

DATE: May 27, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-27012

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

**FOR APPLICANT**

Leon M. Braun, Jr., Esq.

**SYNOPSIS**

Applicant was charged with driving under the influence of alcohol in 1986 and again in 1999. He failed to list either arrest in a security clearance application he submitted in July 2000, however, there was no intent on his part to falsify the application. He has mitigated the security clearance concern allegedly caused by his personal conduct. Clearance is granted.

**STATEMENT OF THE CASE**

On March 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern Guideline E (personal conduct). Applicant submitted an answer to the SOR that was signed and sworn to on March 23, 2004. He denied the SOR allegations and requested a decision on the written record without a hearing. Subsequently, by letter dated August 8, 2004, Applicant requested a hearing.

The case was assigned to another administrative judge on November 10, 2004, and reassigned to a different administrative judge on January 12, 2005, due to periodic regional rotations. The case was thereafter reassigned to me on February 16, 2004, due to caseload considerations. A notice of hearing was originally issued on January 25, 2005, scheduling the hearing for February 17, 2005. However, upon the case being reassigned to me, the original hearing date was cancelled by notice issued on February 16, 2005. A new notice of hearing was issued on February 28, 2005, rescheduling the hearing for March 23, 2005. The hearing was conducted as rescheduled.

The government submitted three documentary exhibits that were marked as Government Exhibits (GE) 1-3, and admitted into the record without objection. Applicant testified, called two witnesses to testify on his behalf, and submitted 11 documentary exhibits that were marked as Applicant Exhibits (AE) 1-11, and admitted into the record without objection. The transcript was received on April 4, 2005.

**FINDINGS OF FACT**

After a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 51-year-old man who has been employed as a cable installer/LAN maintenance worker by a government contractor since April 2000. He is a high school graduate who worked as a cable splicer for a telephone company from May 1977 to February 1999. He has been married three times, the first and third time to the same woman. In between the first and third marriage was a marriage to a different woman that lasted from November 1983 until it ended in divorce in November 1993. He remarried his first wife in approximately January 2003. Applicant has two married daughters, ages 26 and 23, and a 13-year-old son who, based on Applicant's less than clear testimony, apparently resides with Applicant and his wife. Applicant also has two stepsons, ages 17 and 14, who reside with Applicant and his wife.

The testimony of Applicant's co-workers/supervisors, and the letters of recommendation he submitted establish that he is an excellent worker, and is considered to be honest, dependable, and trustworthy. The county sheriff where Applicant has lived for 51 years has known Applicant his entire life and believes he is a civic-minded and upstanding citizen, who portrays himself with dignity and respect. (AE 6) Similar opinions were rendered by the chief of the fire department, a county commissioner, a church pastor, and other community members.

Having viewed Applicant's appearance, demeanor, and manner of testifying, along with the substance of his testimony and that of his co-workers/supervisors, and the recommendations and opinions expressed in the letters he offered in evidence, I find him to be a credible witness. Based upon that finding, along with his obvious lack of sophistication in the preparation of documents such as a security clearance application, I find his testimony to be completely truthful. Most noteworthy was his complete candor during cross-examination in discussing his present drinking patterns while on hunting trips with friends. (Tr. pp. 52-53)

Applicant was charged with Driving Under the Influence of Alcohol (DUI) in November 1986, convicted, and sentenced to attend a traffic school and fined \$330.00. (GE 3) He was charged with DUI and DUI with a blood alcohol concentration (BAC) of 0.10 or more in March 1999. He was found not guilty of the DUI with a BAC of 0.10 or more and the DUI was nolle prossed in April 1999. He was, however, found guilty of two counts of Reckless Driving and placed on probation for 12 months and order to pay a fine in the amount of \$1,000.00 and attend driver's school. (AE 1)

Applicant electronically submitted a security clearance application (SF 86) on July 13 2000. The SF 86 is unsigned. He answered "No" to question 24: *Your Police Record - Alcohol/Drug Offenses - Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? . . .* Applicant did not disclose either of his arrests for DUI in response to this question.

Applicant provided a statement to a special agent from the Defense Security Service (DSS) on November 15, 2001, in which he stated he didn't know why he failed to list the offenses indicating it must have been an oversight. He assured the agent that he did not intend to mislead anyone. He testified he failed to list the 1986 offense because he believed he did not have to disclose a conviction more than seven/ten years old. His testimony explaining the failure to list the 1999 offense attributed it to the fact that he was not convicted of DUI and he thought only convictions needed to be listed. (2)

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, with its DC and MC, is most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (3) The government has the burden of proving controverted facts. (4) The burden of proof in a security clearance case is something less than a preponderance of evidence (5), although the government is required to present substantial evidence to meet its burden of proof. (6) "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." (7) Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. (8) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (9)

No one has a right to a security clearance (10) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (11) Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. (12)

### **CONCLUSIONS**

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence

the person can be trusted to properly safeguard classified information. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

I am satisfied Applicant was not attempting to deliberately provide false or misleading information by his failure to disclose his two DUI arrests in the July 2000 SF 86. His obvious lack of sophistication in such matters, coupled with his impeccable reputation for honesty and trustworthiness, attested to by a variety of responsible and upstanding members of his community and workplace, all who know him well, provide more than adequate corroboration of his claim that his failure to disclose the offenses was an oversight caused by his misunderstanding of the question. Accordingly, no disqualifying condition applies.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For 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. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. I do not consider the different explanations to be inconsistent. The statement to the DSS special agent was apparently made in response to an immediate question without much time spent on reflection. Applicant's testimony occurred after he had sufficient time to review the SF 86 and reflect on why he failed to disclose the DUIs.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.