member was resolved in state court in March 2009, when Applicant received a deferred adjudication of guilt. Applicant completed probation in March 2010. Provided his good behavior, the case will be dismissed in March 2011. Applicant's wife left him on the day of the incident, he has seen her once since, and he is unaware of her whereabouts. The marriage ended in divorce several months after the incident. Applicant presented sufficient evidence to mitigate the criminal conduct security concerns. Accordingly, as explained in further detail below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on May 21, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline J for criminal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion and requested a hearing. The case was assigned to me August 10, 2010. The hearing took place September 30, 2010. The hearing transcript (Tr.) was received October 9, 2010.

Findings of Fact

Applicant is a 32-year-old employee of a federal contractor. He began his current job as a consultant in 2005. His educational background includes a bachelor's degree in accounting and a master's degree in telecommunications engineering. He is enjoying success in his chosen field and he is well regarded at work and at his place of worship.² He is seeking to maintain a security clearance previously granted to him by the Defense Department.

A native of India, Applicant has lived here for about the last 14 years. He became a U.S. citizen in 2002. In 2007, he acceded to his family's wishes for an arranged marriage; he married an Indian woman he had met twice before the marriage. In hindsight, Applicant now considers the marriage a mistake as it appears that he and his spouse were not a good match for each other.

In January 2009, a little more than one year into their marriage, Applicant and his wife were quarreling over a pending visit from his wife's family from India. At some point in the argument, Applicant grabbed the telephone from his wife when she was about to call her father. Their argument took place at their home in the presence of his parents. Their argument continued and shortly thereafter the police arrived at the home to investigate. The result was Applicant was arrested and charged with the misdemeanor offense of assault and battery on a family member. Applicant was released about four

¹ 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 to this case. 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.

² See Exhibits A, D, and E; Tr. 38–48; 89–90.

hours later and came home to find that his wife had taken her things along with one of their cars and departed. Applicant reported his arrest to the company's facility security officer within a few days of the incident.

The misdemeanor charge was heard via a bench trial in state court in March 2009. Upon presentation of the evidence, the judge determined the facts were sufficient to find Applicant guilty, but deferred adjudication of guilt until March 2011. The court ordered Applicant to pay a fine of \$1,500, sentenced him to 180 days in county jail, which was suspended for two years upon good behavior. Also, Applicant was placed on probation for one year and ordered to complete a domestic-violence program.

Applicant completed the domestic-violence program in September 2009.³ He completed probation in March 2010.⁴ The case will be closed and the charge dismissed in March 2011 if there are no violations of the law.

Applicant has had essentially no contact with his wife since the day of the January 2009 incident. She left the marital home that day and he has seen her once since (in court in March 2009). His efforts at reconciliation were met with no reply. The marriage ended in divorce in December 2009.⁵ Applicant is now unaware of his ex-wife's whereabouts.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.⁶ 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."⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt

³ Exhibit C.

⁴ Exhibit B.

⁵ Exhibits F and G.

⁶ *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 (10th Cir. 2002) (no right to a security clearance).

⁷ 484 U.S. at 531.

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.⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁴ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁵

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 facts and circumstances, 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.¹⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

⁸ Directive, ¶ 3.2.

⁹ Directive, ¶ 3.2.

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁶ Executive Order 10865, § 7.

Analysis

Under Guideline J,¹⁷ the suitability of an applicant may be questioned or put into doubt when that applicant has a criminal history record regardless of whether the criminal conduct at issue has been subject to prosecution and adjudication in a court of law. The overall concern under Guideline J is that:

Criminal activity creates doubts about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.¹⁸

The January 2009 incident and the misdemeanor charge in state court are sufficient to raise security concerns for criminal conduct.¹⁹ In addition, although he completed probation in March 2010, he remains under the state court's supervision via the suspended sentence until March 2011, when the charge will be dismissed provided his good behavior. This is not parole or probation, but it is akin to it and is a concern as well.²⁰

In mitigation, the incident happened under the unusual circumstances of an arranged marriage that ended nearly as quickly as it began. Applicant has had essentially no contact with his ex-wife since the incident, the marriage ended in divorce, and Applicant is now unaware of his ex-wife's whereabouts. These facts and circumstances suggest that the incident was situational in origin and that similar criminal conduct is unlikely to recur.²¹ In addition, there is evidence of successful reform and rehabilitation, to include Applicant's good employment record as well as successfully completing the one-year period of probation and complying with the other requirements imposed by the state court.

To conclude, the facts and circumstances surrounding the whole affair do not justify current doubts about Applicant's judgment, reliability, and trustworthiness. It was an isolated event and Applicant is otherwise a law-abiding citizen. Now divorced, the turmoil or discord in his life due to a problematic marriage is a thing of the past. Looking forward, it is most probable that he will avoid similar problems in the future. Based on the evidence as a whole, I have no doubts or concerns about Applicant's security suitability or fitness. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

¹⁷ AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁸ AG ¶ 30.

¹⁹ AG ¶ 31(c).

²⁰ AG ¶ 31(d).

²¹ AG ¶ 32(a).

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J: For Applicant

Subparagraph 1.a: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge