

DATE: January 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14348

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of theft in 1997, sentenced to imprisonment in a penitentiary for two years (suspended) and placed on four years probation. He successfully completed all conditions of his sentence and was released from probation on November 13, 2001. He failed to disclose the repossession of an automobile in a Security Clearance Application (SF 86) he submitted on August 6, 2001, but credibly explained he believed the repossession had occurred more than seven years prior to the submission of the SF 86. Applicant has mitigated the security concern caused by his personal conduct, but is unable to mitigate the security concern his criminal conduct has created because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied. I do recommend further consideration of this case for a waiver.

STATEMENT OF THE CASE

On June 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were 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 J for criminal conduct, and Guideline E for personal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR on July 21, 2003, and requested a hearing. Applicant admitted the criminal conduct and denied the personal conduct allegation.

This case was assigned to me on October 29, 2003. A notice of hearing was issued on November 24, 2003, scheduling the hearing for December 9, 2003. The hearing was conducted as scheduled. The government submitted five documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-5, and admitted into the record without an objection. Applicant testified at the hearing and submitted fifteen documentary exhibits that were marked AE 1-15, and admitted into the record without an objection. The transcript was received on December 29, 2003.

FINDINGS OF FACT

Applicants' admission to one of the allegations in the SOR is incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 31 years old, has been married since January 1997, and has two children who are six and one year old. He has been employed by a defense contractor as an engineering technician since July 2001. He graduated from high school in 1991, and enlisted in a state national guard. He has remained a member of the guard and presently serves as a gunner on a tank at the rank of Specialist 4. He completed a one year recall to active duty in support of Operation Noble Eagle II on July 31, 2003, and was awarded the Army Achievement Medal for his performance during the recall. The numerous certificates, awards, and letters of recommendation submitted by Applicant attest to his reputation as a dependable, trustworthy, honest, and widely respected individual. They also establish that he is valued as an excellent employee, and as a member of the national guard.

Applicant was charged with Burglary in the Third Degree and Theft of Property in the First Degree on June 16, 1997. Both charges were based upon his participation in the break-in of an automobile part store in 1996 and the theft of property from the store. Applicant explained that he had been out drinking with three friends and, when they stopped to urinate, one of the individuals kicked in a door of a nearby store. They then entered the store and removed various tools and other items from therein. Although he denies actually taking any of the property from the store, Applicant does admit it was stored in a shed at his girlfriend's house until recovered by the police.

Applicant pled guilty to the theft charge on September 12, 1997 and the burglary charge was nolle prossed. He was sentenced to imprisonment in a state penitentiary for two years (suspended) and placed on four years probation. He was also ordered to pay approximately \$5,000.00 in restitution to be shared with his co-actors. He successfully completed all conditions of his sentence and was released from probation on November 13, 2001. His probation officer believes the incident was an aberration that will not recur, and he has submitted a pardon request to the state parole board recommending that Applicant be granted a pardon.

Applicant also answered "No" to question 35 in the Security Clearance Application (SF 86) he submitted on August 6, 2001. That questions asked: *Your Financial Record - Repossessions - In the last 7 years, have you had any property repossessed for any reason?* Applicant admits that he had an automobile repossessed in late 1995 or early 1996. He credibly testified that he believed the repossession had occurred more than seven years prior to his submission of the SF 86.

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. Applicant was convicted of Theft in the First Degree in 1997 and sentenced to serve two years in a state penitentiary (suspended) for that offense. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year* apply in this case.

Excluding minor traffic offenses, Applicant has not been arrested or charged with any offense other than the one noted herein. Additionally, the various letters of recommendation, including one from his probation officer, attest to the aberrational nature of that offense and the unlikelihood that any similar conduct will ever again occur. I find that Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply in this case.

Appellant also receives credit under the "whole person" concept for his 12-year military career, without any disciplinary action ever being taken against him, and a number of personal awards and commendations being bestowed upon him. His recent successful completion of a one year recall to active duty in support of our nation's defense and the award of an Army Achievement Medal to him attest to his loyalty and dedication to duty. Likewise, his steady employment history, marital and family relations, and recommendations from military and civilian supervisors and his probation officer strongly indicate he is a mature, responsible, trustworthy, and honest individual.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Although I am persuaded by the totality of the evidence available in this case that Appellant is trustworthy, reliable, and does not pose a risk to national security, the statutory disqualification imposed by 10 U.S.C. § 986, mandates that Applicant is unable to mitigate his criminal conduct. 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 did provide an incorrect answer to one question in the SF 86 he submitted. However, I have considered Applicant's appearance, demeanor, and manner of testifying, along with his relative lack of sophistication and lack of experience in preparing documents such as the SF 86, and am convinced he did not intend to deliberately omit or conceal information by providing the incorrect answers. Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: For 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. I do recommend further consideration of this case for a waiver.

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.