

DATE: February 11, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13110

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was charged with two counts of Engaging in Organized Criminal Activity, a first degree felony, in February 1999. He was thereafter granted immunity from prosecution in exchange for agreeing to testify against his co-defendants, and the charges were dismissed on January 29, 2001. Although he listed the arrest in a Security Clearance Application he submitted on February 24, 2000, Applicant intentionally provided false information about the circumstances of the offense when questioned by a special agent of the Defense Security Service on June 27, 2001. Applicant has failed to mitigate the security concern caused by his personal and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 21, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find that 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 a response to the SOR, dated June 12, 2003, and requested a clearance decision based on the written record without a hearing. In his response to the SOR, Applicant admitted all SOR allegations.

Department Counsel prepared a File of Relevant Material (FORM) on July 25, 2003, that was mailed to Applicant the same day. Applicant submitted a response to the FORM, dated September 19, 2003, that contained two letters of recommendation. On October 1, 2003, Applicant sent a letter to Department Counsel in which he stated he had misunderstood his options in responding to the FORM and requested a 30-day extension to file an additional response. Applicant faxed an additional one page response to the FORM to Department Counsel on October 15, 2003. Department Counsel executed a memorandum on November 17, 2003 indicating he did not object to Applicant's responses. The case was assigned to me January 15, 2004.

FINDINGS OF FACT

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

Applicant is a 56-year-old man who has been employed by a defense contractor as a supply technician since October 1, 1999. The two letters of recommendation he submitted attest to his reputation as a reliable, loyal, conscientious, dedicated, and trustworthy employee. He has been married to his present wife since October 1985. He was previously married from May 1980 to September 1985. His prior marriage ended in a divorce.

Applicant is also presently serving as a Command Sergeant Major (paygrade E-9) in the United States Army Reserve. He has approximately twenty-six years of military service during which he has received four Meritorious Service Medals and five Commendation Medals. He has held a secret security clearance without any reported instances of mishandling classified information being contained in the record.

Applicant submitted a Security Clearance Application (SF86) on February 24, 2000 in which he disclosed that he had been charged with *Organized Crime* [sic] on January 1, 1999 and that the charge had been withdrawn. He was questioned about the circumstances that caused him to be charged with that offense by a special agent of the Defense Security Service on June 25, 2001 and provided the special agent a written, signed, sworn-to statement on June 27, 2001. During the interview and in the written statement, Applicant denied he had engaged in the fraudulent activity alleged in the indictment, claimed to have merely been an innocent employee of the company that was involved in the criminal activity, and implied he was wrongfully accused.

Applicant was again interviewed by a special agent of the Defense Security Service on November 13, 2001. Applicant initially again denied any wrongdoing on his part in the scheme that caused him to be indicted, and only admitted the information he provided during the June 27, 2001 interview was false after being confronted by the special agent with investigative results. He then specifically acknowledged that he was aware of the fraudulent conduct of the business and that he abetted that conduct by knowingly and intentionally preparing and submitting monthly reports/vouchers to a state agency.

Applicant was indicted for his part in the scheme on February 9, 1999, and was charged with two counts of Engaging in Organized Criminal Activity, a first degree felony. The offenses constituting the criminal activity alleged in the indictment were the theft of between \$100,000 and \$200,000 from a state natural resource conservation commission and the state comptroller, and securing the execution of documents by deception to accomplish the theft. The offenses began in February 1995 and continued to December 1995. Applicant was granted immunity from prosecution in return for his testimony against his three co-defendants, who were all convicted for their parts in the scheme. The charges against Applicant were dismissed on January 29, 2001.

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, Guidelines 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. ⁽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 ⁽⁵⁾

government is required to present substantial evidence to meet its burden of proof. "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

Criminal conduct under Guideline J 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 rules.

Applicant committed the offenses alleged in the indictment and the charges against him were dismissed only as a result of the cooperation he provided in the prosecution of his co-defendants. DC1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged* and DC2: *A single serious crime or multiple lesser offenses* apply in this case.

There is no indication that Applicant committed any criminal conduct either before or after that alleged in the indictment. The offenses alleged occurred almost nine years ago and Applicant did cooperate in the prosecution of his co-defendants. MC1: *The criminal behavior was recent*; and MC2: *The crime was an isolated incident* apply in this case. I have considered the remaining mitigating conditions and do not find that any apply. Specifically, there is no indication that applicant was pressured or coerced into committing the acts nor that he was acquitted. I cannot find that the criminal activity is unlikely to recur or that there is evidence of successful rehabilitation in view of the relatively recent false information he provided to a special agent of the Defense Security Service when he was questioned about the circumstances that caused him to be charged with a crime. Considering all of the evidence, including the whole person factors, and in view of the recent fabrication made in support of his security clearance application, I find the mitigating conditions are substantially outweighed by the disqualifying conditions. Accordingly, Guideline J is decided against 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. Applicant knowingly and intentionally submitted false reports/vouchers to a state agency in furtherance of his employer's scheme to defraud the state. This resulted in his being charged with two counts of Engaging in Organized Criminal Activity that were only dismissed as a result of his agreement to cooperate in the prosecution of his co-defendants. Applicant compounded his personal conduct concerns by failing to disclose the true circumstances surrounding the events that caused him to be indicted when he was questioned by a special agent of the Defense Security Service.

DC3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination*; DC4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency* apply in this case.

I have considered all mitigating conditions under Guideline E and none apply in this case. Specifically, I note that Applicant provided false information to special agents on several occasions and did nothing to correct that false information until he was directly confronted by a special agent with his apparent falsehoods. Further, while he finally admitted his criminal conduct to a special agent, he submitted a letter of recommendation with his answer to the FORM

from a supervisor who noted "(T)o my knowledge, he has no criminal record. . ." indicating that Applicant's apparent lack of candor with his references may still leave him vulnerable to coercion, exploitation, or duress. Guideline E is decided against Applicant.

After considering the evidence, I find that Applicant has failed to mitigate the security concern caused by his criminal and personal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the 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.

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.