

DATE: December 8, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32082

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has been arrested multiple times for driving while intoxicated and other traffic offenses. He had numerous tax liens and a foreclosure lawsuit filed against him. He deliberately either omitted accurate information or provided false information for security clearance applications he submitted in 1996 and 2002, and in a statement he submitted in 2003. He has failed to mitigate the security clearance concern caused by his personal conduct and the related criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 03, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 E (personal conduct) and Guideline J (criminal conduct). Applicant submitted answers to the SOR that were received by DOHA on October 8, 2004 and December 3, 2004. He admitted all SOR allegations, except those contained in subparagraphs 1.d, 2.a, and 2.b, and requested a hearing.

The case was assigned to me on June 20, 2005. A notice of hearing was issued on June 30, 2005, scheduling the hearing for July 28, 2005. Applicant failed to appear for the hearing, but subsequently contacted Department Counsel and indicated he had been on medical leave, and apparently asserted he was unaware of the hearing date. An amended notice of hearing was issued on October 3, 2005, scheduling the hearing for October 26, 2005. Applicant again failed to appear, but again spoke with Department Counsel after the hearing date and provided her with his reason for not appearing. Department Counsel, at my request, notified Applicant that if he were able to appear on November 3, 2005, I would conduct the hearing in his case rather than seeking to have it terminated based upon his multiple non appearances.⁽²⁾ The hearing was conducted on November 3, 2005.

The government submitted 14 documentary exhibits that were marked as Government Exhibits (GE) 1-14, and admitted

into the record without objection. Applicant testified but did not submit any documentary evidence. As requested by Applicant, the record was held open until November 11, 2005, to provide him the opportunity to submit material in support of his case. However, nothing was ever received from him. The transcript was received on November 18, 2005.

FINDINGS OF FACT

Applicants' admissions to some of 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 67-year-old man who has been employed as a systems engineer by a government contractor since September 1999. He was previously employed as a mechanical engineer by the U.S. Navy from May 1989 until September 1999. He was married in September 1966 and divorced in March 1982. He received a bachelor of science degree in mechanical engineering in 1966, and a master of science degree in the same discipline in 1973. He has held a security clearance since approximately 1989, without any complaints ever being made that allege he mishandled classified material or information.

Applicant executed security clearance applications (SF 86) on June 25, 1996, and April 3, 2002. In each SF 86, he certified: "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith." He also acknowledged in each SF 86 that he understood willful false statements therein potentially subjected him to the criminal sanctions imposed by 18 U.S.C. § 1001.

In the SF 86 executed on April 3, 2002, Applicant denied: 1) having ever been charged with or convicted of any offense(s) related to alcohol or drugs; 2) in the preceding seven years having been arrested for, charged with, or convicted of any offense not listed elsewhere on the form; and 3) in the preceding seven years having had a lien placed against his property for failing to pay taxes or other debts. In the SF 86 he executed on June 25, 1996, Applicant denied: 1) in the preceding seven years having had a lien placed against his property for failing to pay taxes or other debts; and 2) in the preceding seven years having been a party to any public record civil court action not listed elsewhere on the form. Each of these denials was false.

In the April 2002 SF 86, Applicant failed to list his residence in a western state of the U.S. from 1989 until 1999, and instead listed that his sole residence was located in a state in the eastern part of the U.S. However, he did list his employment in the western state from 1989 until 1999 in that SF 86. The record evidence supports a finding that his permanent residence remained in the eastern state despite long periods of time spent residing in the state where he was employed. Accordingly, there is insufficient evidence to conclude his omission of the additional residence was a deliberate omission.

Applicant was arrested on August 10, 1996, and charged with Driving Under the Influence (DUI) and Driving with a Blood Alcohol Content (BAC) of .08 or more [a blood test disclosed a BAC of 0.15. (GE 8)]. He pled nolo contendere to the DUI charge, was found guilty of that offense, and was placed on five years probation and ordered to pay fines and fees totaling \$1,532.00. Additionally, his license was suspended for six months.⁽³⁾

Applicant was arrested on September 7, 1996, and again charged with DUI, Driving with a BAC of .08 or more [a breath test disclosed a BAC of 0.10 (GE 10)], and other less serious traffic offenses. He pled nolo contendere to a reduced charge of Reckless Driving, was found guilty of that offense, and was placed on three years probation and ordered to pay fines and costs totaling \$884.00.⁽⁴⁾

Applicant was arrested on April 1, 1999 and charged with DUI (GE 7). There is no information of record concerning the disposition of this charge. Applicant was charged with Driving While License Suspended on November 7, 1996. He entered a plea of nolo contendere to the charge and was ordered to pay fines and costs totaling \$845.00 (GE 11).⁽⁵⁾ Although record evidence is scarce concerning the incident, Applicant acknowledged that he was cited for Driving on a Suspended and/or Revoked License on October 6, 1998 (GE 6, page 4).

Applicant was charged with obstructing a public officer in August 1969. There is scant evidence of record in support of the SOR allegation, the record is devoid of any information concerning the alleged circumstances surrounding the

charge or its disposition, and Applicant denied this SOR allegation. As such, the record does not support a finding that this minor and remote in time criminal allegation creates a security concern.

A municipal school district filed tax liens against Applicant in 1995, 1997, and 1998, based on his failure to pay school taxes levied for the tax years of 1981-88, 1992, and 1995. The total unpaid taxes for those years were \$12,885.90. A municipality filed a tax lien against Applicant in the amount of \$1,954.43 in April 2000. A county filed tax liens against Applicant in 1990⁽⁶⁾ and 1995, totaling \$8,350.26. The Internal Revenue Service filed a tax lien against Applicant in 1995 for unpaid taxes in the amount of \$5,664.85.

A mortgage foreclosure law suit was filed against Applicant on February 23, 1995. He was served with a complaint in that case on May 23, 1995, and an attorney entered an appearance on his behalf on May 26, 1995. A judgment was entered against him in the amount of \$28,503.31 on October 16, 1995, and a praecipe for writ of execution in the amount of \$35,147.09 plus costs was issued on December 1, 1995. The judgment was satisfied on January 11, 2001, but only after two ordered sheriff's sales of the property were continued, and a stay of execution ordered because a bankruptcy had been filed.

Applicant submitted a signed, sworn statement, dated May 29, 2002, to a Special Agent (SA) of the Defense Security Service (DSS). In that statement, he described only the 1996 suspended license offense and a single unspecified DUI. However, and contrary to the allegation contained in SOR subparagraph 1.g, he never asserts in that statement that those were the only two times he had been arrested in the state alleged.

Applicant submitted another signed, sworn statement, dated April 28, 2003, to the same SA of the DSS. In that statement, he again provided information about the 1996 suspended license offense and a single unspecified DUI. However, this time he went on to assert: "these were the only two times I have had law enforcement contact or been pulled over or charged for anything including DUIs." He was thereafter confronted by the SA with information about other arrests and indicated he could not recall any arrests other than the two he originally described.

Applicant submitted a third signed, sworn statement, dated September 26, 2003, to a different SA of the DSS. In that statement, he admitted he had been arrested and charged with DUI in connection with the August 1996 and September 1996 offenses, and asserted he could not recall the 1999 DUI. He also admitted he had been cited for Driving on a Suspended and/or Revoked License in November 1996 and October 1998. He went on to allege that the reason he did not list the DUIs in the SF 86s was because he did not consider the DUI charges when he prepared the form, and thought they were only asking about drug related offenses. He went on to further state that he had overlooked the questions regarding criminal offenses.

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, and Guideline J, pertaining to criminal 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.⁽⁷⁾ The government has the burden of proving controverted facts.⁽⁸⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁹⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽¹⁰⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹¹⁾ 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. ⁽¹²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽¹³⁾

No one has a right to a security clearance ⁽¹⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽¹⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. ⁽¹⁶⁾

CONCLUSIONS

I carefully viewed Applicant's appearance, demeanor, and manner of testifying during the hearing. I have also carefully considered the substance of his testimony and the information he provided in the various statements he gave to SAs of the DSS and in his answers to the SOR. I found him to be as evasive as he could possibly be in answering questions at the hearing, and the substance of his statements strongly indicates his conduct was similar when questioned by the SAs. His most common response when confronted with adverse information, namely: "I don't recall" is not credible.

Most illustrative of his lack of credibility is the record evidence dealing with the foreclosure of his house. In a signed, sworn statement he provided to a SA of the Defense Investigative Service (DIS) in January 1997, he asserted he was unaware of the foreclosure proceedings when he submitted the SF 86 in June 1996. When questioned at the hearing about the foreclosure proceedings and the service of a complaint on him on May 23, 1995, as indicated in GE 12, he insinuated he was unaware of the service and suggested it had been done by leaving the notice on the door of his house (Tr. page 54). However, after he was confronted with the additional information from GE 12 that an attorney had filed an appearance on his behalf on May 26, 1995, Applicant finally admitted he was aware of the foreclosure and had retained the attorney to represent him in the foreclosure proceedings (Tr. page 55).

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. Applicant's failure to disclose in the SF 86s he submitted his multiple DUI and suspended license arrests and charges, the numerous tax liens that had been filed against him, and the foreclosure action, along with the false answers and information he provided to the Special Agent in the April 2003 statement severely undermine the ability to place any trust and confidence in him. His false answers, and the reasons he has given for providing those answers, raise significant security concerns.

Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and DC 3: Deliberately providing false or misleading information concerning relevant and material matter to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* apply. I have considered all Mitigating Conditions under Guideline E and none apply. Guideline E is decided against Applicant.

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 his multiple DUI and suspended license arrests and convictions, the false answers he gave in the SF 86s, and the false information he provided to the Special Agents, all in violation of 18 U.S.C. § 1001. DC 1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and DC 2: A single serious crime or multiple lesser offenses* apply.

I have considered all Mitigating Conditions under Guideline J and none apply. Mitigating Condition (MC) 1: *The criminal behavior was not recent* is inapplicable because although it has been more than seven years since his last

criminal arrest, it has been only about two and one-half years since he provided false information to a SA of the DSS in violation of 18 U.S.C. § 1001. Applicant's evasive, misleading, and most likely false testimony at the hearing prohibits granting him any consideration under MC 6: *There is clear evidence of successful rehabilitation*. The remaining mitigating conditions clearly have no applicability. Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against Applicant

Subparagraphs a-c: Against Applicant

Subparagraph d: For Applicant

Subparagraph e-f: Against Applicant

Subparagraph g: For Applicant

Subparagraph h: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: For Applicant

Subparagraph c: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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. All hearings were scheduled at a location on the other side of the country from my office. I had multiple hearings scheduled between October 26, 2005 and November 3, 2005 in that distant region which provided afforded Applicant the chance to appear.
3. The findings concerning the sentence imposed are based upon Applicant's admissions contained in his answers to the SOR.
4. The findings concerning the sentence imposed are based upon Applicant's admissions contained in his answers to the SOR.
5. The findings concerning the disposition and sentence imposed are based upon Applicant's admissions contained in his answers to the SOR.
6. Applicant's admission to the SOR allegation is the only record evidence in support of this allegation.
7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

9. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

14. *Egan*, 484 U.S. at 528, 531.

15. *Id* at 531.

16. *Egan*, Executive Order 10865, and the Directive.