

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted of driving while intoxicated in May 2001, and failed to list that arrest and conviction in a security clearance application she submitted in January 2002. She has mitigated the security clearance concern caused by her criminal and personal conduct. Clearance is granted.

CASENO: 02-27527.h1

DATE: 01/27/2005

DATE: January 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27527

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant was convicted of driving while intoxicated in May 2001, and failed to list that arrest and conviction in a security clearance application she submitted in January 2002. She has mitigated the security clearance concern caused by her criminal and personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On March 2, 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. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct), and Guideline E (personal conduct). Applicant submitted an answer to the SOR that was received by DOHA on March 17, 2004. She admitted both criminal conduct allegations, although it is apparent from her answer that she was unclear as to what was being alleged in subparagraph 1.b., and denied the personal conduct allegation. Applicant requested a hearing.

The case was assigned to me on September 10, 2004. A notice of hearing was issued on November 4, 2004, scheduling the hearing for December 3, 2004. The hearing was conducted as scheduled. The government submitted two documentary exhibits that were marked as Government Exhibits (GE) 1 and 2, and admitted into the record without objection. Applicant testified, called her employer to testify on her behalf, and submitted 16 documentary exhibits that were marked as Applicant Exhibits (AE) 1-16, and admitted into the record without objection. The transcript was received on December 9, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 25-year-old single woman who has been employed as a chemist by a government contractor since January 2002. She graduated from high school in June 1997, and from college in December 2001 with a bachelor of science degree in marine biology and environmental science. The testimony of her supervisor and her performance evaluations establish that she has been highly successful in her work, and is considered to be responsible, dependable, credible and trustworthy.

Having viewed Applicant's appearance, demeanor, and manner of testifying, along with the substance of her testimony and that of her employer, I find her to be a credible witness. Based upon that finding, I find her testimony to be completely truthful.

Applicant was charged with Driving While Intoxicated (DWI) and Negligent Driving in October 2000. She was a college student at the time, and had been drinking with friends at a local bar near the college. She was stopped by a police officer after crossing out of her lane of traffic, failed a field sobriety test, and registered a 0.18 blood alcohol concentration (BAC) on a breathalyser test. On May 14, 2001, Applicant pled guilty to the DWI charge, and the Negligent Driving charge was nolle prossed. Applicant was placed on three years probation before judgment, and ordered to perform 180 hours community service, attend a victim impact panel, and pay fines and costs totaling \$105.00. She completed all terms of probation and it was terminated June 5, 2003.

Applicant was informed by her attorney that ". . . Probation Before Judgment is not a conviction, inasmuch as the Guilty finding is stricken from your record." (AE 3) Applicant understood this advice to mean she did not need to disclose her arrest and conviction to future employers because she had not been found guilty and nothing would appear on an arrest record if anyone checked.

Applicant electronically submitted a security clearance application (SF 86) on January 7, 2002 that she signed on January 9, 2002 as part of her in processing with her new job. She 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? . . .* and question 26: *Your Police Record - Other Offenses - In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related.) . . .*

Applicant was obviously aware she answered the questions incorrectly, but based on the advice she had received from her attorney was unsure if she was required to disclose the DWI offense. Very shortly after she submitted the SF 86, Applicant spoke with her employer's facility security officer (FSO), notified her of the DWI incident, sought her advice as to whether she was required to disclose the incident, and inquired what she should do. The FSO told her they would leave the SF 86 as submitted and if there was an issue with her not disclosing the arrest and conviction she would be contacted, questioned, and could clear up any issue that might exist at that time. Although he was not privy to the conversations, Applicant's supervisor saw her consult with the company's FSO on several occasions while she was filling out the SF 86.

Applicant provided a statement to a Special Agent from the Defense Security Service on June 11, 2002. She explained to the agent her confusion

over how to answer questions, her reason for being confused, and the action she took to seek guidance from the FSO. She also provided the agent with the names of her attorney and the FSO so that her claims could be further substantiated. She also revealed she had not consumed alcohol since the date of her conviction.

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 J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history

of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J based upon the DWI incident. Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses* applies. Although Applicant was aware that she was providing incorrect answers in the SF 86 she submitted, I do not find her action was knowing and willful within the meaning of 18 U.S.C. 1001, and subparagraph 1.b. is found for Applicant on that basis.

The DWI occurred more than four years ago while Applicant was a college student, and it is the only criminal offense she has ever committed. She had not consumed any alcohol from the date of her conviction to at least the date she provided a statement to the DSS. Accordingly, Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* all apply. Guideline J is decided for Applicant.

Personal conduct under Guideline E 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.

While Applicant knew she was answering the SF 86 questions incorrectly, I am satisfied she was not attempting to deliberately provide false or misleading information. As a young and inexperienced individual she was genuinely confused on how to answer the questions based upon the advice she received from her attorney and what she interpreted that advice to mean. She promptly sought the advice of the FSO, and relied upon that advice to wait until it became an issue to further disclose the DWI incident. Accordingly, no disqualifying condition exists. To whatever extent her personal conduct might call into question her security clearance eligibility, that concern is overwhelming outweighed by application of MC 3: *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*. Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.